

Docket: 2016-1443(GST)I

BETWEEN:

QUN Y. ZHENG,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

Appeal heard on January 24, 2017, at Toronto, Ontario

Before: The Honourable Justice B. Russell

Appearances:

Agent for the Appellant: Dennis Chow

Counsel for the Respondent: Alisa Apostle

JUDGMENT

The appeal from the assessment raised February 19, 2012 under the *Excise Tax Act* (Canada) for the period December 1, 2012 to December 31, 2012 is allowed, without costs, and that assessment denying the New Housing Rebate is referred back to the Minister of National Revenue for reconsideration and reassessment on the basis that the New Housing Rebate application should be allowed, having been made by the Appellant in her capacity as agent for her principal, Kwong Wing Cheung.

Signed at Ottawa, Canada, this 13th day of July 2017.

“B. Russell”

Russell J.

Citation: 2017TCC132
Date: 20170713
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QUN Y. ZHENG,

Appellant,

and

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Respondent.

REASONS FOR JUDGMENT

Russell J.

[1] This matter is an informal procedure appeal of an assessment raised February 19, 2014 by the Respondent's Minister of National Revenue ("Minister") and confirmed by the Minister February 2, 2016. The assessment denied the GST/HST New Housing Rebate ("Rebate"), applied for by the Appellant. A notice of objection was subsequently served, with the Minister deciding on February 2, 2016 to confirm the said assessment. The Appellant appeals this Rebate denial.

[2] The subject property for which the Rebate was claimed being in Ontario, the Rebate would be authorized *per* subsection 41(2) of the *New Harmonized Value-added Tax System Regulations, No. 2* (Canada), which 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(I) 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 x 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.

[3] As the above provision specifies, to qualify for the Rebate subsection 254(2) of the *Excise Tax Act* (Canada) (“Act”) also must be satisfied. It provides:

(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*, [italics added for emphasis]

(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 [...]

[4] The question in this appeal is whether the Appellant's Rebate application was made by a "particular individual" per paragraph 254(2)(b). The Respondent's Reply discloses that the Minister denied the Rebate on the assumption that the Appellant did not intend, nor did any qualifying relation of the Appellant intend, to use the property pertinent to the Rebate as a primary place of residence. Such intention is required by paragraph 254(2)(b).

[5] The Appellant was represented by a non-lawyer agent. Five witnesses were called on the Appellant's behalf, including the Appellant herself, Qun Y. Zheng, her older sister Yu-Lian Zheng, that sister's ex-husband Kwong Wing Cheung, the latter two's daughter Lucy Cheung ("Lucy") and a real estate agent, Millie Chung ("Millie"). The Respondent sought and obtained an exclusion order for these witnesses, and called no witnesses herself. In my view, each witness testified in a wholly credible manner.

[6] The following summarizes their evidence. In the spring of 2011 the Appellant, Qun Y. Zheng ("Qun"), of Richmond Hill, Ontario was asked by her older sister Ms. Yu-Lian Zheng ("Yu-Lian") and that sister's ex-husband Kwong

Wing Cheung (“Kwong”), both of the Vancouver area, to search for a house in the Toronto area that they could buy for their daughter Lucy Cheung (“Lucy”), also resident in the Vancouver area. Lucy had enrolled in a degree course at University of Toronto (“UofT”) beginning in the fall of 2012 and therefore would have to live in the Toronto area to attend that course. Qun was these Vancouverites’ only Toronto area relative, and so they had turned to her for help with this.

[7] Qun, aided by real estate agent Millie, made a search of available real estate, resulting in identification of a prospectively appropriate property in nearby Markham. The property was a planned house, with construction completion anticipated for late October, 2012. This property was close to Qun’s own house and sufficiently sized for Lucy’s parents to stay there when visiting. The purchase price was \$509,900. Price was a factor in not buying closer to the UofT downtown campus. Qun informed her sister and sister’s ex-husband of this property, recommending same for their purchase for Lucy’s use.

[8] On July 26, 2011, at the request of Yu-Lian and Kwong, Qun initiated purchase of this Markham property, by signing a purchase/sale agreement with the developer to buy this property which would include the to-be-constructed house (Exhibit A-1, purchase/sale agreement, July 26, 2011). While it was intended that Qun’s ex-brother-in-law, Kwong, would be the purchaser on title, at this particular time he happened to be in China and his full name with photo identification, needed before his name could appear in the purchase/sale agreement as a purchaser, apparently was temporarily unattainable. The \$40,000 deposit for the purchase/sale agreement was funded to Qun from a bank account Yu-Lian and Kwong had established for this purpose (Exhibit A-2, Downpayment funds).

