Docket: 2015-4796(GST)G

BETWEEN:

9118-5322 QUÉBEC INC.,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

[OFFICIAL ENGLISH TRANSLATION]

Appeal heard on January 23, 2018, at Montreal, Quebec

Before: The Honourable Justice Dominique Lafleur

Appearances:

Counsel for the Appellant:	Claude Germain
For the Respondent:	David Roulx **Arnaud Prud'Homme (student-at-law)**

AMENDED JUDGMENT

The appeal from the reassessment made under Part IX of the *Excise Tax Act*, notice of which is dated September 12, 2014, and concerns certain reporting periods between August 1, 2010, and February 28, 2013, is dismissed, with costs in favour of the respondent, in accordance with the attached Reasons for Judgment.

Signed at Ottawa, Canada, this 23rd day of January 2019.

This amended judgment with reasons for judgment is issued in replacement of the judgment with reasons for judgment dated May 18, 2018. Note that only the judgment page and the counsel page have been amended to correct an error with respect to the appearances.

"Dominique Lafleur"

Lafleur J.

Translation certified true
on this 22nd day of August 2019.

Janine Anderson, Revisor

Citation: 2018 TCC 96
Date: 20180518
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REASONS FOR JUDGMENT

Lafleur J.

I. BACKGROUND

[1] The company 9118-5322 Québec Inc. (the "appellant") is appealing an assessment, notice of which is dated September 12, 2014, made under Part IX of the *Excise Tax Act* (R.S.C. 1985, c. E-15, as amended) (the "ETA") by the Agence du Revenu du Québec (the "ARQ") acting on behalf of the Minister of National Revenue (the "Minister") for some of the appellant's reporting periods between August 1, 2010, and February 28, 2013 (the "periods in question"). In the notice of assessment, various adjustments were made and various amounts were assessed. However, this appeal concerns only the adjustments the Minister made to the appellant's net tax calculation, disallowing a deduction in the amount of $92,767.91 for a number of goods and services tax ("GST") new housing rebates ("NHRs") the appellant credited to its clients. The NHRs that were credited related to 26 property sales transactions carried out by the appellant between September 2010 and May 2012 in favour of its clients (the "Property Sales").

II. STATUTORY PROVISIONS

[2] The relevant provisions of the ETA can be found in the annex to these reasons.

[3] All references to statutory provisions in these reasons are references to the ETA, unless otherwise indicated.

III. FACTS

[4] The appellant was incorporated in June 2002 and it employs three to ten people; its business consists primarily of the construction of residential complexes.

[5] Marc Lacombe, president and sole shareholder of the appellant, and Daniel Guillemette, CPA, the appellant's accountant since its incorporation, testified at the hearing. Christopher Gagnon, a corporate tax auditor for the ARQ, also testified. At the time of the audit of the appellant, Mr. Gagnon was a technical auditor of GST and Quebec Sales Tax ("QST") with the ARQ. He explained to the Court that he started the audit of the appellant in February 2014; the audit covered the period from August 2010 to February 2013.

[6] Mr. Lacombe testified that he takes care of the appellant's entire business but uses only manual accounting. Gaston Quirion, a bookkeeper, does accounting work for the appellant once a month. The annual accounting of the appellant is performed by Daniel Guillemette. More specifically, Mr. Guillemette's mandate is to prepare review engagements or notices to reader and prepare the appellant's tax returns.

[7] During his testimony, Mr. Lacombe explained the manner in which the appellant proceeded with the Property Sales. When someone was interested in purchasing a house, that person and the appellant would sign a preliminary purchase contract (Exhibit A-1). In that contract, a GST credit amount (equivalent to 36% of the GST applicable on the purchase price of the residential complex) was deducted from the total amount of GST payable by the purchaser on the purchase price.

[8] After signing the preliminary purchase contract and obtaining financing, the appellant would build the house. After it was built and a final inspection was done, a notarized contract was signed by the appellant and the purchaser (Exhibit A-2).

The notary was responsible for making adjustments and managing the disbursements.

[9] All of the notarized purchase contracts included a clause to the effect that the conditions set out in the ETA for obtaining the NHR had been met, for example:

> [TRANSLATION]
>
> The purchaser declares and acknowledges the following:
>
> . . .
>
> - For the purposes of the G.S.T. and Q.S.T. rebate, the purchaser declares and attests to being a Canadian resident, agrees to be the first occupier of the above-mentioned residential complex or to have one or more relations within the meaning of the Excise Tax Act respecting the goods and services tax be the first occupier of the above-mentioned residential complex, with the said residential complex to serve as the primary place of residence; should the purchaser fail to meet one of these conditions and lose entitlement to the rebate, the purchaser shall reimburse the seller for the credit that the purchaser received from the seller;
>
> . . .

[10] Mr. Lacombe explained that in May 2014, he received a draft GST and QST assessment. Mr. Lacombe immediately met with Mr. Quirion and Mr. Guillemette to discuss the draft assessment. That is when Mr. Quirion explained to Mr. Lacombe that a GST form, that is, form FP-2190.C, was missing for the Property Sales. Mr. Lacombe explained to the Court that he had never seen that form before. Mr. Lacombe instructed Mr. Guillemette to deal with the issues that were raised in the draft assessment.

