Docket: 2018-1952(GST)I

BETWEEN:

ADELINA SIMONETTA,

Appellant,

and

HIS MAJESTY THE KING,

Respondent.

Appeal heard on November 5, 2019 and November 29, 2021, at Toronto, Ontario. Written submissions received on November 12, 2019, December 18, 2019, December 31, 2019, January 13, 2022, January 14, 2022 and November 8, 2022. Case management conference convened on October 31, 2022.

Before: The Honourable Justice Don R. Sommerfeldt

Appearances:

Agent for the Appellant:	Alan Vale (November 5, 2019) Biagio Simonetta (November 29, 2021)
Counsel for the Respondent:	Acinkoj Magok

AMENDED JUDGMENT

This Appeal is allowed, **without costs**.

Signed at Ottawa, Canada, this 11th day of **August** 2023.

"Don R. Sommerfeldt"

Sommerfeldt J.

Citation: 2023 TCC 54
Date: May 9, 2023
Docket: 2018-1952(GST)I

BETWEEN:

ADELINA SIMONETTA,

Appellant,

and

HIS MAJESTY THE KING,

Respondent.

AMENDED REASONS FOR JUDGMENT

Sommerfeldt J.

I. ISSUE

[1] The issue in this Appeal is whether Adelina (Adele) Simonetta is entitled to the new housing rebate (the "Rebate"), pursuant to subsection 254(2) of the *Excise Tax Act* (the "*ETA*"), in respect of her purchase of a house (the "House") and lot (the "Lot") located on Edgevalley Drive, Toronto, Ontario (together, the "Property"). Ms. Simonetta asserts that she qualifies for the Rebate. The Crown takes the position that Ms. Simonetta failed to satisfy paragraph 254(2)(d) and subsection 262(1) of the *ETA*. More specifically, the Crown submits that Ms. Simonetta did not pay any harmonized sales tax ("HST") in respect of the supply of the Property, and that the GST/HST New Housing Rebate Application for Houses Purchased from a Builder (Form GST 190)[1] (the "Application") sent by Ms. Simonetta to the Canada Revenue Agency (the "CRA") did not show the name, business number and contact information of, and was not signed by, the builder of the House. Those are the only two reasons asserted by the Crown in denying Ms. Simonetta's claim for the Rebate.

[2] Notably, the Crown did not advance any arguments to suggest that:

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[1] Exhibit R-1.

a) The sale to Ms. Simonetta of the Property was not a taxable supply. In other words, the Crown did not submit that the sale was an exempt supply (see paragraph 254(2)(a) of the *ETA*).

b) The Property had been occupied by someone else before Ms. Simonetta purchased it (see paragraph 254(2)(f) of the *ETA*).

c) The first individual to occupy the Property was not Ms. Simonetta or one of her relations or family members (see paragraph 254(2)(g) of the *ETA*).

II. FACTS

[3] Biagio Simonetta is married to Ms. Simonetta. He is a certified professional accountant and the chief financial officer of the A.R.G. Group of Companies, which is a real estate firm, and which develops, constructs and sells industrial units and residential properties.

[4] Mr. Simonetta stated that he found a reference to the Property online and became interested in viewing the Property, with the thought of possibly purchasing the Property. Paul Simonetta, who is the son of Biagio and Adelina Simonetta and who is a real estate agent, assisted his parents in researching the Property and preparing the Agreement of Purchase and Sale (the "APS").[2]

[5] As the Simonettas researched the Property, they learned that:

a) Two individuals (the "Vendors")[3] had purchased a two-storey, four-bedroom house (the "Original Dwelling"), which was located on the Lot, on May 19, 2010 (with a closing date of September 1, 2010), at a price of $1,155,000.[4]

b) On February 13, 2013, the Vendors obtained, from the City of Toronto (Etobicoke York District), what appears to be a demolition and construction permit in respect of the Lot.[5]

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2 Exhibit A-1, tab 1.

3 To maintain the privacy of the above-referenced two individuals, who are married, I will refer to them in these Reasons as the "Vendors". One of the Vendors was a witness at the trial. Where I mention him in these Reasons, I will refer to him as "Mr. B".

4 Exhibit A-1, tab 2, first page.

5 Exhibit A-1, tab 2, second page.

c) After obtaining the above permit, the Vendors arranged for the Original Dwelling to be demolished and for the House to be constructed on the Lot.

d) On May 29, 2015, the Vendors entered into a listing agreement (having an expiry date of September 30, 2015) with Royal LePage Real Estate Services Ltd. ("Royal LePage") in respect of the Property. The corresponding MLS listing document gave the approximate age of the House as "New" and described the House as "Custom New Build," with a list price of $3,600,0000 for the Property.[6]

e) On June 27, 2015, the Vendors entered into another listing agreement (having an expiry date of December 30, 2015) with Royal LePage in respect of the Property. The corresponding MLS listing document gave the approximate age of the House as "New," described the House as "Custom New Build," and showed a list price of $3,500,000 for the Property.[7]

f) On February 18, 2016, the Vendors entered into a listing agreement (having an expiry date of July 2, 2016) with Forest Hill Real Estate Inc. ("Forest Hill") in respect of the Property. The corresponding MLS listing document gave the approximate age of the House as "New," described the House as "Newly Built Custom Home," and showed a list price of $3,395,000 for the Property.[8]

g) On May 13, 2016, the Vendors entered into another listing agreement (having an expiry date of August 13, 2016) with Forest Hill in respect of the Property. The corresponding MLS listing document gave the approximate age of the House as "New," described it as "Newly Built Custom Home," and showed a list price of $3,295,000 for the Property.[9]

h) On August 31, 2016, the Vendors entered into a listing agreement (having an expiry date of October 31, 2016) with Sam McDadi Real Estate Inc. in respect of the Property. The corresponding MLS listing document gave the approximate age of the House as "New," but did not describe it as "New Build" or "Newly Built Custom Home," as had been done before in the previous listing documents. The list price of the Property was shown as

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6 Exhibit A-1, tab 2, third page.
7 Exhibit A-1, tab 2, fourth page.
8 Exhibit A-1, tab 2, fifth page.
9 Exhibit A-1, tab 2, sixth page.

$3,249,000.[10] This was the listing document that caught Mr. Simonetta's attention.

[6] Notwithstanding that the Crown, in its pleadings, had not challenged the position taken by Ms. Simonetta that, when she purchased the Property, it was new and had not been previously occupied, on the first day of the hearing, a considerable amount of time was taken up addressing those particular questions, as summarized in the ensuing paragraphs.

[7] Mr. Simonetta viewed three virtual tours of the Property. The first virtual tour, which he described as Link 1, had a digital document number of 356202. The second virtual tour, which he described as Link 2, had a digital document number of 6930238. The third virtual tour, which he described as Link 3, had a digital document identifier of DQBEKA. The following observations may be made about the three virtual tours of the Property:

a) In the first and third virtual tours, the House was staged, i.e., it had furniture, artwork and floor coverings much as one would expect to see in a show home. However, the furniture, artwork and floor coverings were different in the two virtual tours. In other words, it was obvious that after the first virtual tour had been photographed or filmed, the furniture, artwork and floor coverings were removed, and sometime later, prior to photographing or filming the third virtual tour, different furniture, artwork and floor coverings were placed in the House.

b) In the second virtual tour, there was no furniture, artwork or floor coverings in the House. Rather, the House was bare.

c) There were no window coverings in any of the three virtual tours.

[8] Prior to Ms. Simonetta making an offer to purchase the Property, she and Mr. Simonetta (together, the "Simonettas") toured the Property themselves. Describing what he observed as he toured the Property, Mr. Simonetta testified that:

a) Some of the packing plastic was still on the surface of the gas range in the kitchen.

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[10] Exhibit A-1, tab 2, seventh page. The listing document described the House as "Custom Built Executive Home."

b) The racks in the oven were still in cardboard packaging.

c) The shelves in the refrigerator were all taped together and lying in a stack on the bottom of the refrigerator.

d) The refrigerator still had Styrofoam packaging inside it and the drawers were taped shut.

e) The operator manuals for the washer and dryer were still inside the appliances.

f) The shipping bolts in the washing machine (to keep the tub secure) had not been removed.

g) The vent opening of the dryer had not been connected to the exterior vent.

h) The wine refrigerator was still wrapped.

i) There were no window coverings.

j) There were no rods, shelves or drawers in any of the closets.

k) The marble tile walls in the showers were still covered with marble dust, which appeared to have been caused by the tiles being cut before they were installed.

