Docket: 2005-4476(GST)I

BETWEEN:

CONSTRUCTION BERGEROY INC.,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

[OFFICIAL ENGLISH TRANSLATION]

Appeals heard on August 29, 2006, at Trois-Rivières, Quebec

Before: The Honourable Justice Paul Bédard

Appearances:

Counsel for the Appellant:	Pierre Hémond
Counsel for the Respondent:	Louis Cliche

JUDGMENT

The appeals from the assessments made under the *Excise Tax Act*, for the period from January 1 to January 31, from June 1 to June 30, from September 1 to September 30 and from November 1 to November 30 of 2004, of which the notices, dated February 25, 2005, numbers D6E-2552, D6E-2553, D6E-2550 and D6E-2551, respectively, are dismissed in accordance with the attached Reasons for Judgment.

Signed at Ottawa, Canada, this 3rd day of April 2007.

"Paul Bédard"

Bédard J.

Translation certified true
on this 31st day of July 2007.
Daniela Possamai, Translator

Citation: 2007TCC198
Date: 20070403
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BETWEEN:

CONSTRUCTION BERGEROY INC.,

Appellant,

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REASONS FOR JUDGMENT

Bédard J.

[1] These appeals are from assessments, whose notices are dated February 25, 2005, and bear the numbers D6E-2552, D6E-2553, D6E-2550 and D6E-2551, in respect of the goods and services tax ("GST") for the period from January 1 to January 31, from June 1 to June 30, from September 1 to September 30 and from November 1 to November 30 of 2004, respectively. In fact, the Minister of National Revenue (the "Minister"), through the Quebec Minister of Revenue, assessed the Appellant and is requiring it to repay the rebate of the GST provided as a "rebate in respect of land and building for residential rental accommodation" (the "rebate") on four residential complexes it built and which are located at 82, 88, 92 and 96 Gendron Street in Victoriaville (the "complexes").

Facts

[2] The Appellant built the complexes in 2003 and 2004. In July 2004, the Appellant received the rebate on the complexes. For each residential complex, the construction start and end dates were established as follows:

Location	Construction start date	Construction end date
82 Gendron Street	2003.08.02	2004.09.01
88 Gendron Street	2003.05.03	2004.11.01
92 Gendron Street	2003.05.03	2004.06.01
96 Gendron Street	2003.05.03	2004.01.01

[3] Once construction ended, the complexes were rented out to individuals and then sold to the Société Habitation Bergeroy Inc. ("Bergeroy"), a corporation controlled by the same shareholders as the Appellant, on the following dates:

Location	Occupancy date	Sale to Bergeroy
82 Gendron Street	2004.09.01	2004.09.22
88 Gendron Street	2004.11.01	2004.11.02
92 Gendron Street	2004.06.01	2004.06.02
96 Gendron Street	2004.01.01	2004.05.31

Issue

[4] The issue is whether the Minister can require the Appellant to repay the rebate provided in July 2004 on the complexes.

The law

[5] The provisions relevant to the *Excise Tax Act* ("E.T.A.") read as follows:

> **191.**(1) For the purposes of this Part, **where**
>
> > (*a*) **the construction** or substantial renovation of a residential complex that is a single unit residential complex or a residential condominium unit is substantially completed,
> >
> > (*b*) **the builder of the complex**
> >
> > > (i) gives possession of the complex to a particular person under a lease, licence or similar arrangement (other than an arrangement, under or arising as a consequence of an agreement of purchase and sale of the complex, for the possession or occupancy of the complex until ownership of the complex is transferred to the purchaser under the agreement) entered into

for the purpose of its occupancy by an individual as a place of residence,

(ii) **gives possession of the complex to a particular person under an agreement for**

(A) **the supply by way of sale** of the building or part thereof in which the residential unit forming part of the complex is located, and

(B) **the supply by way of lease** of the land forming part of the complex or the supply of such a lease by way of assignment,

other than an agreement for the supply of a mobile home and a site for the home in a residential trailer park, or

(iii) where the builder is an individual, occupies the complex as a place of residence, and

(*c*) the builder, the particular person or an individual who is a tenant or licensee of the particular person is the first individual to occupy the complex as a place of residence after substantial completion of the construction or renovation,

the builder **shall be deemed**

(*d*) **to have made** and received, at the later of the time **the construction or substantial renovation is substantially completed** and the time **possession of the complex is so given to the particular person** or the complex is so occupied by the builder, **a taxable supply** by way of sale **of the complex**, and

(*e*) to have **paid as a recipient and to have collected as a supplier**, at the later of those times, tax in respect of the supply calculated on the fair market value of the complex at the later of those times.

[Emphasis added.]