[11] Following that meeting, Mr. Lacombe immediately completed the FP-2190.C forms and had the purchasers sign them for the Property Sales. All of the forms were signed at the same time, in June 2014. However, the signatures of two or three purchasers whom Mr. Lacombe was unable to reach were still missing. Mr. Guillemette sent the FP-2190.C forms to the ARQ by letter dated June 19, 2014.

[12] Mr. Lacombe also testified that one of the purchasers, Rémi Bélliveau, had received a request from the ARQ asking him to provide certain information and documents about his purchase from the appellant (Exhibit A-4). The ARQ representative apparently subsequently sent him an email on December 1, 2015, stating that the file [TRANSLATION] “had been classified as *compliant*” (Exhibit

A-5). Mr. Lacombe thus concluded that Mr. Bélliveau's file was correct and that he had received an appropriate rebate. Mr. Lacombe testified that he did not know whether the other purchasers had received such communication from the ARQ.

[13] Mr. Gagnon testified that, in a letter dated February 12, 2014, he requested copies of certain documents, including copies of the tax accounts (GST/HST and QST) from the appellant's ledger. Then, in a letter dated April 25, 2014, Mr. Gagnon requested copies of the rebate application forms given by the builder for new housing, i.e. copies of the FP-2190.C forms, and requested that they be submitted to him by May 8, 2014. He explained to the Court that he gave a short deadline because the appellant should have already had the forms in its possession. Mr. Gagnon finally received copies of the forms on June 20, 2014, after agreeing to extend the deadline. All of the forms received were dated June 2014.

[14] He explained to the Court that he had disallowed the deduction for the Property Sales because the FP-2190.C forms had not been filed within two years of the date of the transfer of the residential complexes. Mr. Gagnon confirmed that the calculation of the NHR amounts was correct and that the purchasers were eligible for the NHRs if the missing FP-2190.C forms were left out of the equation.

IV. ISSUE

[15] The issue is whether the appellant was entitled to deduct $92,767.91, which represented the NHRs claimed for the Property Sales, in the calculation of its net tax under subsection 234(1) for the periods in question.

V. POSITION OF THE PARTIES

1. *Appellant's position*

[16] The appellant is of the opinion that, since the purchasers were eligible for the NHRs and the calculation of the credits granted by the appellant to the purchasers was consistent with the ETA, it would be unreasonable and contrary to the spirit of the ETA to disallow the deduction in the calculation of its net tax because of its failure to have the purchasers complete the forms required by the Minister.

[17] The appellant argues that the NHR applications were duly completed by its clients within the prescribed time limits since all of the information required by form FP-2190.C could be found in the contractual documents for the Property Sales. In addition, the appellant contends that, regardless, it is not subject to the

two-year time limit set out in the ETA since only purchasers claiming the NHR must respect it, not builders that grant a credit for it to purchasers.

[18] According to the appellant, it is when a builder grants a credit for the NHR to a purchaser under subsection 254(4) that the two-year time limit for the purchaser to submit the form to the builder begins (paragraph 254(4)(*c*)) and, consequently, the builder can never know at the time it grants such a credit whether the purchaser will submit the form to it within the prescribed time limit.

[19] The appellant argues that this time limit is inconsistent with subsection 254(6) because subsection 254(6) applies when the builder grants the credit, contrary to subsection 254(4). Therefore, the appellant argues that when it granted the credit, its liability could only be engaged pursuant to subsection 254(6). However, according to the appellant, subsection 254(6) does not apply in this case because it exercised due diligence.

[20] The appellant also argues that an ARQ representative, by the email indicating that Mr. Bélliveau's file was compliant, proceeded with a tacit release of the debt, such that all of the purchasers and the appellant, in respect of the joint and several liability, were discharged from the total tax debt of $92,767.91.

[21] The appellant did concede that the conditions set out in paragraph 254(5)(*a*) were not met in this case, but it argues that this is not fatal to its case.

2. *Respondent's position*

[22] According to the respondent, the Minister was correct to disallow the deduction in the amount of $92,767.91, which represented the NHRs claimed for the Property Sales, in the calculation of the appellant's net tax under subsection 234(1) because the conditions set out in paragraphs 254(4)(*c*) and 254(5)(*a*) were not met: the purchasers did not complete and submit to the appellant in the form and within the time limit prescribed by the ETA the forms referred to in those statutory provisions, i.e. form FP-2190.C (GST-QST New Housing Rebate Application: Rebate Granted by a Builder), and the appellant did not attach these forms to the tax returns it had to file under Division V of the ETA for the reporting periods during which it credited the NHR amounts to its clients.

[23] The respondent agrees that the other conditions set out in subsection 254(2) are not at issue in this appeal.

[24] In this case, since the forms were completed and received in June 2014, and since they were all signed in June 2014, the NHRs cannot be granted because the two-year time limit set out in paragraph 254(4)(*c*) is strict. The respondent relies on, *inter alia*, *494743 BC Ltd. v. The Queen*, 2007 TCC 27 [*494743 BC Ltd.*] to argue that this two-year time limit is strict.

[25] Alternately, the respondent argues that pursuant to subsection 254(6), the appellant and the purchasers are jointly and severally, or solidarily, liable for the GST amounts credited for NHRs on the Property Sales since the appellant knew or ought to have known that the purchasers were not entitled to the NHRs given the absence of the FP-2190.C forms.

