Docket: 2014-1560(GST)I

BETWEEN:

ANGELA MARIA HENAO,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

Appeal heard on January 23, 2015, at Toronto, Ontario

Before: The Honourable Justice K. Lyons

Appearances:

Counsel for the Appellant:	Adam Serota
Counsel for the Respondent:	Stephen Oakey

JUDGMENT

The appeal from the assessment, notice of which is dated July 2, 2013, of a Goods and Services Tax/Harmonized Sales Tax New Housing Rebate made under the *Excise Tax Act* is dismissed, without costs, in accordance with the reasons for judgment attached hereto.

Signed at Toronto, Ontario, this 30th day of March 2015.

"K. Lyons"

Lyons J.

Citation: 2015 TCC 81
Date: 20150330
Docket: 2014-1560(GST)I

BETWEEN:

ANGELA MARIA HENAO,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

REASONS FOR JUDGMENT

Lyons J.

[1] This is an appeal by Angela Maria Henao, the appellant, of the assessment made under the *Excise Tax Act* (the "*Act*") relating to the GST/HST New Housing Rebate (the "Rebate") application that she and Carlos Restrepo, her uncle, had made with respect to the purchase of a house located on Quetico Crescent, Oakville, Ontario (the "House").

[2] The Minister of National Revenue (the "Minister") refused the Rebate on the basis the House was not acquired by Mr. Restrepo for use as his primary place of residence and failed to satisfy the requirement in paragraph 254(2)(*b*) of the *Act*.[1]

[3] The issue in this appeal is the appellant's entitlement to the Rebate.

I. Facts

[4] The appellant owned another property in Mississauga, which she retained, but wanted to buy the House to improve the quality of her life and for her daughter's future. She occupied the House as her primary place of residence.

[5] On June 9, 2011, the appellant and her aunt entered into an agreement of purchase and sale for the House with a closing date of June 19, 2012. The appellant's income was too low to qualify for the $472,000 mortgage.[2]

[6] The agreement of purchase and sale was amended by replacing her aunt, due to credit issues, with Mr. Restrepo as a co-signer (the "Amended Purchase Agreement").[3] He and the appellant became the registered owners of the House.[4] The appellant testified that her uncle was merely on title for mortgage purposes and she would have been on title on her own had she qualified for financing. She made all the payments relating to the House.[5] In 2014, she renewed the mortgage. When the House is sold, the appellant will receive all the proceeds.

[7] Mr. Restrepo tesftified that he agreed to help by going on title for mortgage purposes and testified that he never owned, intended to occupy, occupied, made mortgage payments nor expects proceeds from the House when it is sold.[6] He claims that he and his wife were neighbours of the appellant living in the same complex where the House is located and they have a close family bond with the appellant and her daughter.[7]

II. Law

[8] All references to provisions that follow will be to the *Excise Tax Act*. The relevant legislation is provided below.

[9] Subsection 254(2) sets outs the requirements for the rebate in paragraphs (*a*) to (*g*), all of which must be met by all individuals purchasing a new home to be eligible for the rebate. Paragraphs 254(2)(*a*) and *(b)* reads:

> 254(2) Where
>
> (*a*) a builder of a single unit residential complex or a residential condominium unit makes a taxable supply by way of sale of the complex or unit to a particular individual,
>
> (*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, …

[10] Subsection 262(3) stipulates:

> 262(3) 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.

[11] Paragraph 133(a) states:

> 133. For the purposes of this Part, where an agreement is entered into to provide property or a service,
>
> (a) the entering into of the agreement shall be deemed to be a supply of the property or service made at the time the agreement is entered into; and …

[12] If all the requirements in subsection 254(2) are satisfied, the Minister is to pay a rebate.

III. Position

[13] The appellant's position is that the legal substance, not labels, governs. Mr. Restrepo signed the Amended Purchase Agreement and was placed on title for the specific purpose of mortgage financing as a "form of guarantor" and he had no beneficial ownership. Therefore, section 134 applies deeming that the House was not a supply to him and the transfer of title to him is to be ignored for GST purposes so that he would not be required to meet the conditions in subsection 254(2) of the *Act* and the appellant was the "primary recipient".[8]

[14] The respondent's position is that the appellant is attempting to re-characterize the legal reality after the fact. Rather, upon entering into the Amended Purchase Agreement, the appellant and Mr. Restrepo both became liable for the House (as recipients of a supply under subsection 123(1) and section 133 of the *Act)* and since the builder did not transfer the House as security to the appellant and Mr. Restrepo, section 134 is not applicable. Given that Mr. Restrepo never

intended to acquire the House for use as his primary place of residence, he failed to satisfy the requirement in paragraph 254(2)(*b*), disentitling the appellant to the Rebate.

