Docket: 2012-4575(GST)I

BETWEEN:

ZILA BERKOVICH,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

Appeal heard on February 14 and March 26, 2014,
at Toronto, Ontario.
Before: The Honourable Justice K. Lyons

Appearances:

Counsel for the Appellant:	Adam Serota
Counsel for the Respondent:	Lindsay Beelen

JUDGMENT

The appeal from the assessment dated August 3, 2011, of a GST/HST New Housing Rebate made under the *Excise Tax Act,* is dismissed, in accordance with the Reasons for Judgment attached hereto.

Signed at Toronto, Ontario, this 8th day of September 2014.

"K. Lyons"

Lyons J.

Citation: 2014 TCC 268
Date: 20140908
Docket: 2012-4575(GST)I

BETWEEN:

ZILA BERKOVICH,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

REASONS FOR JUDGMENT

Lyons J.

[1] This is an appeal from an assessment issued under the *Excise Tax Act* (the "*Act*") relating to the GST/HST New Housing Rebate ("rebate").

[2] Zila Berkovich, the appellant, and Vladimir Khaimsky ("they") entered into an amended agreement ("Agreement") to purchase a new condominium to be constructed at 38 The Esplanade, Unit 213, Toronto (the "Unit"). The appellant applied for and was refused a rebate for the Unit. The Minister of National Revenue refused the rebate on the basis that the Unit was not acquired for use as their primary place of residence.

[3] The only issue is whether, at the time they signed the Agreement, they were purchasing the Unit with the intention of using it as their primary place of residence.[1]

[4] If so, the appeal will be allowed and the appellant is entitled to the rebate. If not, the appeal will be dismissed.

[5] The appellant, on her own behalf, and Mr. Khaimsky and Alfred Berkovich, her son ("Alfred"), testified for the appellant. Ms. Shortt, a Canada Revenue Agency ("CRA") auditor, testified for the respondent.

I. Facts

[6] The appellant is 65 years of age and has been a registered real estate agent for 25 years. She works at Remax located at 185 Finch Avenue, Toronto.

[7] Mr. Khaimsky is 72 years of age and the common-law partner of the appellant of 17 years. Until February 2009, when he sustained a workplace injury to his leg, he was working as a fitter at Proline, located at Highways 7 and 27, Toronto and 20 kilometres from home (ie., Rockford Road). Driving from home to work in his car would take up to an hour and a half in the afternoon and 40 minutes in the morning.

Rockford Property

[8] Since 1997, the appellant lived with Mr. Khaimsky and Alfred on Rockford Road, Toronto ("Rockford property" or "Rockford"). It is a detached house situated north of Highway 401. Prior to that, the appellant had resided at the Rockford property with her former spouse and children for a number of years.

The Unit

[9] The appellant testified that she was "hanging out" in the area where The Esplanade condominium complex is situated and "fell in love" with the model unit she had seen. Mr. Khaimsky liked the marina, the lake and the loft. They liked the neighbourhood, proximity to downtown and the condominium lifestyle.

[10] Mr. Khaimsky testified that a few years before purchasing the Unit they had discussed the prospect of buying a new home together but it was not a defined goal because he was working full-time. He stated that everyone lives in a condominium when approaching retirement. They were walking along the waterfront and they saw a billboard and a sales office and dropped in. They liked it and decided to buy the Unit.

[11] On April 18, 2005, the appellant had signed an agreement of purchase and sale for the Unit for $329,900. On April 24, 2005, the agreement of purchase and sale was amended to add Mr. Khaimsky as a purchaser (i.e., Agreement). Under the Agreement, the Unit was to be constructed by September 2008. Because of construction delays, it was not ready for possession until August 14, 2009.

[12] They each testified that they intended to leave the Rockford property and live in the Unit. The appellant planned to give the Rockford property to Alfred

outright; he was 39 years old at the time of the hearing. Mr. Khaimsky had no legal interest in the Rockford property.[2]

[13] The floor plan of the Unit shows the size of the floor area of the Unit as 925 square feet. It is a one-bedroom unit with a walk-in closet and only one shower, all of which are on the second floor. It came with one parking space.