VI. DISCUSSION

[26] For the reasons set out below, the Court cannot accept the appellant's interpretation of the relevant provisions of the ETA; therefore, the appeal is dismissed, with costs in favour of the respondent.

1. *Interpretation of the ETA*

[27] The Federal Court of Appeal noted the following in *Canada v. Livingston*, 2008 FCA 89:

> [15] The Supreme Court of Canada's preferred approach to statutory interpretation remains Dreidger's modern principle (Elmer A. Driedger, *The Construction of Statutes* (Toronto: Butterworths, 1974) at 67):
>
> > Today there is only one principle or approach, namely, the words of an Act are to be read in their entire context, in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.
>
> See *Re Rizzo and Rizzo Shoes Ltd.* [1998] 1 S.C.R. 27 at 41; *Bell ExpressVu Limited Partnership v. Rex*, 2002 SCC 42 at paragraph 26.

[28] In addition, the purpose of the ETA was confirmed by the Federal Court of Appeal in *Canada v. Sneyd*, [2000] GSTC 46, [2000] FCJ No. 955 (QL), as follows: "The [*Excise Tax Act*] is a taxing statute whose purpose is to raise government revenues. The GST New Housing Rebate is a limited exception to that purpose."

[29] And, very recently, in *Canada v. Cheema*, 2018 FCA 45 [*Cheema*], the Federal Court of Appeal (reasons of the majority) reiterated the principles of interpretation applicable to the ETA in the context of the NHR:

	[TRADUCTION]
85 Overall, "the [*Excise Tax Act*] consists of clear, precise rules to facilitate ease of application, consistency and predictability" and this "underscores the dominance of the plain meaning of the text of the Act in the process of interpreting provisions of the Act": *Quinco Financial* at para. 8.	85 Dans l'ensemble, « la [*Loi sur la taxe d'accise*] comporte des règles claires et précises en vue de faciliter son application, son uniformité et sa prévisibilité » et c'est ce « qui fait ressortir le rôle primordial que joue le sens ordinaire du libellé de la Loi dans le processus d'interprétation de ses dispositions » : arrêt *Quinco Financial*, au par. 8.
86 Where, as here, Parliament grants a rebate in a discrete section for a discrete policy reason, it does not normally express itself in vague terms or require that we undertake a circuitous, serpentine and roundabout tour of various other provisions in the Act to find out when the rebate is available. To understand who may claim a rebate and in what circumstances, normally we need only read the plain language granting the rebate.	86 Dans un cas comme en l'espèce où le législateur accorde une remise en vertu d'un article pour un objet particulier, il ne s'exprime pas normalement au moyen d'expressions vagues ni ne contraint le lecteur à suivre une trajectoire sinueuse à travers diverses autres dispositions de la loi l'obligeant à faire plusieurs détours avant de pouvoir déterminer quand la remise est disponible. Normalement, il suffira de lire le libellé simple de la disposition prévoyant le droit à la remise pour savoir qui y a droit et dans quelles circonstances.

[30] It is in light of these principles that the Court will interpret the provisions at issue in this appeal.

2. *The GST new housing rebate*

[31] In general, when the conditions set out in subsection 254(2) are met, the purchaser of a new residential complex is entitled to receive a rebate for a portion of the GST that the purchaser paid when the purchaser acquired the residential complex, in an amount calculated in accordance with that subsection, and it is

referred to as the NHR. According to subsection 254(3), the purchaser must submit an application to the Minister to be entitled to the NHR within two years of the day ownership of the residential complex is transferred to the purchaser. Therefore, the NHR belongs to the purchaser (*Canada v. Polygon Southampton Development Ltd.*, 2003 FCA 193, [2003] FCJ No. 674 (QL) at paragraph 42 [*Polygon Southampton Development Ltd.*]).

[32] However, the builder may agree to pay or credit to the purchaser an amount on account of the NHR if the conditions set out in subsections 254(4) and (5) are met. More specifically, according to paragraph 254(4)(*c*), the purchaser must submit an application in that regard to the builder within two years after the day ownership of the residential complex is transferred to the purchaser. In addition, pursuant to paragraph 254(5)(*a*), the builder must transmit this application to the Minister with its tax return for the reporting period in which the NHR was paid or credited to the purchaser. Subsection 234(1) allows the builder to claim a deduction in determining its net tax for the amount of the NHR paid or credited to the purchaser.

[33] The appellant argues that when it granted the credit equivalent to the NHR to its clients, it could not have known whether its clients would complete the application referred to in paragraph 254(4)(*c*) because its clients had two years from the day on which ownership of the residential complex was transferred to submit the application. Furthermore, since all of the information required by the prescribed form, form FP-2190.C, could be found in the preliminary contracts and in the notarized contracts entered into by the appellant and its clients, it would be unreasonable and contrary to the spirit of the ETA to require the submission of the FP-2190.C forms. In addition, the appellant conceded that the conditions set out in subsection 254(5) were not met but that this is not fatal to its case. This Court is of the opinion that that interpretation cannot be accepted.

[34] The wording of subsection 234(1) is clear: a builder that pays to or credits in favour of a purchaser an amount on account of an NHR in the circumstances described in subsection 254(4) and that transmits the purchaser's rebate application to the Minister in accordance with subsection 254(5) may then deduct the amount in determining its net tax for the reporting period in which the amount was paid or credited to the purchaser.

