Docket: 2008-3798(GST)I

BETWEEN:

DON WALLACE REYNOLDS
and PAUL PO HUI PEI,

Appellants,

and

HER MAJESTY THE QUEEN,

Respondent.

Appeal heard on July 3, 2009, at Toronto, Ontario.

By: The Honourable Justice B. Paris

Appearances:

Agent for the Appellant:	Martin R. Wasserman
Counsel for the Respondent:	Thang Tuieu

JUDGMENT

The appeal from the assessment made under the *Excise Tax Act*, notice of which is dated August 20, 2007, is dismissed.

Signed at Ottawa, Canada, this 18th day of September 2009.

"B.Paris"

Paris J.

Citation: 2009 TCC 470
Date: 20090917
Docket: 2008-3798(GST)I

BETWEEN:

DON WALLACE REYNOLDS
and PAUL PO HUI PEI,

Appellants,

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Respondent.

REASONS FOR JUDGMENT

Paris J.

[1] The issue in this appeal is whether the Appellants are entitled to the transitional rebate of goods and services tax (GST) provided for in subsection 256.3(1) of the *Excise Tax Act* (the *Act*). A rebate equal to 1% of the price paid for a residential complex is available to the purchaser of the complex where certain conditions have been met. The rebate is a consequence of the reduction of the rate of GST from 7% to 6% that came into force on July 1, 2006.

[2] Among the conditions for the rebate, paragraph 256.3(1)(*a*) requires that ownership and possession of the residential complex be transferred to the applicant on or after July 1, 2006. Subsection 256.3(1) reads as follows:

> 256.3(1) If a particular person, other than a cooperative housing corporation,
>
> (*a*) pursuant to an agreement of purchase and sale, evidenced in writing, entered into on or before May 2, 2006, is the recipient of a taxable supply by way of sale from another person of **a residential complex in respect of which**

> **ownership and possession under the agreement are transferred to the particular person on or after July 1, 2006,**
>
> (*b*) has paid all of the tax under subsection 165(1) in respect of the supply calculated at the rate of 7%, and
>
> (*c*) is not entitled to claim an input tax credit or a rebate, other than a rebate under this subsection, in respect of the tax referred to in paragraph (*b*),
>
> the Minister shall, subject to subsection (7), pay a rebate to the particular person equal to 1% of the value of the consideration for the supply.
>
> (Emphasis added.)

[3] In this case, the Minister of National Revenue refused the Appellants' application for the rebate on the basis that they took possession of their new condominium prior to July 1, 2006.

[4] Mr. Reynolds and Mr. Pei closed on the purchase of their new condominium on March 17, 2006 and began occupying it on March 28, 2006, the date at which it was substantially complete. However, title was not transferred to them until October 24, 2006.

[5] The Appellants maintain that, while they moved into the condominium in March 2006, they merely occupied it under a licence from the developer, and that they did not have possession of the unit until title was transferred to them. Schedule C to the Agreement of Purchase and Sale provided that upon payment by Mr. Reynolds and Mr. Pei of the required amounts on or before the closing date, the Vendor would grant them "a licence to occupy the unit" between the closing date and the unit transfer date. It also provided that they would be required to pay a monthly "Occupancy Fee", and set out the basis for the calculation of that amount. Mr. Reynolds and Mr. Pei paid all of these amounts.

[6] The Appellants also argue that their occupancy of the condominium amounted to something less than possession because the developer maintained substantial control over ingress and egress from the unit. According to section 23 of the Agreement of Purchase and Sale, the Vendor and persons authorized by it had a right of entry to the Appellants' condominium to inspect the unit or to do any work that was required. That provision reads as follows:

Right of Entry

> 23 Notwithstanding the Purchaser occupying the Unit on the Closing Date or the closing date of [the] transaction and the delivery of title to the Unit to the Purchaser, as applicable, the Vendor or any person authorized by it shall be entitled at all reasonable times and upon reasonable prior notice to the Purchaser to enter the Unit and the common elements in order to make inspections or to do any work or replace therein or thereon which may be deemed necessary by the Vendor in connection with the Unit or the common elements and such right shall be in addition to any rights and easements created under the Act. A right of entry in favour of the Vendor for a period not exceeding five (5) years similar to the foregoing may be included in the [final] Transfer/Deed provided on the Unit Transfer Date and acknowledged by the Purchaser at the Vendor's sole discretion.

[7] Mr. Reynolds said that after he and Mr. Pei moved in, workers frequently required access to correct construction deficiencies, and that this disturbed their enjoyment of the unit. On two occasions, each lasting several days, Mr. Reynolds said that he and Mr. Pei were required to move out so that the floors could be redone. Work was also continuing in the common areas of the building.

