

Docket: 2012-4576(GST)G

BETWEEN:

RIYADH AL-HOSSAIN,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

Appeal heard on June 23, 2014, at Toronto, Ontario.

Before: The Honourable Justice K. Lyons

Appearances:

Counsel for the Appellant: Nicholas Kapelos

Counsel for the Respondent: Tony Cheung

JUDGMENT

The appeal from the assessment of a GST/HST New Housing Rebate made under the *Excise Tax Act*, notice of which is dated October 5, 2011, is dismissed in accordance with the Reasons for Judgment attached hereto.

Signed at Edmonton, Alberta, this 30th day of December 2014.

“K. Lyons”

Lyons J.

Citation: 2014 TCC 379
Date: 20141230
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BETWEEN:

RIYADH AL-HOSSAIN,

Appellant,

and

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Respondent.

REASONS FOR JUDGMENT

Lyons J.

[1] The issue in this appeal is whether the appellant is entitled to a New Housing Rebate in the amount of \$27,240.24 (the “Rebate”) under the *Excise Tax Act* with respect to the property located at 3 Gwillimbury Drive, Bradford, Ontario, L3Z OB3 (the "property").

I. Facts

[2] On May 13, 2010, the appellant signed an agreement of purchase and sale (the “Agreement”) to acquire the property from Brookfield Homes Ontario Limited (the "Builder") for consideration of \$361,288.62 with a deposit of \$25,000. The closing date was scheduled for July 12, 2010.

[3] From the outset, the appellant realized that he would have difficulty obtaining financing to close the transaction. He had four days to decide if he wished to proceed with the transaction and, if not, could have obtained his full deposit, without penalty, from the Builder. Instead, he wanted to proceed and Refath Khandaker, his friend, agreed to assist the appellant.

[4] The appellant and Mr. Khandaker (“both”) met a mortgage broker from the Bank of Nova Scotia Mortgage Development Managers who explained that the

simplest way was for Mr. Khandaker to be added as a co-owner of the property to satisfy Scotiabank's requirement (the "Lender").

[5] A commitment notification, dated June 4, 2010, was issued by the Lender to both individuals approving a five-year term first mortgage loan with respect to the property ("Commitment") and requiring them to execute a Personal Credit Agreement for the mortgage loan ("Credit Agreement"). The same day, both individuals executed the Credit Agreement promising to pay the mortgage loan and acknowledging receipt of the Cost of Borrowing Disclosure Statement. They executed the Commitment on June 8, 2010.

[6] Mr. Kasman, the appellant's lawyer, testified that he had explained to both that if they wanted to close the deal that Mr. Khandaker would need to be a co-purchaser and be placed on title to the property as a co-owner to satisfy the Lender's requirement. Mr. Kasman informed the Builder's lawyer that the appellant had informed him of the Builder's awareness of the Lender's requirement. The Builder's lawyer suggested that Mr. Khandaker be added as a purchaser to the Agreement.

[7] On June 22, 2010, a document described as an Amendment to the Agreement was signed by Mr. Khandaker, the Builder's representative and the same witness that had signed the May 13, 2010 Agreement. The Amendment added him to the Agreement as a purchaser. Mr. Kasman stated that the June 22, 2010 document ("amended Agreement") formed part of the May 13, 2010 document and that Mr. Khandaker understood what he was signing. The amended Agreement also acknowledges that it was understood and agreed between the Builder and the appellant that this change be made to the agreement signed by the appellant on May 13, 2010. The appellant testified that he was aware that the amended Agreement had been signed and did not express any concerns nor take steps to instruct Mr. Kasman to withdraw or contact the Builder nor indicate it should not be part of the agreement of purchase and sale.

[8] An application for the Rebate in respect of the property was signed by the appellant on July 9, 2010 and shows both individuals as owners of the property. The Minister of National Revenue (the "Minister") disallowed the Rebate.

[9] On July 9, 2010, the Statutory Declaration, prepared by Mr. Kasman, was signed by both. It states "We are the purchasers of the above noted property", it is being acquired as the primary place of residence for the appellant who is the 100%

beneficial owner of the property and Mr. Khandaker holds a 0.01% interest in trust for the appellant to accommodate the requirement of the Lender.¹

[10] On July 9, 2010, the appellant signed a one-page document entitled Acknowledgement indicating that he indemnifies Mr. Khandaker from all liability under the mortgage to the Lender and would make his best efforts to relieve Mr. Khandaker from personal liability under the mortgage by having his father replace Mr. Khandaker as a covenantor/guarantor on the mortgage and on title.

[11] On July 10, 2010, Mr. Khandaker signed the Acknowledgement indicating he holds a 0.01% interest in the property solely as trustee for the appellant and to assist the appellant to obtain a mortgage from the Lender.