[14] They requested upgrades because of their plan to live at the Unit.

[15] The appellant testified that in the summer evenings (after August 17, 2009), they would walk along the lakeside and nearby marina. In the winter evenings, she would go to the theatre and restaurants with guests. They had a number of social gatherings at the Unit for friends plus held a News Year's party with several couples.

[16] Drapes were installed at the Unit in October 2009, and four rattan armchairs and a desk were purchased for the Unit in December 2009.[3] Photos taken by Mr. Khaimsky on January 9, 2010, show those items in the Unit.

[17] Title was transferred to them on December 15, 2009.[4] The Unit was listed for sale on February 17, 2010. It sold for $140,000 more than the purchase price. The transaction closed in early July 2010. They stated that they remained in the Unit until July 2010.

Other Circumstances

[18] A landline phone at the Unit was unnecessary because they each had a cell phone.

[19] They did their grocery shopping mainly at Costco or went to eateries on Yonge Street and the St. Lawrence Market for small food items. Other than the American Express card for Costco, the Appellant said in cross-examination that she had no credit card statements showing that she made purchases in the area.

[20] When asked about not being able to retain two cars at the Unit, the testimony was that they did not need two cars at the time and they wanted to sell one but it was too old.

Other Properties

Navy Wharf Condominium

[21] On August 25, 2005, they entered into an agreement to purchase the condominium at 1803 – 10 Navy Wharf near the Toronto waterfront ("Navy Wharf property"). It has one level. The appellant testified that they did not rent this condominium because Mr. Khaimsky used it and sometimes his family used it. Mr. Khaimsky also said his family and sometimes a colleague used it and, contrary to the appellant's testimony, he said it was rented in 2009.

Townsend Drive Rental Property

[22] Mr. Khaimsky owned and received rental income from 1402 – 11 Townsend Drive, Toronto.

Charles Street East Condominium

[23] On January 6, 2011, the appellant was assigned, by the builder, all rights and title to the condominium situated at #3905, 110 Charles Street East in downtown Toronto (“Charles Street property”). She testified that an agreement of purchase and sale had been entered into by a person overseas several years ago; she failed to elaborate further and other details remained unclear relating to this property.

II. Analysis

[24] The Minister assesses based on assumptions of fact. The jurisprudence establishes that the initial onus is on the taxpayer to demolish the exact assumptions made by the Minister in order to show the Minister’s assessment is incorrect. That onus (i.e., to demolish assumptions) is met where a taxpayer makes out a *prima facie* case. A *prima facie* case is one supported by evidence which raises such a degree of probability in her or his favour that it must be accepted if believed by the Court unless it is rebutted or the contrary is proved. The taxpayer’s burden of proof is not to be lightly, capriciously or casually shifted.[5]

[25] The Minister determined that the appellant is not entitled to the rebate because they do not meet the requirements under paragraph 254(2)(*b*) of the *Act* requiring the acquisition of a unit for use as the “primary place of residence.”[6] They must both satisfy the requirements. It reads:

> … at the time the particular individual becomes liable or assumes liability … the particular individual is acquiring the complex or unit for use as the primary place of residence of the particular individual or a relation of the particular individual.

[26] Some factors that assist in determining what constitutes a primary place of residence are found in *Yang v Canada*, 2009 TCC 636, [2009] GSTC 186, at paragraph 7.[7] The Court states:

> 7. Many factors that assist in determining what constitutes a primary place of residence are found in previous decisions of this Court as well as in policies issued under the Goods and Services Tax/Harmonized Sales Tax legislation. Some of these factors are the following: the parties' intention with regard to the use of the housing unit as their **primary residence**; their length of stay at the new unit; the address they use for correspondence; when they moved in and when they moved their personal belongings, and if the move was delayed, what events occurred that caused the delay; details of the insurance coverage; what they did with their former residence or rental unit; and other factors that may be relevant depending on the facts of the case.

[27] When it is necessary to determine an individual's intention, one must consider not only the stated intention but all the surrounding factual circumstances. This well-established principle was recently reiterated by Justice Jorré, at paragraph 7, in the case of *Kukreja v Canada*, 2014 TCC 56, [2014] GSTC 16, also involving the determination of a primary residence in the context of a rebate.