[9] Two weeks later Kwong was available and promptly had his name added as a purchaser to the purchase/sale agreement (Exhibit A-3, Amendment to Agreement of Purchase/Sale, dated August 9, 2011). The vendor/developer’s policy was to not permit removal of names of purchasers from a purchase/sale agreement. This prevented Qun’s name as purchaser from then being amended off the purchase/sale agreement, at the same time Kwong’s name was added by amendment.

[10] Thereafter, Kwong entered into a mortgage with Bank of Montreal on the Markham property, with ex-wife Yu-Lian signing as guarantor. Qun had no participation whatsoever in the mortgage (Exhibit A-2, Charge/Mortgage), nor in any financing relating to the Markham property.

[11] After delays in construction completion, the Markham property purchase/sale transaction closed on December 20, 2012. Title to the property was taken solely in Kwong's name. Qun was not named on title (Exhibit A-6, Direction re Title). Older sister Yu-Lian, did not seek to be on title. The reason Kwong gave for this was that, his "job was safer than hers".

[12] Meanwhile, in September 2012 Lucy had started attending UofT and was living with her aunt, Qun, pending delayed completion of construction of the Markham property. Upon construction completion and occurrence of the consequently delayed closing on December 20, 2012, Lucy commenced living in the Markham property that her father, Kwong, now owned, being a good-sized house.

[13] At the December 20, 2012 closing Kwong as purchaser was credited by the vendor/developer with the \$24,000 HST Rebate (Exhibit A-7, Statement of Adjustments), in making his net purchase payment to the vendor/developer. The vendor/developer, previously through an application for the Rebate it had prepared in Qun's name and with her signature, unquestioned by her or Millie at the time as to legal effectiveness (neither having legal training), had received the \$24,000 Rebate, which the developer as vendor then credited to Kwong as purchaser at the closing.

[14] Kwong came to Toronto for the closing and remained there for some days thereafter, making some physical improvements to the newly constructed Markham property which he now owned. His work background in the Vancouver area was in the construction business.

[15] Four days after the closing, by a document entitled Continuing Power of Attorney for Property, prepared by a lawyer, Kwong appointed Qun as his attorney, "...restricted to acting [for him and in his name] for all matters relating to the SALE AND OR MANAGEMENT [emphasis as in original] of real property municipally known as 10357 Woodbine Avenue By-Pass, Markham, ON..." (Exhibit A-9, Continuing Power of Attorney for Property, dated December 24, 2012). That property was the Markham property Kwong had just purchased.

[16] By about this time Lucy had become aware that likely UofT would not have an opening for her for the coming academic year. So, she decided she would continue her studies at the University of British Columbia during that coming academic year. In the meantime she continued to live in the Markham property.

[17] With respect to the aforementioned Power of Attorney, Qun considered she did not have time, given her own business responsibilities, to manage the Markham property such as by renting it out, with Lucy not planning to continue at UofT. So she recommended to Kwong that he put the Markham property up for sale. Accordingly on Kwong's instructions Qun caused the property to be put up for sale. It was sold April 30, 2013, for a profit. Net sale proceeds were paid entirely to Kwong, who subsequently apparently paid the money over to his ex-spouse, Yu-Lian. Qun received no proceeds from the sale. Before the closing Lucy moved out of the Markham property and back to live with her aunt, Qun, for the remainder of her UofT academic term.

[18] Kwong testified that he had been busy with his own work in Vancouver and so had not addressed the Power of Attorney matter until he was in Toronto for the December 20, 2012 closing. In cross-examination he said he was involved from the start with the locating and acquiring of a property for his daughter's use, although he was not personally there (Toronto area). He and his ex-wife, Yu-Lian and family had decided to buy a house for daughter Lucy's use while she attended UofT. The family group making this decision included Kwong, ex-wife Yu-Lian, their daughter Lucy, his elder daughter and also his son.

[19] Yu-Lian testified that both she and ex-husband Kwong wanted to purchase a house in Toronto for their daughter to live in while attending UofT. Both she and Kwong provided funds for the purchase. In cross-examination she stated that she mostly handled this, with her sister Qun, noting that some of the time in 2011 Kwong had been away in China.

