

Docket: 2013-2981(GST)I

BETWEEN:

PETERSON ROCHEFORT,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

Appeal heard on January 24, 2014, at Ottawa, Ontario

By: The Honourable Justice Campbell J. Miller

Appearances:

For the Appellant: The Appellant himself
Counsel for the Respondent: Tamara Watters

JUDGMENT

The Appeal from the reassessment made under the *Excise Tax Act* in respect of a Goods and Services Tax/Harmonized Sales Tax (GST/HST) Notice of Assessment dated March 15, 2012, is allowed and the reassessment is referred back to the Minister of National Revenue for reconsideration and reassessment on the basis that the Appellant does meet all the requirements in subsection 254(2) of the *Excise Tax Act* for the new housing rebate.

Signed at Ottawa, Canada, this 31st day of January 2014.

"Campbell J. Miller"

C. Miller J.

Citation: 2014 TCC 34
Date: 20140131
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Appellant,

and

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REASONS FOR JUDGMENT

C. Miller J.

[1] In March 2010, Mr. Rochefort and his wife signed an Agreement of Purchase and Sale to acquire a home to be constructed as their primary residence. Due to their failure to qualify for a mortgage, Mr. Rochefort asked his nephew, Mr. Fontaine, to become a co-signor, which entailed Mr. Fontaine becoming a joint tenant on title with Mr. Rochefort. Mr. Rochefort applied for the GST/HST New Housing Rebate, and a rebate of \$27,277.29 was credited to the developer, DCR Phoenix Development Corporation Limited ("DCR"). The Minister of National Revenue (the "Minister") assessed Mr. Rochefort denying the rebate on the basis the requirement in subparagraph 254(2)(e) of the *Excise Tax Act* (the "Act") had not been met.

Facts

[2] Mr. and Mrs. Rochefort, shortly after their marriage, decided to buy a new home. They considered several developers but ultimately settled on DCR. Mr. Rochefort had also gone to the National Bank of Canada to obtain mortgage pre-approval. He and Mrs. Rochefort signed an Agreement of Purchase and Sale with DCR on March 8, 2010 to build a new home at 1928 Pennyroyal Crescent, Orleans, Ontario, and together they made the \$5,000 deposit. They also made the subsequent requisite deposits. Together they agreed on certain amendments to the Agreement of

Purchase and Sale over the next few months. Mr. Rochefort put his current home on the market, but it did not sell.

[3] Shortly before the closing of the purchase and sale in November 2010, Mr. Rochefort was advised by the National Bank of Canada that, due to his failure to sell his current property, and given his wife's poor credit rating at that time, they no longer qualified for a mortgage. After consulting with their lawyer and being advised they would have to forfeit over \$20,000 in deposits and may be liable for damages the Rocheforts decided they could not abandon the deal. They had their mortgage broker find another lender. TD Canada Trust were prepared to lend the money but required what Mr. Rochefort referred to as a "co-signor". Mr. Rochefort therefore approached his nephew, Mr. Fontaine, to serve in this capacity.

[4] Mr. Fontaine testified that he was prepared to help his uncle out by signing whatever was necessary. It was evident from Mr. Fontaine's testimony that he was not entirely clear on exactly what the lawyer had him sign, though acknowledged his signature on the TD Canada Trust Commitment for a Fixed Rate Mortgage form, signed November 3, 2010, the day before closing – the day before Mr. and Mrs. Rocherfort moved into their new home. Mr. Fontaine also signed a Direction re: Title, as did Mr. and Mrs. Rochefort, authorizing the lawyers to "engross the deed on transfer" to Mr. Rochefort and Mr. Fontaine as joint tenants, also signed on November 3, 2010. Title was transferred to Mr. Rochefort and Mr. Fontaine as joint tenants and the TD Canada Trust mortgage was registered on title on November 4, 2010. Mr. Rochefort got the keys on November 4, 2010 and he and Mrs. Rochefort moved into their new home and have been living there ever since as their primary residence. Mr. Rochefort has still been unable to sell his former home and continues to rent it.