IV. Analysis

[15] Collectively, subsections 254(2) and 262(3) provides that to qualify for a new housing rebate each individual purchaser must satisfy the requirements in subsection 254(2) of the *Act*.[9] Paragraph 254(2)(*b*), in issue in this appeal, requires that at the time the particular individual (all in the group) becomes liable or assumes liability under the agreement of purchase and sale with the builder, the particular individual must intend to acquire the home as his/her primary place of residence and section 133 deems it to be a supply upon entering into the agreement.[10] If applicable, section 134 deems the transfer not to be a supply. I am to determine if section 134 applies.

[16] The appellant argues that section 134 applies as it did in *Pro-Ex Trading Co. v Canada*, [2001] GSTC 111 [*Pro-Ex*], deeming a supply not to have occurred despite documentation showing that it had made sales of equipment to various lender companies even though these had been recorded as corporate sales. O'Connor J. accepted Pro-Ex's argument that title to the equipment had been transferred by Pro-Ex, as a guarantor, for security purposes only to secure repayment of loans taken by Pro-Ex. He stated that it is the legal substance, not the labels, that is relevant for tax purposes.[11]

[17] The appellant contends that her case is no different than *Pro-Ex* because, in substance, at the time the builder transferred the House to the appellant, the appellant simultaneously transferred an interest in the House to Mr. Restrepo, thus deeming it not to be a supply to him because he was involved strictly for financing purposes, as a form of guarantor, because of her low income. Applying section 134, a supply was not deemed to be received by Mr. Restrepo for the purposes of subsection 262(3), therefore, he need not meet the requirements in subsection 254(2).

[18] Section 134 of the *Act* reads:

> 134. For the purposes of this Part, where, under an agreement entered into in respect of a debt or obligation, a person transfers property or an interest in property for the purpose of securing payment of the debt or performance of the obligation, the transfer shall be deemed not to be a supply, and where, on payment of the debt or performance of the obligation or the forgiveness of the debt or

> obligation, the property or interest is retransferred, the retransfer of the property or interest shall be deemed not to be a supply.

[19] For section 134 to apply, the transfer of property (or interest) must be for the purpose of securing payment of the debt (or obligation). In the present case, the builder did not transfer the House as security or to secure a debt. The builder transferred the House under the Amended Purchase Agreement as consideration in exchange for the money paid by the appellant and Mr. Restrepo enabling them to obtain title to the House.

[20] *Pro-Ex* is further distinguishable because the present situation involves two separate agreements (Amended Purchase Agreement and Mortgage Loan) with each agreement involving different entities with separate purposes. I agree with respondent counsel that a debt obligation must comprise the same parties involving a lender and debtor without, as here, the third party bank lending money under a separate arrangement of which the builder was not privy.[12] *Pro-Ex* was a debt obligation involving the same two entities with the same lender(s) loaning funds (the debt) to Pro-Ex (debtor) and the lender(s) receiving title to equipment from Pro-Ex as security for the loans thus comes within the ambit of section 134.[13]

[21] The appellant's situation is more analogous to *Canpar Developments Inc. v Canada*, 2011 TCC 353, [2011] GSTC 118 [*Canpar*], in which the application of section 134 was rejected by Paris J. In that case, he notes that the provision applies to the transfer of security arising out of a debt agreement and the debt agreement must be between the same two parties.[14] At paragraphs 15 and 22 Paris J. finds that there is no evidence that Canpar transferred the property to its two shareholders to secure payment of debt.

[22] Similar to *Canpar*, there is no evidence that the builder transferred the House to the appellant and Mr. Restrepo to secure a debt as the builder is not party to any debt obligation. In my view, this is not a transfer of property for the purpose of securing debt as contemplated by section 134. I find that the supply was made to Mr. Restrepo thus, as a particular individual, he must satisfy the requirements in paragraph 254(2)(*b*) as previously noted.

[23] In *Sharp v Canada*, 2014 TCC 323, [2014] TCJ No. 251 (QL), C. Miller J. did not accept that section 134 applied noting, at paragraph 22, that there had been no transfer of an interest in property to secure payment.