[28] Appellant counsel argued that their intention, on April 24, 2005, was to leave Rockford and move to and use the Unit as their primary place of residence ("primary residence") when constructed. The appellant was to then give the Rockford property to Alfred outright. Further, Mr. Khaimsky's unforeseen health issues did not change their intention, but impacted the length of their stay in the Unit which they occupied from August 2009 to July 2010 as their primary residence.[8]

[29] The decision in this appeal hinges on findings of credibility. Based on all of the evidence adduced, I conclude that neither the appellant nor Mr. Khaimsky were credible or reliable witnesses and reject their evidence as to their stated intention in light of the surrounding circumstances. I find that when executing the Agreement in 2005, they did not intend to use the Unit as their primary residence. Some of the evidence that has led me to that conclusion is referred to below.

Properties

[30] The facts that the Unit and the Navy Wharf property were purchased by them within one day of each other; the appellant's extensive experience in real estate for 25 years; the existing Townsend rental property; and they resided in the Rockford property in 2005, where they resided at the time of the hearing, are indicators that the Unit was acquired as an investment.

[31] Furthermore, within one month of receiving legal title to the Unit and before they received their lawyer's accounting for the transaction, photos were taken of the Unit to list it on the MLS. In February 2010, it was listed for sale and a few months later, it sold for a $140,000 profit; the transaction closed in July 2010. The appellant admitted that in 2011 she acquired the rights and title to the Charles Street property.

[32] Contrary to Mr. Khaimsky's testimony that no other properties were purchased after the Unit was purchased and later sold, the appellant admitted in cross-examination that the day after the Unit was purchased they purchased the Navy Wharf property, and in 2011 she acquired the Charles Street property. Another inconsistency is that he said the Navy Wharf property was rented, the appellant said it was not. I do not find his testimony credible or reliable.

[33] These factors reflect their interest in opportunities in real estate, rather than an intent to leave the Rockford property and acquire the Unit as a primary residence.

Health Issues

[34] At the end of 2008, Mr. Khaimsky had a heart attack. On February 10, 2009, he sustained a permanent injury to his leg at work and went to emergency. He testified that it changed his life: he was unable to walk normally; he had to use a cane; he could no longer work; and he received disability benefits in 2009. I accept his evidence relating to his health issues.

[35] Clearly, Mr. Khaimsky's heart attack and workplace injury in February 2009 could not have been anticipated in 2005.[9]

[36] In his testimony, he described the metal staircase in the Unit as steep, narrow and curved, reaching the second level at a height of 20 feet where the only bedroom, the only shower and a closet were situated. I accept that evidence. Mr. Khaimsky had been aware of the configuration and staircase in 2005 when they saw the model unit, and would have been approximately 63 years of age at that time. I agree with him that when approaching retirement many people (he said everyone) gravitate to a condominium lifestyle. However, even if people nearing retirement have no mobility issues, they would still opt for a condominium on one level, similar to the Navy Wharf property, as a primary residence. It is highly unlikely that people would opt for a unit similar to the Unit where the only bedroom and only shower are situated on the second level, which can only be accessed via a steep, curved and narrow metal staircase.

[37] Only six months before they claim to have moved to the Unit, Mr. Khaimsky sustained a serious and permanent leg injury where he could not walk normally, used a cane and had developed a heart condition. In view of his health and his description of the challenges in the Unit, it is unbelievable that Mr. Khaimsky would even contemplate moving into the Unit and leave the Rockford property, which was equipped with all the amenities on the ground floor to facilitate his mobility needs.

[38] In explaining the impetus to sell the Unit, he said that every time he climbed the stairs it resulted in pain, pressure and his leg constantly hurt and was swollen on two occasions; he wondered every time he climbed the stairs what was going to happen to him. "It was extremely difficult to go up and down the stairs. My leg hurt me. At any time and even at night, I had difficulty to sleep, to stand, to walk and even to lie down. Especially when you put pressure on it -- for instance, one climb on the stairs may result in pain problems for half a day before getting back to its normal state."[10] Encountering that, it is highly improbable that, in ascending and

descending the staircase daily, it would have taken them six months (i.e., until February 2010) to reach their realization that they had to sell the Unit. It is even more improbable that they continued to stay at the Unit for an additional four months after the realization before returning to the Rockford property.