[5] Mr. Fontaine testified that he never paid any part of the mortgage, or any of the property bills. He and Mr. Rochefort were clear that if the property ever sold Mr. Fontaine was entitled to nothing, "not a dime", as Mr. Rochefort put it. This was clearly not an investment for Mr. Fontaine but a family favour to help the Rocheforts acquire their new home. As Mrs. Rochefort indicated, Mr. Fontaine simply came in to help them out at the last minute.

[6] Although Mr. Rochefort could not specifically recall signing the new housing rebate, he did so sometime in 2010, and DCR was credited with the \$27,278. The Respondent has assessed Mr. Rochefort on the basis he is not entitled to the rebate.

Issue

[7] Is Mr. Rochefort entitled to the GST/HST new housing rebate pursuant to subsection 254(2) of the *Act*?

Analysis

[8] The new housing rebate is found in subsection 254(2) of the *Act* which reads:

254(2) Where

- (a) a builder of a single unit residential complex or a residential condominium unit makes a taxable supply by way of sale of the complex or unit to a particular individual,
- (b) at the time the particular individual becomes liable or assumes liability under an agreement of purchase and sale of the complex or unit entered into between the builder and the particular individual, the particular individual is acquiring the complex or unit for use as the primary place of residence of the particular individual or a relation of the particular individual,
- (c) the total (in this subsection referred to as the “total consideration”) of all amounts, each of which is the consideration payable for the supply to the particular individual of the complex or unit or for any other taxable supply to the particular individual of an interest in the complex or unit, is less than \$450,000,
- (d) the particular individual has paid all of the tax under Division II payable in respect of the supply of the complex or unit and in respect of any other supply to the individual of an interest in the complex or unit (the total of which tax under subsection 165(1) is referred to in this subsection as the “total tax paid by the particular individual”),
- (e) ownership of the complex or unit is transferred to the particular individual after the construction or substantial renovation thereof is substantially completed,
- (f) after the construction or substantial renovation is substantially completed and before possession of the complex or unit is given to the particular individual under the agreement of purchase and sale of the complex or unit

- (i) in the case of a single unit residential complex, the complex was not occupied by any individual as a place of residence or lodging, and
 - (ii) in the case of a residential condominium unit, the unit was not occupied by an individual as a place of residence or lodging unless, throughout the time the complex or unit was so occupied, it was occupied as a place of residence by an individual, or a relation of an individual, who was at the time of that occupancy a purchaser of the unit under an agreement of purchase and sale of the unit, and
- (g) either
- (i) the first individual to occupy the complex or unit as a place of residence at any time after substantial completion of the construction or renovation is
 - (A) in the case of a single unit residential complex, the particular individual or a relation of the particular individual, and
 - (B) in the case of a residential condominium unit, an individual, or a relation of an individual, who was at that time a purchaser of the unit under an agreement of purchase and sale of the unit, or
 - (ii) the particular individual makes an exempt supply by way of sale of the complex or unit and ownership thereof is transferred to the recipient of the supply before the complex or unit is occupied by any individual as a place of residence or lodging,

the Minister shall, subject to subsection (3), pay a rebate to the particular individual equal to

- (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

$$A \times [(\$450,000 - B)/\$100,000]$$

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.

[9] Section 133 of the *Act* describes a taxable supply for these purposes as follows:

133. For the purposes of this Part, where an agreement is entered into to provide property or a service,
- (a) the entering into of the agreement shall be deemed to be a supply of the property or service made at the time the agreement is entered into; and
 - (b) the provision, if any, of property or a service under the agreement shall be deemed to be part of the supply referred to in paragraph (a) and not a separate supply.

[10] Section 254 of the *Act* refers to a "particular individual". Where there is more than one purchaser, subsection 262(3) of the *Act* makes it clear that the particular individual refers to both. That provision reads:

262(3) If

- (a) a supply of a residential complex or a share of the capital stock of a cooperative housing corporation is made to two or more individuals, or
- (b) two or more individuals construct or substantially renovate, or engage another person to construct or substantially renovate, a residential complex,

the references in sections 254 to 256 to a particular individual shall be read as references to all of those individuals as a group, but only one of those individuals may apply for the rebate under section 254, 254.1, 255 or 256, as the case may be, in respect of the complex or share.

[11] It is clear that the taxable supply was made to Mr. and Mrs. Rochefort: they signed the Agreement of Purchase and Sale, and they put down the deposit. Mr. Fontaine did not. No supply, for purposes of the *Act*, was made to Mr. Fontaine.