[9] Ms. Simonetta confirmed most of the above observations made by her husband. Describing her perceptions during the tour, she also stated that:

a) Upon entering the House, it smelled like a new house.

b) There was still sawdust in the kitchen cupboards.

c) When she turned on the exhaust fan over the gas range, sawdust spilled out of the vent.

d) Factory oils were still on the inside walls of the oven and on the griddle.

e) The stove, range and griddle had not been cured.

f) It appeared that the House had not been previously occupied.

[10] Mr. Simonetta, who (by reason of his career) has knowledge concerning new home construction and occupancy permits, produced a copy of a document entitled "Toronto Building's TelePermit System Automated Inspection Status Report," showing that the building permit for the House had been closed on November 15, 2016, with an indication that work was complete.[11] The document showed that the occupancy status had been determined as "Passed" on November 15, 2016. Mr. Simonetta explained that, when he first viewed the Property, it was clear that there were a number of construction deficiencies that required resolution. During the ensuing period between mid-September and mid-November of 2016, various workers worked on the Property to resolve the deficiencies and to make the House suitable for occupancy. Mr. Simonetta also stated that it is his experience that an occupancy permit is issued only once by the City of Toronto and that it is issued after an inspector has determined that a new house is suitable for occupancy.

[11] On September 9, 2016, Ms. Simonetta signed the APS. The opening portion of the APS stated that the price of the Property was $3,158,000.

[12] Before Ms. Simonetta signed the APS, Mr. Simonetta made a point of ensuring that paragraph 7 thereof was completed so as to read as follows:

> HST: If the sale of the Property (Real Property as described above) is subject to Harmonized Sales Tax (HST), then such tax shall be *included in* the Purchase Price. If the sale of the Property is not subject to HST, Seller agrees to certify on or before closing that the sale of the Property is not subject to HST. Any HST on chattels, if applicable, is not included in the Purchase Price.[12] [*Italics added.*]

[13] As the closing of the sale and purchase transaction approached, it became apparent that the Vendors and Ms. Simonetta took different positions concerning the exigibility of HST in respect of the supply of the Property. This difference was apparent in some of the correspondence exchanged by the solicitors for the respective parties. On November 16, 2016 (which was the originally scheduled closing date), Cindy M. Aulicino of Rigobon Carli (the solicitors for Ms. Simonetta)

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11 Exhibit A-1, tab 9.

12 Exhibit A-1, tab 1, second page, ¶7. The preprinted form of agreement used for the APS has a blank, represented by a dotted line, in paragraph 7 thereof. Beneath the dotted line, and in fine print, are the words *included in/in addition to*. In the APS signed by Ms. Simonetta, the words *included in* were inserted above the dotted line, such that paragraph 7 read as shown above.

wrote to a letter to the solicitor for the Vendors. Paragraph 5 of that letter read as follows:

> The home is new construction and accordingly subject to HST. As the Agreement of Purchase and Sale indicated that HST was included in the purchase price, we require amended statement of adjustments to reflect the purchase price net of the HST for purposes of the transfer in order to calculate the Land Transfer Tax exigible thereon. We require amended Vendors' documents as the document provided to us is incorrect as the Vendors are claiming that HST is not exigible as it is a used residential property, which is false. We have reviewed all prior listings for the property and pictures from the listings either show the home as empty of all furniture or staged. The home was staged two (2) separate times, with different furniture and accessories. Did your clients move in and out three (3) times during the year and did they buy furniture two (2) separate times to furnish the home? If your clients have lived in the home, as they claim, then we require the same evidence that Canada Revenue Agency would require that indicates that this is a used residential home, including copies of their driver's licence and health cards showing the address of the home thereon and copies of all utility bills for the property, including cable/internet, that shows utilities have been consumed consistent with a family occupying and using the home.[13]

[14] Rather than providing Ms. Aulicino with the requested documentation (such as copies of utility bills, driver's licences and health cards), on November 17, 2016, the Vendors' solicitor wrote, rather cryptically, to Walter J. Rigobon (also of Rigobon Carli), as follows:

> My client's [*sic*] advise that they have owned the property for 5 years, that the home after construction was occupied as their residence. In accordance with paragraph 7 of the Agreement of Purchase and Sale my clients have certified the sale of the property is not subject to HST. The issue of whether the HST is payable is a matter for CRA to determine. My clients have satisfied the HST provisions of the Agreement of Purchase and Sale.[14]

[15] The Simonettas recognized that the letter from the Vendors' solicitor contained two misrepresentations. First, the Simonettas were well aware that the House had not been occupied as a residence by anyone, let alone the Vendors. Second, the Simonettas were aware that the Vendors had not provided them with any certification that the sale of the Property was not subject to HST.[15]

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13 Exhibit A-1, tab 3, p. 2.

14 Exhibit A-1, tab 4.

15 Mr. Simonetta learned of a third misrepresentation when he reviewed a copy of the MLS listing document in respect of the Vendors' acquisition of the Lot and the Original Dwelling

[16] After receiving the above-mentioned letter of November 17, 2016, Ms. Aulicino replied to the Vendors' solicitor. Her letter, also dated November 17, 2016, contained the following statement concerning the HST issue:

> We do not agree with your position; however, our client has instructed us to close and reserves her rights accordingly.[16]

[17] Due to a delay encountered in discharging one or more mortgages from the title to the Property, the transaction closed a couple of days later than originally scheduled. After the Simonettas moved into the House, their understanding that no one had previously occupied the House was confirmed. For instance, Ms. Simonetta explained that, after they took possession of the Property, in order to make the House habitable and the appliances functional, she needed to:

a) clean a lot of sawdust out of the kitchen cupboards;

b) with the help of Mr. Simonetta, wash marble dust off the shower walls and bathroom walls;

c) cure the gas oven and range;

d) wash and cure the griddle;

e) wash the oven walls to remove the factory oils;

f) unwrap and install the trays and shelves (presumably, she meant racks) for the oven;

g) clean sawdust from the exhaust fan over the gas range;

h) unpack and install the shelves and drawers in the refrigerator;

i) remove the operator manuals from the dishwasher, washing machine and clothes dryer; and

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on September 1, 2010. He realized that, in November 2016, they had owned the Lot for six, not five, years, See Exhibit A-1, tab 2, first page.

16 Exhibit A-1, tab 5, p. 1, ¶5.

j) remove the shipping bolts from the back of the washing machine.[17]

As well, the Simonettas spent approximately $20,000 to purchase and instal closet organizers.[18] In addition, they hired a handyman to install tubing to connect the exhaust at the back of the clothes dryer to the exterior vent outlet.[19]

[18] In reviewing the warranty documentation and the packing slips for some of the appliances,[20] Mr. Simonetta observed that some of the appliances had been delivered to the House in November 2014 (i.e., approximately two years before the Simonettas moved into the House).[21] As noted above, it was clear to the Simonettas that those appliances had not been used in the two-year interval between 2014 and 2016.