[24] While I accept that Mr. Restrepo was assisting his niece, I do not accept that there was a simultaneous transfer of an interest as between them. It is contrary to the evidence showing that the House was jointly purchased from and transferred by the builder to the appellant and Mr. Restrepo as purchasers under the Amended Purchase Agreement and they were identified as joint tenants on title which continues at the time of the hearing. Assisting in such a manner does not displace nor invalidate the rights and obligations flowing from the legal relationships they created.

[25] Turning to the appellant's reliance on the decision of *Rochefort v. Canada*, 2014 TCC 34, 2014 CarswellNat 161 (TCC), and that it is factually similar to her situation (and consistent with the *Pro-Ex* decision) because in *Rochefort*, the nephew was found not to be a beneficial owner and should apply to her based on Mr. Restrepo's testimony that he was not a beneficial owner.[15]

[26] Several facts in *Rochefort* are similar to the present situation, but the decision in *Rochefort* does not assist the appellant.[16] First, the Court was focused on whether there had been a transfer of ownership to Mrs. Rochefort in the context of paragraph 254(e). She had signed the agreement of purchase and was involved in other aspects of the property purchase but was not placed on title. The Court found that she was a beneficial owner.[17]

[27] Second, pivotal to C. Miller J.'s finding – that no supply was made to the nephew – was the fact that he had not signed the agreement of purchase. Further, he was unaware that he would be placed on title. In referring to subsection 262(3) and the requirements in subsection 254(2), he notes that the words "made to" refer to the definition of a recipient of the supply in subsection 123(1), which refers to the individual who became liable under the agreement of purchase agreement. He distinguished the decisions of Goyer *v Canada*, 2010 TCC 511, [2010] GSTC 163, and *Davidson v Canada*, [2001] GSTC 25 on the basis that the individual assisting had signed the agreement of purchase and sale; thus the particular individual in paragraph 254(2)(*b*) who became liable pursuant to the purchase agreement and because of subsection 262(3) was required to meet all the legislative requirements in subsection 254(2).[18]

[28] The third reason why the *Rochefort* decision does not assist the appellant is the recent confirmation by C. Miller J. in *Sharp* that a person entering into an agreement of purchase and sale is caught by subsection 254(2) and subject to the requirements of the provision. At paragraph 23, he states:

> 23. I was also referred to the cases of *Davidson v The Queen* and *Goyer v The Queen*, cases I had distinguished in my reasons in *Rochefort v The Queen*. I find that they do no [*sic*] help Ms. Sharp in this case, but confirm a finding that someone entering a purchase agreement is a "particular individual" for purposes of section 254(2) of the *Act* and subject to the requirements in that provision.

[29] C. Miller J. dismissed the appeal because paragraph 254(2)(*b*) and subsection 262(3) provides that every person who "becomes liable or assumes liability under an agreement of purchase and sale" must intend to live in the new home (or have a qualified relation live in it).[19] Mr. Da Silva, Ms. Sharp's colleague, had signed the agreement with Ms. Sharp. Since Mr. Da Silva did not intend to live in the home, Ms. Sharp was disentitled to the rebate.

[30] Similarly, the individuals assisting in *Davidson*, *Goyer* and *Al-Hossain v Canada*, 2014 TCC 379, [2014] TCJ No. 295 (QL), had also entered into an agreement or amended agreement of purchase and sale and were also placed on title mirroring the appellant's situation.

[31] Despite the creative arguments advanced by appellant counsel, I am unable to conclude that section 134 applies nor that the decision in *Rochefort* supports his position.

[32] With respect to the portrayal of Mr. Restrepo as a form of a guarantor, in *Sharp*, it was argued that Mr. Da Silva's status had changed from purchaser to guarantor as a result of a further amendment to the amended purchase agreement adding Ms. Sharp's parents. The Court found that he remained a purchaser under the amended purchase agreement because the builder would not permit him to extricate himself from his obligations under that arrangement and even though Mr. Da Silva had directed in writing that he not be placed on title.

[33] The appellant's testimony was the bank dictated the terms of financing for the purchase, she was unsophisticated in financial matters, had relied on her lawyer and was unfamiliar with the term guarantor. I accept her evidence. Clearly, the bank would want to minimize its exposure and optimize its security by dictating the terms to accomplish that, especially because of her low income. It insisted that Mr. Restrepo be placed on title as a registered owner and become a borrower and mortgagor. I find it highly improbable that the bank would entertain Mr. Restrepo as a mere guarantor (that generally steps in the event of default by the borrower) in these circumstances.

