Docket: 2014-1802(GST)I

BETWEEN:

FAISAL JAVAID,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

Appeal heard on March 11, 2015 at Toronto, Ontario

Before: The Honourable Justice Judith Woods

Appearances:

Counsel for the Appellant:	Bobby B. Solhi
Counsel for the Respondent:	Aaron Tallon Laurent Bartleman

JUDGMENT

The appeal with respect to an assessment made under the *Excise Tax Act* by notice dated September 20, 2012 is allowed, and the assessment is referred back to the Minister of National Revenue for reconsideration and reassessment on the basis that the appellant is entitled to a new housing rebate with respect to a property 2922 Elgin Mills Road East, Markham, Ontario. The appellant is entitled to costs in accordance with the applicable tariff.

Signed at Ottawa, Ontario this 17th day of April 2015.

"J.M. Woods"

Woods J.

Citation: 2015 TCC 94
Date: 20150428
Docket: 2014-1802(GST)I

BETWEEN:

FAISAL JAVAID,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

AMENDED REASONS FOR JUDGMENT

(Back page amended to change counsel of record.)

Woods J.

[1] This appeal concerns the denial of a claim by Faisal Javaid for a new housing rebate under the *Excise Tax Act*. The amount of the claim is $24,000.

[2] On June 3, 2010, Mr. Javaid entered into an Agreement of Purchase and Sale with a builder, Monarch Corporation, to purchase a home to be built at 2922 Elgin Mills Road East, Markham, Ontario (the "Markham Property"). The closing took place on December 1, 2011.

[3] The Crown disputes Mr. Javaid's entitlement to the rebate on two grounds.

[4] First, the Crown submits that one of the purchasers, Hasan Zia, did not satisfy some of the rebate conditions, such as having an intention that the property be his primary place of residence.

[5] Mr. Javaid agrees that Mr. Zia does not satisfy the conditions. His position is that the rebate conditions do not apply to Mr. Zia because the property was not supplied to him.

[6] Second, the Crown submits that Mr. Javaid himself failed to satisfy all the rebate conditions because he did not establish an intention that the property be his primary place of residence.

[7] Mr. Javaid submits that this condition has been satisfied. There is also a question, which will be discussed below, as to whether the Crown has raised this issue too late.

Relevant legislative provisions

[8] It is not clear from the pleadings which section of the *Act* provides the rebate in issue. Since the rebate amount is $24,000, I have assumed that the relevant provision is the Ontario rebate payable under section 41(2) of the *New Harmonized Value-added Tax System Regulations, No.* 2 (the "*Regulations*"). The provision reads:

> **41.(2) Rebate in Ontario** - If an individual is entitled to claim a rebate under subsection 254(2) of the Act in respect of a residential complex that is a single unit residential complex, or a residential condominium unit, acquired for use in Ontario as the primary place of residence of the individual or of a relation of the individual, or the individual would be so entitled if the total consideration (within the meaning of paragraph 254(2)(c) of the Act) in respect of the complex were less than $450,000, for the purposes of subsection 256.21(1) of the Act, the individual is a prescribed person and the amount of a rebate in respect of the complex under that subsection is equal to the lesser of $24,000 and the amount determined by the formula
>
> $$A \times B$$
>
> where
>
> A is 75%; and
>
> B is the total of all tax under subsection 165(2) of the Act paid in respect of the supply of the complex to the individual or in respect of any other supply to the individual of an interest in the complex.

[9] In order to qualify for this rebate, a person must be a "particular individual," as described in paragraph 254(2)(a) of the *Act*, and satisfy the conditions set out in paragraphs 254(2)(b) to (g). These provisions are reproduced below.