[19] After taking ownership and possession of the Property, and having confirmed what they already knew, i.e., that the House had not been previously occupied, the Simonettas instructed Mr. Rigobon to send a letter to the Vendors' solicitor, advising that Ms. Simonetta intended to apply for the Rebate, in the amount of $24,000. Accordingly, on December 15, 2016, Mr. Rigobon sent a letter to Mr. Davidson. The opening paragraph of the letter began as follows:

> Further to our letter to you of November 16, 2016 and your response contained in paragraph 5 of your letter of November 17, 2016[,] our client has conducted further review and investigation in this matter. It would appear clear that your client never occupied the property and the property constitutes a new home construction for the purposes of the appropriate tax legislation. Accordingly, kindly advise your client that our client will be making the appropriate application for H.S.T. reimbursement in the amount of Twenty-Four Thousand Dollars ($24,000.00) for the rebate provided for new homes.[22]

Recognizing that an application by Ms. Simonetta to the CRA for the Rebate might trigger an audit of the Vendors, Mr. Rigobon went on to advise the Vendors' solicitor

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17 Transcript, vol. 1, p. 64, line 18 to p. 67, line 11.
18 Transcript, vol.1, p. 22, line 16 to p. 23, line 6.
19 Transcript, vol.1, p. 66, line 27 to p. 67, line 2.
20 Exhibit A-1, tab 10, first and second pages.
21 Transcript, vol. 1, p. 33, lines 8–28.
22 Exhibit A-1, tab 7, p. 1.

that Ms. Simonetta would not apply for the Rebate if the Vendors were to pay $24,000 to her.[23]

[20] The same day, the solicitor for the Vendors replied to Mr. Rigobon, with the following curt response:

> My clients advise that the sale of their home is not subject to HST.[24]

[21] In December 2016, Mr. Simonetta completed, and Ms. Simonetta signed, the rebate application form entitled "GST/HST New Housing Rebate Application for Houses Purchased from a Builder" (Form GST190) (defined above as the "Application"), to which was attached a copy of a document entitled "GST190 Ontario Rebate Schedule" (Form RC7190-ON) and a copy of the Statement of Adjustments for the sale and purchase transaction in respect of the Property.[25] Given the uncooperative and dismissive nature of the letters from the Vendors' solicitor, as referenced above, Mr. Simonetta was certain that he would not be able to obtain the builder information necessary to complete section D of the Application.[26] Therefore, he left that section blank. While he knew, and could have inserted the names of the Vendors, his failure to do so was not critical, as the names of the Vendors were shown at the top of the Statement of Adjustments that was attached to the Application. The failure to provide the other builder information is an issue that I will discuss below.

[22] Regrettably, on account of the pandemic and the associated Court closure for much of that time, the continuation of the hearing of this Appeal was delayed until November 29, 2021. When the hearing reconvened, counsel for the Crown called Mr. B, one of the Vendors, as a witness. He appeared by video connection. To my surprise, and possibly to the surprise of the Simonettas, Mr. B readily acknowledged that at no time did he or any member of his family occupy the Property as a residence. He also stated that he had owned the Property for more than five years before its sale

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23 In addition to requesting compensation for the Rebate in the amount of $24,000, Mr. Rigobon also requested that the Vendors reimburse Ms. Simonetta in the additional amount of $14,532.38, representing the provincial land transfer tax on the amount of $363,309.74, which, according to the Simonettas, represented HST on the supply of the Property, and which, according to the Vendors, represented a portion of the consideration for that supply.

24 Exhibit A-1, tab 8.

25 The three documents together constitute Exhibit R-1.

26 Transcript, vol. 1, p. 55, lines 18-28.

to Ms. Simonetta. These two statements by Mr. B were completely contrary to statements made by the Vendors' solicitor in his letter of November 17, 2016.

[23] When Mr. B was asked why the solicitor representing him and the other Vendor had made incorrect statements in his letter, all that Mr. B said was that he was not sure why the solicitor's letter was written that way, that he didn't have an answer for that question, and that he couldn't tell the Court what the solicitor was thinking when he wrote the letter. To my mind, that is an unsatisfactory response. Either the solicitor wrote the letter based on instructions given to him by his clients, or he fabricated the letter without discussing it with his clients. Mr. B did not address or discuss either of those possibilities. Given the ethical duties of lawyers to their clients and to third parties who are interacting with their clients, it seems unlikely that the solicitor fabricated the letter without any input from the Vendors. In my mind, this raises significant questions concerning the credibility and reliability of Mr. B's testimony, about which I will have more to say later.

[24] During his examination-in-chief, Mr. B provided a woeful summary of unfortunate events that transpired during the approval and construction phases in respect of the House. Some of the notable aspects of that unfortunate series of events are the following:

a) The new House that the Vendors proposed to have built was substantially larger than the Original Dwelling, which they had demolished. This caused an uproar and considerable opposition from the neighbours, which required several meetings with local government officials and ultimately a revision of the proposed plans and a reduction in the size of the House.

b) Shortly after the basement had been excavated, the historic flood of 2013 occurred, which filled the excavation pit and destabilized the bank.

c) Due to the bank destabilization, the foundation of their neighbour's home cracked, as a result of which the Vendors were required to reinforce that foundation with steel beams, at a major cost to the Vendors.

d) The neighbour with the cracked foundation commenced a lawsuit against the Vendors, relating to an insurance claim in respect of her house.

e) In the same year or the following year, an ice storm hit Toronto.

f) One of the neighbours continually harassed the workers on the job site, to the point that Mr. B had to call the police and hire a private security company.

g) The purchase of the Property and the construction of the House were heavily financed. Ultimately, the debt became unmanageable and the position of the Vendors became untenable. Due to the financial difficulties, the approval and construction delays, and the added costs, the House became unaffordable and problematic.[27]

[25] As a result of the forgoing events, as well as the general animosity of the neighbours, the Vendors decided sometime in the latter part of 2014 not to move into the House when it was ultimately completed. However, based on advice that they received from a friend and business associate (the "Associate"), who was the source of most of their financing, they decided that the preferred course of action was to carry on with the construction of the House, to its completion, and then to sell the House, hopefully for enough money to enable them to pay off all of their debts and to realize a profit, as well.

[26] Construction of the House was substantially completed in 2014. During the winter of 2014-2015, the Vendors met with a real estate agent, to discuss the sale of the Property. "To get a spring market," they waited until May 2015 to list the Property for sale.[28] Ultimately, over a period of 15 months, the Vendors entered into five successive listing agreements, before Ms. Simonetta came across the Property and ultimately purchased it.

III. ANALYSIS

A. Credibility and Reliability of Mr. B's Evidence

[27] In paragraph 5 on page 2 of Ms. Aulicino's letter of November 16, 2016 to the Vendors' solicitor, she outlined her concern that the House was newly constructed and that its sale was subject to HST. She supported her concern by referring to the MLS listing documents discussed above and the pictures from the virtual tours showing the House as staged, then empty, then staged again with different furniture and accessories. She provided the Vendors' solicitor with an opportunity for his clients to alleviate that concern by providing documentary evidence (such as driver's licences, health cards and utility bills) to show that the Vendors actually had been occupying and using the House.[29] Rather than providing the requested documentation, or explaining why it would not be provided, and rather

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27 Transcript, vol. 2, p. 65, lines 22-24.
28 Transcript, vol. 2, p. 66, lines 24-25.
29 Exhibit A-1, tab 3, p. 2, ¶5.

than acknowledging or addressing Ms. Aulicino's observations about the listing documents and the pictures from the virtual tours, the Vendors' solicitor, in his letter of November 17, 2016, simply said that his clients advised that they had owned the Property for five years and that the House, after construction, was occupied as their residence.[30] I consider that to be an insufficient and obfuscatory response to the concerns raised by Ms. Aulicino on behalf of Ms. Simonetta.

[28] Unless the Vendors' solicitor decided to fabricate the details set out in his letter of November 17, 2016, which is unlikely, the Vendors, through their solicitor, made representations that they had owned the Property for five years, that they had occupied it as their residence, and that they had certified the sale of the Property as not being subject to HST, when, in fact, the Vendors had then owned the Property for slightly more than six years, they had never occupied the Property as their residence, and they had not certified that the sale of the Property was not subject to HST. Given those misrepresentations, I have doubts in my mind as to the extent to which I may rely on the evidence given by Mr. B.

[29] In Ms. Aulicino's letter of November 16, 2016, she also raised a concern about construction liens, as follows:

> As the home is new construction, we require either (i) a statutory declaration from the Vendors that all trades, suppliers, contractors, materials, etc. have been paid and that there has not been any work to the property in the past 45 days that if unpaid could form a lien on the property under the *Construction Lien Act*, (Ontario) or, (ii) a holdback equivalent to 10% of the construction contract to be held by your firm in trust until 45 days has [*sic*] elapsed from the closing date and evidence that no liens have been registered on title to the property. Your letter of even date advises that there has been no work to the property for over a year, however, our client advises that the Vendors have retained contractors to make repairs to the home as there were some deficiencies. Please provide us with evidence that these contractors have been paid.[31]

The above-referenced "letter of even date" was not put into evidence.