[20] Millie, real estate agent for Kwong's purchase of the Markham property, testified, stating she knew Qun was acting on behalf of her ex-brother-in-law Kwong. She said Qun's role was to help Kwong purchase the property. Millie knew Kwong was the real purchaser. The vendor/developer would not let Qun delete her name as purchaser, when the purchase/sale agreement was amended to add Kwong's name two weeks after the purchase/sale agreement was initially signed. Nor, Millie testified, would the vendor/developer allow Qun to describe herself as purchaser "in trust" for Kwong.

[21] Millie did not initially have Kwong's full legal name with photo ID so she added his name to the purchase/sale agreement only shortly subsequently. He was out of the country for a period of time and she had to wait to get his photo ID. Her real estate brokerage worked for the vendor/developer. The vendor/developer handled the GST New Housing Rebate application.

[22] The last witness was Lucy. Her evidence was consistent with that of her parents and aunt. She lived in the Markham property for four months. It was supposed to have been ready in October 2012 but only was ready in December of that year. In cross-examination she testified that she was not a visiting student, she was a full time UofT student. But she had become aware in December 2012 or January 2013 that her grades were not sufficient for her to remain at UofT for the following year, so she decided she would continue her studies for the following academic year at University of British Columbia, in Vancouver.

[23] In argument the Respondent submitted the Appellant, Qun, was correctly assessed, as no assignment had been made to ex-brother-in-law, Kwong. She was not buying for herself nor for a relation as niece was not included in the defined term of "relation", per subsection 126(2) of the Act. Also the Respondent submitted there was no trust as there was no property that constituted the trust. And, the Respondent submitted that the Power of Attorney signed December 24, 2012 was signed too late - *i.e.* after the property transaction on December 20. The developer/vendor had prepared for Qun's signature the Rebate application and had submitted it prior to the date of closing. The Respondent argued also that viewing this as a trust or agency situation was re-characterizing the legal relationship, citing particularly *Al-Hussain v HMQ*, 2014 TCC 379, para. 23.

[24] As stated, I found that all witnesses in this matter testified entirely credibly. It is clear to me from the evidence that the Appellant was acting on behalf of her former brother-in-law Kwong and her older sister, Yu-Lian, being Lucy's parents. I consider that specifically the Appellant, Qun, acted as agent for Kwong, and as well for Yu-Lian, Qun being the sole Toronto relative that these two Vancouver-based parents could turn to, to locate suitable housing for their daughter Lucy, also Vancouver-based, in respect of her impending time living in Toronto as a student. The fact that Qun signed the purchase/sale agreement did not make her a purchaser as, in my view, she signed on behalf of Kwong, as his agent. Her name would have come off the agreement when Kwong's name was subsequently added by way of amendment as purchaser, except that the vendor/developer subsequently declined to let Qun's name be taken off.

[25] Qun had no pecuniary interest in the Markham property. The uncontradicted evidence showed that all purchase payments were made by her using funds that had been provided by Yu-Lian and Kwong. Likewise all proceeds of the subsequent sale of the Markham property went to Kwong and Yu-Lian, and not to

Qun. This all was well documented with bank account exhibits and transactional closing adjustment statements.

[26] The test for finding an implied agency was recently re-visited by this Court in *GEM Health Care Group Limited v Her Majesty*, 2017 TCC 13, *per* my colleague, Sommerfeldt, J. The *GEM* judgment and reasons were initially released January 25, 2017 being one day after the hearing of the herein matter (and amended February 26, 2017 in a respect irrelevant to the issue herein). The *GEM* reasons for judgment are here noted for the then existing authorities cited therein respecting implied agency.

[27] At paragraph 26 of the *GEM* reasons the Court extracted from G.H.L. Fridman, *Canadian Agency Law*, 2nd ed. at pp. 40-1 as follows:

As with other contracts, the agency relationship may be impliedly created by the conduct of the parties, without anything having been expressly agreed as to terms of employment, remuneration, etc.... The assent of the agent may be implied by the fact that he has acted intentionally on another's behalf. In general, however, it will be the assent of the principal which is more likely to be implied.... Such assent may be implied where the circumstances clearly indicate that the principal has given authority to another to act on his behalf. This may be so even if the principal did not know the true state of affairs. Mere silence will be insufficient. There must be some course of conduct to indicate the acceptance of the agency relationship. The effect of such an implication is to put the parties in the same position as if the agency had been expressly created.

[28] The Court in *GEM*, at paragraphs 27-8, cited also the Federal Court of Appeal decision of *Kinguk Trawl Inc v The Queen*, 2003 FCA 85. That decision, on different facts of course, was said to illustrate,

...that a finding of agency, depending on the circumstances (including any relevant agreements), may be made in a situation where two parties do not actually describe their relationship as an agency relationship and where there is no express appointment of one as the agent of the other.