[35] Therefore, before a builder pays to or credits in favour of a purchaser an amount on account of an NHR and thus is able to deduct an amount in determining its net tax as permitted by subsection 234(1), the builder must ensure that the

conditions set out in subsection 254(4) have been met. In addition, the builder must transmit the rebate application to the Minister in accordance with the conditions set out in subsection 254(5).

3. *The NHR application form*

[36] For the following reasons, the Court is of the opinion that form FP-2190.C is the form contemplated by paragraph 254(4)(*c*) and that the purchaser's submission of this form to the builder is an essential condition to the granting of the credit by the builder. In other words, the builder cannot grant the credit to the purchaser if the purchaser has not submitted the form to the builder. Even if the preliminary contracts and the notarized contracts contained for the most part the information required by form FP-2190.C, those documents cannot replace form FP-2190.C.

[37] With regard to the form of the application, the wording of paragraph 254(4)(*c*) is clear: the NHR cannot be paid or credited to an individual by the builder unless the individual has submitted to the builder in prescribed manner an application in prescribed form [in French, "*en la forme et selon les modalités déterminées par le ministre*"] containing prescribed information [in French, "*contenant les renseignements requis par le ministre*"].

[38] The phrases "*en la forme et selon les modalités déterminées par le ministre*" and "*contenant les renseignements requis par le ministre*" are not defined in the French version of the ETA, but in the English version of paragraph 254(4)(*c*) of the ETA, the word "prescribed" is used: the individual "submits to the builder in prescribed manner an application in prescribed form containing prescribed information".

[39] The word "prescribed" is defined as follows in subsection 123(1):

> **123(1) Definitions** — In section 121, this Part and Schedules V to X,
>
> . . .
>
> ***prescribed*** means
>
> (*a*) in the case of a form or the manner of filing a form, authorized by the Minister,
>
> (*b*) in the case of the information to be given on a form, specified by the Minister,

> (*c*) in the case of the manner of making or filing an election, authorized by the Minister, and
>
> (*d*) in any other case, prescribed by regulation or determined in accordance with rules prescribed by regulation; (*Version anglaise seulement*)
>
> . . .
>
> [Emphasis added.]

[40] Thus, the Court is of the opinion that, in light of the context of paragraph 254(4)(*c*), the word "prescribed" refers to the form authorized by the Minister, including the information specified or required by the Minister. In this case, according to Canada Revenue Agency Guide RC4028,[1] it is the document prepared by Revenu Québec, that is, form "FP-2190.C" entitled "GST-QST New Housing Rebate Application: Rebate Granted by a Builder".[2]

[41] However, despite the wording of paragraph 254(4)(*c*), the following question must be asked: is this provision, which provides some formalism, imperative (or mandatory) in nature, or simply directory (or indicative)? In other words, it must be determined whether the purchaser's submission to the builder of an NHR application in prescribed manner is a condition essential to the legality of the process or simply a guideline. A directory provision need only be fulfilled substantially and does not have an invalidating consequence for its disregard, while a mandatory provision must be fulfilled exactly, and non-compliance has an invalidating consequence (*Senger-Hammond v. Canada*, [1996] TCJ No. 1609 (QL) at paragraphs 23–25).

[42] With respect to the ETA, Justice Bowman concluded as follows in *Helsi Construction Management Inc. v. Canada*, [2001] TCJ No. 149 (QL) at paragraph 11 (upheld in *Helsi Construction Management Inc. v. Canada*, 2002 FCA 358, [2002] FCJ No. 1367 (QL)):

> [11] . . . While there may be some justification in certain cases for treating technical or mechanical requirements as directory rather than mandatory (for example see *Senger-Hammond v. R.*, [1997] 1 C.T.C. 2728) that is not so in the case of the GST provisions of the *Excise Tax Act*.
>
> [Emphasis added.]

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[1] Canada Revenue Agency, Guide RC4028, "GST/HST New Housing Rebate" (October 4, 2016) (https://www.canada.ca/en/revenue-agency/services/forms-publications/publications/rc4028/gst-hst-new-housing-rebate.html#P175_11191).

[2] Revenu Québec, Form FP-2190.C, "GST-QST New Housing Rebate Application: Rebate Granted by a Builder" (https://www.revenuquebec.ca/en/online-services/forms-and-publications/current-details/fp-2190.c-v/).

[43] According to this observation, a technical or formal requirement imposed by the ETA generally cannot be simply directory (or indicative). The Court agrees with this. The Court is of the opinion that the formalities set out in the ETA are mandatory in the context of our system of self-assessment for sales tax. Scrupulous compliance with the rules and formalities prescribed by the ETA is essential for the system to function properly. The Federal Court of Appeal arrived at the following conclusion in *Cheema*, *supra*:

	[TRADUCTION]
109 It must be recalled that we are dealing with a self-assessment system comprised of millions of tax returns verified through audits.	109 Rappelons-le, nous avons affaire ici à un système d'autocotisation concernant des millions de déclarations de taxes assujetties à une vérification.
110 One of the purposes of the *Excise Tax Act* is to ensure administrative efficiency. Absent statutory wording to the contrary and all else being equal, an interpretation that favours administrative efficiency is more likely to have been intended by Parliament over one that does not.	110 Un des objets de la *Loi sur la taxe d'accise* est d'assurer l'efficacité administrative. En l'absence d'un libellé dans la Loi à l'effet contraire, toutes choses étant égales par ailleurs, il est vraisemblable que l'intention du législateur était de favoriser l'efficacité administrative.