[30] During his testimony, Mr. Simonetta stated that, when he first viewed the Property, he noticed deficiencies that he brought to the attention of the Vendors, and that they arranged to have various tradesmen attend at the Property to remedy the deficiencies. Mr. Simonetta also testified that the City of Toronto building inspectors who had viewed the Property had registered various deficiencies on the title to the

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30 Exhibit A-1, tab 4, ¶5. See paragraph 14 above.

31 Exhibit A-1, tab 3, p. 2, ¶4.

Property. Shortly before the closing of the sale and purchase transaction, the deficiencies were completed and an occupancy permit was provided by the City. I accept that work was being done on the Property between September 2016 and November 2016 inclusive. Therefore, I consider the statement given by the Vendors, through their solicitor, to the effect that there had been no work done on the Property for over a year, to be incorrect. This casts doubt on the reliability of the other statements made by the Vendors through their solicitor.

[31] I also have concerns about Mr. B's memory of relevant events. For instance, during his examination-in-chief, Mr. B stated that the Vendors had listed the Property three times,[32] whereas it appears that the Property to was actually listed five times.[33] At another point in his examination-in-chief, he stated that the ice storm occurred a year after the flood, but only a few minutes later, he stated that the ice storm occurred in the same year as the flood. Mr. B also stated that he did not remember whether he reported the sale of the Property on his 2016 income tax return. As well, he could not remember the rate of interest he was paying to the Bank of Montreal (the "Bank") in respect of the mortgage loan that he and the other Vendor had obtained to enable them to purchase the Property, although he thought that the rate was likely in the range of 2% to 3% per year.

[32] Further examples suggesting that Mr. B's recollection of the relevant events and circumstances may have been deficient are the following:

a) Mr. B testified that the ceiling in the basement of the House was over 15 feet high.[34] However, the third and fourth MLS listings stated that the lower level (presumably the basement) had ten-foot ceilings.[35]

b) Mr. B testified that, by the time the construction of the House was concluded, there were four mortgages registered against the title to the Property.[36] However, it is my understanding that there were actually five mortgages registered against the title to the Property.[37]

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32 Transcript, vol. 2, p. 66, lines 6-7.

33 Exhibit A-1, tab 2, third through seventh pages. The exhibit shows five different listings; however, in fairness to Mr. B, it is possible that he might have considered that the second and fourth listings were revisions or extensions of the first and third listings.

34 Transcript, vol. 2, p. 79, lines 15-18.

35 Exhibit A-1, tab 2, fifth and sixth pages.

36 Transcript, vol. 2, p. 49, lines 4-11.

37 Exhibit R-4 (i.e., the Forbearance Agreement), ¶10-11; and Exhibit R-5 (i.e., the Trust Ledger Statement prepared by the Vendors' solicitor), dated November 16, 2016.

[33] During his testimony, Mr. B produced an incomplete copy of a Forbearance Agreement, dated September 16, 2015, among the Bank, himself and the other Vendor. He acknowledged to the Court that he had removed a number of provisions from that agreement, which he preferred to keep confidential, as they related to other litigation between the Bank and himself. This deletion of some of the Forbearance Agreement was acknowledged by him only when he was questioned about what appeared to be missing provisions. At that point, Mr. B readily offered to provide the full document, saying that he had the fully intact document. When he subsequently produced what was supposedly the complete copy of the Forbearance Agreement, there were several differences between the version that was originally produced and the version that was subsequently produced. In addition, neither version had been executed by the Bank. The Forbearance Agreement also refers to completed but unsworn [*sic*] statutory declarations that were attached as Schedule "A" and a consent to judgment that was attached as Schedule "B". Neither of those schedules was attached to either copy of the Forbearance Agreement that was put before the Court. Consequently, I was left wondering whether there was something that Mr. B preferred that I not see.

[34] At a case management conference on October 31, 2022, I expressed my concerns about the copies of the Forbearance Agreement that had been produced to me. Counsel for the Crown subsequently provided to me copies of two counterparts of an agreement entitled "Further Amended and Extended Forbearance Agreement", which were dated October 15, 2018 (i.e., more than three years after the date of the Forbearance Agreement that was originally provided by Mr. B to the Court.) The counterparts of the Further Amended and Extended Forbearance Agreement contained executed copies of the statutory declarations referred to above and a consent to judgment (also referred to above) signed by the then solicitor for the Vendors.[38]

[35] Mr. B stated that he did not seek qualified tax advice concerning whether the sale of the Property was a taxable supply or an exempt supply. Rather, he discussed the matter with his real estate agent, who advised that, because Mr. B was "not a builder and it was [his] home, it is not [his] business, the sale is not subject to HST."[39]

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38 The copies of the counterparts of the Further Amended and Extended Forbearance Agreement were accompanied by a letter dated November 8, 2022, from counsel for the Crown. The solicitor for the Vendors who signed the above mentioned consent to judgment was not the same solicitor as, and was not associated or affiliated with, the solicitor who acted for the Vendors on the sale of the Property.

39 Transcript, vol. 2, p. 102, lines 2-5.

B. CRA's Assumptions

[36] Paragraph 7 of the Crown's Reply lists the following assumptions of fact made by the Minister of National Revenue (the "Minister") in assessing Ms. Simonetta to deny the Rebate for which she had applied:

a) on September 9, 2016, the Appellant [i.e., Ms. Simonetta] signed an Agreement of Purchase and Sale with the Sellers [i.e., the Vendors] to acquire the Property;

b) the purchase price of the Property was $3,158,000;

c) the purchase price of the Property did not include GST or HST; and

d) the Appellant did not pay any amount representing tax under the [*Excise Tax*] *Act* on the purchase of the Property.

[37] Notably, the Minister did ***not*** assume any of the following as facts:

a) The Vendors did not, at a time when they had an interest in the Lot, carry on, or engage another person to carry on for them, the construction of the House.

b) The Vendors constructed, or engaged another person to construct, the House otherwise than in the course of a business or an adventure or concern in the nature of trade.

c) The Vendors occupied the Property as a place of residence or lodging.

d) Neither Vendor was a builder (as defined in subsection 123(1) of the *ETA*) of the House.

e) Ms. Simonetta did not intend to occupy the property as a place of residence.

f) Ms. Simonetta and her husband did not actually occupy the Property as a place of residence.

g) Ms. Simonetta and her husband were not the first individuals to occupy the Property as a place of residence.

h) Ms. Simonetta did not apply for the New Housing Rebate on a timely basis.

i) Ms. Simonetta did not use the prescribed form.

In other words, the Minister did not assume that any of the circumstances described in subparagraphs a) through i) above existed, nor did the Minister submit that any of subparagraphs a) through i) is a basis for denying the Application.

C. Nature of Supply

[38] Subsection 123(1) of the *ETA* states that a *taxable supply* is a supply made in the course of a commercial activity. The same subsection states that a *commercial activity* includes the making of a supply (other than an exempt supply) by a person of real property of the person. Thus, the sale by the Vendors of the Property was a commercial activity, unless the sale constituted an exempt supply.

[39] Subsection 123(1) of the *ETA* states that an *exempt supply* is a supply included in Schedule V. Section 2 of Part I of Schedule V to the *ETA* refers to a supply by way of sale of a residential complex by a person who is not a builder of the complex, unless the person claimed an input tax credit (an "ITC") in respect of the last acquisition by the person of the complex (there is also another exclusion, which is not applicable here). In simpler language, the *Technical Notes* released by the Department of Finance in February 2001 state, "Section 2 of Part I of Schedule V to the Act exempts a sale of a residential complex … by a person other than a builder." Thus, a sale of a residential complex by a builder is not an exempt supply. In other words, if a person selling a residential complex is a builder, it is immaterial whether the person claimed an ITC or not.

[40] It is the position of Ms. Simonetta that the sale by the Vendors to her of the Property was a taxable supply. It is clear that the sale was a supply of real property, such that it was a commercial activity, unless it is established that it was an exempt supply.

[41] The Crown takes the position that there was not sufficient evidence before the Court to determine whether the Vendors met the definition of *builder* in subsection 123(1) of the *ETA*.[40] The Crown also asserts that, apart from the fact that Ms. Simonetta and her family "moved into a brand-new home," there was not sufficient

[40] Transcript, vol. 1, p. 74, lines 19-22.

evidence before the Court to find that the sale of the Property by the Vendors to Ms. Simonetta was not an exempt supply, and was instead a taxable supply.[41]

[42] For the sale of the Property by the Vendors to Ms. Simonetta to be a taxable supply, it would need to be shown that the Vendors were builders of the House or that they claimed ITCs in respect of their last acquisition of the Property.[42] In this regard, I note that the Crown did not raise any arguments in its pleadings about the issues of whether the Vendors were builders and whether the sale of the Property was a taxable supply or an exempt supply.

