Federal Court of Appeal Cour d'appel fédérale

Date: 20180227

Docket: A-447-16

Citation: 2018 FCA 45

CORAM: **NADON J.A.**
STRATAS J.A.
WEBB J.A.

BETWEEN:

HER MAJESTY THE QUEEN

Appellant

and

MOHAMMAD N. CHEEMA

Respondent

Heard at Toronto, Ontario, on September 20, 2017.

Judgment delivered at Ottawa, Ontario, on February 27, 2018.

REASONS FOR JUDGMENT BY: STRATAS J.A.

CONCURRED IN BY: NADON J.A.

DISSENTING REASONS BY: WEBB J.A.

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REASONS FOR JUDGMENT

WEBB J.A. (Dissenting reasons)

[1] This appeal relates to the conditions that must be satisfied in order to obtain the new housing rebate under the *Excise Tax Act*, R.S.C. 1985, c. E-15 (ETA) and the *New Harmonized Value-added Tax System Regulations, No. 2*, SOR/2010-151 (the Regulations). In particular, the issue is whether a person who signs an agreement of purchase and sale for a single unit residential complex solely for the purpose of assisting another person in obtaining the mortgage

that will be required to purchase that complex and who does not acquire a beneficial interest in that complex, must satisfy the occupancy requirements of subsection 254(2) of the ETA.

[2] The Minister of National Revenue reassessed Mr. Cheema to deny him the new housing rebate on the basis that Dr. Akbari, who is not related to Mr. Cheema and who signed the agreement of purchase and sale, did not intend to occupy the residential complex. The Tax Court determined (2016 TCC 251) that, in this case, Mr. Cheema qualified for the rebate and allowed Mr. Cheema's appeal from that reassessment. For the reasons that follow, I would dismiss this appeal.

I. Background

[3] On March 26, 2012, Mr. Cheema and his friend, Dr. Akbari, signed an agreement of purchase and sale that was accepted by Mosaik Pinewest Inc., the builder, on the following day. The agreement provided for the construction of a house, identified by the name of the particular model, on a specified lot in Vaughan, Ontario. The civic address had not yet been assigned. Therefore, it is a logical inference that when the agreement of purchase and sale was signed the house did not exist. The purchase price for the house was in excess of $800,000.

[4] The house was for Mr. Cheema and his family. Dr. Akbari signed the agreement of purchase and sale to assist Mr. Cheema in obtaining mortgage financing. The Tax Court Judge accepted the testimony of Mr. Cheema that from the beginning it was understood that Dr. Akbari would not have any real interest in the property (paragraph 8 of his reasons). He also accepted the testimony of Dr. Akbari that he did not pay any part of the purchase price for the house nor

did he pay for any of the ongoing expenses related to the house. Mr. Cheema paid all of the amounts related to the purchase and ongoing maintenance of the house (paragraph 9 of his reasons). It is also clear that Dr. Akbari never intended to occupy the house as his primary residence.

[5] At the closing of the purchase and sale of the house on July 26, 2013, Mr. Cheema and his spouse acquired a 99% interest in the house and Dr. Akbari acquired a 1% interest. On the same day, Dr. Akbari signed a trust declaration acknowledging that he was holding this 1% interest in trust for Mr. Cheema and his spouse.

[6] This trust declaration was not provided to the mortgage lender and the Tax Court Judge found that it was probably not provided to the builder.

[7] Dr. Akbari later transferred his 1% interest to Mr. Cheema's son, who had been approved by the mortgagee (paragraph 16 of the reasons of the Tax Court Judge).

[8] Mr. Cheema and his spouse moved into the house as their primary place of residence immediately following the closing on July 26, 2013.

II. Relevant Statutory Provisions

[9] The new housing rebate for Ontario is payable under section 256.21 of the ETA and the Regulations. Subsections 41(1) and (2) of the Regulations provide that:

41(1) In this section, relation and single unit residential complex have the same meanings as in subsection 254(1) of the Act.	**41**(1) Au présent article, immeuble d’habitation à logement unique et proche s’entendent au sens du paragraphe 254(1) de la Loi.
(2) If an individual is entitled to claim a rebate under subsection 254(2) of the Act in respect of a residential complex that is a single unit residential complex, or a residential condominium unit, acquired for use in Ontario as the primary place of residence of the individual or of a relation of the individual, or the individual would be so entitled if the total consideration (within the meaning of paragraph 254(2)(*c*) of the Act) in respect of the complex were less than $450,000, for the purposes of subsection 256.21(1) of the Act, the individual is a prescribed person and the amount of a rebate in respect of the complex under that subsection is equal to the lesser of $24,000 and the amount determined by the formula	(2) Dans le cas où un particulier a droit au remboursement prévu au paragraphe 254(2) de la Loi au titre d’un immeuble d’habitation qui est un immeuble d’habitation à logement unique ou un logement en copropriété acquis en vue de servir en Ontario de résidence habituelle du particulier ou de son proche ou aurait droit à ce remboursement si la contrepartie totale, au sens de l’alinéa 254(2)c) de la Loi, relative à l’immeuble était inférieure à 450 000 $, pour l’application du paragraphe 256.21(1) de la Loi, le particulier est une personne visée et le montant du remboursement versé au titre de l’immeuble selon ce paragraphe est égal au montant obtenu par la formule suivante, jusqu’à concurrence de 24 000 $:
$A \times B$	$A \times B$
Where	où :
A is 75%; and	A représente 75 %;
B is the total of all tax under subsection 165(2) of the Act paid in respect of the supply of the complex to the individual or in respect of any other supply to the individual of an interest in the complex.	B le total de la taxe payée en vertu du paragraphe 165(2) de la Loi relativement à la fourniture de l’immeuble au profit du particulier ou relativement à toute autre fourniture, effectuée au profit de celui-ci, d’un droit sur l’immeuble.