[44] The case law of this Court is to the same effect.

[45] In *494743 BC Ltd.*, *supra*, the Court found that the builder could not apply for a rebate on behalf of the purchasers because the forms had not been adequately completed. In fact, the purchasers had not validly assigned their rights to the rebate to the builder under paragraph 254(4)(*c*) (paragraphs 35–40). Therefore, logically, if the forms prescribed by the ETA that were not adequately completed did not have the effect of assigning the rights to the builder, *a fortiori*, the same is true for missing forms, as is the situation here.

[46] Similarly, subsection 262(1), which applies to a NHR that a purchaser applies for directly, also states that a rebate application must be submitted to the Minister in prescribed form:

262(1) Form and filing of application — An application for a rebate under this Division (other than	**262(1) Forme et production de la demande** — Une demande de remboursement selon la présente

section 253) shall be made in prescribed form containing prescribed information and shall be filed with the Minister in prescribed manner.	section, exception faite de l'article 253, est présentée au ministre en la forme et selon les modalités qu'il détermine et contient les renseignements requis.

[Emphasis added.]

[47] In *Chandna v. The Queen*, 2009 TCC 230 (paragraphs 3 and 9) [*Chandna*], the Court dismissed the appeal of a purchaser who had not submitted an application in prescribed form containing prescribed information pursuant to subsection 262(1) since the builder's signature and the information in section D of the form were missing.

[48] These decisions, which concern NHRs applied for directly by purchasers, demonstrate that compliance with the formalism set out in the ETA is mandatory. In the Court's view, there is no valid reason for treating NHR applications submitted via the builder differently.

[49] Moreover, as previously stated, the NHR belongs to purchasers, not builders (*Polygon Southampton Development Ltd.*, *supra*). The Court is of the view that Parliament wanted to make builders subject to strict formalities to prevent them from committing fraud and abuse in carrying out their role as intermediaries. Therefore, it is reasonable to subject builders to certain formalities. However, the Court is not finding or insinuating in any way that the appellant or Mr. Lacombe committed any abuse or fraud in this case.

4. *The time limit for submitting the application to the builder*

[50] For the following reasons, the Court is of the opinion that, as prescribed by paragraph 254(4)(*c*), a purchaser must submit form FP-2190.C to the builder within two years of the residential complex being transferred to the purchaser because that time limit is strict. The builder simply cannot grant the credit without having received this form within the prescribed time limit. The two-year time limit therefore applies to the builder, contrary to what was argued by the appellant. Since the FP-2190.C forms were signed in June 2014, it is clear that this two-year time limit was not met, the transfers in this case having occurred between September 2010 and May 2012. Therefore, the appellant complied with these formal requirements after the expiration of the two years from the day ownership of the residential complexes was transferred.

[51] The appellant presented the following position at the hearing: when it granted the credit equivalent to the NHRs to its clients, it could not have known whether its clients would complete the application referred to in paragraph 254(4)(*c*) because they had two years from the day ownership of the residential complex was transferred to submit the application. Therefore, according to the appellant, this two-year time limit cannot apply in these circumstances.

[52] The court is of the view that the appellant's reading of the ETA is erroneous since the builder simply cannot grant the credit without having received the prescribed form from the purchaser pursuant to paragraph 254(4)(*c*). It is only after it receives the form within the prescribed time limit of two years from the transfer of ownership that a builder can grant a credit to the purchaser and claim a deduction in determining its net tax under subsection 234(1) for the reporting period in which the credit was granted.

[53] The case law of this Court relating to the GST new housing rebate is consistent in respect of the individual who has failed to meet the prescribed time limit for claiming the rebate, even in cases where the result may appear unjust (see *Brar v. The Queen*, 2014 TCC 76, [2014] TCJ No. 60 (QL) at paragraph 12 [*Brar*]; *Doerksen v. The Queen*, 2009 TCC 350, [2009] TCJ No. 264 (QL) at paragraphs 3–4 [*Doerksen*]; *Napoli v. The Queen*, 2013 TCC 307, [2013] TCJ No. 269 (QL) at paragraphs 13–15 [*Napoli*]; *Slovack v. The Queen*, 2006 TCC 687 at paragraph 11 [*Slovack*]; *Zubic v. The Queen*, 2004 TCC 533 at paragraph 7 [*Zubic*]).

[54] At issue in *Brar*, *supra*, was subsection 254(3), which stipulates that an individual must file an application for the rebate within two years after the day ownership of the residential complex is transferred to the individual. In *Brar*, this Court found that it did not have the power to grant exemptions with respect to the prescribed time limit:

> [12] Unfortunately, once the statutory deadline has expired, no new housing rebate can be obtained. In *Cairns v. The Queen*, 2001 GSTC 52, this Court stated:
>
> > . . . The intention of Parliament to limit the time period for the filing of a rebate application has been set out in clear and unambiguous language. When the meaning is clear, the Court has no jurisdiction to mitigate a harsh consequence . . .

[55] Furthermore, this time limit must be respected even if the new owners received incorrect information from the builder (see *Slovack*, *supra*, at paragraph 11).