[43] Turning to the question of whether the Vendors were builders of the House, subsection 123(1) of the *ETA* states that a *builder* of a residential complex includes "a person who … at a time when the person has an interest in the real property on which the complex is situated, carries on or engages another person to carry on for the person … the construction … of the complex … but does not include … [such] an individual … who carries on, [or] engages another person to carry on the construction …, otherwise than in the course of a business or an adventure or concern in the nature of trade." While it appears that the House was not constructed in the course of a business carried on by the Vendors, it is necessary to determine whether the House was constructed in the course of an adventure or concern in the nature of trade.

D. Adventure in the Nature of Trade

[44] For the purposes of these Reasons, I will use the phrase *adventure in the nature of trade* as meaning an adventure or concern in the nature of trade. As Justice Major said in the *Friesen* case, "The concept of an adventure in the nature of trade is a judicial creation designed to determine which purchase and sale transactions are of a business nature and which are of a capital nature."[43] With the advent of the goods and services tax (the "GST"), the concept of an adventure in the nature of trade also became applicable for certain purposes related to the GST.

[45] In its traditional income tax context, the determination of whether a particular transaction is an adventure in the nature of trade involves a consideration of whether

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41 Transcript, vol. 1, p. 89, lines 5-11.

42 In his testimony, Mr. B said that he and the other Vendor did not claim any ITCs in respect of the construction of the House. See Transcript, vol. 2, p. 77, lines 14-15; and p. 101, lines 10-16.

43 *Friesen v. The Queen*, [1995] 3 SCR 103, ¶15.

a particular gain is of an income or capital nature. In *Happy Valley Farms*, Justice Rouleau enumerated several tests that had been used by the courts to determine whether a gain is of an income or capital nature, as follows:

a) the nature of the property sold;

b) the length of period of ownership;

c) the frequency or number of other similar transactions by the taxpayer;

d) work expended on or in connection with the property realized;

e) the circumstances that were responsible for the sale of the property; and

f) motive or intention.[44]

[46] The above list of factors continues to be used to determine "whether a gain realized on a disposition of property is an income gain or a capital gain."[45] The above factors or tests, which are to be applied by reference to the facts of the particular case, "directly or indirectly lead back to the intention of the taxpayer."[46] I will now consider the above six factors.

(1) Nature of the Property

[47] The Property was a large custom-built executive home in an exclusive neighbourhood,[47] with five spacious bedrooms, each with its own ensuite bathroom, a private office with a built-in bookcase, three fireplaces, ten-foot or eleven-foot

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44 *Happy Valley Farms v. MNR*, [1986] 2 CTC 259, 86 DTC 6421 (FCTD), ¶14. The above list of factors does not include the elaborating comments that Justice Rouleau provided in respect of each factor. While Justice Rouleau, in his list in ¶14 of his reasons, showed the sixth factor as *motive*, he subsequently (in ¶15) used the term *intention*. Accordingly, I have used both *motive* and *intention* in the above list.

45 *Wall v. The Queen*, 2021 FCA 132, ¶24.

46 *Ibid*, ¶25.

47 Exhibit A-1, tab 2, seventh page.

ceilings,[48] laundry rooms on the main floor and the second floor, a finished basement and a three-car garage.

[48] As the Property could have been used by the Vendors as their residence or could have been sold with the expectation of making a profit, the nature of the Property is a neutral factor, rather than a determining factor, in this analysis.

(2) Length of Ownership

[49] The Vendors closed the purchase of the Lot and the Original Dwelling on September 1, 2010. In November 2012, the Vendors entered into a Project Management Agreement with Majesty Homes Inc. ("Majesty"), which was hired by the Vendors to be the project manager and builder of the House.[49] On February 13, 2013, without having moved into the Original Dwelling, the Vendors obtained a demolition permit in respect of the Original Dwelling and a construction permit authorizing them to build the House on the Lot.

[50] In May 2013, after the frost had lifted and the ground had thawed, Majesty began to demolish the Original Dwelling.[50] A couple of months later, Majesty commenced construction of the House. The House was substantially completed by the end of 2014. However, certain items were not entirely completed at that time, and the construction of those items continued up to November 2016.[51]

[51] The Vendors entered into the first listing agreement on May 29, 2015.

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48 As noted above, the third and fourth MLS listings stated that the lower level of the House had ten-foot ceilings. The fifth MLS listing stated that the House had eleven-foot ceilings. See Exhibit A-1, tab 2, fifth to seventh pages.

49 Exhibit R-2. It is important to note that the word *builder*, as used in the undated letter from Majesty to the Bank (which is the first page of Exhibit R-2 and which is attached to the Project Management Agreement), does not have the same meaning as the word *builder*, as used in subsection 123(1) of the ETA. For the purposes of the ETA, a person may be a builder of a residential complex without actually performing the construction of the complex. In other words, in some situations, the term *builder* includes a landowner who engages another person to construct a residential complex. As well, subsection 123(1) also provides that the term *builder* includes a person who is engaged by a landowner to carry on the construction of a residential complex on that land.

50 Transcript, vol. 2, p. 63, lines 14-21.

51 Exhibit A-1, tab 9.

[52] While the Vendors owned the Lot for slightly more than six years (i.e., September 1, 2010 to November 16, 2016),[52] they owned the House in a substantially completed condition for slightly less than two years (i.e., from late 2014 to November 16, 2016). I consider this to be a relatively short period of time, particularly as the Property was first listed for sale on May 29, 2015, about five or six months after substantial completion of the House.

[53] While the Vendors encountered a number of challenges in constructing the House, which may explain their decision to sell the House, the short period of ownership of the House is also consistent with an adventure in the nature of trade.

(3) Use of Borrowed Money

[54] In the *Friesen* case, Justice Major combined the *length-of-ownership* factor with another factor, namely, the extent to which borrowed money was used to finance a transaction. He stated that "Transactions involving borrowed money and rapid resale are more likely to be adventures in the nature of trade."[53]

[55] The Bank advanced to the Vendors the amount of money needed to close their purchase of the Property (less the amount of the down payment that had been put up by the Vendors). It appears that the amount advanced by the Bank on that occasion was in excess of $1,000,000. Based on the evidence, it appears that most, if not all of the money required to demolish the Original Dwelling and to construct the House was borrowed by the Vendors from two corporations owned by the Associate. Based on the available evidence, it also appears that the Associate's corporations loaned more $3,000,000 to the Vendors to finance the construction of the House.

[56] At some point in time during the construction of the House, the Bank appears to have lost patience with the amount of time that it was taking for the Vendors to complete the construction of the House. This may have been exacerbated by the litigation between the Bank and the Vendors in respect of some other unrelated transactions. As the Bank was pressuring the Vendors, and perhaps threatening to foreclose, Mr. B arranged with the Associate to borrow additional money in order to pay out a significant portion (if not all) of the amount owed by the Vendors to the Bank. Consequently, one of the Associate's corporations took over the Bank's

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52 The originally scheduled closing date was to have been November 16, 2016; however, due to a delay in discharging one or more mortgages, the transaction actually closed a couple of days later. The precise closing date was not put into evidence.

53 *Friesen*, *supra* note 43, ¶17(iv).

position, as the first secured lender, in respect of a loan with a principal amount (on or about November 16, 2016) of $521,632.16. It appears that the Bank was not paid out entirely, as the Trust Ledger Statement prepared by the Vendors' solicitor showed that, at the time of closing, the Bank held a fifth mortgage against the Property, with a balance of $223,593.81.[54]

[57] Ms. Aulicino, writing on behalf of Ms. Simonetta's lawyers on November 16, 2016, noted that the discharge statements that were provided to Mr. Rigobon in respect of the mortgages registered against the title to the Property showed that the aggregate amount needed to pay out the mortgages exceeded the purchase price of the Property by $1,326,147.58.[55] This suggests that the Property was over-leveraged.

