

BETWEEN:

CHEN SUN,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

Appeal heard on November 15, 2019, at Toronto, Ontario.

Before: The Honourable Justice Gaston Jorré, Deputy Judge

Appearances:

| | |
|-----------------------------|---------------------------------|
| For the Appellant: | The Appellant himself |
| Counsel for the Respondent: | Anne Shirley Lebel Craig Maw |

JUDGMENT

In accordance with the attached reasons for judgment, the Appeal is allowed and the matter is referred back to the Minister for reconsideration and reassessment on the basis that the appellant is entitled to the GST/HST New Housing Rebate in respect of the condominium he purchased on Bastion St. in Toronto.

There is no order as to costs.¹

Signed at Ottawa, Canada, this 9th day of October 2020.

“G. Jorré”

Jorré D.J.

¹ There can not be any order as to costs given paragraphs 18.3009(1)(c) and 2.2(2)(c) of the *Tax Court of Canada Act*.

Citation: 2020 TCC 112
Date: 2020 10 09
Docket: 2016-2402(GST)I

BETWEEN:

CHEN SUN,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

REASONS FOR JUDGMENT

Jorré D.J.

I. INTRODUCTION

[1] This is a New Housing Rebate case.

[2] The Appellant applied for a GST/HST New Housing Rebate in respect of a condominium he purchased on Bastion Street in Toronto. The Respondent denied the application.

[3] The Appellant, Meng Zhang, a real estate broker, and Si Yuan Chen testified. Si Yuan Chen is the Appellant's spouse.

[4] At the hearing, the principle position of the Respondent was based on her conclusion that the Appellant had not bought the condominium from a builder but rather from Meng Zhang who was not a builder. I will come back to this as well as the rest of the Respondent's argument.

[5] On 22 May 2011, Meng Zhang, the Assignor, signed an agreement of purchase and sale with a builder, West Harbor City (III) Residences Corp., in respect of the condominium in issue. At that time, the tentative possession date for the new condominium was the 30th day of November 2013; that date was postponed substantially. The purchase price was \$326,900 inclusive of net HST,

(i.e. after deducting the amount of the expected HST rebate from the total of the selling price and HST).²

[6] On 1 March 2014, the Assignor and the Appellant signed an assignment agreement with respect to the condominium in question.

[7] Originally the Assignor bought the property as an investment with the thought that she might give it to her son at a later date.

[8] The Assignor made no profit on the assignment agreement.

[9] The Appellant's uncle, Mr. Ching, was the Assignor's best friend. Around the beginning of 2014 Mr. Ching referred the Appellant to her and the Appellant started to work for her as an assistant; the Appellant left that employment in 2015.

[10] Mr. Ching lived in a unit in the same building as the condo in issue and the Appellant sought to live in the same building as his uncle. The Assignor then entered into the assignment agreement with the Appellant.

[11] While working for the Assignor, the Appellant met Si Yuan Chen, who also worked in the same office.

[12] Pursuant to the assignment agreement the Appellant paid \$49,035 to the Assignor. This amount was equal to the payments made by the Assignor up to the date of the assignment agreement pursuant to the agreement of purchase and sale.

[13] The agreement of purchase and sale signed by the Assignor contained certain restrictions on assignment, including that the terms of any assignment conform to the vendor's standard form of assignment and that the purchaser could only exercise her right to assign the agreement once by giving notice to the vendor on or before one of two dates.³

[14] The purchaser did not give timely notice to the vendor of the assignment as required by the purchase agreement.⁴

² The price of any upgrades, extras or changes to the vendor's furnishings did not include HST. See clauses 2 and 8 of Schedule F of the Agreement at page 10 of Tab 4 of Exhibit R-2.

³ On or before the 90th day prior to the Confirmed Possession Date or on or before the 60th day prior to the Closing Date. See the 15th page of the Agreement at Tab 4 of Exhibit R-2.

⁴ See the testimony of the Assignor at page 37 of the Transcript.