[56] According to the case law of this Court, the time limits set out in the ETA for the NHR and the rebates provided for in subsections 256(3) and 256.2(7) are strict (see *Brar, supra*, at paragraph 12; *Doerksen*, *supra*, at paragraphs 3–4; *Mercure v. The Queen*, 2012 TCC 148, [2012] GSTC 45, [2012] TCJ No. 133 (QL) at paragraph 21 (affirmed in *Mercure v. Canada*, 2013 FCA 102, [2013] GSTC 56, [2013] FCJ No. 401 (QL)); *Napoli*, *supra*, at paragraphs 13–15; *Nijaf Enterprises Inc. v. The Queen*, 2013 TCC 241, [2013] TCJ No. 205 (QL) at paragraph 39; *Slovack*, *supra*, at paragraph 11; *Zubic*, *supra*, at paragraph 7).

[57] In the Court's opinion, the same finding applies to the time limit set out in paragraph 254(4)(*c*); the time limit is strict. Consistency requires that the time limit be strict when the application is submitted through a builder. Otherwise, the purchaser could file the application at any time through the builder, even when the time limit for submitting the application directly to the Minister has elapsed, which would be illogical and unreasonable.

5. *Paragraph 254(5)(a)*

[58] For the following reasons, the Court is of the view that a builder that does not transmit the application in the prescribed manner pursuant to subsection 254(5) may not claim a deduction in determining its net tax under subsection 234(1).

[59] According to paragraph 254(5)(*a*), a builder that receives an NHR application from an individual in accordance with subsection 254(4) must transmit the application to the Minister with its return, filed pursuant to Division V, for the reporting period in which the rebate was paid or credited. Subsection 234(1) provides that the builder may then deduct an amount in determining its net tax if it transmits the purchaser's rebate application to the Minister in accordance with subsection 254(5) (and if the conditions set out in subsection 254(4) have been met). The appellant admitted that the conditions set out in paragraph 254(5)(*a*) were not met for the Property Sales.

[60] Therefore, the Court must determine whether builders must comply with paragraph 254(5)(*a*) to be entitled to claim a deduction in determining their net tax.

[61] In the opinion of the Court, the mandatory nature of the provision is clear from the English version:

> **254(5) Forwarding of application by builder** — Notwithstanding subsections (2) to (3), where an application of an individual for a rebate under this section in respect of a single unit residential complex or a residential condominium unit is submitted under subsection (4) to the builder of the complex or unit,

> (*a*) the builder shall transmit the application to the Minister with the builder's return filed under Division V for the reporting period in which the rebate was paid or credited; and
>
> . . .
>
> [Emphasis added.]

[62] The word "shall" ("*doit*" in French) in a provision concerning GST is generally mandatory and not simply directory (*Chandna*, *supra*, at paragraph 4). The Court is therefore of the opinion that paragraph 254(5)(*a*) must be strictly respected, especially since the Court has previously established that the mechanical requirements of the ETA are generally mandatory in our system of self-assessment for sales tax.

[63] This conclusion is also confirmed by the very text of subsection 234(1), which provides that the transmission of the rebate application "in accordance with subsection . . . 254(5)" is a condition for claiming a deduction in determining net tax.

[64] Consequently, a builder that fails to comply with the requirements of paragraph 254(5)(*a*) cannot deduct an amount in this regard in determining its net tax, as non-compliance with a mandatory provision has an invalidating consequence.

[65] In *494743 BC Ltd.*, *supra*, the builder had also not transmitted the application to the Minister with the return it was required to file for the reporting period in which the rebate had been paid or credited. Therefore, the Court accepted the argument that a builder that does not transmit an individual's application within the time limit set out in subsection 254(5) is not entitled to the rebate (paragraphs 41–46).

VII. CONCLUSION

[66] For these reasons, the Court is of the opinion that the appellant was not entitled to deduct the amount of $92,767.91 in determining its net tax under subsection 234(1) on account of the NHRs for the Property Sales because the conditions set out in subsection 234(1) and paragraphs 254(4)(*c*) and 254(5)(*a*) were not met within the prescribed time limits. The appeal is therefore dismissed, with costs in favour of the respondent.

VIII. SUBSECTION 254(6)

[67] Although the above reasons are sufficient to dispose of this appeal, the Court will briefly examine the argument with regard to subsection 254(6).

[68] The respondent argues, in the alternative, that pursuant to subsection 254(6), the appellant and the purchasers were jointly and severally, or solidarily, liable for the amounts of GST credited because the appellant knew or ought to have known that the purchasers were not entitled to the tax rebates because the purchasers did not provide the appellant with the forms prescribed by the ETA. The appellant, however, argues that, given the tacit release of the debt by the ARQ representative as indicated in the email to Mr. Bélliveau, all of the debtors of the tax debt, in this case the purchasers and the appellant, were discharged from the debt. The appellant also adds that because all of the objective conditions set out in subsection 254(2) were met, logically, it cannot be held liable for the amounts it credited under subsection 254(6).

[69] Since the Court has already concluded that the appeal should be dismissed, the question as to whether subsection 254(6) applies in cases where all of the conditions set out in subsection 254(2) have been met will not be addressed in this appeal. The Court will limit itself to making the following observations.

[70] Firstly, the email sent by the ARQ representative to Mr. Bélliveau indicating that the [TRANSLATION] "file was classified as *compliant*" cannot in any way be equated with a release of debt. At the hearing, the appellant did not call the author of the email to testify; the Court was not provided with information on the real meaning of the email or of the author's intent. The email is too ambiguous to be characterized as a tacit release. The Court gives no probative value to that piece of evidence.