[39] Their testimony that they had not considered selling the Unit before February 2010 is contrary to the testimony by the appellant in cross-examination that the photos of the Unit were taken on January 9, 2010, for posting in the MLS listing to sell the Unit. Their entire testimony on these matters lacks credibility and I reject their testimony.

Hydro

[40] Ms. Shortt testified that having reviewed and compared the Appliance Usage Chart with the September to December 2009 Enbridge bills, the energy consumption on the bills does not support people actively living in the Unit.[11]

[41] In cross-examination, the appellant explained that the lower usage of power for September and October was attributable to Mr. Khaimsky's practical nature and that they were trying to save. Also, they cooked infrequently, rarely used the fridge, stove and microwave, did not use the air conditioning and he read, did some walking and watched television from the cable from the CN Tower situated nearby. He stated that he ate cereal for breakfast and did not use the dishwasher.

[42] If social gatherings took place at the Unit, as the appellant testified, the hydro usage would be higher. I find their evidence relating to their purported activities at the Unit implausible. I also draw an adverse inference from the appellant's failure to call the individuals as witnesses to testify that they attended social gatherings at the Unit.

[43] I accept the evidence proferred by Ms. Shortt that low hydro usage is consistent with people not actively living in the Unit. This, the previous factor and subsequent factors lead me to the conclusion that they did not move into the Unit.

Furniture and Belongings

[44] The appellant testified that between August 14 and 17, 2009, they packed Mr. Khaimsky's vehicle with dishes and clothing and brought those to the Unit. She stated that on August 17, 2009, their friend and his brother helped them to move some of their furnishings from the Rockford property to the Unit in their friend's truck.[12] Mr. Khaimsky stated that only some of the living room furniture, plus bedside shelves, lamps, chairs and a television were moved and the remaining belongings stayed at the Rockford property.

[45] Alfred's testimony is inconsistent in that he said he thought a mini van had been rented to move their belongings and described it as a "gradual" move over a few weeks. I find Alfred's evidence of the duration of the move unlikely and not reliable. In describing the items that were moved, he identified some dishes, the master bedroom mattress, small items from the living room that were easy to take such as a small couch, glass table and "minor stuff" but the "heavy stuff" stayed at Rockford. I accept Alfred's evidence that certain items (such as the small couch) were moved to the Unit because both he and Mr. Khaimsky had testified that a small couch was moved which was then identified in the photos.

[46] The appellant stated that they spent their first night at the Unit on August 17, 2009, or a day later. Initially, the appellant testified that she did not stay at the Rockford property once they had moved to the Unit. Later, she said that if she worked late at the Rockford property, she might have stayed at Rockford overnight. Her evidence is not reliable.

[47] In response to questions from respondent counsel in cross-examination as to whether he had to buy anything to replace the items that went to the Unit, he said he did not because there was enough furniture remaining in the Rockford house to "fill everything up". He referred to examples such as furnishings in the living room, den and every room had a bed. He also had his bed and bedroom set.

[48] The appellant produced a letter from their friend concerning the move. I place no weight on the letter and draw an adverse inference from her failure to arrange for him to testify, as an independent witness, about the details of the move. I infer that furniture and belongings were not moved into the Unit in August 2009.

[49] Initially, in cross-examination, the appellant stated that she did not know what staging meant despite her occupation. She had also claimed staging expenses in her 2009 tax return. Subsequently, she admitted she did know but did not do it

and then said maybe she did some staging for clients but on a small scale to make the premises look good. The appellant's testimony lacks credibility.

[50] The only furniture that was moved from Rockford to the Unit comprise the items in the photos except for the items that were purchased in December 2009. The inference I draw is that the Unit was staged to get it ready for sale.

[51] Maintaining a house full of heavy furniture, belongings, services[13] and insurance plus doing the main laundry at Rockford, indicate that the primary residence remained unchanged.