> **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,

(*c*) the total (in this subsection referred to as the "total consideration") of all amounts, each of which is the consideration payable for the supply to the particular individual of the complex or unit or for any other taxable supply to the particular individual of an interest in the complex or unit, is less than $450,000,

(*d*) the particular individual has paid all of the tax under Division II payable in respect of the supply of the complex or unit and in respect of any other supply to the individual of an interest in the complex or unit (the total of which tax under subsection 165(1) is referred to in this subsection as the "total tax paid by the particular individual"),

(*e*) ownership of the complex or unit is transferred to the particular individual after the construction or substantial renovation thereof is substantially completed,

(*f*) after the construction or substantial renovation is substantially completed and before possession of the complex or unit is given to the particular individual under the agreement of purchase and sale of the complex or unit

(i) in the case of a single unit residential complex, the complex was not occupied by any individual as a place of residence or lodging, and

(ii) in the case of a residential condominium unit, the unit was not occupied by an individual as a place of residence or lodging unless, throughout the time the complex or unit was so occupied, it was occupied as a place of residence by an individual, or a relation of an individual, who was at the time of that occupancy a purchaser of the unit under an agreement of purchase and sale of the unit, and

(*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 […]

[10] If the property is supplied to two or more individuals, all of the individuals must satisfy the rebate conditions. At the hearing, the parties referred to s. 262(2) of the *Act*, but I believe that the correct reference is section 40 of the *Regulations*. (I am grateful to author David Sherman for pointing this out in GST and HST Case Notes, Carswell, March 2015.)

[11] Section 40 reads:

> **40**. **Group of individuals** - If 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 two or more individuals construct or substantially renovate, or engage another person to construct or substantially renovate, a residential complex, the references in sections 41, 43, 45 and 46 and the references in section 256.21 of the Act to an individual are to be read as references to all of those individuals as a group, but only one of those individuals may apply for a rebate under subsection 256.21(1) of the Act in respect of the complex or share, the amount of which is determined under section 41, 43, 45 or 46.

[12] For purposes of determining who has received a supply for purposes of s. 254(2)(a), the definition of "recipient" in s. 123(1) of the *Act* is relevant. It provides that it is the recipient, as defined, who has received the supply. The provision reads:

> "**recipient**" of a supply of property or a service means

> (*a*) where consideration for the supply is payable under an agreement for the supply, the person who is liable under the agreement to pay that consideration,
>
> (*b*) where paragraph (*a*) does not apply and consideration is payable for the supply, the person who is liable to pay that consideration, and
>
> (*c*) where no consideration is payable for the supply,
>
> (i) in the case of a supply of property by way of sale, the person to whom the property is delivered or made available,
>
> (ii) in the case of a supply of property otherwise than by way of sale, the person to whom possession or use of the property is given or made available, and
>
> (iii) in the case of a supply of a service, the person to whom the service is rendered,
>
> and any reference to a person to whom a supply is made shall be read as a reference to the recipient of the supply;
>
> [Emphasis added]

[13] Section 133 of the *Act* is also relevant. It provides that a deemed supply of property occurs upon entering into an agreement to provide the property. The section also provides that the provision of the property is not a separate supply and is part of the deemed supply. Section 133 is reproduced below.

> **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
>
> (b) the provision, if any, of property or a service under the agreement shall be deemed to be part of the supply referred to in paragraph (a) and not a separate supply.

Issue 1 Do rebate conditions apply to Mr. Zia?

A. *Factual background*

[14] One of the issues is whether Mr. Zia must satisfy the rebate conditions. The rebate conditions must be satisfied by individuals who are supplied property by

way of sale and therefore are a "particular individual" within the meaning of s. 254(2)(a).

[15] Mr. Zia's involvement with this transaction was as a proposed "guarantor" of a mortgage that would finance Mr. Javaid's purchase of the property. The background to Mr. Zia's involvement is set out below.

[16] In order to finance the purchase, Mr. Javaid needed a "guarantor" because he did not have the financial resources to obtain a mortgage on his own. For this purpose, it was planned that the "guarantor" would sign the agreement of purchase and sale as one of the purchasers and be on title as co-owner. There was no evidence as to why the guarantee arrangement was structured in this manner.

[17] Mr. Abbas, a relative of Mr. Javaid, initially agreed to be the guarantor but he backed out before the closing. He was replaced by Mr. Zia, who was a friend. Mr. Zia also backed out before the closing. His replacement was Farrukh Riaz, another friend. Mr. Riaz actually became the "guarantor."

