Docket: 2010-2460(GST)I

BETWEEN:

ROBERT and MARY KEARSE,

Appellants,

and

HER MAJESTY THE QUEEN,

Respondent.

Appeal heard on February 17, 2011, at Toronto, Ontario

By: The Honourable Justice E.A. Bowie

Appearances:

For the Appellants:	The Appellants themselves
Counsel for the Respondent:	John Grant

JUDGMENT

The appeal from the assessment made under the *Excise Tax Act*, notice of which is dated January 23, 2009 and bears number 09019505012370003 is dismissed.

Signed at Ottawa, Canada, this 13th day of May 2011.

"E.A. Bowie"

Bowie J.

Citation: 2011 TCC 264
Date: 20110513
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BETWEEN:

ROBERT and MARY KEARSE,

Appellants,

and

HER MAJESTY THE QUEEN,

Respondent.

REASONS FOR JUDGMENT

Bowie J.

[1] This appeal is brought from the decision of the Minister of National Revenue to refuse the appellants' application for what is called the transitional rebate of goods and services tax (gst) that was made available, in certain circumstances, to the purchasers of new residential housing. By an amendment to subsection 165(1) of the *Excise tax* Act,[1] Part IX, (the *Act*) the rate at which gst was exigible on commercial transactions was reduced from 7% to 6% on July 1, 2006.[2] Both before and after that date the gst was ameliorated by section 254 which provides for a rebate of gst on a new residence bought for occupation by the purchaser or a family member. Where the selling price is less than $450,000.00, the amount of that rebate is 36% of the gst. That effectively reduced the rate of gst in such cases to 4.48% before July 1, 2006 and to 3.84% after that date.

[2] It is common in the new housing market for transactions to take place by way of agreements of purchase and sale that specify a price that is inclusive of gst. It is also common that agreements of purchase and sale include an assignment by the

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1 R.S. 1985 c.E-15, as amended.

2 S.C. 2006, c.4, s. 3.

purchaser to the vendor of the section 254 gst rebate. Many agreements for the sale of new housing were entered into in the months immediately prior to July, 2006 that specified closing dates after July 1. To ensure that these purchasers were not deprived of the benefit of the reduction in the rate of tax, Parliament enacted subsection 256.3(5); it makes provision for the transitional rebate.

[3] Subsections 256.3(5) and (6) provide as follows:

> 256.3(5) If a particular individual
>
> (a) pursuant to an agreement of purchase and sale, evidenced in writing, entered into on or before May 2, 2006, is the recipient of a taxable supply by way of sale from another person of a residential complex in respect of which ownership and possession under the agreement are transferred to the particular individual on or after July 1, 2006,
>
> (b) has paid all of the tax under subsection 165(1) in respect of the supply calculated at the rate of 7%, and
>
> (c) is entitled to claim a rebate under subsection 254(2) in respect of the complex,
>
> the Minister shall, subject to subsection (7), pay a rebate to the particular individual equal to the amount determined by the formula
>
> $$A \times [0.01 - ((B/A)/7)]$$
>
> where
>
> A is the total of all amounts, each of which is the consideration payable for the supply to the particular individual of the complex or for any other taxable supply to the particular individual of an interest in the complex in respect of which the particular individual has paid tax under subsection 165(1) calculated at the rate of 7%, and
>
> B is the amount of the rebate under subsection 254(2) that the particular individual is entitled to claim in respect of the complex.
>
> 256.3(6) If a supply of a residential complex is made to two or more individuals, the references in subsection (5) to a particular individual shall be read as references to all of those individuals as a group, but

> only the particular individual that applied for the rebate under section 254 may apply for the rebate under subsection (5).

Subsection 256.3(5) provides very specific requirements that must be met in order to entitle a purchaser to the transitional rebate:

- the agreement must be in writing and predate July 1, 2006;
- the transaction must close after July 1, 2006;
- the purchaser must have paid gst at the rate of 7%;
- the purchase must be as a dwelling for the purchaser or a relative of the purchaser.