[29] Additionally, paragraph 29 of the *GEM* reasons references *Fourney v The Queen*, 2011 TCC 520, *per* my colleague Hogan, J. Four principles respecting implied agency as identified in *Fourney* were paraphrased in *GEM* as follows:

(a) In the absence of a written agency agreement, a court must closely examine the conduct of the parties to determine whether there was an implied intention to create an agency relationship.

(b) In reviewing the conduct of the alleged principal and the alleged agent, a key consideration is to determine the level of control which the former exerted over the latter.

(c) The alleged principal's control over the actions of the alleged agent may be manifested in the authority given by the former to the latter. In other words, the concepts of authority and control sometimes overlap.

(d) Where it is alleged that a corporation is acting as the agent of its shareholders, a high threshold of evidence is needed.

[30] I consider that the description and tests for implied agency referred to above have been fully met in the case at bar. The uncontroverted evidence is that the Appellant, Qun, was acting on the directions of and for the benefit of her former brother-in-law and his ex-wife, being the Appellant's older sister, in being able to arrange suitable accommodation in Toronto for those two ex-spouses' university student daughter. The Appellant was given authority by former brother-in-law Kwong and sister Yu-Lian, to enter into the purchase and sale agreement for the Markham property on their joint behalf. Testimony of Qun, Kwong, Yu-Lian and Millie all demonstrated and confirmed this. In respect of *Fourney*, control of Qun was "manifested in the authority" Kwong and Yu-Lian gave her in buying and eventually selling the Markham property for them.

[31] The Respondent's position was simply that the Power of Attorney was signed too late (*i.e.*, it was signed four days after the December 20, 2012 closing). This indicates an undue focus simply on when an explicit, written document came into existence. That position overlooks the concept of implied agency. And in any event the terms of the Continuing Power of Attorney, focused on "sale and management", would not, strictly speaking, apply to the purchase of the Markham property.

[32] An implied agency simply reflects existence of an agency relationship in the absence of formal or explicit documentation identifying that agency relationship. As well, whether an agency relationship exists is generally determined on the actual facts of the situation, not upon whether the relationship has been formalized in writing. The existence of a written agency agreement is usually just further evidence supporting existence of an agency relationship; it is not generally determinative as to the actual existence of an agency relationship. That is, an agency agreement could exist on paper but if the conduct of the parties were not reflective of an agency relationship then likely it would be concluded as a matter of fact and law that there was no agency relationship. Actual conduct rather than

existence of formal agency agreement normally governs. In this regard I disagree with the Respondent's submission that finding an agency relationship here constitutes a re-characterization of the actual circumstances. In my view it is a correct characterization of the attendant circumstances.

[33] As well, I note that I am not attempting to confer equitable relief; rather, I am identifying the actual legal situation that here pertains, for the purpose of deciding whether to dismiss or allow this appeal as to the correctness or otherwise of the subject February 19, 2014 GST assessment.

[34] On the basis of the foregoing, I find that the Appellant acted as agent for Lucy Cheung's father, Kwong Wing Cheung, and mother, Yu-Lian Zheng, in all the Appellant's actions in respect of the Markham property, including signing the purchase/sale agreement as purchaser and signing the developer-prepared application for the New Home HST Rebate. It was Kwong who obtained the benefit of the Rebate as shown by the closing adjustments when he purchased the Rebate property. Yes, the Appellant was not herself a "particular individual" per paragraph 254(2)(b) of the Act, because she did not intend, nor did any qualifying relation of the Appellant intend (note that a niece is not a qualifying relation), to use the property pertinent to the Rebate as a primary place of residence. But her principal, Kwong Wing Cheung, for whom the Appellant acted as agent as I have found, was a "particular individual". He did have a qualifying relation, being his daughter Lucy, who had the intention to and did in fact use the Markham property – for four months - as a primary place of residence.

[35] I therefore conclude that this appeal should be allowed, without costs, and that the appealed reassessment denying the Rebate be referred back to the Minister for reconsideration and reassessment on the basis of the reasons herein, resulting in the Rebate being allowed. The Rebate application was not made by Qun Y. Zheung on her own behalf but rather by her in her capacity as agent for Lucy's father, Kwong Wing Cheung, he being titular owner of the Markham property between December 20, 2012 and April 30, 2013.

Signed at Ottawa, Canada, this 13th day of July 2017.

"B. Russell"

Russell J.

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