[52] The disposition of a former residence is usually an indicator that the new residence is intended to be a primary residence. She testified that her intention was to give the Rockford property to Alfred, and she maintained her home office at Rockford after August 2009. Neither the appellant nor Alfred were able to provide specifics as to discussions as to her intent to give the Rockford property to him and how and when that would occur. He testified that over the years the appellant told him when she moves out, the Rockford property would be his. I accept his evidence on this aspect and that title was never transferred to him.[14]

[53] Alfred's testimony, that they returned to Rockford in the fall of 2010, is inconsistent with their testimony.

[54] After August 2009, she maintained the Rockford home office in order to meet clients, retain contacts, and use it as her business address. She had no space for an office at the Unit. Rockford is approximately four kilometres from her business office at Remax. All the bills relating to services provided at Rockford remained in her name. Except for $400 that Alfred gave her towards utilities and cable, the appellant paid the rest. She conducted her banking in the area, and Mr. Khaimsky testified that she did the main laundry at "home" (i.e., Rockford). I accept the evidence as to retaining services in her name and the activities she conducted. I infer that the appellant and Mr. Khaimsky never moved from Rockford.

Change of Address

[55] Changing the mailing address from the old to a new residence can be an indicator of a primary residence at the new address. Mr. Khaimsky provided copies of various documents showing that he had changed his mailing address to the Unit.[15]

[56] Except for a few Enbridge invoices, paid at Dufferin and Steeles near the Rockford property, the appellant provided no such proof she had effected a change of address and when asked whether she had notified her bank and the credit card companies, she indicated she had not. She explained that Alfred and her home office remained at Rockford. Her testimony was that she did not think it was crucial to change the address on her driver's licence because she planned to wait until the next licence renewal. Appellant counsel referred me to *Yang v The Queen*, *supra*, in which Justice Angers notes, at paragraph 10, that the failure to change an address might be negligent, but in determining a primary residence, it may be of less importance where both owners still have relatives residing at their former places of residence.

[57] Notwithstanding her rationale for not having changed her address, when she applied for the Charles Street rebate from the CRA, she indicated on her tax return that her address had changed to the Charles Street property.[16] Shortly after receiving that rebate, she had changed her address back to the Rockford property. Her conduct is confusing and inconsistent.

Insurance

[58] The insurance at the Rockford property remained intact for contents, and in the appellant's name, with no similar insurance at the Unit. The appellant explained this was because of the home office. However, the insurance policy was not produced at the hearing to show the stated use of the Rockford property for purposes of the policy such as business coverage. This is a further indicator that Rockford remained the primary residence.

Parking Space

[59] The evidence was that the Unit only came with one parking space. I find it highly improbable that in purchasing the Unit in 2005, they would purchase it as a primary residence with only one parking space. They would have needed at least two to enable them to commute to work and commuting from the Unit in

downtown Toronto would have extended their already lengthy commutes. They did not inform the insurance company, for car insurance purposes, that they had moved in 2009.

[60] On the totality of the evidence, I reject the stated intention. The appellant has not made out a *prima facie* case to demolish the Minister's assumptions to show, on a balance of probabilities, that the Minister's assessment is incorrect. I find that the Unit was acquired as an investment, and not as their primary place of residence.

III. Conclusion

[61] I have concluded that neither the appellant nor Mr. Khaimsky provided credible or reliable testimony with respect to their stated intention and reject their stated intent. Given that, I conclude that the Unit was not acquired for use as their primary place of residence as required and within the meaning of paragraph 254(2)(*b*) of the *Act*. The appeal is dismissed.[17]

Signed at Toronto, Ontario, this 8th day of September 2014.

"K. Lyons"

Lyons J.

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[1] Appellant counsel also asserted that they occupied the Unit as a primary residence which exceeds the test in subclause 254(2)(*g*)(i)(B) which only refers to "place of residence." He noted that the word "primary" is absent from that subclause and acknowledged that his assertion is based on *obiter* comments by the Court in *Virani v The Queen*, 2010 TCC 113, [2010] GSTC 53, and the subclause was not in issue. Respondent counsel stated that paragraph 254(2)(*g*) is not in contention. However, this is not because the respondent agrees that the appellant or Mr. Khaimsky occupied the Unit but, rather, there is no evidence to show that anyone who was not family occupied the Unit before it was sold. Both counsel confirmed that paragraph 254(2)(*b*) is the focus of the present appeal, and respondent counsel indicated that the Minister based the assessment on that paragraph. As such, it is unnecessary for me to deal with the assertion.