[15] In addition to the lack of timely notice, the Respondent argued that the 1 March 2014 assignment agreement did not comply with the purchase agreement insofar as the assignment agreement did not conform to the other conditions set out in the purchase agreement with respect to any assignment of the purchase agreement. As explained below I do not need to reach a conclusion on this question and I decline to do so.⁵

[16] The Appellant moved into the condominium at the beginning of May 2014 shortly after the 28 April 2014 interim occupancy date of the unit.⁶

[17] After he signed the assignment agreement, the Appellant made all payments to the vendor required pursuant to the agreement of purchase and sale.

[18] While the evidence is limited, it is clear that in March 2015, prior to the closing, there was communication between the vendor of the condominium, the Assignor and the Appellant or their representatives. This resulted in an exchange of emails on 19 March 2015 indicating that the builder accepted a direction that title to real estate was to be in the name of the Appellant.⁷ I note that the direction came from an individual at the Appellant's law firm.⁸

[19] The Respondent says that the assignment agreement was invalid, at least in the sense that it did not bind the vendor, West Harbor City (III) Residences Corp., because it did not conform to the requirements of the agreement of purchase and sale and because there was no timely notice of the assignment to the vendor.

[20] However, I see little in the evidence that would support a conclusion that the Appellant bought the condominium from the Assignee. While there is a statement of adjustment as of 26 March 2015 with the Assignee's name shown as the

⁵ While the assignment agreement does not use the vendor's standard form, the requirement set out at the 15th page of Tab 4 of Exhibit R-2 is not to use the vendor's form but to conform to the conditions set out by the vendor in the purchase agreement including those contained in that form. While the form used by the Assignor and the Appellant is quite different from the vendor's form, it would require careful analysis to determine if it is different in any material way, especially when one considers that the agreement of purchase and sale is annexed to the assignment agreement and the Appellant as assignee agreed to conform to all the obligations of the assignor under the purchase agreement. In any event, as said above I need not decide the point.

⁶ The Appellant provided documentary corroboration of his moving to the condominium in the form of various documents showing his address at the condominium.

⁷ See Tab 5 of Exhibit A-2. See also the Assignor's testimony at page 37 of the Transcript.

⁸ One sees this from the email address of the email at 17:40 on 19 March 2015 sending the direction (@zhumattis.com, see Tab 5 of Exhibit A-2) and from the reporting letter to the Appellant of 9 April 2015 (at Tab 5 of R-2.)

purchaser⁹, I see nothing else in the evidence to indicate that the Assignee actually completed the purchase.

[21] On the contrary, the reporting letter from the Appellant's lawyer for the real estate purchase dated 9 April 2015 refers to the Appellant's purchase from West Harbor City (III) Residences Corp¹⁰ and the extract from the land registry shows the transfer of title as being from West Harbor City (III) Residences Corp. to the Appellant.¹¹

[22] I infer that there was no sale from West Harbor City (III) Residences Corp to the Assignor.

[23] Given that there was no sale from West Harbor to the Assignor, given that the Appellant made all the payments due to West Harbour under the purchase agreement arising after he signed the assignment agreement, including the monthly payments due after interim occupancy began, given the 19 March 2015 emails showing acceptance by West Harbor of a direction coming from the office of the Appellant's lawyer that title would be in the Appellant's name and given the land registry records showing the transfer from West Harbor to the Appellant, it is clear from its conduct that the vendor, West Harbor, waived any unfulfilled conditions regarding the assignment, accepted the assignment and sold the property to the Appellant.¹²

⁹ See Tab 2 of Exhibit R-2. The date is after the title direction was accepted on 19 March.

¹⁰ See Tab 5 of Exhibit R-2.

¹¹ There was the following exchange during the cross-examination of the Appellant:

Q. Maybe to go back to the beginning of the story, the person who first acquired the condo from West Harbour Residence is Ms. Zhang, who is here today; is that right?