[71] In addition, the Court cannot accept the argument that all of the purchasers were co-debtors of the tax debt of $92,767.91. Subsection 254(6) provides that an individual and a builder are jointly and severally, or solidarily, liable for the debt. The subsection does not provide that all purchasers who have done business with a builder are joint and several co-debtors. Lastly, the appellant did not provide evidence that an email of the same nature as the one sent to Mr. Bélliveau had also been sent to the other purchasers.

Signed at Ottawa, Canada, this 23rd day of January 2019.

"Dominique Lafleur"

Lafleur J.

Translation certified true
on this 22nd day of August 2019.

Janine Anderson, Revisor

ANNEX

123(1) Definitions — In section 121, this Part and Schedules V to X,

. . .

prescribed means

(*a*) in the case of a form or the manner of filing a form, authorized by the Minister,

(*b*) in the case of the information to be given on a form, specified by the Minister,

(*c*) in the case of the manner of making or filing an election, authorized by the Minister, and

(*d*) in any other case, prescribed by regulation or determined in accordance with rules prescribed by regulation; (*English version only*)

. . .

234(1) Deduction for rebate — If, in the circumstances described in subsection 252.41(2), 254(4), 254.1(4) or 258.1(3) or in circumstances prescribed for the purposes of subsection 256.21(3), a particular person pays to or credits in favour of another person an amount on account of a rebate and transmits the application of the other person for the rebate to the Minister in accordance with subsection 252.41(2), 254(5), 254.1(5), 256.21(4) or 258.1(4), as the case requires, the particular person may deduct the amount in determining the net tax of the particular person for the reporting period in which the amount is paid or credited.

. . .

254(2) New housing rebate — Where

234(1) Déduction pour remboursement — La personne qui, dans les circonstances visées aux paragraphes 252.41(2), 254(4), 254.1(4) ou 258.1(3) ou prévues par règlement pour l'application du paragraphe 256.21(3), verse à une autre personne, ou porte à son crédit, un montant au titre d'un remboursement et qui transmet la demande de remboursement de l'autre personne au ministre conformément aux paragraphes 252.41(2), 254(5), 254.1(5), 256.21(4) ou 258.1(4), selon le cas, peut déduire ce montant dans le calcul de sa taxe nette pour la période de déclaration au cours de laquelle le montant est versé à l'autre personne ou porté à son crédit.

[…]

254(2) Remboursement — habitation neuve — Le ministre

(*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

verse un remboursement à un particulier dans le cas où, à la fois :

a) le constructeur d'un immeuble d'habitation à logement unique ou d'un logement en copropriété en effectue, par vente, la fourniture taxable au profit du particulier;

b) au moment où le particulier devient responsable ou assume une responsabilité aux termes du contrat de vente de l'immeuble ou du logement conclu entre le constructeur et le particulier, celui-ci acquiert l'immeuble ou le logement pour qu'il lui serve de lieu de résidence habituelle ou serve ainsi à son proche;

c) le total des montants — appelé « contrepartie totale » au présent paragraphe — dont chacun représente la contrepartie payable pour la fourniture de l'immeuble ou du logement et pour toute autre fourniture taxable, effectuée au profit du particulier, d'un droit sur l'immeuble ou le logement est inférieur à 450 000 $;

d) le particulier a payé la totalité de la taxe prévue à la section II relativement à la fourniture et à toute autre fourniture, effectuée à son profit, d'un droit sur l'immeuble ou le logement (le total de cette taxe prévue au paragraphe 165(1) étant appelé « total de la taxe payée par le particulier » au présent paragraphe);

e) la propriété de l'immeuble ou du logement est transférée au particulier une fois la construction ou les rénovations majeures de ceux-ci achevées en grande partie;

f) entre le moment où les travaux sont achevés en grande partie et

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

celui où la possession de l'immeuble ou du logement est transférée au particulier en vertu du contrat de vente :

i) l'immeuble n'a pas été occupé à titre résidentiel ou d'hébergement,

ii) le logement n'a pas été occupé à titre résidentiel ou d'hébergement, sauf s'il a été occupé à titre résidentiel par le particulier, ou son proche, qui était alors l'acheteur du logement aux termes d'un contrat de vente;

g) selon le cas :

i) le premier particulier à occuper l'immeuble ou le logement à titre résidentiel, à un moment après que les travaux sont achevés en grande partie, est :

(A) dans le cas de l'immeuble, le particulier ou son proche,

(B) dans le cas du logement, le particulier, ou son proche, qui, à ce moment, en était l'acheteur aux termes d'un contrat de vente,

ii) le particulier effectue par vente une fourniture exonérée de l'immeuble ou du logement, et la propriété de l'un ou l'autre est transférée à l'acquéreur de cette fourniture avant que l'immeuble ou le logement n'ait été occupé à titre résidentiel ou d'hébergement.

Le remboursement est égal au montant suivant :

h) si la contrepartie totale est de 350 000 $ ou moins, un montant

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

(*h*) where the total consideration is not more than $350,000, an amount equal to the lesser of $6,300 and 36% of the total tax paid by the particular individual, and

(*i*) where the total consideration is more than $350,000 but less than $450,000, the amount determined by the formula

A × [($450,000 - B)/$100,000]

where

A is the lesser of $6,300 and 36% of the total tax paid by the particular individual, and

B is the total consideration.