[10] In essence, the Regulations provide for a rebate of a portion of the tax paid under subsection 165(2) of the ETA. The conditions that must be satisfied to qualify for this rebate are

the same conditions that are applicable for determining when a new housing rebate will be payable under subsection 254(2) of the ETA, except that, for a residential complex in Ontario, the rebate, capped at $24,000, will be payable regardless of the cost of the house.

[11] The general conditions for a new housing rebate (other than the conditions related to the consideration for the residential complex and the calculation of the rebate) are set out in subsection 254(2) of the ETA:

(2) Where	(2) Le ministre verse un remboursement à un particulier dans le cas où, à la fois :
(*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,	*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*) 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,	*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;
[…]	[…]
(*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	*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

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

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 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*) either	*g*) selon le cas :
(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	(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) in the case of a single unit residential complex, the particular individual or a relation of the particular individual, and	(A) dans le cas de l'immeuble, le particulier ou son proche,
(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	(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) 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,	(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.
[…]	[…]

III. Decision of the Tax Court

[12] The Tax Court Judge noted that there are decisions of that Court that deny the new housing rebate when an unrelated person has signed the agreement of purchase and sale to assist

someone in obtaining financing to buy the house. However, in this case, he found that Dr. Akbari was a bare trustee (paragraph 55 of his reasons) and that he had "no interest *per se* in the Property itself" (paragraph 53 of his reasons). Therefore, even though Dr. Akbari had "assumed a certain risk by signing the Agreement of Purchase and Sale and the mortgage" (paragraph 50 of his reasons), Dr. Akbari was not a "particular individual" for the purposes of subsection 254(2) of the ETA and Mr. Cheema qualified for the new housing rebate.

IV. Standard of Review

[13] The standard of review for any question of law is correctness and for any finding of fact (or question of mixed fact and law without an extricable legal question) is palpable and overriding error (*Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235).

V. Analysis

[14] Under the ETA, tax is generally payable when a person acquires a new house. The ETA also provides that, subject to certain conditions, the purchaser of a new house is entitled to a rebate of a portion of the tax paid. The general rebate conditions in subsection 254(2) of the ETA provide for a rebate of a portion of the tax paid under subsection 165(1) of the ETA. This rebate will only be paid if the total consideration payable for the house (excluding any GST or HST – paragraph 154(2)(*a*) of the ETA) is less than $450,000. For a new house acquired in Ontario, the Regulations provide for a separate rebate of a portion of the tax paid under subsection 165(2) of the ETA. For this rebate there is no restriction on the amount of the consideration payable for the house but the rebate amount is limited to the lesser of $24,000 and 75% of the tax paid under

subsection 165(2) of the ETA (subsection 41(2) of the Regulations). The tax rate imposed under subsection 165(2) of the ETA for Ontario is 8% (Schedule VIII of the ETA). Therefore, the maximum rebate of $24,000 for Ontario in relation to tax paid under subsection 165(2) of the ETA is payable for houses that cost $400,000 or more.

[15] The Tax Court Judge referred to the statement of the Department of Finance in the *Goods and Services Tax: Explanatory Notes to Bill C-62 as passed by the House of Commons on April 10, 1990*, (May 1990) at p. 124 (Explanatory Notes) related to the new housing rebate under subsection 254(2) of the ETA. The Explanatory Notes stated that “[t]he rebate seeks to ensure that the GST does not pose a barrier to affordable housing by effectively lowering the tax rate on most newly-constructed homes to 4 1/2 per cent – a level roughly equivalent to the existing average rate of tax embodied in new house prices.” Since the rebate payable under the Regulations is in relation to the additional tax imposed on new housing when Ontario harmonized its sales tax with the GST, it would seem logical that the same purpose can be inferred for the rebate payable under the Regulations – to effectively lower the tax rate on newly-constructed homes to ensure that the HST does not impose a barrier to affordable housing.

[16] The Regulations, which provide the rebate for new homes in Ontario, incorporate the occupancy requirements contained in paragraphs 254(2)(*b*) and (*g*) of the ETA. Paragraph 254(2)(*b*) of the ETA provides that when a particular individual becomes liable under the agreement of purchase and sale made with the builder, that individual must be acquiring the residential complex as his or her primary place of residence or as the primary place of residence of a relation of that individual. Paragraph 254(2)(*g*) of the ETA provides that, subject to certain

exceptions, the particular individual (or a relation of that individual) must be the first person to occupy the residential complex as a place of residence after it is substantially completed.

[17] Because the particular individual is the person who must satisfy the occupancy requirements, it is critical to determine who, in any particular case, will be a particular individual. As noted by the Crown, if there is more than one particular individual, all of those individuals as a group will have to satisfy the occupancy requirements (subsection 262(3) of the ETA, section 40 of the Regulations).

[18] Paragraph 254(2)(*a*) of the ETA provides that the first condition that must be satisfied is that "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". Therefore, this paragraph essentially provides that a "particular individual" is an individual to whom "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".

[19] It was the position of the Crown at the hearing of the appeal that any individual who signs an agreement of purchase and sale (and as a result has a liability under that agreement) will be a "particular individual" and therefore, must satisfy the occupancy requirements of paragraphs 254(2)(*b*) and (*g*) of the ETA regardless of whether that individual acquires an interest in the residential complex. Therefore, an unrelated individual who signs an agreement of purchase and sale as a guarantor solely to assist another individual in acquiring a residential complex (and obtaining the necessary financing) would, in the Crown's view, have to satisfy the

occupancy requirements of subsection 254(2) of the ETA. The Crown submits that failing to do so would result in a denial of the new housing rebate to that other person.