[12] How then does this legislation apply to Mr. and Mrs. Rochefort? Subparagraph 254(2)(e) of the *Act* requires that "ownership" is transferred to the particular individual, in this case to Mr. & Mrs. Rochefort. The Respondent's argument is simply that ownership was not transferred to Mr. and Mrs. Rochefort but to Mr. Rochefort and Mr. Fontaine and therefore this requirement has not been met. Respondent's counsel referred me to the cases of *Davidson v R*¹ and *Goyer v R*² as dispositive of the matter. With respect, I disagree. In *Davidson*, Justice McArthur found that an individual, Ms. Waterhouse, who became a joint tenant with Mr. Davidson but solely to financially help Mr. Davidson, who occupied the new home, was a particular individual along with Mr. Davidson, as she had signed the Agreement of Purchase and Sale. As such, she had to meet the subsection 254(2) of the *Act* requirements, which she did not. In the case before me, Mr. Fontaine was not a particular individual: the situation is simply different.

[13] The Respondent also referred me to the more recent case of *Goyer*, but again this confirms the same principle as set out in *Davidson*: that is, where a taxable supply is made to a "particular individual", if the particular individual is a group, all members of the group must meet the requirements of subsection 254(2) of the *Act*.

[14] In the case before me, Mr. and Mrs. Rochefort are the "particular individuals". Clearly, Mr. Rochefort meets all the subsection 254(2) of the *Act* requirements. The question is - did Mrs. Rochefort; more specifically, did Mrs. Rochefort have any ownership transferred to her as required by subparagraph 254(2)(e) of the *Act*.

[15] Respondent's counsel argued that "ownership" means title to the property. She referred me to Justice Bell's decision in *277287 Alberta Ltd. v R*³ where he canvassed the meaning of "ownership" in the context of section 336 of the *Act*. He relied on provincial laws, in that case the *Land Titles Act*⁴ of Alberta, to assist in defining

¹ 2002 CarswellNat 479, [2002] G.S.T.C. 25.

² 2010 TCC 511.

³ 1997 CarswellNat 750, [1997] G.S.T.C. 44.

⁴ RSA 2000, c L-4.

ownership to include beneficial ownership. Respondent's counsel pointed out that Ontario's *Land Titles Act*⁵ defines "owner" as an owner in fee simple. She suggests that should be the definition for purposes of the *Act*. I do not agree that is an end to it.

[16] I refer back to 277287 *Alberta Ltd.* where Justice Bell stated:

11. ... It would have been an easy task for the persons preparing this legislation to have used clear language had they sought to confine the meaning of "ownership" to legal title.

[17] Transfer of ownership, as required by the *Act*, cannot include beneficial ownership in Alberta but not beneficial ownership in Ontario. Interpretation of "ownership" for purposes of the *Act*, and specifically subsection 254(2) of the *Act* should be consistent. I agree with Justice Bell that if the legislators had intended ownership to mean title they could have said so, and not left it to differing provincial laws to complete the meaning. No, "ownership" for purposes of a GST/HST New Housing Rebate must be explored in a textual, contextual and purposive manner for a fuller meaning than simply title.

[18] Textually, as already indicated, I do not read "ownership" as equating to legal title. Black's Law Dictionary provides a more fulsome definition:

A collection of rights allowing one to use and enjoy property, including the right to convey it to others: ownership implies the right to possess a thing regardless of any actual or constructive control.

[19] Contextually, subsection 254(2) of the *Act* must be read in conjunction with section 133 of the *Act*. That provision establishes the fact of, and timing of, a taxable supply. Subparagraph 254(2)(e) of the *Act* presupposes there has been a taxable supply and now something different needs to happen to satisfy the requirement, a transfer of ownership. So, neither entering an Agreement of Purchase and Sale nor receiving title to a property is sufficient on its own to constitute ownership for the purpose of subparagraph 254(2)(e). Context confirms that ownership should be viewed more expansively, which leads to a purposive look.