256.2

(3) If

(*a*) a **particular person**, other than a cooperative housing corporation,

(i) is the recipient of a taxable supply by way of sale (in this subsection referred to as the "purchase from the supplier") from another person of a residential

(ii) is a **builder of a residential complex**, or of an addition to a multiple unit residential complex, **who makes an exempt supply by way of lease** included in section 6 or 6.1 of Part I of Schedule V **that results in the particular person being deemed under section 191 to have made and received a taxable supply by way of sale** (in this subsection referred to as the "deemed purchase") of the complex or addition,

(*b*) at a particular time, tax first becomes payable in respect of the purchase from the supplier or **tax in respect of the deemed purchase is deemed to have been paid by the person**,

(*c*) at the particular time, the complex or addition, as the case may be, **is a qualifying residential unit of the person or includes one or more qualifying residential units of the person**, and

(*d*) the person **is not entitled to include** the tax in respect of the purchase from the supplier, or the **tax in respect of the deemed purchase**, **in determining an input tax credit of the person**,

the Minister shall, subject to subsections (7) and (8), **pay a rebate to the person**. . . .

[Emphasis added.]

256.2

(1) The definitions in this subsection apply in this section.

"qualifying residential unit" of a person, at a particular time, means

(*a*) a residential unit of which, at or immediately before the particular time, the person is the owner, a co-owner, a lessee or a sub-lessee or has possession as purchaser under an agreement of purchase and sale, or a residential unit that is situated in a residential complex of which the person is, at or immediately before the particular time, a lessee or a sub-lessee, where

(i) at the particular time, the unit is a self-contained residence,

(ii) the person holds the unit

(A) for the purpose of making exempt supplies of the unit that are included in section 5.1, 6, 6.1 or 7 of Part I of Schedule V, or

(B) if the complex in which the unit is situated includes one or more other residential units that would be qualifying residential units of the person without regard to this clause, for use as the primary place of residence of the person,

(iii) it is the case, or can reasonably be expected by the person at the particular time to be the case, that **the first use of the unit is or will be**

(A) **as the primary place of residence** of the person or a relation of the person, or of a lessor of the complex or a relation of that lessor, **for a period of at least one year** or for **a shorter period** where the next use of the unit after that shorter period is **as described in clause (B)**, or

(B) **as a place of residence of individuals, each of whom is given continuous occupancy of the unit**, under one or more leases, for a period, throughout which the unit is used as the primary place of residence of that individual, of at least one year **or for a shorter period ending when**

(I) the unit is **sold to a recipient who acquires the unit for use as the primary place of residence of the recipient** or of a relation of the recipient, or

(II) the unit is taken for use as the **primary place of residence of the person or a relation of the person** or of a lessor of the complex or a relation of that lessor, and

(iv) except where subclause (iii)(B)(II) applies, if, at the particular time, the person intends that, after the unit is used as described in subparagraph (iii), the person will occupy it for the person's own use or the person will supply it by way of lease as a place of residence or lodging for an individual who is a relation, shareholder, member or partner of, or not dealing at arm's length with, the person, the person can reasonably expect that the unit will be the primary place of residence of the person or of that individual; or

(*b*) a prescribed residential unit of the person.

[Emphasis added.]

256.2

(10) If a person **was entitled to claim a rebate under subsection (3)** in respect of a qualifying residential unit (other than a unit located in a multiple unit residential complex) and, within **one year after the unit is first occupied as a place of residence** after the construction or last substantial renovation of the unit was substantially completed, the person **makes a supply by way of sale** (other than a supply deemed under section 183 or 184 to have been made) **of the unit to a purchaser who is not acquiring the unit for use as the primary place of residence of the purchaser or of a relation of the purchaser**, the person shall pay to the Receiver General an amount equal to the rebate plus interest at the prescribed rate less 2% per year, calculated on that amount for the period beginning on the day the rebate was paid or applied to a liability of the person and ending on the day the amount of the rebate is paid by the person to the Receiver General.

[Emphasis added.]

Appellant's position

[6] The Appellant submits that subsection 256.2(10) of the E.T.A. must be interpreted in light of the purpose which it is intended to serve, that is to protect the residential character of a qualifying residential unit by preventing it from being sold within a period of one year and by a person who would not hold the unit for use as the primary place of residence.

[7] The Appellant goes on to claim that subsection 256.2(10) of the E.T.A. applies to the "person" who is an individual referred to in subparagraph (iii)(A) of the definition of "qualifying residential unit" provided for in subsection 256.2(1) of the E.T.A. and not to the company which expects that the unit will be "a place of residence of individuals."

[8] The Appellant adds that, in order for subsection 256.2(10) of the E.T.A. to be applicable, it is imperative that the right of occupancy of the individual who resides in the unit under a residential lease end at the time of the sale, which ensures that the lessee shall leave the premises, as the same person cannot be the lessee and the owner of the unit.