[20] The net effect of the Crown's interpretation is that an individual, who has sufficient assets to be able to buy a new house without a mortgage or has sufficient income to obtain a mortgage without a co-signor, will qualify for the new housing rebate, assuming the other conditions are satisfied. However, an individual who is unable to afford a new house on their own and who needs a second unrelated person to guarantee the payment of the purchase price, will be denied the new housing rebate. This would appear to deny the new housing rebate to those who need it the most and would raise the question of whether this was the intent of Parliament.

[21] The issue in this appeal is the interpretation of "particular individual" for the purposes of subsection 254(2) of the ETA. The Supreme Court of Canada has set out the approach to be used in interpreting provisions such as the ones in issue in this appeal in *Canada Trustco Mortgage Co. v. The Queen*, 2005 SCC 54, [2005] 2 S.C.R. 601 at paragraph 10:

> 10 It has been long established as a matter of statutory interpretation that "the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament": see *65302 British Columbia Ltd. v. Canada*, [1999] 3 S.C.R. 804, at para. 50. The interpretation of a statutory provision must be made according to a textual, contextual and purposive analysis to find a meaning that is harmonious with the Act as a whole. When the words of a provision are precise and unequivocal, the ordinary meaning of the words play a dominant role in the interpretive process. On the other hand, where the words can support more than one reasonable meaning, the ordinary meaning of the words plays a lesser role. The relative effects of ordinary meaning, context and purpose on the interpretive process may vary, but in all cases the court must seek to read the provisions of an Act as a harmonious whole.

[22] Therefore, based on the text, context and purpose of subsection 254(2) of the ETA, the question is whether a person who signs an agreement of purchase and sale (and thereby becomes liable under that agreement) solely to assist another individual in obtaining financing and who does not acquire any beneficial interest in the residential complex is a "particular individual" for the purposes of subsection 254(2) of the ETA.

[23] As noted by the Tax Court Judge there have been a number of decisions of the Tax Court in which individuals were denied the new housing rebate because another unrelated person, who did not intend to occupy the house, had signed the agreement of purchase and sale (*Davidson v. The Queen,* 2001-985 (GST)I, [2002] G.S.T.C. 25; *Goyer v. The Queen*, 2010 TCC 511, [2010] G.S.T.C. 163; *Sharp v. the Queen*, 2014 TCC 323, [2014] G.S.T.C. 135; *Al-Hossain v. The Queen*, 2014 TCC 379, [2014] G.S.T.C. 157; *Henao v. The Queen*, 2015 TCC 81, [2015] G.S.T.C. 40 and *Malik v. The Queen*, 2015 TCC 83, [2015] G.S.T.C. 51). Generally, in these cases the second person signed the agreement to enable the first person to obtain the financing to purchase the house. All of these cases were decided under the Informal Procedure. None of these decisions provide any detailed consideration of the text, context and purpose of the relevant provisions and it is difficult to reconcile these decisions.

[24] However, in *Javaid v. The Queen*, 2015 TCC 94, [2015] G.S.T.C. 53, Justice Woods held that an agent who signed an agreement of purchase and sale but who backed out of the deal before the closing was not a "particular individual" for the purposes of subsection 254(2) of the ETA and therefore did not have to satisfy the occupancy requirements of this subsection.

A. *Paragraph 254(2)(b) of the ETA*

[25] As support for the position of the Crown that any person who signs an agreement of purchase and sale will be a "particular individual", the Crown, in her memorandum, appears to rely on paragraph 254(2)(*b*) of the ETA.

[26] However, the opening words of paragraph 254(2)(*b*) of the ETA are:

> 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, […]

This paragraph only applies if a person is a particular individual – it does not make a person a particular individual. Whether a person is a particular individual is to be determined based on the wording of paragraph 254(2)(*a*) of the ETA, which provides that a particular individual is an individual to whom a builder has made a taxable supply by way of sale of a residential complex.

[27] It could be argued that it is implicit in paragraph 254(2)(*b*) of the ETA that, in addition to the requirement of paragraph 254(2)(*a*) of the ETA (that the residential complex is sold to the person), a particular individual is one who also has entered into an agreement of purchase and sale for the residential complex. However, even if an individual can only be a particular individual if that individual has entered into the agreement of purchase and sale for the residential complex, it does not necessarily follow that each person who enters into that agreement will be a particular individual.

B. *Subsection 262(3) of the ETA and Section 40 of the Regulations*

[28] The Crown, in her memorandum, also referred to subsection 262(3) of the ETA as support for her position that each person who is liable under the agreement of purchase and sale must satisfy the occupancy conditions of paragraphs 254(2)(*b*) and (*g*) of the ETA.

[29] Subsection 262(3) of the ETA provides that:

> (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.

> (3) Lorsque la fourniture d'un immeuble d'habitation ou d'une part du capital social d'une coopérative d'habitation est effectuée au profit de plusieurs particuliers ou que plusieurs particuliers construisent ou font construire un immeuble d'habitation, ou y font ou font faire des rénovations majeures, la mention d'un particulier aux articles 254 à 256 vaut mention de l'ensemble de ces particuliers en tant que groupe. Toutefois, seulement l'un d'entre eux peut demander le remboursement en application des articles 254, 254.1, 255 ou 256 relativement à l'immeuble ou à la part.

