Docket: 2014-2020(GST)I

BETWEEN:

FAISAL MALIK,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

Appeal heard on March 25, 2015, at Toronto, Ontario.

Before: The Honourable Justice David E. Graham

Appearances:

Agent for the Appellant:	Stephen Ji Amy Sujae Lee
Counsel for the Respondent:	Adam Gotfried

JUDGMENT

The Appeal from the Notice of Assessment dated October 4, 2012, made under Part IX of the *Excise Tax Act* in respect of the GST/HST New Housing Rebate is dismissed, without costs.

Signed at Ottawa, Canada, this 15th day of April 2015.

"David E. Graham"

Graham J.

Citation: 2015 TCC 83
Date: 20150415
Docket: 2014-2020(GST)I

BETWEEN:

FAISAL MALIK,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

REASONS FOR JUDGMENT

Graham J.

[1] Faisal Malik signed a contract of purchase and sale (the "Purchase Agreement") to purchase a house located in Ajax, Ontario. Prior to closing his wife's uncle, Ziauddin Sheikh, was made a party to the Purchase Agreement because Mr. Malik was having difficulty obtaining financing. At closing, only Mr. Sheikh took title to the house. Mr. Malik and his family moved into the house. Mr. Sheikh did not reside in the house. Mr. Malik claimed a GST/HST New Housing Rebate in respect of the purchase of the house. The Minister of National Revenue denied Mr. Malik's claim. Mr. Malik has appealed that denial.

Legislative Background

[2] The legislation regarding New Housing Rebates is set out in subsection 254(2) of the *Excise Tax Act*. That subsection contains a number of tests that must be met. The tests that are relevant to this Appeal are found in paragraphs 254(2)(*a*), (*b*) and (*e*). Those paragraphs provide that a rebate is payable where:

> (a) a builder of a single unit residential complex … makes a taxable supply by way of sale of the complex … 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 … entered into between the builder and the particular individual, the particular individual is acquiring the

> complex … for use as the primary place of residence of the particular individual or a relation of the particular individual,
>
> …
>
> (e) ownership of the complex … is transferred to the particular individual after the construction or substantial renovation thereof is substantially completed,

[3] Subsection 262(3) states that if the supply of the residential complex is made to more than one individual, then all of the individuals to whom the supply is made must meet the tests in subsection 254(2).

Issues

[4] There are three issues in this Appeal:

(a) To whom was the supply of the house made? If the supply was made only to Mr. Malik, then I can skip to the third issue. If the supply was made to Mr. Sheikh or to both Mr. Malik and Mr. Sheikh, then I will have to consider the second issue.

(b) Does section 134 deem any supply of the house made to Mr. Sheikh not to have occurred? If the answer is "yes", then I will have to consider the third issue. If the answer is "no", then the appeal will be dismissed. This is because Mr. Sheikh never intended to reside in the house and thus cannot satisfy the test in paragraph 254(2)(*b*).

(c) Was "ownership" of the house transferred to Mr. Malik? If the supply of the house was made or deemed to have been made only to Mr. Malik and "ownership" of the house was transferred to Mr. Malik, then the appeal will be allowed. If not, then the appeal will be dismissed as Mr. Malik will have failed to meet the test in paragraph 254(2)(*e*).

To Whom Was the Supply of the House Made?

[5] On March 5, 2010, Mr. Malik entered into a contract of purchase and sale to purchase a house from a developer (the "Developer"). He made an initial deposit but was unable to make the subsequent deposits when they were due. As a result of these late deposits, the Developer told Mr. Malik that, if he did not provide proof that he could obtain financing to close the purchase, the Developer would consider

him to be in default. Remarkably, it was only at this point that Mr. Malik began looking into financing.

[6] Mr. Malik and his wife had made poor financial choices in 2005 that resulted in each of them declaring personal bankruptcy in 2006. Not surprisingly, Mr. Malik soon learned that this credit history made it impossible for him to obtain conventional bank financing. No conventional lender would lend money to him alone nor would they lend money against the property if he were going to be on title. To further complicate matters, the Developer would allow someone else to be added to the Purchase Agreement but would not allow Mr. Malik to be removed.