[18] The agreement of purchase and sale was initially signed by Mr. Javaid alone. The proposed guarantors were added to the agreement as additional purchasers in a series of amendments, but the replacement of Mr. Zia with Mr. Riaz was never reflected in the agreement. Monarch Corporation took the position that Mr. Riaz' involvement had to be documented through a lawyer as part of the closing.

[19] In light of this, Mr. Javaid and Mr. Zia were still named as purchasers in the agreement at the time of closing. They issued a direction for title to be in the names of Mr. Javaid and Mr. Riaz.

[20] Some of these details are set out in the following assumptions of the Minister as set out in paragraphs 10(e) to (m) of the Reply, which read:

> e) the Appellant signed a purchase and sale agreement with the Builder for the construction of the Property on May 31, 2010;
>
> f) the purchase and sale agreement was amended as follows:
>
> i) on July 4, 2010 to insert the name of the Appellant and Raja Aneed Abas purchasers of the Property;

ii) on August 29, 2010 to insert the name of the Appellant, Raja Aneed Abas and Hasan Ahmed Zia as purchasers of the Property;

iii) on December 8, 2010 to remove the name of Raja Aneed Abbas from the agreement and insert the name of the Appellant and Hasan Ahmed Zia as purchasers of the Property;

g) Hasan Zia signed a Declaration of Trust and Undertaking on November 2, 2010 in which he agreed to co-sign the mortgage documents relating to the Property as a guarantor in order to assist the Appellant to meet the mortgage requirements;

h) Farrukh Riaz signed a Declaration of Trust and Undertaking on November 3, 2011 in which he agreed to co-sign the mortgage documents relating to the Property as a guarantor in order to assist the Appellant to meet the mortgage requirements;

i) the Appellant, Hasan Zia and Farrukh Riaz are the legal owners of the Property;

j) the Property was resold on March 30, 2012;

k) at all material times, Hasan Zia and Farrukh Riaz maintained and resided at a personal residence other than the Property; and

l) neither Hasan Zia nor Farrukh Riaz acquired the Property for use as their primary place of residence or the primary place of residence of their relation; and

m) at no time following the purchase of the Property did Hasan Zia, Farrukh Riaz, or a relation of either Hasan Zia or Farrukh Riaz occupy the Property as a place of residence.

[21] The evidence supports the above assumptions, except for paragraph 10(i). The legal owners of the property were Mr. Javaid and Farrukh Riaz. Mr. Zia did not become a legal owner of the property.

B. *Discussion*

[22] It is the position of the Crown that Mr. Zia must satisfy the rebate conditions as a "particular individual" under s. 254(2)(a). The Crown submits that Mr. Zia was supplied the property when he signed the agreement of purchase and sale (section 133), and he was a "recipient," as defined, because he was liable for the

consideration under the agreement. It does not matter that Mr. Zia backed out of the deal before closing, it is submitted.

[23] The problem that I have with this submission is that Mr. Zia was only acting in the capacity as an agent in signing the agreement of purchase and sale. This is clear on the evidence as the agency arrangement was documented in a Declaration of Trust and Undertaking.

[24] Counsel for Mr. Javaid referred me to an administrative position of the Canada Revenue Agency which states that an agent is not a recipient (GST/HST Memorandum 8.1). The relevant part of the Memorandum is reproduced below.

> **69**. Even though the agent may appear to be the recipient of the supply as the agent is identified on the invoice as the customer, it is the principal who is ultimately liable to pay the consideration thereby making the principal the recipient of the supply.

[25] Further, the rebate provisions would not make sense if an agent who signed an agreement of purchase and sale was required to comply with the occupancy requirements of the rebate provision. I would be loath to support the position of the Crown on this point unless the legislation is very clear, which it is not.

[26] Although this is sufficient to dispose of this issue, I would also comment briefly on Mr. Javaid's main argument.

[27] As I understand it, Mr. Javaid submits that paragraph (c) of the definition of "recipient" applies because no consideration is due at the time Mr. Zia signed the agreement of purchase and sale. Mr. Zia is not a recipient under this paragraph because he never acquired the property.

[28] The problem with this argument is that paragraph (c) applies only if there is no consideration payable for the supply of property. In this case, there is consideration payable for the supply of property. It does not matter that the consideration is not due when Mr. Zia signed the agreement.