. . .

(3) Application for rebate — A rebate under this section in respect of a residential complex or residential condominium unit shall not be paid to an individual unless the individual files an application for the rebate within two years after the day ownership of the complex or unit is transferred to the individual.

(4) Application to builder — Where

(*a*) the builder of a single unit residential complex or a residential condominium unit has made a taxable supply of the complex or unit by way of sale to an individual

égal à 6 300 $ ou, s'il est inférieur, le montant représentant 36 % du total de la taxe payée par le particulier;

i) si la contrepartie totale est supérieure à 350 000 $ mais inférieure à 450 000 $, le montant calculé selon la formule suivante :

A × [(450 000 $ - B)/100 000 $]

où :

A représente 6 300 $ ou, s'il est moins élevé, 36 % du total de la taxe payée par le particulier;

B la contrepartie totale.

[…]

(3) Demande de remboursement — Le montant d'un remboursement prévu au présent article n'est versé que si le particulier en fait la demande dans les deux ans suivant le jour où la propriété de l'immeuble ou du logement lui est transférée.

(4) Demande présentée au constructeur — Le constructeur d'un immeuble d'habitation à logement unique ou d'un logement

and has transferred ownership of the complex or unit to the individual under the agreement for the supply,

(*b*) tax under Division II has been paid, or is payable, by the individual in respect of the supply,

(*c*) the individual, within two years after the day ownership of the complex or unit is transferred to the individual under the agreement for the supply, submits to the builder in prescribed manner an application in prescribed form containing prescribed information for the rebate to which the individual would be entitled under subsection (2) or (2.1) in respect of the complex or unit if the individual applied therefor within the time allowed for such an application,

(*d*) the builder agrees to pay or credit to or in favour of the individual any rebate under this section that is payable to the individual in respect of the complex, and

(*e*) the tax payable in respect of the supply has not been paid at the time the individual submits an application to the builder for the rebate and, if the individual had paid the tax and made application for the rebate, the rebate would have been payable to the individual under subsection (2) or (2.1), as the case may be,

the builder may pay or credit the amount of the rebate, if any, to or in favour of the individual.

(5) Forwarding of application by builder — Notwithstanding subsections (2) to (3), where an

en copropriété peut verser un remboursement à un particulier, ou en sa faveur, ou le porter à son crédit, dans le cas où, à la fois :

a) le constructeur a effectué la fourniture taxable de l'immeuble ou du logement par vente au particulier auquel il en a transféré la propriété aux termes de la convention portant sur la fourniture;

b) la taxe prévue à la section II a été payée, ou est payable, par le particulier relativement à la fourniture;

c) le particulier présente au constructeur, en la forme et selon les modalités déterminées par le ministre, dans les deux ans suivant le jour du transfert au particulier de la propriété de l'immeuble ou du logement, une demande contenant les renseignements requis par le ministre et concernant le remboursement auquel il aurait droit selon les paragraphes (2) ou (2.1) s'il en faisait la demande dans le délai imparti;

d) le constructeur convient de verser au particulier, ou en sa faveur, le remboursement qui est payable à celui-ci relativement à l'immeuble, ou de le porter à son crédit;

e) la taxe payable relativement à la fourniture n'a pas été payée au moment de la présentation de la demande au constructeur et, si le particulier avait payé cette taxe et en avait demandé le remboursement, celui-ci aurait été payable au particulier selon les paragraphes (2) ou (2.1), selon le cas.

application of an individual for a rebate under this section in respect of a single unit residential complex or a residential condominium unit is submitted under subsection (4) to the builder of the complex or unit,

(*a*) the builder shall transmit the application to the Minister with the builder's return filed under Division V for the reporting period in which the rebate was paid or credited; and

(*b*) interest under subsection297(4) is not payable in respect of the rebate.

(6) Joint and several liability — If the builder of a single unit residential complex or a residential condominium unit pays or credits a rebate to or in favour of an individual under subsection (4) and the builder knows or ought to know that the individual is not entitled to the rebate or that the amount paid or credited exceeds the rebate to which the individual is entitled, the builder and the individual are jointly and severally, or solidarily, liable to pay the amount of the rebate or excess to the Receiver General under section 264.

(5) Transmission de la demande par le constructeur — Malgré les paragraphes (2) à (3), dans le cas où la demande d'un particulier en vue d'un remboursement visé au présent article est présentée au constructeur en application du paragraphe (4) :

a) le constructeur doit transmettre la demande au ministre avec la déclaration qu'il produit en application de la section V pour la période de déclaration au cours de laquelle il verse le remboursement au particulier ou le porte à son crédit;

b) les intérêts prévus au paragraphe 297(4) ne sont pas payables relativement au remboursement.

(6) Obligation solidaire — Le constructeur qui, en application du paragraphe (4), verse un remboursement à un particulier, ou en sa faveur, ou le porte à son crédit, alors qu'il sait ou devrait savoir que le particulier n'a pas droit au remboursement ou que le montant payé au particulier, ou porté à son crédit, excède le remboursement auquel celui-ci a droit, est solidairement tenu, avec le particulier, au paiement du remboursement ou de l'excédent au receveur général en vertu de l'article 264.

[Emphasis added.]

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