[7] Mr. Malik sought help from his family members. He was unable to obtain any assistance from his own family. As a result, he reluctantly turned to his wife's family. His wife's uncle, Mr. Sheikh, agreed to help.

[8] Mr. Malik and Mr. Sheikh agreed that Mr. Sheikh would finance the closing using a mortgage in his name alone and would secure that mortgage by taking sole title to the house at closing. Mr. Malik, his wife and their two children would live in the house. Mr. Sheikh was able to convince his bank to overlook the fact that Mr. Malik was a party to the Purchase Agreement so long as Mr. Malik was not on title to the property.

[9] Because of the Developer's concerns about Mr. Malik's ability to close, the Developer insisted that Mr. Sheikh be added to the Purchase Agreement. On January 20, 2011, Mr. Malik, Mr. Sheikh and the Developer entered into an Assignment of Agreement of Purchase and Sale (the "Assignment Agreement"). Pursuant to that agreement, Mr. Malik assigned all of his rights under the Purchase Agreement to Mr. Sheikh and himself and Mr. Malik and Mr. Sheikh jointly assumed all of Mr. Malik's obligations under the Purchase Agreement. The Developer's role under the Assignment Agreement was essentially limited to consenting to the assignment and confirming that if the transaction collapsed the Developer would return the deposits to Mr. Sheikh and Mr. Malik jointly.

[10] The purchase of the house closed in early May 2011[1]. As had been arranged, title to the house was registered in Mr. Sheikh's name and Mr. Malik and his family moved into the house.

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[1] I do not have evidence of the actual closing date. The Minister made an assumption of fact that possession occurred on May 6, 2011. That assumption was not challenged by

[11] The Respondent submits that, when Mr. Sheikh was added as a party to the Purchase Agreement, he became one of the individuals to whom the Developer made the supply of the house. The Respondent argues that when Mr. Sheikh entered into the Assignment Agreement he became liable, along with Mr. Malik, to pay the purchase price to the Developer on closing. Pursuant to subsection 123(1), the "recipient" of a supply is the person who is liable to pay for the supply.

[12] The Respondent relies on the informal procedure decisions in *Davidson v. The Queen*[2] and *Ho v. The Queen*[3]. In both of those decisions a third party who was added to the agreement of purchase and sale for the purpose of assisting the taxpayer in obtaining financing was, nonetheless, held to have received a supply of the property from the Developer. I cannot see anything in the facts of those cases that would distinguish them from Mr. Malik's case.

[13] Mr. Malik relies on the informal procedure decision in *Rochefort v. The Queen*[4]. That case involved a third party who was added to the legal title to a property and the related mortgage in order to help the taxpayer obtain financing. Justice Campbell Miller held that the taxpayer was entitled to the new housing rebate. While that decision clearly supports Mr. Malik's position on the second issue in this Appeal, it does not support his position on the first issue. Justice Miller noted that section 133 states that when a taxpayer enters into an agreement to provide a property, the entering into of the agreement is deemed to be the supply. Since the third party in *Rochefort* never became a party to the agreement of purchase and sale, Justice Miller concluded that the supply was made to the taxpayer. By contrast, in Mr. Malik's case, Mr. Sheikh clearly became a party to the Purchase Agreement.

[14] Based on the foregoing, I conclude that the supply of the house was made to both Mr. Malik and Mr. Sheikh. It is therefore necessary for me to consider the second issue.

Does section 134 deem the supply of the house to Mr. Sheikh not to have occurred?

Mr. Malik. I infer from this that closing must have occurred sometime on or shortly before May 6, 2011.

2 2002 CarswellNat 479.

3 2015 TCC 10.

4 2014 TCC 34.

[15] The relevant portion of section 134 reads:

> … where, under an agreement entered into in respect of a debt or obligation, a person transfers property or an interest in property for the purpose of securing payment of the debt or performance of the obligation, the transfer shall be deemed not to be a supply …

[16] There are four elements that must be present for section 134 to apply:

(i) parties must enter into an agreement;

(ii) that agreement must be in respect of a debt or obligation;

(iii) under that agreement a person must transfer property or an interest in property; and

(iv) the purpose of transferring that property or interest in property must be to secure the payment of the debt or the performance of the obligation.