[30] However, since Mr. Cheema was applying for a rebate under section 256.21 of the ETA and not subsection 254(2) of the ETA, as noted by Justice Woods in *Javaid*, the reference should have been to section 40 of the Regulations:

40 If 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 two or more individuals construct or substantially renovate, or engage another person to construct or substantially renovate, a residential complex, the references in sections 41, 43, 45 and 46 and the references in section 256.21 of the Act to an individual are to be read as references to all of those individuals as a group, but only one of those individuals may apply for a rebate under subsection 256.21(1) of the Act in respect of the complex or share, the amount of which is determined under section 41, 43, 45 or 46.	**40** Si la fourniture d'un immeuble d'habitation ou d'une part du capital social d'une coopérative d'habitation est effectuée au profit de plusieurs particuliers ou que plusieurs particuliers construisent ou font construire un immeuble d'habitation ou y font ou y font faire des rénovations majeures, la mention d'un particulier aux articles 41, 43, 45 et 46 ainsi qu'à l'article 256.21 de la Loi vaut mention de l'ensemble de ces particuliers en tant que groupe. Toutefois, seulement l'un d'entre eux peut demander un remboursement en application du paragraphe 256.21(1) de la Loi relativement à l'immeuble ou à la part, dont le montant est déterminé selon les articles 41, 43, 45 ou 46.

[31] This provision also provides that if a supply of a residential complex is made to two or more individuals, all of those individuals, as a group, must satisfy the requirements of section 41 of the Regulations and subsection 254(2) of the ETA. Subsection 41(2) of the Regulations provides that it applies to individuals who are entitled to a rebate under subsection 254(2) of the ETA. In my view, in applying section 40 of the Regulations to the occupancy requirements of subsection 254(2) of the ETA, the result would be that only those individuals who are particular individuals in relation to the acquisition of a specific residential complex would have to satisfy these occupancy requirements. The first question that must be addressed is whether an individual is a particular individual. Only once the particular individuals have been identified would it be necessary to determine if those particular individuals (if there is more than one particular individual), as a group, satisfy the occupancy requirements of paragraphs 254(2)(*b*) and (*g*) of the ETA as these provisions refer specifically to the "particular individual". As a result the

determination of whether an individual is a particular individual (and hence how many particular individuals there are) is done before section 40 is applied.

C. *Definition of "recipient" in section 123 of the ETA*

[32] In some of the cases referred to in paragraph 23 above, the Tax Court Judges referred to the definition of "recipient" in section 123 of the ETA to expand what would otherwise be contemplated by the words of paragraph 254(2)(*a*) of the ETA. "Recipient" is defined in section 123 of the ETA as:

recipient of a supply of property or a service means	**acquéreur**
(*a*) where consideration for the supply is payable under an agreement for the supply, the person who is liable under the agreement to pay that consideration,	*a*) Personne qui est tenue, aux termes d'une convention portant sur une fourniture, de payer la contrepartie de la fourniture;
(*b*) where paragraph (a) does not apply and consideration is payable for the supply, the person who is liable to pay that consideration, and	*b*) personne qui est tenue, autrement qu'aux termes d'une convention portant sur une fourniture, de payer la contrepartie de la fourniture;
(*c*) where no consideration is payable for the supply,	*c*) si nulle contrepartie n'est payable pour une fourniture :
(i) in the case of a supply of property by way of sale, the person to whom the property is delivered or made available,	(i) personne à qui un bien, fourni par vente, est livré ou à la disposition de qui le bien est mis,
(ii) in the case of a supply of property otherwise than by way of sale, the person to whom possession or use of the property	(ii) personne à qui la possession ou l'utilisation d'un bien, fourni autrement que par vente, est transférée ou à la disposition de

is given or made available, and	qui le bien est mis,
(iii) in the case of a supply of a service, the person to whom the service is rendered,	(iii) personne à qui un service est rendu.
and any reference to a person to whom a supply is made shall be read as a reference to the recipient of the supply	Par ailleurs, la mention d'une personne au profit de laquelle une fourniture est effectuée vaut mention de l'acquéreur de la fourniture.

[33] The closing words state that "any reference to a person to whom a supply is made shall be read as a reference to the recipient of the supply". Since paragraph 254(2)(*a*) of the ETA refers to a taxable supply being made to a particular individual, the question is whether the reference to the particular individual is to read as the "recipient". Because a "recipient" means any person who is liable under an agreement for the supply (paragraph (*a*) of the definition of "recipient"), if "recipient" is substituted for "particular individual", then any person who signs an agreement of purchase and sale (and who would be liable to pay the consideration) would be a particular individual for the purposes of subsection 254(2) of the ETA regardless of whether ownership of the residential complex is transferred to that person.

[34] However, applying this interpretation would mean that paragraph 254(2)(*a*) of the ETA would be significantly expanded from its textual version. The text clearly provides that only an individual who acquires a residential complex as a result of a sale of that complex will be a "particular individual". Applying the definition of recipient to the individual described in paragraph 254(2)(*a*) of the ETA and finding that liability for the consideration – and not the acquisition of an ownership interest – will be the sole determining factor in finding that an

individual is a particular individual would result in a significant alteration to the paragraph as written.

[35] Subsection 15(2) of the *Interpretation Act*, R.S.C., 1985, c. I-21, provides that:

(2) Where an enactment contains an interpretation section or provision, it shall be read and construed	(2) Les dispositions définitoires ou interprétatives d'un texte :
(*a*) as being applicable only if a contrary intention does not appear; and	*a*) n'ont d'application qu'à défaut d'indication contraire;
(*b*) as being applicable to all other enactments relating to the same subject-matter unless a contrary intention appears.	*b*) s'appliquent, sauf indication contraire, aux autres textes portant sur un domaine identique.