[12] A Statement of Adjustments, dated July 12, 2010, addressed to both as purchasers of the property was sent to them by Mr. Kasman.

[13] The appellant testified that he occupied the property as his principal place of residence from July 12, 2010 to April 2012 when it was sold.

II. Analysis

[14] All references to provisions that follow will be to the *Excise Tax Act*. Paragraphs 254(2)(b) and (g) are relevant provisions which read:

254(2) New Housing Rebate - Where

...

(b) at the time the particular individual becomes liable or assumes liability under an agreement of purchase and sale of the complex or unit entered into between the builder and the particular individual, 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,

...

(g) either

(i) the first individual to occupy the complex or unit as a place of residence at any time after substantial completion of the construction or renovation is

(A) in the case of a single unit residential complex, the particular individual or a relation of the particular individual, and

(B) in the case of a residential condominium unit, an individual, or a relation of an individual, who was at that time a purchaser of the unit under an agreement of purchase and sale of the unit, or

(ii) the particular individual makes an exempt supply by way of sale of the complex or unit and ownership thereof is transferred to the recipient of the supply before the complex or unit is occupied by any individual as a place of residence or lodging,

the Minister shall, subject to subsection (3), pay a rebate to the particular individual equal to

...

[15] Paragraph 254(2)(b) requires the Minister to pay a rebate to a particular individual where a builder makes a supply by way of sale of a complex or unit and at the time the particular individual becomes liable or assumes liability under the agreement of purchase and sale in acquiring the unit for use as a primary place of residence.

[16] Under subsection 262(3), a particular individual includes all purchasers as a group. It reads:

262(3) Group of individuals - If

(a) a supply of a residential complex or a share of the capital stock of a cooperative housing corporation is made to two or more individuals, or

(b) two or more individuals construct or substantially renovate, or engage another person to construct or substantially renovate, a residential complex,

the references in sections 254 to 256 to a particular individual shall be read as references to all of those individuals as a group, but only one of those individuals may apply for the rebate under section 254, 254.1, 255 or 256, as the case may be, in respect of the complex or share.

[17] Where a supply is made to the particular individual as a group, subsection 254(2) applies so that each individual in the group must meet the criteria in paragraph 254(2)(b).

[18] The particular individual that becomes liable or assumes liability qualifies to receive the rebate assuming that individual meets all of the other requirements under subsection 254(2). The wording stipulates that liability fixes to the particular individual who executes an agreement of purchase and sale with the builder.

[19] The appellant argued that he executed the agreement of purchase and sale and was the exclusive, real and the 100% beneficial owner of the property with all the responsibility. Mr. Khandaker was added as a co-purchaser to satisfy the Builder because of the Lender's requirement that he be on title as an owner and he was merely assisting the appellant to secure financing.² While that appears plausible, it conflicts with some of the evidence.

[20] Both individuals had executed the Credit Agreement and the Commitment, as purchasers, several weeks subsequent to the Agreement and several weeks prior to the amended Agreement. They also appeared on title and on the mortgage loan as owners of the property as tenants in common.³ I note that the Acknowledgement signed by the appellant on July 9, 2010 indemnifies Mr. Khandaker from liability.

[21] Upon signing the Agreement on May 10, 2010, the appellant realized that he could not secure financing to close the transaction. It was not until he was able to enlist Mr. Khandaker's assistance to become the co-purchaser and co-owner that the purchase was able to proceed. Initially, the Builder and the appellant, as purchaser, each signed the Agreement. Subsequently, the Builder and Mr. Khandaker, as co-purchaser, each signed the amended Agreement, which Mr. Kasman testified formed part of the Agreement. As acknowledged by appellant counsel, in signing the amended Agreement it was Mr. Khandaker's intention to assume liability within the meaning of paragraph 254(2)(b).⁴

[22] Since the appellant executed the Agreement, Mr. Khandaker executed the amended Agreement and the Builder executed both, I find that both individuals are the particular individual and both assumed liability. Each must therefore meet the requirements in paragraphs 254(2)(a) to (g).

[23] In *Rocheffort v Canada*, 2014 TCC 34, [2014] GSTC 8, C. Miller J. noted it was Mr. and Mrs. Rocheffort who had signed the agreement of purchase and sale and not their nephew who was merely a co-signatory and thus he was not a particular individual to which liability attaches. Unlike the nephew in that case, Mr. Khandaker had executed the amended Agreement being fully aware of what he was doing and the nature of his involvement in signing as a co-purchaser and in being placed on title and on the mortgage as an owner and not merely as a

co-signatory. I agree with respondent counsel that the appellant is seeking to re-characterize the legal relationship that was established between the parties at the relevant time. It is well established in the jurisprudence that the court must look at the legal relationships that were entered into by private and contract law and tax consequences flow from those relationships.