[17] If these four elements are present, then the transfer of the property is deemed not to have been a supply.

[18] Mr. Malik submits that the Developer, in entering into the Assignment Agreement with Mr. Sheikh, was transferring an interest in property for the purpose of securing performance of Mr. Malik's obligations under the Purchase Agreement and therefore that section 134 applies to deem the transfer of the house from the Developer to Mr. Sheikh not to have occurred.

[19] I do not agree with this conclusion. I will discuss each of the four elements of the test individually.

(a) Agreement: I accept that the Developer and Mr. Sheikh entered into the Assignment Agreement.

(b) In respect of an obligation: The phrase "in respect of" has a very broad scope. I accept that the Assignment Agreement was an agreement in respect of Mr. Malik's obligations under the Purchase Agreement as it caused Mr. Malik and Mr. Sheikh to assume those obligations from Mr. Malik.

(c) Transfer of property or an interest in property under that agreement: The heart of section 134 lies in the third element of the test. If a taxpayer wants section 134 to deem a specific transfer not to be a supply, that specific transfer must be the transfer described in the third element of the test. In Mr. Malik's case, he wants the transfer of the house from the Developer to Mr. Sheikh to be deemed not to be a supply. Therefore, the transfer of the house from the Developer to Mr. Sheikh must be covered by the third element of the test. The third element refers to the transfer occurring under the agreement set out in the first element of the test. The agreement that Mr. Malik says satisfies the first element of the test is the Assignment Agreement. Therefore, to meet the third element of the test, the transfer of the house from the Developer to Mr. Sheikh must have occurred under the Assignment Agreement. Unfortunately for Mr. Malik, the Assignment Agreement transferred Mr. Malik's right to acquire the house, not the house itself, and it transferred that right from Mr. Malik to himself and Mr. Sheik, not from the Developer to Mr. Sheikh. The transfer of the house from the Developer to Mr. Sheikh occurred under the Purchase Agreement. Therefore Mr. Malik cannot satisfy the third element of the test. Mr. Malik argued that the transfer that satisfied the third element of the test was a purported transfer under the Assignment Agreement of rights under the Purchase Agreement. This argument cannot succeed for two reasons:

(i) First, for section 134 to offer Mr. Malik any relief, the section must apply to the transfer of the house, not the transfer of rights under the Purchase Agreement. Mr. Malik has been denied the new housing rebate because Mr. Sheikh was a recipient of the supply of the house, not because Mr. Sheikh was the recipient of a supply of rights under the Purchase Agreement. I acknowledge that section 133 deems a supply to have occurred when Mr. Sheikh became a party to the Purchase Agreement. However, section 133 makes it clear that the supply that is deemed to have been made is a supply of the property in question, not a supply of the rights under the agreement[5].

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[5] Section 133 states "… where an agreement is entered into to provide property…, (a) the entering into of the agreement shall be deemed to be a supply of the property … made at the time the agreement is entered into; …" [emphasis added]

(ii) Second, it was Mr. Malik, not the Developer, who transferred his rights under the Purchase Agreement to Mr. Sheikh. The Developer merely consented to the transfer. Mr. Malik had the right to cause the Developer to sell the house to him for a certain sum. The Developer had the right to cause Mr. Malik to buy the house for a certain sum. What Mr. Sheikh ended up with was the right to cause the Developer to sell the house to him for a certain sum. He could only have acquired that right from Mr. Malik.