[36] In my view, the text, context and purpose of paragraph 254(2)(*a*) of the ETA establish that "recipient" is not to be substituted for "particular individual". The language chosen by Parliament expresses a contrary intention to simply applying the definition of "recipient" to the person described in paragraph 254(2)(*a*) of the ETA. Parliament did not use the word "recipient" anywhere in subsection 254(2) of the ETA even though this word is defined in the ETA. As well, the clear language of paragraph 254(2)(*a*) of the ETA limits a particular individual to one to whom "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". "Sale" is defined in section 123 of the ETA as:

sale, in respect of property, includes any transfer of the ownership of the property and a transfer of the possession of the property under an agreement to transfer ownership of the property	**vente** Y sont assimilés le transfert de la propriété d'un bien et le transfert de la possession d'un bien en vertu d'une convention prévoyant le transfert de la propriété du bien

[37] Thus, a sale will include a transfer of either ownership or possession. Paragraph 254(2)(*a*) of the ETA refers to a “taxable supply by way of sale of the complex or unit”. “Taxable supply” is a supply made in the course of a commercial activity and “supply”, in relation to property, is the provision of that property (section 123 of the ETA). Therefore, it seems clear that a taxable supply by way of sale of a residential complex cannot take place until either ownership or possession of that complex is transferred.

[38] The wording of paragraph 254(2)(*a*) of the ETA suggests that an assumption of liability under an agreement of purchase and sale, in and of itself, will not be sufficient to make a person a particular individual – there must be a transfer of ownership or possession of a residential complex to that individual. This would also be consistent with the purpose of the rebate which is intended to benefit new home buyers. Individuals who purchase new homes (and who do not simply assume a liability without acquiring a beneficial interest) should be the particular individuals who will have to satisfy the occupancy requirements of paragraphs 254(2)(*b*) and (*g*) of the ETA. As a result, in my view, the word “recipient” should not be substituted for “particular individual” in paragraph 254(2)(*a*) of the ETA.

D. *Section 133 of the ETA*

[39] The Crown also referred to section 133 of the ETA:

<table>
<tr>
<td>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</td>
<td>133 Pour l’application de la présente partie, la fourniture objet d’une convention est réputée effectuée à la date de conclusion de la convention. La livraison du bien ou la prestation du service aux termes de la convention est réputée faire partie de la fourniture</td>
</tr>
</table>

made at the time the agreement is entered into; and	et ne pas constituer une fourniture distincte.
(*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.	

[40] The Crown submits that based on this section, the supply of the residential complex was made when the agreement of purchase and sale was entered into (which presumably was when any conditions precedent were satisfied). Therefore, Dr. Akbari acquired an interest in the residential complex at that time. There was no trust declaration signed by Dr. Akbari when he entered into the agreement as this was not completed until the closing of the purchase of the property.

[41] The purpose of section 133 of the ETA is summarized by the Department of Finance in the Explanatory Notes at p. 35:

> Under this section [133], the entering into of an agreement to supply any property or service will be treated as a supply of the property or service, made at the time the agreement is entered into. As a consequence, GST applies to any prepayment or part payment of the consideration for a supply even if, at the time payment is made, property has not in fact been transferred or the service has not yet been rendered. In these circumstances, paragraph 133(b) treats the actual provision of the property or service under the agreement as being a part of the same supply and not as a separate supply.

[42] This Explanatory Note suggests that section 133 was intended to relate to the liability for tax under the ETA. However, the new housing rebate provisions relate to a rebate of tax under the ETA. The question is whether, based on a textual, contextual and purposive analysis,

section 133 of the ETA applies for the purposes of subsection 254(2) of the ETA, and in particular, whether the time for determining if an individual is a particular individual is when the agreement of purchase and sale is entered into (section 133) or when the sale of the residential complex actually occurs (based on the requirement of paragraph 254(2)(*a*) of the ETA that there must be a supply by way of sale).

[43] As noted, paragraph 254(2)(*a*) of the ETA provides that there must be a supply by way of sale of a single unit residential complex (or a residential condominium unit). In this case, Mr. Cheema acquired a single unit residential complex.

[44] Subsection 41(1) of the Regulations provides that the definition of “single unit residential complex” as defined in subsection 254(1) of the ETA is adopted for the purposes of the Regulations. However, this definition of “single unit residential complex” only expands the definition of “single unit residential complex” to include certain multiple unit residential complexes. A detached house would not be included in the parts added by subsection 254(1) of the ETA. The general definition of “single unit residential complex” in section 123 of the ETA provides that:

single unit residential complex means a residential complex that does not contain more than one residential unit, but does not include a residential condominium unit.	**immeuble d’habitation à logement unique** Immeuble d’habitation, à l’exclusion d’un logement en copropriété, qui contient au plus une habitation.

[45] The definitions of residential complex and residential unit (which are incorporated into the definition of residential complex) are lengthy but essentially require the existence of a building (or a mobile home or floating home) where an individual resides or could reside. In this

case, when the agreement of purchase and sale was entered into, there was no building. The agreement provided that the house was to be constructed.

[46] If section 133 were to apply to determine when the taxable supply by way of sale of the residential complex occurs for the purposes of paragraph 254(2)(*a*) of the ETA, then as a result of the deeming rule in paragraph 133(*a*) the supply of the residential complex would have occurred when the agreement was entered into, at which time there was no building. "Supply", in relation to property, is defined in section 123 as the provision of property in any manner including sale. "Sale" is defined as including a transfer of ownership. If the supply by way of sale of the residential complex is deemed to have occurred when the agreement of purchase and sale was entered into, then it would seem to also mean that, for the purposes of the ETA, ownership of that residential complex would have been deemed to have been transferred at that time. Although "sale" refers to a transfer of ownership or possession, the more logical application of the deeming rule would be to deem ownership to have been transferred for the purposes of the ETA.