A. [With interpreter] Yes.

Q. So later on she assigned her interest in the condo to you.

A. [With interpreter] Yes.

Q. This means that you acquired the condo from Ms. Zhang and not from West Harbour directly.

A. [With interpreter] that's right.

I do not regard this exchange as proof that the condominium was sold by the Assignor to the Appellant. While there is a sense in which he obtained the condominium from the Assignor, given that the Vendor could not have signed an agreement of purchase and sale with the Appellant for the same condominium unit it had already agreed to sell to the Assignor, the evidence does not show that the Assignor ever completed the purchase herself so as to be in a position to sell the property to the Appellant.

¹² I am unaware of any legal reason why, in these circumstances, West Harbor would not have been able to validly waive any of the conditions related to the assignment. Given that it does not matter whether the terms of the assignment agreement fully complied with the agreement of purchase and sale.

[24] As a consequence, the Appellant took over from the Assignor and became the purchaser from the vendor, West Harbour, under the agreement of purchase and sale of 22 May 2011.¹³

[25] Accordingly, the first requirement for a rebate was met.¹⁴ There was a purchase from a builder.

[26] The Appellant paid the \$326,900 for the condominium, the purchase price set out in the agreement of purchase and sale.¹⁵

[27] As previously stated this price includes net HST after taking account of the Vendor crediting the Appellant with the New Housing Rebate.¹⁶

[28] In addition to the condition set out in paragraph 254(2)(a) of the *Excise Tax Act* the Respondent argued that several other conditions in subsection 254(2) were not met by the Appellant.

[29] Turning to other arguments¹⁷, the Respondent also submitted that the Appellant does not meet the requirements of paragraphs 254(2)(b), (d), (f) and (g) of the *Excise Tax Act*.

[30] I am satisfied that the Appellant acquired the condominium for use as his primary place of residence at the time he became liable under the agreement of purchase and sale on the 1st of March 2014, the day he signed the assignment

¹³ One factor that may have contributed to this dispute is the 1st page of the New Housing Rebate application form, see Tab 1 of Exhibit R-2, which shows 1 April 2015 as the date the agreement of purchase and sale was signed. This is clearly in error. The reporting letter from the Appellant's counsel shows 1 April 2015 as the date the transaction was completed and 2 April 2015 as the date that the transaction was registered.

¹⁴ The condition set out in paragraph 254(2)(a) of the *Excise Tax Act*.

¹⁵ \$49,035 at the time of the assignment agreement (See page 1 of the assignment agreement at Tab 1 of Exhibit A-2), \$32,690 at the time of interim occupancy (See tab 3 of Exhibit A-2.) and, finally, \$245,175 at sale, a sum the Appellant financed by means of a first mortgage.

¹⁶ This is seen from the calculations in the top 8 lines of the statement of adjustments at Tab 2 of Exhibit R-2 where one sees the Federal and Ontario portions of the HST are \$15,725 and \$25,160 respectively, i.e. 5% and 8%, respectively, of the net sale price (i.e. the price before HST) of \$314,500. When one adds the total HST to the net sale price and then subtracts the Federal and Ontario rebates shown one gets \$330,855 which is the total payable to the Vendor including HST; it is clear from this that the amount takes account of the vendor crediting the purchaser with the New Housing Rebate. \$330,855 is the agreed sale price of \$326,900 plus additional consideration of \$3,955; it is not clear what the additional consideration of \$3,955 is for but it is clear that the purchaser is credited with the New Housing Rebate. I also note that at page 4 of the reporting letter to the Appellant from his counsel it confirms that he paid a purchase price of \$314,500. It is not clear whether the Appellant paid the additional \$3,955, or not, but that has no effect on the question of whether the Appellant eligible for rebate.

¹⁷ These arguments and related factual assumptions are not raised in the Reply to the Notice of Appeal.

agreement. He moved into the condominium as soon as it was available for interim occupancy, two months after he signed the assignment agreement.¹⁸

[31] With respect to the conditions in paragraphs (f) and (g) it is clear that they are met, given that the Appellant was the first occupant of the condominium and that there was no occupant of the unit before him.