[29] Mr. Javaid's counsel refers in support to subsection 168(5) of the *Act*. This provision reads:

> **168.(5) Sale of real property** - Notwithstanding subsections (1) and (2), tax under this Division in respect of a taxable supply of real property by way of sale is payable

> (a) in the case of a supply of a residential condominium unit where possession of the unit is transferred, after 1990 and before the condominium complex in which the unit is situated is registered as a condominium, to the recipient under the agreement for the supply, on the earlier of the day ownership of the unit is transferred to the recipient and the day that is sixty days after the day the condominium complex is registered as a condominium; and
>
> (b) in any other case, on the earlier of the day ownership of the property is transferred to the recipient and the day possession of the property is transferred to the recipient under the agreement for the supply.

[30] Subsection 168(5) uses the term "payable" in a different sense than in the "recipient" definition. In s. 168(5), the term "payable" is used in the context of determining the time at which tax is payable. This provision does not assist in interpreting the definition of "recipient." An amount can be payable within the meaning of the "recipient" definition even if it is not presently due.

[31] Accordingly, I do not agree that paragraph (c) of the definition of "recipient" applies in this case.

[32] Finally, I wish to comment that it is not clear to me that rebate conditions apply to someone who signs an agreement of purchase and sale and never becomes an owner of the property. At the end of the day, Mr. Zia backed out of the deal. It is the person who is liable for the consideration that the definition of "recipient" seeks to determine. I have trouble with the notion that an individual must comply with rebate conditions if they back out of the arrangement prior to closing.

[33] From a common sense point of view, the rebate conditions should apply to individuals who become owners. I would also note that this interpretation is consistent with the requirement in s. 254(2)(a) that there be a supply "by way of sale." There was no sale to Mr. Zia.

[34] However, I am not aware of support for this interpretation. I note, for example, that in *Rochefort v. The Queen*, 2014 TCC 34, at paragraph 11, my colleague C. Miller J. comments that property is supplied to an individual who signs an agreement of purchase and sale, and further that property is not supplied to an owner who does not sign the agreement. I would note that section 133(b) provides that the provision of the property is part of the supply.

[35] It is not necessary that I decide this point because of my finding that Mr. Zia was only acting as an agent. This issue can be left for another day.

[36] In the result, I would conclude that Mr. Zia is not a "particular individual" for purposes of s. 254(2)(a), and he is not required to comply with the rebate conditions.

Issue 2 - Did Mr. Javaid intend to use the property as his primary residence?

[37] The Crown also submits that the rebate should be denied because Mr. Javaid did not intend to use the Markham Property as his primary place of residence, as required by paragraph 254(2)(b) of the *Act*. This provision reads:

> **254.(2)** 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,

[38] This issue was raised by the Crown at the commencement of the hearing and it was not mentioned as an issue in the Reply.

[39] Counsel for Mr. Javaid informed me that the Crown first raised this issue a couple of days before the hearing. In my view, this simply was not enough time for Mr. Javaid to properly prepare for trial on this issue.

[40] The difficulty in preparing in such a short period of time was evident at the hearing. For example, counsel for Mr. Javaid mentioned that the Crown informed him that Mr. Javaid had the burden of proof to establish his residency intention.

[41] It is not correct that Mr. Javaid has this burden of proof. The only burden that is imposed on Mr. Javaid is to disprove the assumptions that the Minister made when determining the tax liability (*Hickman Motors Ltd. v. The Queen*, [1997] 2 S.C.R. 336, 97 D.T.C. 5363, at p. 5376). These assumptions are reflected in paragraph 10 of the Reply and they do not deal with Mr. Javaid's residency.

[42] In my view, it is unfair for the Crown to raise this issue at this late stage and I do not propose to consider it.

Conclusion

[43] The appeal will be allowed, with costs to Mr. Javaid in accordance with the applicable tariff.

These Amended Reasons for Judgment are issued in substitution of the Reasons for Judgment dated April 17, 2015.

Signed at **Toronto**, Ontario this **28th** day of April 2015.

"J.M. Woods"

Woods J.

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COURT FILE NO.:	2014-1802(GST)I
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APPEARANCES:

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