[47] Although there is a transfer of ownership of the residential complex after the agreement of purchase and sale is entered into, in my view, this subsequent transfer of ownership (which, but for paragraph 133(*b*) would be a separate supply) would be part of the deemed supply that occurred when the agreement was entered into and not a separate supply (paragraph 133(*b*)), if section 133 applies. By deeming the provision of property under the agreement to be part of the supply referred to in paragraph 133(*a*), in my view, paragraph 133(*b*) would deem the transfer of ownership, for the purposes of the ETA, to have occurred as part of the supply referred to in

paragraph 133(*a*) which would, for the purposes of the ETA, be deemed to have occurred when the agreement is entered into and not when it actually occurs. If, for the purposes of the ETA, the transfer of ownership of the residential complex occurs at a time after the agreement of purchase and sale is entered into, this would result in a separate supply of the residential complex as the transfer of ownership is a sale and hence a supply. However, this would be contrary to paragraph 133(*b*), if section 133 of the ETA applies for the purposes of section 254 of the ETA.

[48] Paragraph 254(2)(*e*) of the ETA provides, as one of the conditions for receiving a new housing rebate, that "ownership of the complex or unit is transferred to the particular individual after the construction or substantial renovation thereof is substantially completed". Since the agreement of purchase and sale provides for the supply of a constructed house, if the supply by way of sale of the constructed residential complex is deemed to have occurred when the agreement of purchase and sale is entered into, this would not be after the residential complex was substantially constructed. The deeming rule in section 133 does not provide for two separate events. It does not provide that first the residential complex will be deemed to be substantially constructed and then ownership will be deemed to be transferred. Rather, under section 133, both deeming results (a deemed property – the substantially constructed house – and the deemed supply) would occur at the same time – when the agreement is entered into. Therefore, the application of section 133 to an agreement to construct a new house would disqualify any individual who enters into such an agreement from qualifying for the new housing rebate. This cannot be the result that was intended.

[49] It also would not be appropriate, in my view, to find that section 133 would apply for the purposes of paragraph 254(2)(*a*) of the ETA but not paragraph 254(2)(*e*) of the ETA. Either section 133 applies to deem the supply by way of sale of the residential complex to have occurred when the agreement was entered into or it does not. If Parliament had intended that section 133 would deem the supply by way of sale of the residential complex (and therefore the transfer of ownership) to have occurred when the agreement was entered into for the purposes of paragraph 254(2)(*a*) of the ETA but not paragraph 254(2)(*e*) of the ETA, then clearer language would have been required.

[50] As well, the opening part of paragraph 254(2)(*b*) of the ETA is “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”. If Parliament had intended that section 133 would apply then this part could have been shortened to “at the time the supply of the complex is made”. When the agreement is entered into for the purposes of section 133 of the ETA would presumably be the same time that the individual becomes liable under the agreement for the purposes of paragraph 254(2)(*b*) of the ETA since any conditions precedent to any assumption of liability would presumably also affect the determination of when the agreement is entered into.

[51] An example will also illustrate a further reason to support the interpretation that Parliament did not intend that the determination of whether an individual is a particular individual would be made when the agreement is entered into. Assume that an individual, A, enters into an agreement of purchase and sale for a new house with a builder. The house is to be

constructed and the closing will be a year later. However, shortly after signing the agreement, A is transferred to another city and is required to sell his interest in the agreement. A transfers his interest in the agreement to B. The builder adds B to the agreement but does not release A from the agreement. The house is constructed. B fulfills the obligations of A under the agreement (including the payment of the HST) and ownership is conveyed to B at the closing. If the time for determining who is a particular individual is the time when the agreement is entered into by A, then A would be the particular individual. However, A is not the person who would have paid all of the tax, which is a requirement of paragraph 254(2)(*d*) of the ETA and, therefore, no new housing rebate would be paid.

[52] Since section 133 is a deeming rule, it could be interpreted as applying twice in this example, once when A enters into the agreement and again when B is added to that agreement. This would mean that the builder will be deemed to have supplied the same residential complex to A and then again to B under the same agreement, or if it is a new agreement when B is added, the builder will have supplied the residential complex first to A and later to B (or A and B) without any conveyance of that complex from A back to the builder before B is added. In my view, the possibility of multiple applications of section 133 would mean that Parliament did not intend for section 133 to apply for the purposes of determining who is entitled to the new housing rebate.

[53] If Parliament had intended that section 133 would apply for the purposes of subsection 254(2) of the ETA to make a person who enters into an agreement of purchase and sale a “particular individual” and apply repeatedly each time a person was added to the

agreement of purchase and sale, then it would seem logical that a provision would also have been added to the ETA to provide that an individual would no longer be a particular individual if that individual is removed from the agreement of purchase and sale prior to ownership being transferred by the builder. If adding individuals would make them particular individuals, then removing them prior to closing should also remove them from the determination of who is a particular individual. Since there is no provision to remove such an individual from the determination of who is a particular individual, this, in my view, would support the interpretation that Parliament did not intend for section 133 of the ETA to apply but rather only intended that the determination of who is a particular individual would be made at the closing when ownership or possession of the residential complex is transferred by the builder.

[54] The determination of the entitlement to the rebate is only made once. It is clear from paragraph 254(2)(*e*) of the ETA that entitlement to the rebate can only arise after ownership of the residential complex is transferred to the particular individual. There is no ongoing or recurring right to a rebate nor is there any need to determine, prior to the closing of the purchase of the residential complex (at which time all of the tax will have been paid as required by paragraph 254(2)(*d*) of the ETA) whether an individual is a “particular individual”. When an agreement of purchase and sale for a new house is entered into, it is not relevant, at that time, whether an individual who entered into that agreement is a “particular individual”. No new housing rebate is payable at the time that an agreement to construct a new house is entered into.