Analysis

[8] The term "possession" is not defined in the *Act*. In *North Shore Health Region v. Canada*,[1] the Federal Court of Appeal considered the meaning of the word "possession" as used in section 191 of the *Act*, which deals with the "self-supply rule". One of the issues in *North Shore* was whether occupants of a healthcare facility were given possession of the rooms they occupied in that facility. In determining the meaning to be given to the word possession in the provision, the Court said that "when used in a legal context, "possession" generally implies elements of dominion and exclusivity." The Court went on to say, at paragraph 44:

> In my view, the word "possession" in the context of subparagraph 191(3)(*b*)(i) of the *Excise Tax Act* is intended to describe a right of possession that is equivalent or analogous to the right of possession normally enjoyed, for example, by the tenant of a residential apartment. That would suggest, generally speaking, a right to the exclusive use and enjoyment of a particular apartment for a defined period of time for residential purposes, a right that cannot be defeated during the stipulated period except upon a breach by the tenant of the terms of the tenancy.

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1 2008 FCA 2.

I accept that the word "possession" in subsection 256.3(1) should also be interpreted as requiring exclusive possession.

[9] In support of their position that they did not have exclusive possession of the unit before October 24, 2006, the Appellants relied on the description of their right to occupy the premises as a "license'. They said that a license to occupy premises does not normally entail a grant of exclusive possession. It is clear, however, that the nature of the right granted to the Appellants is a matter of construction of the Agreement, and the terms used by the parties are not determinative.

[10] While Schedule C to the Agreement of Purchase and Sale, which granted the right to occupy the unit in the interim between the closing date and the title transfer date, does not explicitly state that the Appellants were granted exclusive possession of the unit, I believe that it can be inferred from the remainder of the Agreement for Purchase and Sale and from all of the circumstances that this was the case.

[11] Firstly, the reservation to the Vendor of the right to enter in certain circumstances relating to the repair or inspection of the premises implies that the parties intended that the Appellants' possession would otherwise be exclusive.

[12] Secondly, the right of entry granted to the Vendor and its agents in the Agreement of Purchase and Sale is not inconsistent with the Appellants having a right to exclusive possession of the unit. The right of entry is limited in nature and is not unlike the right of a landlord to enter leased premises to carry out repairs. Such a right was held not to be incompatible with the grant of exclusive possession in *Radaich v. Smith*:[2]

> A reservation to the landlord, either by contract or statute, or a limited right of entry, as for example to view or repair, is, of course not inconsistent with the grant of exclusive possession. Subject to such reservations, a tenant for a term or from year to year or for a life or lives can exclude his landlord as well as strangers from the demised premises…

This finding was adopted by the Ontario Superior Court of Justice in *Arsandco Investments Ltd. v. Municipal Property Assessment Corporation et al*[3] at paragraph 21.

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2 (1959), 101 C.F.R. 209 (Aust. H.C.) at p. 222.

3 (2007) 279 D.L.R. (4th) 160.

[13] Finally, the evidence showed that the Appellants moved into the unit as their residence on March 28, 2006 and, except for two short periods, have continued to reside there. Mr. Reynolds conceded in cross-examination that they have had control over who entered the unit since that time. It appears to me as well that on the two occasions that they vacated the premises, this was by mutual agreement with the developer in order to facilitate the necessary repair work. Nothing in any of the documents showed that the developer had the right to unilaterally require the Appellants to vacate the unit. Also, their possessions remained in the unit at all times after March 28, 2006, and I infer that the Appellants maintained control over the unit even during the periods when the repairs were carried out.

[14] These facts distinguish this case from *North Shore*, where possession of the residents' rooms could be taken by the operator of the facility at any time at the operator's sole discretion. Here, the two temporary unanticipated interruptions to the Appellant's occupancy of their unit and the entry of workers to do repairs did not result in the Appellants not having possession from March 28, 2006 on.

[15] As a result, I find that the Vendor transferred possession of the condominium unit to the Appellants on March 28, 2006 within the meaning of paragraph 256.3(1)(*a*) of the *Act*.

[16] The Appellants' representative also suggested that even if the Appellants were found to have taken possession of their condominium before July 1, 2006, this would not disqualify them from receiving the rebate. This position, in my view, is not supported by the wording of paragraph 256.3(1)(*a*) which requires that "ownership and possession" of the residential complex be transferred to the applicant on or after July 1, 2006 in order to be eligible for the rebate. It is clear that the transfer of both elements must occur on or after July 1, 2006, and as I have already found, this was not the case here.

[17] For all of these reasons, the appeal is dismissed.

Signed at Ottawa, Canada, this 18th day of September 2009.

"B.Paris"

Paris J.

CITATION:	2009 TCC 470
COURT FILE NO.:	2008-3798(GST)I
STYLE OF CAUSE:	DON WALLACE REYNOLDS and PAUL PO HUI PEI and HER MAJESTY THE QUEEN
PLACE OF HEARING:	Toronto, Ontario
DATE OF HEARING:	July 3, 2009
REASONS FOR JUDGMENT BY:	The B. Paris
DATE OF JUDGMENT:	September 17, 2009

APPEARANCES:

Agent for the Appellant:	Martin R. Wasserman
Counsel for the Respondent:	Thang Tuieu

COUNSEL OF RECORD:

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