[34] Documentary evidence adduced shows that in their dealings with the bank the appellant and Mr. Restrepo were represented as borrowers and mortgagors (granting a security interest to the bank by way of a mortgage against the House as owners do). Under the Mortgage Loan, the appellant and Mr. Restrepo each promised to pay and assume individual and joint liability for the mortgage amount plus interest. That arrangement - and remaining on title as registered owners - continue to subsist at the time of the hearing and notwithstanding the mortgage was renewed in 2014. On closing the transaction, they co-signed the Direction directing that mortgage funds be advanced from the bank to their lawyer. I find that Mr. Restrepo was not a guarantor or a form of guarantor.

[35] Appellant counsel conceded that there was no formal trust agreement. Statements were made by the appellant in her testimony that she had made all of the House-related payments and provided some documents. She also commented that she would eventually receive all the proceeds from the House but did not provide any further elaboration as to how that impacted Mr. Restrepo. Of some importance is the fact that the appellant and Mr. Restrepo were purchasers with the same rights accorded with that status and assumed liability. They were liable to the builder to pay for the House. Subsequently, they were legally liable to the bank to pay for the funds loaned to them under the Mortgage Loan with ongoing and continuing obligations plus they transferred security interest in the House to the bank, all of which point to incidents of ownership. On the application for the Rebate, the appellant and Mr. Restrepo are also identified as owners. I also note that no references to a trust were pled in the Amended Notice of Appeal. It appears to be an attempt to re-characterize the transaction and find that there was no trust in place and the appellant was not the sole beneficial owner.[20]

[36] In *Canpar*, Paris J. referred to the requirements of a trust and concludes that no trust was established. He noted that if an individual holds out to the bank as co-owner, that has implications and an individual cannot hold themselves out to the world as different things. At paragraph 10, he stated that:

> 10. Thirdly, as pointed out by counsel for the Respondent, there was no evidence that either Mr. Parmar and Mr. Canning ever advised TD Canada Trust of the existence of a trust with respect to the property, and I infer from this that no such representation was made. This is inconsistent, in my view, with an intention to create a trust. The comments of Justice Bowman in *Erb v. The Queen*, 2000 D.T.C. 1401 in this regard, I think, are appropriate. Justice Bowman said at paragraph 26:

> It strikes me that where a person transfers property to someone else by a deed or conveyance that on its face is absolute and does so to achieve a purpose that is premised upon a transfer on beneficial ownership that would require very cogent evidence to establish that the transferor had no intention of doing what the documentation unequivocally shows that it did do and that intended to withholding from the grantee beneficial title to the property.

[37] Appellant counsel asserted that from a policy perspective, it could not have been Parliament's intent to deny the appellant the Rebate since she took possession and occupation of the House. While it is unfortunate that the legislation disentitles the appellant from the Rebate, it is for Parliament - not the Court - to remedy the situation.

[38] Based on the above reasons, I conclude that when Mr. Restrepo entered into the Amended Purchase Agreement with the builder, the combined operation of subsections 254(2) and subsection 262(3) and section 133, results in a supply of the House being made to Mr. Restrepo but because he did not intend to acquire the House for use as his primary place of residence, the requirements in paragraph 254(2)(*b*) have not been satisfied and the appellant is not eligible to the Rebate.

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

Signed at Toronto, Ontario, this 30th day of March 2015.

"K. Lyons"

Lyons J.

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[1] It is undisputed that the appellant satisfies the requirement.

[2] Exhibit A-1 – Tabs 9 and 10, Notices of Assessment for income tax for 2011 for the appellant and Mr. Restrepo.

[3] Neither documents were produced at the hearing.

[4] Exhibits R-2 and R-3 – Service Ontario Land Registry Office, Parcel Register and Mortgage Charge.

[5] Exhibit A-1 - Tabs 3 and - Capital One hydro bill and TD Canada Trust Line of Credit July 31, 2013. Tab 7 - Deposit cheques for the House signed by the appellant.

[6] Exhibits A-1 – Tab 1 Agreement for a Closed Fixed Interest Rate Mortgage Loan in both names. Tab 2 Direction to make mortgage advance payable to lawyer, signed by the appellant and Mr. Restrepo. Tab 2 - Declaration that the appellant will be occupied by her as her principal residence, signed by the appellant and Mr. Restrepo.