[55] Section 133 was, based on the Explanatory Note, introduced to address a concern related to an agreement to purchase property where there would be ongoing or recurring obligations to make payments.

[56] In the context of the new housing rebate, in my view, Parliament intended that the determination of whether an individual would be a particular individual is only to be made once. Since the rebate conditions clearly contemplate that entitlement can only arise if ownership is transferred after the residential complex is substantially constructed or renovated, the time for the determination of whether an individual is a particular individual is when the actual supply by way of sale has been made. This would be the actual transfer of ownership by the builder at the closing or the actual transfer of possession under the agreement to transfer ownership. Once it has been determined that an individual is a particular individual, then the question will be whether that particular individual has satisfied all of the necessary requirements of subsection 254(2) of the ETA.

[57] As a result, in my view, section 133 of the ETA does not apply for the purpose of determining who is entitled to a rebate under subsection 254(2) of the ETA.

E. *Bare Trust*

[58] In this case an ownership interest was transferred to Dr. Akbari. However, the issue is whether for the purposes of subsection 254(2) of the ETA a transfer of a legal interest only to a particular individual (where that person does not acquire a beneficial interest) will be considered to be a taxable supply by way of sale of the residential complex to that individual. The Tax Court

Judge found that Dr. Akbari was a bare trustee and that he signed the declaration of trust on the same day that ownership of the property was transferred by the builder, presumably at or in preparation for the closing. This finding that Dr. Akbari was a bare trustee has not been challenged in this appeal.

[59] In *De Mond Jr. v. The Queen*, [1999] 4 C.T.C. 2007, 99 D.T.C. 893, Justice Lamarre (as she then was) stated that:

> 37 Bare trustees have also been compared to agents. The existence of a bare trust will be disregarded for income tax purposes where the bare trustee holds property as a mere agent or for the beneficial owner. In *Trident Holdings Ltd. v. Danand Investments Ltd.* (1988), 64 O.R. (2d) 65 (Ont. C.A.), Mr. Justice Morden, speaking for the Ontario Court of Appeal, made the distinction between an ordinary trust and a bare trust. He reproduced the following passages from Scott, *The Law of Trusts*, 4th ed. (1987):
>
>> An agent acts for, and on behalf of, his principal and subject to his control; a trustee as such is not subject to the control of his beneficiary, although he is un-der a duty to deal with the trust property for the latter's benefit in accordance with the terms of the trust, and can be compelled by the beneficiary to perform this duty. The agent owes a duty of obedience to his principal; a trustee is under a duty to conform to the terms of the trust [Vol. 1, p. 88].
>>
>> …..
>>
>> A person may be both agent of and trustee for another. If he undertakes to act on behalf of the other and subject to his control he is an agent; but if he is vested with the title to property that he holds for his principal, he is also a trustee. In such a case, however, it is the agency relation that predominates, and the principles of agency, rather than the principles of trust, are applicable [Vol. 1, p. 95].
>
> 38 Mr. Justice Morden also quoted with approval from an article by M.C. Cullity, "Liability of Beneficiaries - A Rejoinder", (1985-86), 7 Estates & Trusts Quarterly 35, at p. 36:

> It is quite clear that in many situations trustees will also be agents. This occurs, for example, in the familiar case of investments held by an investment dealer as nominee or in the case of land held by a nominee corporation. In such cases, the trust relationship that arises by virtue of the separation of legal and equitable ownership is often described as a bare trust and for tax and some other purposes it is quite understandably ignored.
>
> The distinguishing characteristic of the bare trust is that the trustee has no independent powers, discretions or responsibilities. His only responsibility is to carry out the instructions of his principals --- the beneficiaries. If he does not have to accept instructions, if he has any significant independent powers or responsibilities, he is not a bare trustee.

[60] The view that bare trusts should be ignored has also been applied to the ETA (*S.E.R. Contracting Ltd. v. The Queen*, 2006 TCC 6, [2006] G.S.T.C. 2 at para. 12; *City of Edmonton v. The Queen*, 2015 TCC 172, [2017] G.S.T.C. 33 at para. 56).

[61] The purpose of the new housing rebate is to reduce, in certain situations, the cost of new housing. Presumably this is meant to benefit the beneficial purchasers of new houses and therefore, there is no apparent reason to depart from the general principle that bare trusts will be ignored for the purposes of the ETA. As well, paragraph 254(2)(*d*) of the ETA provides that a new housing rebate will not be paid unless the “particular individual” has paid all of the tax under Division II of the ETA. Section 165 of the ETA is in Division II. Since the beneficial owner will generally be the person who will have paid all of the tax, this would support the view that the beneficial interest is the relevant interest. In this case, there is no dispute that Mr. Cheema paid all of the tax payable under the ETA.

[62] There may also be situations where the Minister will want to determine whether the supply by way of sale was made to the person who is the beneficial owner. Assume that two individuals want to buy a condo – one as an investment (the investor) and the other as a place to live (the occupant). Assume that the investor is not a relation of the occupant for the purposes of section 254 of the ETA. Assume that the occupant is the only person who signs the agreement of purchase and sale as a purchaser and is the only person shown on the deed as a grantee. The occupant collects one-half of the amount of the purchase price from the investor and pays the full purchase price to the builder. The occupant signs a declaration of bare trust in favour of the investor, declaring that a fifty interest in the property is being held for the investor. The occupant occupies the condo as their primary place of residence. It would seem to me that the Minister would want to argue that transfer of legal title by the builder to the occupant would not be sufficient to make the occupant the only particular individual for the purposes of paragraph 254(2)(*a*) of the ETA.