[9] Finally, the Appellant submits that subsection 256.2(10) of the E.T.A. must be read in conjunction with the definition of "qualifying residential unit." Thus, this provision would only apply to temporary leasing, that is to say, where the lease is

terminated before a 12-month period, and that the unit is sold to a purchaser who is not acquiring the unit for use as the primary place of residence of the purchaser or of a relation of the purchaser.

Analysis and conclusion

[10] First, it is important to note that, according to well-established principles of interpretation, where the terms of a statute are clear, they must simply be applied without interpretation. Such are the teachings of the Supreme Court of Canada in *Shell Canada Ltd.* v. *Canada*, [1999] 3 S.C.R. 622:

> 40 Second, it is well established in this Court's tax jurisprudence that a searching inquiry for either the "economic realities" of a particular transaction or the general object and spirit of the provision at issue can never supplant a court's duty to apply an unambiguous provision of the Act to a taxpayer's transaction. Where the provision at issue is clear and unambiguous, its terms must simply be applied:
>
> . . .
>
> [Emphasis added.]

[11] Second, it is important to add that, according to well-established principles of interpretation,[1] where the terms of a statute are clear, the Court must apply them even if the result is absurd.

[12] In the case at bar, I am of the opinion that the provisions of subsection 256.2(10) of the E.T.A. are clear and unambiguous and therefore are not to be interpreted in light of the general purpose and intent of the provisions provided for in section 256.2 of the E.T.A.

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[1] *LGL Ltd.* v. *Canada*, [1999] T.C.J. No. 99.

[13] Thus, under subsection 256.2(10) of the E.T.A., the repayment of a rebate must be made

> (a) by a person who was entitled to claim a rebate under subsection 256.2(3) of the E.T.A.*;*
>
> (b) in respect of a qualifying residential unit;
>
> (c) where the qualifying residential unit is sold within one year after the unit is first occupied as a place of residence.

[14] There is no repayment of rebate in the following two situations:

> (a) the qualifying residential unit is located in a multiple unit residential complex;
>
> (b) the unit is sold to a purchaser who is acquiring the unit for use as the primary place of residence of the purchaser or of a relation of the purchaser.

[15] In my opinion, subsection 256.2(10) of the E.T.A. applies to the Appellant for the following reasons:

> (a) The Appellant was entitled to the rebate under subsection 256.2(3) of the E.T.A.;
>
> (b) The complexes fell within the definition of “qualifying residential unit” enacted by section 256.2 of the E.T.A., especially as the first use of the unit was as a place of residence of individuals, under one or more leases, for a period of at least one year;
>
> (c) Each of the complexes were sold within one year after they were first occupied as a place of residence. In this regard, it is irrelevant that the complexes were sold a few days or months after they were leased;
>
> (d) The complexes are not units located in a multiple unit residential complex owing to the following definitions in subsection 123(1) of the E.T.A.

> "multiple unit residential complex" means a residential complex that contains more than one residential unit, but does not include a condominium complex;
>
> "condominium complex" means a residential complex that contains more than one residential condominium unit;
>
> "residential condominium unit" means a residential complex that is, or is intended to be, a bounded space in a building designated or described as a separate unit on a registered condominium or strata lot plan or description, or a similar plan or description registered under the laws of a province, and includes any interest in land pertaining to ownership of the unit;

(e) The complexes are residential condominium units which are excluded from the definition of "multiple unit residential complex" pursuant to the above definitions. Accordingly, the complexes do not fall within the exception provided for in subsection 256.2(10) of the E.T.A.;

(f) The complexes were not sold to a purchaser for use as the primary place of residence of the purchaser or of a relation of the purchaser. The Appellant submits that subsection 256.2(10) of the E.T.A. only applies where a qualifying residential unit is sold to a purchaser who is an individual. By interpreting the subsection in this manner, the Appellant adds to the provision words it does not contain. In fact, subsection 256.2(10) of the E.T.A. requires as a condition that a qualifying residential unit be sold within one year after the unit is first occupied as a place of residence. The only exception provided for in subsection 10 of section 256.2 of the E.T.A. is the sale to an individual who is acquiring the qualifying residential unit for use as the primary place of residence of the purchaser or of a relation of the purchaser.

[16] For these reasons, the appeals are dismissed.

Signed at Ottawa, Canada, this 3rd day of April 2007.

"Paul Bédard"

Bédard J.

Translation certified true
on this 31st day of July 2007.
Daniela Possamai, Translator

CITATION:	2007TCC198
COURT FILE NO.:	2005-4476(GST)I
STYLE OF CAUSE:	CONSTRUCTION BERGEROY INC. AND HER MAJESTY THE QUEEN
PLACE OF HEARING:	Trois-Rivières, Quebec
DATE OF HEARING:	August 29, 2006
REASONS FOR JUDGMENT BY:	The Honourable Justice Paul Bédard
DATE OF JUDGMENT:	April 3, 2007

APPEARANCES:

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