[58] At the time of closing, the total of the then outstanding balances of the five mortgages registered against the Property was slightly less than $3,800,000. To be fair, at that time the Vendors were holding cash in the amount of $795,010.31, which represented funds that had been advanced to them by one of the Associate's corporations to finance the construction of the House, but which they had not actually expended. Accordingly, at the time of closing, that amount was repaid by the Vendors, so as to reduce the total of the outstanding balances of the five mortgages to an amount slightly less than $3,000,000.

[59] Given that the price paid by Ms. Simonetta to purchase the Property was $3,158,000, it is clear that the Vendors used borrowed money to a significant extent to fund their prior purchase of the Lot and the construction of the House. This factor is indicative of an adventure in the nature of trade.

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54 Exhibit R-5, dated November 16, 2016

55 Exhibit A-1, tab 3, p. 1, ¶2.

(4) Frequency or Number of Similar Transactions

[60] In June 2010, the Vendors sold the home in which they had been residing, on Lakeshore Boulevard West. Shortly before purchasing the Lot and the Original Dwelling, the Vendors and their family moved into a leased home on Meadowbank Road.

[61] As noted above, the copy of the Forbearance Agreement (Exhibit R-4) that was originally presented to the Court by Mr. B was incomplete, In particular, the first six recitals to that agreement (as well as other provisions) had been removed by Mr. B. After a more complete copy of the Forbearance Agreement was provided to the Court, it became apparent that some of the removed recitals indicated that sometime on or before April 9, 2009, the Vendors were the owners of real property located on Winterborne Gate in Mississauga. The Winterborne property was mortgaged to the Bank as security for the repayment for various loans advanced by the Bank to the Vendors. In May 2015, the Bank sold the Winterbourne property under a power of sale.

[62] Thus, during the period from mid-2010 to late 2016, the Vendors disposed of at least three parcels of real property. This could be viewed as a frequency that was consistent with an adventure in the nature of trade.

(5) Work Expended on the Property

[63] In *Happy Valley Farms*, Justice Rouleau stated that, if effort is put into bringing a property into a more marketable condition during the period of ownership, there is some evidence of dealing in the property.[56] The Vendors put substantial effort into bringing the Property into a more marketable condition, by demolishing the Original Dwelling and by constructing, in its place, the House, which may be described as an upscale residence. While this may be some evidence of dealing in property, it is also consistent with the Vendors' stated intention that they were building a home for them and their family to live in.[57]

[64] In commenting on this factor, Justice Rouleau also stated that, if special efforts are made to find or attract purchasers, there is come evidence of dealing in the

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56 *Happy Valley Farms*, *supra* note 44, ¶14(4).

57 Transcript, vol. 2, p. 45, lines 4-8; p. 45, line 28 to p. 46, line 1; p. 96, lines 19-22; and p. 102, lines 6-15.

property.[58] That appears to have been done here. For instance, as persuaded by the Bank, the Vendors chose not to move into the House (even though they claimed that it was to have been their dream home) because they did not want to diminish the saleability of the Property.[59] As well, for some of the time while the Property was listed for sale, it was professionally staged with temporary or imitation furniture.

[65] Overall, although this factor is generally consistent with the Vendors' stated intention, this factor is also consistent with an adventure in the nature of trade.

(6) Circumstances Responsible for the Sale of the Property

[66] As explained above, the Vendors encountered a number of difficulties in constructing the House, including opposition from the neighbours, the serious flood in 2013, the subsequent ice storm, and the need to undertake remedial measures to stop the cracking of the neighbours' foundation and to deal with the resultant lawsuit. Those factors were indicative of a frustrated endeavour to build a family dream home.

[67] In addition, the Vendors were receiving pressure from the Bank and from the Associate to sell the Property and to pay off the debts that they owed to the Bank and to the Associate's corporations. As already noted, the pressure from the Bank became so overpowering that the Vendors borrowed additional money from one of the Associate's corporations in order to pay off some or all of the amount owed by them to the Bank.

[68] In his submissions on behalf of Ms. Simonetta, Mr. Simonetta suggested that the Vendors were overextended financially. Based on my review of the evidence, that seems to have been the case. It is notable that, while the rate of interest paid by the Vendors to the Bank was in the range of 2% to 3%, the rate of interest paid by them to the Associate's corporations was 9% in respect of the loan used to pay off the Bank and 10% in respect of the three construction loans (however, it should be noted that Mr. B commented that 10% was a reasonable rate of interest for a construction loan, although no independent evidence was adduced to confirm this comment). It should also be noted that the Vendors were not able to make the anticipated payments in respect of all of the financing provided to them by the Associate's corporations. In particular, Mr. B acknowledged that, while they initially

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58 *Happy Valley Farms, supra* note 44, ¶14(4).

59 Transcript, vol. 2, p. 70, lines 8-13.

made monthly payments in respect of the 9% loan that was used to pay off the Bank, those payments ultimately stopped.

[69] Mr. B testified that the Associate too began to pressure them for repayment of the loans advanced by his corporations. However, the Associate also advised the Vendors that the amount that they could realize on the sale of the Property would be maximized if they were to complete the construction of the House and sell it as a home ready for occupancy, rather than if they were to sell the Lot and the unfinished House shortly after they had decided not to move into it.

[70] While the Vendors' hope to live in the House was frustrated, it is also apparent that, when they made the decision not to move into the House, they were determined to complete the construction of the House so as to sell it for the maximum amount possible, in the hope of paying off their debts and making a profit. This factor appears to point in both directions.

(7) Motive or Intention

[71] As was stated by the Supreme Court of Canada in *Friesen*, to constitute an adventure in the nature of trade, "the taxpayer must have a legitimate intention of gaining a profit from the transaction."[60] In considering this factor, courts typically determine an individual's intention at the time of acquiring the particular property.[61] However, as an individual's intention may change, it may also be necessary to consider the individual's intention at the time of disposition, as explained by the editors of the *Canada Tax Service*:

> The intention test embraces the taxpayer's intention at the time of acquiring the object of the transaction[,] as well as at the time of its disposition. Thus, it is possible to have an investment intention at the time of acquisition but to have altered that intention and to have become a trader at the time of disposition.[62]

[72] At the outset of their discussion of *No. 170 v. MNR*,[63] the editors of the *Canada Tax Service* state:

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60 *Friesen*, *supra* note 43, ¶16.
61 *Happy Valley Farms*, *supra* note 44, ¶14(6); *Friesen*, *supra* note 43, ¶17(i).
62 Chris Falk *et al*. (editors), *Canada Tax Service*, vol. 2, p. 9-131 (dated 2018-08-10).
63 *No. 170 v. MNR*, (1954) 10 Tax ABC 364 (TAB).

> Even if the original intention can be established not to have been for resale at a profit, subsequent events can well prove damaging if they show a change of heart.[64]

In *No. 170*, the corporate taxpayer stressed that, when it acquired the land in question, it did not have the intention of reselling it. However, the evidence showed that the taxpayer undertook expenses to grade the land and to improve it with a water system and roads, and then arranged for a real estate agent to sell parcels of the land. The Tax Appeal Board summarized its analysis as follows:

> In determining this appeal after a rather prolonged scrutiny of the facts as adduced in evidence, … it must be noted with what emphasis the appellant has stressed its intention in first acquiring this property. Whatever this original intention may have been it must be found that at some point the appellant abandoned its original purported intention and entered into and engaged in the operation of a business or activity or an adventure in the nature of trade for the purpose of making a profit.[65]

The second sentence of the above quotation (confined to the context of an adventure in the nature of trade) can be applied to the Vendors in this Appeal.

[73] The courts have held that "a clear and unequivocal positive act implementing a change of intention" is required.[66] In my view, that clear and unequivocal positive act occurred when Mr. B's wife announced, apparently sometime in 2014, that she no longer wanted to live in the midst of neighbours who had treated her and her family so poorly. It seems that thereafter the focus of the Vendors was to complete the construction of the House and to sell it for as much as possible so as to pay off their extensive debts and, as well, to realize a profit.