[4] On April 15, 2004 the appellants purchased a new home, to be built, from Lebovic Enterprises Limited (Lebovic). The agreement of purchase and sale specified a price of $324,918.00, and a closing date of July 28, 2005. The purchase price was stated to include gst at the rate of 7%. An addendum to the agreement provided this:

> The parties acknowledge and agree that the purchase price stipulated in the within Agreement is inclusive of the NET amount of G.S.T. which would be otherwise payable by the Purchaser pursuant to the appropriate G.S.T. legislation.
>
> The term "Net amount of G.S.T." shall mean the total amount of G.S.T. payable by the Purchaser, less the refunds, credits, rebates or the like to which the Purchaser is entitled to [sic] under the G.S.T. legislation, which refunds, etc. may be reasonably estimated by the Vendor, if necessary. The Purchaser shall assign the right to receive such refund, credit or rebate to the Vendor if necessary.

On April 23, 2007 the parties agreed to amend their contract, changing the lot number on which the house would be built, changing the closing date to September 20, 2007, and increasing the price to $329,918.00. By a further amendment the closing date was changed again to November 5, 2007, and the transaction did in fact close on that date. By that time the gst rate had been reduced to 6%.

[5] On, or soon after, November 2, 2008 the appellants applied for the transitional rebate provided for in subsection 256.3(5), on the basis that they had paid gst at the rate of 7% as the contract specified, and that the rate imposed by the Act at the time

of closing was 6%. This application was rejected on the basis that the appellants had actually paid tax at the new rate of 6%, and following their filing of a notice of objection this decision was confirmed by notice dated April 27, 2010.

[6] The appellants argue that with the reduction of the rate of gst to 6% the price of their house, net of tax at the rate of 7%, should have been $329,918.00 ÷ 1.07 = $308,334.58, and that the gst payable at 6% should then have been $308,334.58 x 0.06 = $18,500.07. That is not the basis on which the gst was collected and remitted, however.

[7] The statement of adjustments that was used to govern the closing of the transaction on November 5, 2007 is in evidence at tab 6 of Exhibit R-1. It proceeded on the basis that the price of the house, inclusive of net tax at the then prevailing rate of 6%, was $329,918.00, and that gst was exigible on the "adjusted price", that being $329,918.00, net of gst at the effective after rebate rate of tax, which is 3.84%, to which the 6% rate of gst was then applied:

$329,918.00 ÷ 1.0384 = $317,717.64 x 0.06 = $19,063.06

That is the amount of gst that was collected and remitted by Lebovic

[8] It is evident from the foregoing that Lebovic reaped most of the benefit of the reduction of the gst rate from 7% to 6%. By Ms. Kearse's calculations in Exhibit A-3, which I do not doubt are correct, Lebovic's price for the house increased by $2,520.36 because the contract was interpreted on the basis that the tax included price of $329,918.00 on the date of closing included net gst at the new rate rather than the former one. The amount of gst to be paid by the appellants, she says, should have been: $329,918.00 ÷ 1.07 = $308,334.58 x 0.06 = $18,500.07. In other words, the appellants paid $2,520.36 more than they should have to the builder, and $562.99 more than they should have in gst.

[9] I express no opinion as to the correctness of the manner in which the closing balance was computed. Perhaps the selling price should have been reduced by the ratio of 1.0448 to 1.0384 which would result in a price of $327,897.00; perhaps the closing should have simply have taken place at 7% leaving the purchasers free to apply as they did for the transitional rebate. The contract is ambiguous, but it is not for this court to resolve that ambiguity. It is clear from the statement of adjustments that the gst was calculated using a gross rate of 6% and a net rate of 3.84%. The Minister's assumptions pleaded in the Reply to the Notice of Appeal include a statement that gst was collected and remitted at the rate of six%, and the evidence

supports that assumption. The transitional rebate is available only if the gst was collected and remitted at the rate of 7%. The appellants therefore do not qualify, and their appeals must be dismissed. This court has no jurisdiction to grant any remedy in relation to their dispute with Lebovic.

Signed at Ottawa, Canada, this 13th day of May, 2011.

"E.A. Bowie"

Bowie J.

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COURT FILE NO.:	2010-2460(GST)I
STYLE OF CAUSE:	ROBERT and MARY KEARSE and HER MAJESTY THE QUEEN
PLACE OF HEARING:	Toronto, Ontario
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REASONS FOR JUDGMENT BY:	The Honourable Justice E.A. Bowie
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APPEARANCES:

For the Appellants:	The Appellants themselves
Counsel for the Respondent:	John Grant

COUNSEL OF RECORD:

For the Appellants:

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