[7] The Mortgage Loan indicates Mr. Restrepo's address is shown at a location in Vaughan, Ontario.

[8] Appellant counsel submitted the bank considered the appellant as the "primary recipient" He produced a document that uses the descriptor in the context of disclosure information to borrowers relating to the cost of borrowing. Nothing turns on it. Also, the use of "primary" presupposes there was another recipient.

[9] Subsection 262(3) provides where a supply of such complex is made to two or more individuals, the inclusion in section 254 to a particular individual shall be construed as all individuals as a group.

[10] Paragraph 254(2)(*b*) provides that the individual becomes or assumes liability under an agreement and he/she must acquire it for his/her use as a primary place of residence; a property can also become a primary place of residence if a taxpayer has a qualified relative which is not in issue in this appeal.

[11] Lenders provided corroboration that transfers of title to equipment was for security purposes for repayment of loans taken by Pro-Ex. The Court accepted that the transaction was the loan(s) and the equipment was the security for the repayment for the loan(s).

[12] In Reply argument, appellant counsel also said that the debt obligation comprised of the amount to the builder and the amount to the bank and each were integral to the other.

[13] The appellant and Mr. Restrepo obtained funds from the mortgage advance from the bank, the third party lender, pursuant to the Mortgage Loan to pay the builder.

[14] In the *Canpar* case, Canpar had two shareholders who claimed they tried to borrow money from a third party who required to have title to the property. The person transferred property because they wanted to secure the same debt.

[15] Appellant counsel quoted from *Rochefort* and the exploration in a textual, contextual and purposive manner of ownership for the purposes of the Rebate for a fuller meaning than simply title.

[16] That is, the nephew did not intend to occupy the home nor made mortgage payments nor expected to receive proceeds from the House when it is sold.

[17] Mr. and Mrs. Rochefort jointly signed the agreement of purchase and sale for a new home without having sold their existing home, and they could not qualify for financing. Shortly before closing, their nephew stepped in and co-signed the mortgage and was placed on title of the property with Mr. Rochefort. Even though Mrs. Rochefort was not on title, it was determined that she was a beneficial owner. The Rocheforts moved into the home. The Canada Revenue Agency had denied the rebate because their nephew failed to live in the home.

[18] In *Davidson*, Ms. Warehouse provided financial assistance to and became a joint tenant on title with Mr. Davidson of a duplex pursuant to a purchase agreement and was placed on the mortgage for financing purposes. The Court denied the rebate because she did not intend to use the duplex as her primary place of residence and failed to meet the requirements in subsection 254(2) of the *Act*. The Crown had conceded that Ms. Warehouse was not a beneficial owner and was on title as a joint owner for mortgage purposes only. In the *Goyer* case, Ms. Goyer purchased land on which a house was to be constructed as her primary place of residence. Because she failed to qualify for financing, friends assisted by signing an agreement of purchase and sale; they agreed to assist to meet bank ratio requirements and signed the mortgage agreement with Ms. Goyer, but the rebate was denied by the Court because her friends, at the time of acquiring the property, did not intend to reside in the property as their primary place of residence.

[19] Ms. Sharp made an offer on a new house intending that it be a home for her parents who were travelling a distance in caring for her children. The parents initially rejected the idea but before closing they agreed to buy the home with Ms. Sharp. Mr. Da Silva had signed an amended agreement of purchase and sale for a 50% interest, and subsequently, tried to extricate himself from the amended agreement because Ms. Sharp's parents reconsidered. However, the builder refused to release Mr. Da Silva from the obligation.

[20] Appellant counsel also said that Mr. Restrepo would not be a beneficial owner as he would not receive proceeds upon the ultimate sale of the House. According to the Canada Revenue Agency Interpretation Bulletin involving deemed dispositions on death for income tax purposes under subsection 70(5), Mr. Restrepo would not be deemed to dispose of anything thus the respondent's position (that there is a supply to Mr. Restrepo) is illogical and inconsistent because on passing there would be no deemed disposition for income tax purposes.

CITATION:	2015 TCC 81
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STYLE OF CAUSE:	ANGELA MARIA HENAO and HER MAJESTY THE QUEEN
PLACE OF HEARING:	Toronto, Ontario
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