[74] During his testimony, when asked whether he thought, amidst the challenges that had arisen, the Vendors might have been able to sell the Property and still make some money on that sale, Mr. B replied:

> … [T]he original listing was … $3.6 millions [*sic*]. Had we sold it for $3.6 millions[,] … we would have actually done decently. But … when you are carrying mortgages at 9% and 10%[,] … you are losing … $100 and some odd thousand dollars a year, by the [time] it is sold and it sold for … the equivalent of $3.25

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64 *Canada Tax Service*, *supra* note 62, p. 9-133 (dated 2018-08-10).

65 *No. 170*, *supra* note 63, ¶24.

66 *Edmund Peachey Ltd., v. The Queen*, [1979] CTC 51, 79 DTC 5064 (FCAD), ¶10; *Jacobson Holdings Ltd. v. The Queen*, [1986] 1 CTC 87, 85 DTC 5634 (FCTD), ¶4; *Jodare Ltd. v. The Queen*, [1986] 1 CTC 250, 86 DTC 6054 (FCTD), ¶36; and *Magilb Development Corp. v. MNR*, [1987] 1 CTC 66, 87 DTC 5012 (FCTD), ¶23-25.

> millions [i.e., $3,158,000 plus the real estate commission that Ms. Simonetta's son did not charge,] it wiped out virtually any chance of profit that we were going to achieve.[67]

[75] Mr. B then went on to state that the sale process was less about the profit, as they needed to get rid of their debt, because the Bank was leaning on them and the Associate was pushing them.[68]

[76] It is also noteworthy that, while the Property was listed with the initial realtor (which was between May 29, 2015 and December 30, 2015), the Vendors received an offer that was less than $3,000,000. They rejected that offer, as it was insufficient to cover all of the debts that they had incurred in respect of the Property.[69]

(8) Weighing of Factors

[77] Many of the factors considered above are, in a sense, neutral, as they point in either direction (i.e., a personal residence or a profit-making adventure). For instance:

a) Concerning the *nature-of-the-property* factor, after the construction of the House, the Property could have been used by the Vendors as their residence or could have been sold with the expectation of making a profit.

b) Concerning the *frequency-or-number-of-similar-transactions* factor, it is not uncommon for a growing family to purchase or construct, live in and sell a series of increasingly larger homes. However, the Vendors' disposition of three residential properties within a relatively short period of time might be indicative of an adventure in the nature of trade.

c) Concerning the *work-expended-on-the-property* factor, the work expended by the Vendors on the Property is consistent with both the construction of a residence and the construction of a new house to be sold at a profit.

d) Concerning the *circumstances-responsible–for-the-sale* factor, the series of unfortunate events encountered by the Vendors, while constructing the House, provide a reasonable explanation for the sale of the Property. However, the

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67 Transcript, vol. 2, p. 108, line 26 to p. 109, line 7.
68 Transcript, vol. 2, p. 109, lines 8-11.
69 Transcript, vol. 2, p. 109, lines 15-21.

failure to occupy the House and the steps taken to maximize the selling price are indicative of a profit-seeking intention.

[78] On the other hand, one factor in particular, i.e., the extensive use of borrowed money, clearly points to an adventure in the nature of trade.

[79] As Justice Margeson noted in *Freer*, a case considering whether a purchase and a subsequent sale of real property were an adventure in the nature of trade, "the statement of the parties alone as to their avowed intention at the time of purchase of the properties is at best tenuous without further corroboration."[70] Furthermore, in some cases, "the question of credibility [looms] large."[71]

[80] Thus, in addition to considering the above factors, I am also cognizant of the misrepresentations made by the Vendors, through their solicitor, when, in the face of specific observations made by the Simonettas and mentioned by Ms. Aulicino in her letter of November 16, 2016, the Vendors baldly stated that they had owned the property for five years (when it was actually in excess of six years), that they had occupied the House as their residence, and that they had certified the sale of the Property as not being subject to HST. Mr. B acknowledged that the first two statements were incorrect, and the Crown has acknowledged that the third statement was incorrect.[72]

[81] Having carefully considered the evidence and having weighed the above factors, it is my view that the Vendors had a change of intention in 2014, whereupon they embarked upon an adventure in the nature of trade. Consequently, it is my view that the Vendors were builders of the House, within the meaning of subsection 123(1) of the ETA.

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70 *Freer v. The Queen*, 2003 TCC 20, ¶71.

71 *Ibid.* It appears that the published reasons for judgment in *Freer* contain a typographical error, as those reasons use the phrase *loons large*, rather than *looms large*. Katherine Barber (editor), in *Canadian Oxford Dictionary*, 2d ed. (Don Mills: Oxford University Press, 2004), p. 909, defines the phrase *loom large* as "figure significantly."

72 Letter dated January 13, 2022, from counsel for the Crown.

E. Paragraph 7 of the Agreement of Purchase and Sale

[82] As noted above, the relevant portion of paragraph 7 of the APS reads as follows:

> HST: If the sale of the Property … is subject to Harmonized Sales Tax (HST), then such tax shall be included in the Purchase Price. If the sale of the Property is not subject to HST, Seller agrees to certify on or before closing that the sale of the Property is not subject to HST.[73]

[83] As I have found that the Vendors were builders of the House, their sale of the Property to Ms. Simonetta was subject to HST. Furthermore, the Vendors did not certify that the sale of the Property was not subject to HST. This too suggests that the operative portion of paragraph 7 of the APS is the first sentence, rather than the second sentence. Consequently, Ms. Simonetta understood that the HST was included in the price that she paid for the Property.

[84] Ms. Simonetta's understanding of paragraph 7 of the APS is consistent with the general custom of advertising prices of new homes on a modified tax-included basis.[74]

F. Taxable Supply

[85] For the reasons discussed above, I conclude that the sale of the Property by the Vendors to Ms. Simonetta was a taxable supply, and not an exempt supply.

G. Primary Place of Residence

[86] I accept the testimony of Mr. Simonetta and Ms. Simonetta that, after Ms. Simonetta purchased the Property, they occupied the Property as their primary place of residence. At the time of the hearing of this Appeal, they continued to use the Property as their primary place of residence.

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73 Exhibit A-1, tab 1, second page, ¶7.

74 David M. Sherman (editor), note to subsection 223(1), *Practioner's Goods and Services Tax Annotated*, 43rd ed. (Toronto: Thomson Reuters, 2021), p. 509, which states, "The parties can contract to have a quoted price be tax-included or tax-extra…. Some supplies, by general custom, are quoted tax-included, e.g. … new housing…." See also David M. Sherman, "Tax-Included Pricing for HST—Are We There Yet?", (2009) 57(4) *Canadian Tax Journal*, 839-856, at 842, which indicates that "New Homes are advertised at prices that include the 'net' GST. The price includes tax, but the tax is net of the new housing rebate…."

H. Payment of HST

[87] The Crown takes the position that, because the Statement of Adjustments in respect of the sale and purchase of the Property did not break out or show the HST as a separate amount, there was no payment of HST by Ms. Simonetta to the Vendors. However, the Statement of Adjustments clearly shows that the sale price in respect of the Property was $3,158,000. There was no dispute about whether the sale price was paid to the Vendors (if the price had not been paid, the transaction would not have closed and Ms. Simonetta would not have been given possession and ownership of the Property).

[88] As the sale of the Property was a taxable supply, and not an exempt supply, the first sentence, and not the second sentence, of paragraph 7 of the APS is the applicable provision. The first sentence of paragraph 7 clearly states that the HST was to be included in the purchase price. Thus, by paying the price, Ms. Simonetta also paid the HST.

I. Transfer of Ownership

[89] Paragraph 254(2)(e) of the *ETA* requires that ownership of the Property must have been transferred to Ms. Simonetta after the construction thereof had been substantially completed. As noted above, an occupancy permit was issued by the City of Toronto indicating that the work had been completed on or before November 15, 2016, and that the Property was suitable for occupancy as of that date. The closing of the sale and purchase transaction occurred on a subsequent date. Thus paragraph 254(2)(e) was satisfied.

J. No Previous Occupancy

[90] Subparagraph 254(2)(f)(i) of the *ETA* requires that, after the construction of the House was substantially completed and before possession of the Property was given to Ms. Simonetta under the APS, the Property cannot have been occupied by an individual as a place of residence. As discussed above, I am satisfied that this condition was met.