(d) To secure performance of the obligation: Having concluded that the third element of the test has not been satisfied, there is no need for me to consider this fourth element. However, given the number of these cases that have been coming before the Court, I think that it is worthwhile to provide some additional comments. For Mr. Malik to succeed, he had to show that the Developer transferred the house to Mr. Sheikh under an agreement for the purpose of *securing* Mr. Malik's obligations under the Purchase Agreement. I fail to see how the transfer of the house from the Developer to Mr. Sheikh could ever be said to have been done for the purpose of *securing* performance of Mr. Malik's obligation to buy the house. The Developer transferred the house to Mr. Sheikh because Mr. Sheikh paid for the house pursuant to his obligation to do so under the Purchase Agreement. Even if I were to conclude that the Developer merely transferred legal title to Mr. Sheikh in order to allow Mr. Sheikh to lend money to Mr. Malik so that Mr. Malik could purchase the house in satisfaction of his obligation to do so, I still fail to see how that transfer of legal title could be said to have been done to *secure* Mr. Malik's obligation to purchase the house. It could be said to have been done to facilitate the fulfilment of that obligation, yes, but not to *secure* it. The two things happened at the same time. Payment was made in exchange for title. At the moment that the Developer transferred title it had received payment and thus there was no obligation left to secure. The fact that Mr. Malik may have arranged to have title to the house registered in Mr. Sheikh's name in order to secure Mr. Malik's obligation to Mr. Sheikh to pay the mortgage has nothing to do with the Developer. The security in that case was flowing from Mr. Malik to Mr. Sheikh.

[20] In summary, Mr. Malik has not demonstrated how section 134 would deem the supply of the house from the Developer to Mr. Sheikh not to be a taxable supply. I therefore find that the Developer made the supply of the house to both Mr. Malik and Mr. Sheikh. Therefore, since Mr. Sheikh did not intend to reside in the house, Mr. Malik is not entitled to a new housing rebate.

Was "Ownership" of the House Transferred to Mr. Malik?

[21] The word "ownership" in paragraph 254(2)(*e*) means beneficial ownership rather than legal title (*Rochefort*). The Respondent submits that beneficial ownership of the house was not transferred to Mr. Malik. Mr. Malik submits that he was the beneficial owner of the property.

[22] Having already found for the Respondent, it is unnecessary for me to consider this third issue. However, since it is possible that Mr. Malik may appeal my decision, I feel that I should at least comment on a number of relevant questions of fact.

[23] Mr. Malik testified that he paid the deposits on the house (albeit in part with funds borrowed from family members other than Mr. Sheikh), lived in the house, paid the mortgage, paid the expenses associated with the house, determined when to sell the house and kept the profit from the sale. I found Mr. Malik to be a credible witness.

[24] The only assumptions of fact that the Minister made on this issue favour Mr. Malik. The Minister assumed that Mr. Malik paid the purchase price of the house[6] and took possession of the house[7]. The Minister made no assumptions of fact regarding the payment of the mortgage, the payment of expenses, the choice to sell the house or the distribution of the proceeds of sale when the house was sold.

[25] The Respondent asks me to draw an adverse inference from Mr. Malik's failure to call Mr. Sheikh as a witness. The Respondent also argues that I should not accept Mr. Malik's testimony because he failed to provide supporting documentation showing the mortgage repayments and the distribution of the proceeds of sale. I am unwilling to do either of these things. The Respondent's argument on paragraph 254(2)(*e*) was not explicitly raised in the Reply and is not supported by the Minister's assumptions of fact. Mr. Malik cannot be expected to

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6 Reply, paragraph 8(b).

7 Reply, paragraph 8(d).

bring evidence or call witnesses to defend against an unanticipated argument. While it would have been useful to hear evidence from Mr. Sheikh, I am not prepared to draw an adverse inference from the failure to call him.

Conclusion

[26] Based on all of the foregoing, the Appeal is dismissed.

Signed at Ottawa, Canada, this 15th day of April 2015.

"David E. Graham"

Graham J.

CITATION:	2015 TCC 83
COURT FILE NO.:	2014-2020(GST)I
STYLE OF CAUSE:	FAISAL MALIK AND HER MAJESTY THE QUEEN
PLACE OF HEARING:	Toronto, Ontario
DATE OF HEARING:	March 25, 2015
REASONS FOR JUDGMENT BY:	The Honourable Justice David E. Graham
DATE OF JUDGMENT:	April 15, 2015

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