[32] Finally, with respect to the condition in (d), we must take account of two matters. First, the Appellant, because of the assignment agreement and the acceptance of that assignment by the vendor, became the purchaser under the agreement of purchase and sale. That agreement stipulated that the purchaser would pay the HST on the sale less the amount of the New Housing Rebate that would be credited to him by the vendor.¹⁹

[33] Secondly, while paragraph 254(2)(d) requires payment of the whole of the HST, one must also take account of subsection 254(4) which modifies subsection (2) in certain ways. In particular, as a result of paragraph 254(4)(b), the HST must not necessarily have been paid; it need only have been paid or be payable. That is the case here and so the condition has been met.

[34] Accordingly, all the conditions have been met and the Appellant is eligible to receive the HST New Housing Rebate.

[35] As a practical matter, given that the evidence shows that the Appellant has already received the benefit of the Rebate insofar as the vendor, West Harbor, credited it to him, the practical effect for the Appellant is that he will not have to

¹⁸ The Respondent raised several matters that, it submits, should lead me to the contrary conclusion. I will briefly comment on some of these. The location of the condominium was a fair distance from the location of the Appellant's work and from where his future spouse lived. I am not sure what this proves given that not everyone chooses to live close to work, given that the Appellant's uncle lived in the same building as the condominium in issue and given that some people choose to commute into the city while others do the reverse. The Respondent also submitted that the Appellant spent a good deal of time in Scarborough based, in part, on a modest number of restaurant bills shown on bank statements of the Appellant. I am not satisfied that the evidence enables me to make findings as to how long the Appellant spent where and, even if I could, spending a certain amount of time in one area does not really answer where someone's residence is. There was a certain amount of evidence as to what mailing addresses the Appellant and his spouse used in different years as well as to when they first lived together. With respect to the mailing addresses, they had different mailing addresses until 2016, the first year that they both used the same address. As to when they started to live together, considering that they only met in 2014 the reasonable conclusion from the evidence is around the beginning of 2015, months after 1 March 2014. I would note that the Appellant was never asked where they lived together initially and that the Appellant's address prior to that was her parents' house, in which she had a 1% ownership interest. None of this leads me to conclude that the Appellant's intent on 1 March 2014 was other than an intent to acquire the condominium use as his primary place of residence

¹⁹ See paragraphs 5, 26 and 27 and footnotes 2 and 16 above.

pay back the New Housing Rebate. Of course if, he has already paid the rebate back after he received the assessment then the Appellant will be entitled to have it repaid to him.²⁰

[36] To conclude, the appeal is allowed and the matter is referred back to the Minister for reconsideration and reassessment on the basis that the Appellant is entitled to the GST/HST New Housing Rebate.

Signed at Ottawa, Canada, this 9th day of October 2020.

“G. Jorré”

Jorré D.J.

²⁰ Of course, this Court can not order payments or repayments as such; our statutory powers relate to the correctness of the assessment.

CITATION: 2020 TCC 112

COURT FILE NO.: 2016-2402(GST)I;

STYLE OF CAUSE: CHEN SUN AND HER MAJESTY THE QUEEN;

PLACE OF HEARING: Toronto, Ontario

DATE OF HEARING: November 15, 2019

REASONS FOR JUDGMENT BY: The Honourable Justice Gaston Jorré,
Deputy Judge

DATE OF JUDGMENT: October 9, 2020

TRANSCRIPT RECEIVED: January 10, 2020

APPEARANCES:

| | |
|-----------------------------|---------------------------------|
| For the Appellant: | The Appellant himself |
| Counsel for the Respondent: | Anne Shirley Lebel Craig Maw |

COUNSEL OF RECORD:

For the Appellant:

Name:

Firm:

For the Respondent: Nathalie G. Drouin
Deputy Attorney General of Canada
Ottawa, Canada