[24] Paragraph 254(2)(b) requires that the residential unit be purchased for use as the primary place of residence of the owner or a qualified relative.

[25] When the amended Agreement was executed, neither the appellant nor Mr. Khandaker intended the property to be used or lived in by Mr. Khandaker as his primary place of residence nor did he have any interest in buying a home. This was corroborated by Mr. Kasman in his fax cover sheet in stating that “Only Riyadh Hossain will be occupying the property as his personal residence.”⁵ I find that Mr. Khandaker fails to satisfy this requirement.

[26] In *Davidson v Canada*, [2002] GSTC 25, Ms. Waterhouse had provided financial assistance to and became a joint tenant with Mr. Davidson and each had signed the agreement of purchase and sale and the mortgage and thus she was a particular individual. However, McArthur J. denied the rebate on the basis that since Ms. Waterhouse did not intend to use the complex as her principal place of residence and she was not a qualified relative, she did not meet the requirements of subsection 254(2). He dismissed, as non-issues, the notions of bare trustees and beneficial owners.⁶

[27] Turning briefly to appellant counsel’s assertion that the evidence supports that the appellant is the true beneficial owner and Mr. Khandaker was a bare trustee holding a 0.01%, neither the Acknowledgement nor the Statutory Declaration existed before the Agreement or the amended Agreement. The creation of a trust must be properly documented containing the requisite elements of a trust, dated, signed and in existence prior to or contemporaneous with the matter that is the subject of the trust arrangement. Based on the evidence, I find that no trust arrangement was in existence at the relevant time and, therefore, it is unnecessary for me to consider this further.

[28] Pursuant to paragraph 245(2)(g), a particular individual is required to occupy the unit after substantial completion. Mr. Khandaker had never been an occupant of the property nor was he a qualified relative. I find that Mr. Khandaker also fails to satisfy this requirement.

[29] I accept Mr. Kasman's evidence that Mr. Khandaker understood the nature of his involvement and that he was signing as a co-purchaser and co-owner and that the appellant was aware that in structuring the transaction in the manner he did that there would be a risk that he would be disentitled to the Rebate.

[30] I conclude that since the legislative requirements under paragraphs 254(2)(b) and (g) have not been satisfied by the particular individual, the Minister was correct and the appellant is not entitled to the Rebate.

[31] The appeal is dismissed. There will be no order as to costs.

Signed at Edmonton, Alberta, this 30th day of December 2014.

“K. Lyons”

Lyons J.

¹ Two versions of the document were provided. One that was typed and the other was partly typed and partly handwritten. The Commitment provides that “It is a condition of this mortgage approval that you occupy the subject property as your principal residence” - Exhibit Book, Tab 3, page 3 of 7.

² The respondent argued that the appellant and Mr. Khandaker were liable under the Agreement and amended Agreement, respectively, and since both constitute the particular individual under subsection 262 (3), there was a failure by Mr. Khandaker to satisfy the requirements in paragraphs 254(2)(b) and (g) because he did not intend to acquire the property for use as his primary place of residence, and is unrelated to the appellant, thus cannot claim the Rebate. Respondent counsel also argued, in response to appellant counsel's submission, that if the appellant is only seeking the provincial portion of the Rebate, the proper forum to seek such relief lies with the Superior Court of Ontario. I agree with respondent counsel that, in those circumstances, the Tax Court does not have the jurisdiction relating to the provincial portion.

³ Paragraph 254(2)(e) stipulates that ownership of the unit must be transferred to the particular individual after construction or renovation is complete. The evidence is that the appellant and Mr. Khandaker were registered on the title of the property and on the

mortgage documentation with a 99.99% and 0.01% interest, respectively, as tenants in common.

⁴ In *Virani v Canada*, 2010 TCC 113, [2010] GSTC 53, the Court noted that the *Act* attaches at the time the Agreement is signed and not when title is registered.

⁵ Dated June 8, 2010, to the Builder's lawyer.

⁶ Similarly in *Goyer v Canada*, 2010 TCC 511, [2010] GSTC 163, Angers J. confirmed the principle and denied the rebate in circumstances where three individuals had signed an agreement of purchase and sale for a unit built for three but only one of the individuals resided in it and the other two friends, as co-owners, helped finance the property by signing the mortgage agreement.

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PLACE OF HEARING: Toronto, Ontario
DATE OF HEARING: June 23, 2014
REASONS FOR JUDGMENT BY: The Honourable Justice K. Lyons
DATE OF JUDGMENT: December 30, 2014

APPEARANCES:

Counsel for the Appellant: Nicholas Kapelos
Counsel for the Respondent: Tony Cheung

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