K. First Occupancy of the Property

[91] Subparagraph 254(2)(g)(i) of the *ETA* requires that the first individual to occupy the Property as a place of residence after substantial completion of the construction of the House must have been Ms. Simonetta or one or more of her

relations. The evidence was clear that Ms. Simonetta and her husband moved into the House and occupied the Property as their residence, and that no one else had previously occupied the Property as a place of residence.

L. Summary

[92] Based on the above analysis, Ms. Simonetta satisfied all the requirements of subsection 254(2) of the *ETA* in order to qualify for the Rebate.

M. Sufficiency of Application Form

[93] Subsection 262(1) of the *ETA* provides that an application for a new housing rebate must be made in prescribed form containing prescribed information and must be filed with the Minister in prescribed manner. It is my understanding that the only concern that the Crown has in respect of this statutory requirement is that section D of the Application filed by Ms. Simonetta did not give any information concerning the builder, i.e., the Vendors. Section D of the prescribed form indicates that the requisite information consists of the builder's name, business number (if any), address and telephone number. As noted above, by attaching a copy of the Statement of Adjustments to the Application, Ms. Simonetta did provide the CRA with the names of the Vendors.

[94] Section D also asks the question "Did the builder either pay the amount of the rebate directly to the purchaser or credit it against the total amount payable for the house?" Although Ms. Simonetta did not answer that question, it is clear, based on the evidence at the hearing, that the answer to the question is "No."

[95] Section D also calls for the signature of the builder.

[96] Mr. Simonetta testified that he was the one who completed the Application on behalf of his wife and that, based on the responses given by the Vendors' solicitor in the two letters referenced above, he (Mr. Simonetta) was certain that the Vendors would not cooperate in providing the outstanding information called for in section D or in signing the Application.

[97] I am not aware of any jurisprudence that has previously considered the question of what a new home purchaser should do when the vendor refuses to cooperate in submitting the rebate application form. At the hearing, counsel for the Crown helpfully noted that perhaps some guidance might be provided by the cases dealing with an employer who uncooperatively refuses to provide a Declaration of

Conditions of Employment (Form T2200), as required by subsection 8(10) of the *Income Tax Act*.[75]

[98] In this regard, in the *Brochu* case, Justice Boyle, in *obiter dicta*, stated:

> … it may be possible that in exceptional circumstances a paragraph 8(1)(*h.1*) claim could succeed if an employer unreasonably refused, or was unable, to complete and sign a T2200 form….[76]

[99] In *Kreuz*, Justice D'Auray implied that, if an employer fails to provide Form T2200 to an employee claiming business expenses, it may be sufficient if the employee establishes that the employer acted unreasonably or in bad faith in not providing the form.[77]

[100] In *Chao*, Deputy Judge Jorré (as he then was) referred to the maxim that "the law does not require the impossible,"[78] and stated that, "if the maxim applies, it is clear that a very high standard of effort to comply with the law would be required of the taxpayer…," meaning that the taxpayer "would need to make the efforts that a careful, diligent person who is aware of their legal obligations would make…," and "it would have to be shown that the employer acted unreasonably or in bad faith" in failing to provide the form.[79] In a footnote, Deputy Judge Jorré noted that the requisite efforts of a careful, diligent person do not require "extreme ingenuity, superhuman effort, nor massive unusual resources to comply with an Act."[80]

[101] At the hearing, Mr. Simonetta stated that it would have been pointless for him to have requested the business number (if any), address and telephone number of the Vendors, let alone ask them to sign the Application, given the correspondence that had already been exchanged by their respective solicitors. As noted above, the Vendors declined to provide any documentation (such as utility bills, driver's licences and health cards) to show that they actually had resided in the House (as

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75 Transcript, vol. 1, p. 106, lines 3-23.

76 *Brochu v. The Queen*, 2010 TCC 274, ¶11.

77 *Kreuz v. The Queen*, 2012 TCC 238, ¶76.

78 *Chao v. The Queen*, 2018 TCC 72, ¶90. In a footnote, Deputy Judge Jorré noted that, in Latin, the maxim is "*Lex non cogit ad impossibilia*," which Bryan A. Garner (editor), in *Black's Law Dictionary*, 8th ed. (St. Paul: Thomson West, 2004), p. 1730, translates as "The law does not compel to impossible ends." Deputy Judge Jorré also noted that, in French, the maxim is "*À l'impossible, nul n'est tenu*."

79 *Chao*, *ibid*, ¶90-93. See also *Dnebosky v. The Queen*, 2019 TCC 78, ¶18.

80 *Chao*, *supra* note 78, fn. 41; quoting from *Boardwalk Reit LLP v. Edmonton (City)*, 2008 ABCA 220, ¶76.

they claimed). Furthermore, Mr. Rigobon wrote to the Vendors' solicitor on December 15, 2016, to reiterate that the Property constituted "a new home construction for the purposes of the appropriate tax legislation," and to advise that Ms. Simonetta intended to apply for the Rebate unless another arrangement could be worked out.[81] Rather than explain his clients' position or engage in a dialogue about the nature of the supply of the Property for HST purposes, the Vendors' solicitor did no more than curtly state that his clients had advised that the sale of the Property was not subject to HST (which was a position that the Vendors had formulated after talking to their real estate agent, and without consulting a tax adviser).[82] It was apparent from the solicitor's response that, if Ms. Simonetta were to have sent the Application to the Vendors for their signatures, they would have refused to sign it.

[102] The Simonettas were also aware that the Vendors, through their solicitor, had made three misrepresentations (i.e., the Simonettas knew that the number of years that the Vendors had owned the Property was something other than five, that the Vendors had not occupied the Property as their residence, and that the Vendors had not certified that the sale of the Property was not subject to HST). Given the nature and content of the correspondence from the Vendors' solicitor, it would have been unreasonable to expect Ms. Simonetta to go back to the Vendors again and ask them to complete and sign the Application. I am of the view that, in those circumstances, Ms. Simonetta could not have reasonably been expected to obtain the cooperation and signatures of the Vendors, and that this would be an appropriate situation in which to apply the maxim "the law does not require the impossible."

[103] Accordingly, I have determined that this is one of those rare situations where a recipient of a taxable supply of a new residential complex is unable to obtain all of the information needed to complete section D of the application form for the new housing rebate. In my view, the Vendors acted unreasonably in not providing Ms. Simonetta with either the documentation necessary to confirm that they had (as they alleged) occupied the House as their residence, or alternatively, an explanation of their position, or further in the alternative, an acknowledgement in November 2016 (rather than in November 2021, during the course of the trial) that they had not lived in the House. It is also my view that, by reason of the Vendors' uncooperative attitude and disingenuous conduct, as evidenced by the curt, dismissive responses from their solicitor and the misrepresentations in the solicitor's letter of November

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81 Exhibit A-1, tab 7, p. 1. See paragraph 19 above.

82 Exhibit A-1, tab 8; and Transcript, vol. 2, p. 102, lines 2 -5. See paragraphs 20 and 35 above.

17, 2016, it was not possible for Ms. Simonetta to obtain the business number (if any), address, telephone number and signatures of the Vendors. Therefore, Ms. Simonetta's inability to obtain that information and those signatures does not vitiate her Application for the Rebate.

IV. CONCLUSION

[104] This Appeal is allowed**. By reason of subparagraph 18.3009(1)(c)(i) of the *Tax Court of Canada Act,* no costs are awarded.**

Signed at Ottawa, Canada, this 11th day of **August** 2023.

"Don R. Sommerfeldt"

Sommerfeldt J.

CITATION:	2023 TCC 54
COURT FILE NO.:	2018-1952(GST)I
STYLE OF CAUSE:	ADELINA SIMONETTA and HIS MAJESTY THE KING
PLACE OF HEARING:	Toronto, Ontario
DATES OF HEARING:	November 5, 2019 and November 29, 2021
DATES OF WRITTEN SUBMISSIONS:	November 12, 2019, December 18, 2019, December 31, 2019, January 13, 2022, January 14, 2022 and November 8, 2022.
DATE OF CASE MANAGEMENT CONFERENCE:	October 31, 2022
REASONS FOR JUDGMENT BY:	The Honourable Justice Don R. Sommerfeldt
DATE OF JUDGMENT:	May 9, 2023

APPEARANCES:

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COUNSEL OF RECORD:

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Firm:	n/a
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