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[2] A cohabitation agreement was signed by him and the appellant in August 1997.

[3] Copies of invoices from various retailers dated October 28, 2009, December 5, 2009, and December 7, 2009, respectively, with a handwritten note on once invoice indicating delivery to the Unit address.

[4] Lawyer's reporting letter is dated February 1, 2010.

[5] *Dr. Mike Orth Inc. v The Queen*, 2013 TCC 123, 2013 DTC 1110, Chief Justice Rip, at paragraph 12, *Hickman Motors Ltd. v Canada*, [1997] 2 SCR 336, at paragraph 13, *Amiante Spec Inc. v Canada*, 2009 FCA 139, [2009] GSTC 71 (FCA), at paragraph 16, *Orly Automobiles Inc. v Canada*, 2004 TCC 86, [2004] GSTC 57. There are a few exceptions (for example, penalty cases) where the Minister has the initial onus.

[6] Subsection 254(2) of the *Act* contains the criteria that must be met by all individuals to be eligible for the rebate.

[7] Also in *Bérubé v Canada*, [2001] GSTC 129, such factors comprise: putting the current primary place of residence up for sale; changes of address; and moving arrangements or other actions showing an immediate intention to change the primary place of residence. Section 256, relating to a rebate for owner-built homes, is the provision under consideration but it uses parallel wording to paragraph 254(2)(*b*) entitling a purchaser to a rebate for a complex or a unit constructed by a builder. In situations where a person has more than one place of residence, it provides guidance as to the distinction between a primary (first in order of importance and not subordinate) versus secondary residence (such as a property used mainly for recreational purposes or it is occupied less than another).

[8] Respondent's counsel argued that the appellant did not make out a *prima facie* case with respect to their stated intention based on the whole of the circumstances. Even if I were to accept that they purchased the Unit with the intent that it be a residence, and not as an investment property, it was a secondary residence.

[9] An intervening event can frustrate intention. This was recognized in *Sivakumar v Canada*, 2013 TCC 325, [2013] TCJ No. 285 (QL). Appellant counsel submitted that his health issues did not change the purpose for purchasing the Unit but impacted the length of their stay in it.

[10] Transcript of Hearing, Volume 1, at page 90, lines 20 to 26.

[11] Ms. Shortt worked at Ontario Hydro for seven years and dealt with electricity bills. Kilowatt hours on the bills are 40.412, 39.108, 82.269 and 164.085, respectively.

[12] Furniture included the master bedroom, living room, glass desk and lamps.

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[13] Internet, cable, landline phone, and utilities continued uninterrupted. In her 2009 tax return, she claimed office expenses.

[14] His plan, once he owned the property, was to live in it indefinitely. He moved out of Rockford and into an apartment in the summer of 2011.

[15] This included a WSIB statement of benefits, a Citibank Canada bill, several cell phone invoices, driver's licence, property assessment change notice, the Enbridge Electricity Supply and Services agreement and Enbridge bills. The appellant's name was also on the last three.

[16] The appellant confirmed that she had obtained a rebate for the Charles Street property but the evidence was unclear when that transpired. It was suggested it could have been in 2010 or a few years earlier.

[17] Pursuant to section 18.3009 of the *Tax Court of Canada Act*, no costs can be awarded where the amount in dispute exceeds $7,000.

CITATION:	2014 TCC 268
COURT FILE NO.:	2012-4575(GST)I
STYLE OF CAUSE:	ZILA BERKOVICH AND HER MAJESTY THE QUEEN
PLACE OF HEARING:	Toronto, Ontario
DATES OF HEARING:	February 14 and March 26, 2014
REASONS FOR JUDGMENT BY:	The Honourable Justice K. Lyons
DATE OF JUDGMENT:	September 8, 2014

APPEARANCES:

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Counsel for the Respondent:	Lindsay Beelen

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