[20] Who is subsection 254(2) of the *Act* intended to benefit? Clearly, a buyer of a new house who intends to live in the property. I read subparagraph 254(2)(e) of the *Act* as mainly a timing condition – ownership takes place after substantial

⁵ R.S.O. 1990, c. L.5.

completion. In the Government release, "Rebate for Builder Built Unit (land purchase)", in July 1998, as amended in 2002 and 2005, the Government in paragraph 6 of that publication stated:

6. Rebate for individuals – An individual qualifies under section 254 of the *Act* for a rebate of part of the GST/HST paid on a unit if all of the following conditions are met...

...

- (f) Occupancy timing – No one occupies the unit as a place of residence of lodging between the time construction or substantial renovation is substantially completed and the time possession is transferred to the individual.

It appears the Government recognizes the emphasis in subparagraph 254(2)(e) of the *Act* is on the timing.

[21] From a policy perspective, the Rocheforts are clearly who the rebate is meant to benefit, as they are the buyers of the property, the ones liable for the GST, and they took possession of the property after substantial completion to reside in it as their primary residence.

[22] The matter really boils down to whether Mrs. Rochefort acquired sufficient rights to constitute ownership and therefore Mr. Rochefort met the conditions set forth in subparagraph 254(2)(e) of the *Act*. Mrs. Rochefort signed an agreement to become the owner, she provided deposit monies to become the owner, she acted as owner in making decisions amending the Purchase and Sale Agreement, she was liable for the GST, she took possession of the property with her husband and in every way she behaved as an owner by using and enjoying the property. As for whether she held any right to convey the property, there are a couple of possible avenues where she may have obtained such a right. First, as a beneficial owner of the property, and, second, as a spouse living in the matrimonial home.

[23] What evidence is there of a beneficial ownership by Mrs. Rochefort in the property? Did Mr. Fontaine hold legal ownership in the property in trust for Mrs. Rochefort? To say the arrangement between the Rocheforts and Mr. Fontaine was loose is mildly understating the situation. What is the evidence?

- a) Mr. Fontaine had no intention of having to pay anything with respect to the property either by way of purchase price or ongoing expenses;

- b) Mr. Fontaine and the Rocheforts believed Mr. Fontaine had no right to any gain from the property;
- c) Mr. Fontaine did not appreciate he was going on title as an owner; he was simply doing the Rocheforts a favour;
- d) the Rocheforts and Mr. Fontaine considered that the property was the Rocheforts; and
- e) Mr. Rochefort believed he could at any time require Mr. Fontaine to transfer title to the Rocheforts.

[24] I conclude that in these circumstances, Mr. Fontaine agreed to hold title solely for the benefit of the Rocheforts, and, as a trustee of the property, was required to convey title to the Rocheforts on demand, or to any third party at their request. That, I find, was the deal and satisfies me Mrs. Rochefort was a beneficial owner.

[25] From a family law perspective, I note that section 21 of the *Family Law Act* of Ontario provides that a spouse cannot dispose of an interest in the matrimonial home unless the other spouse consents to the transaction. This indicates some right with respect to any conveyance of the house.

[26] Taking an expansive view of ownership, not limited to legal title, bundling Mrs. Rochefort's rights together as sufficient to constitute ownership, considering the purpose of subsection 254(2) of the *Act* would be met if the rebate was granted, and distinguishing this case from those where the supportive third party funder is considered a "particular individual", I conclude that Mr. Rochefort is entitled to the new housing rebate in accordance with the requirements in subsection 254(2) of the *Act*. The Appeal is allowed and referred back to the Minister for reassessment in accordance with these Reasons.

Signed at Ottawa, Canada, this 31st day of January 2014.

"Campbell J. Miller"

C. Miller J.

CITATION: 2014 TCC 34

COURT FILE NO.: 2013-2981(GST)I

STYLE OF CAUSE: PETERSON ROCHEFORT AND HER
MAJESTY THE QUEEN

PLACE OF HEARING: Ottawa, Ontario

DATE OF HEARING: January 24, 2014

REASONS FOR JUDGMENT BY: The Honourable Justice Campbell J. Miller

DATE OF JUDGMENT: January 31, 2014

APPEARANCES:

For the Appellant:	The Appellant himself
Counsel for the Respondent:	Tamara Watters

COUNSEL OF RECORD:

For the Appellant:

Name:	n/a
Firm:	

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