F. *Conclusion*

[63] As a result, a “particular individual” for the purposes of subsection 254(2) of the ETA will be an individual to whom a builder has actually transferred ownership or possession of a residential complex. If a person has signed the agreement of purchase and sale or the mortgage, but based on all of the circumstances, has not acquired a beneficial interest in the residential complex or possession of that complex, then that person will not be a particular individual for the purposes of subsection 254(2) of the ETA. If a person is not a “particular individual” that person does not need to satisfy the occupancy requirements of paragraphs 254(2)(*b*) and (*g*) of the ETA, but that person will also not be entitled to claim the new housing rebate.

[64] In this case, a 99% interest in the property was conveyed to Mr. Cheema and his spouse. There was no indication that Mr. Cheema's spouse had, at any time, signed the agreement of purchase and sale. No one raised any issue that would arise as a result of Mr. Cheema's spouse having acquired an interest in the residential complex without having signed the agreement of purchase and sale. Presumably this is based on the doctrine of constructive receipt.

[65] In *Canada v. Innovative Installation Inc.,* 2010 FCA 285 this Court held that constructive receipt could apply where a person had a contractual right to receive a payment. Therefore, even though the life insurance benefit was paid directly from the insurance company to the company's bank, the company was still considered to have received the life insurance proceeds for the purposes of section 89 of the *Income Tax Act*, R.S.C. 1985, c.1 (5th Supp.) because the company had a contractual right to receive the life insurance benefit.

[66] In the same way, when Mr. Cheema transferred to his spouse a portion of the ownership interest that ought to have been transferred to him (by directing the builder to convey the property to him and his wife) this should be treated, for the purposes of subsection 254(2) of the ETA, the same as if it had been conveyed to him. Since the interest conveyed to Mr. Cheema's wife would be treated as being conveyed to him, the only person who is a particular individual in this case is Mr. Cheema.

[67] Since Dr. Akbari only acquired his interest in the house as a bare trustee, this acquisition of an interest by him will be ignored for the purposes of paragraph 254(2)(*a*) of the ETA and, therefore, there was no supply by way of sale of a residential complex to him and he was not a

particular individual. Dr. Akbari's liability under the agreement of purchase and sale does not alter the determination that he did not acquire a beneficial interest in the residential complex from the builder. His liability under the agreement of purchase and sale does not, in and of itself, make him a particular individual for the purposes of subsection 254(2) of the ETA. The only individual who acquired a beneficial interest in the property from the builder for the purposes of the ETA in this case was Mr. Cheema. Since he satisfied the occupancy requirements and there was no indication that any of the other conditions were not satisfied, Mr. Cheema is entitled to the new housing rebate.

[68] As a result, I would dismiss the appeal.

"Wyman W. Webb"

J.A.

STRATAS J.A.

[69] I have read my colleague's reasons, prepared with his usual erudition and assiduous attention to detail. Regrettably, in this case I do not agree with them.

[70] In my view, the Tax Court erred. I would allow the appeal, quash the judgment of the Tax Court (2016 TCC 251 *per* Smith J.) and restore the Minister's reassessment made under Part IX of the *Excise Tax Act*, R.S.C. 1985, c. E-15.

A. Principles of statutory interpretation

[71] The Tax Court construed section 254, the provision that offers a new housing rebate, as a benefits-conferring section: reasons, at para. 47. Indeed, the purpose of section 254 is to ensure "that the GST does not pose a barrier to affordable housing by effectively lowering the tax rate on most newly constructed homes": Canada, Department of Finance, *Goods and Services Tax: Explanatory Notes to Bill C-62 as passed by the House of Commons on April 10, 1990*, ss. 254-256.

[72] However, the fact that the section confers a benefit, here a new housing rebate, says nothing about the circumstances in which the rebate is available.

[73] To determine this, we must look to the purpose, context and text of the section to ascertain its authentic meaning: *Re Rizzo & Rizzo Shoes Ltd.*, [1998] 1 S.C.R. 27, 154 D.L.R.

(4th) 193; *Bell ExpressVu Limited Partnership v. Rex*, 2002 SCC 42, [2002] 2 S.C.R. 559; *Canada Trustco Mortgage Co. v. Canada*, 2005 SCC 54, [2005] 2 S.C.R. 601.

[74] In doing this, we cannot "drive Parliament's language…higher than what genuine interpretation [of the section]—an examination of its text, context and purpose—can bear": *Wilson v. Atomic Energy of Canada Limited*, 2015 FCA 17, [2015] 4 F.C.R. 467 at para. 86, rev'd on another point 2016 SCC 29, [2016] 1 S.C.R. 770. While we might personally support the purpose behind the new housing rebate, we cannot allow that support to extend the rebate beyond the authentic meaning of the section: *Williams v. Canada (Public Safety and Emergency Preparedness)*, 2017 FCA 252 at paras. 46-52. Where the legislative language of a provision is precise, we cannot use its underlying purpose to "supplant" clear language or "to create an unexpressed exception to clear language": *Placer Dome Canada Ltd. v. Ontario (Minister of Finance)*, 2006 SCC 20, [2006] 1 S.C.R. 715 at para. 23.

[75] On an earlier occasion, the Supreme Court put the same idea this way:

> In discussing [*Canada v. Antosko*, [1994] 2 S.C.R. 312, [1994] 2 C.T.C. 25], P. W. Hogg and J. E. Magee, while correctly acknowledging that the context and purpose of a statutory provision must always be considered, comment that "[i]t would introduce intolerable uncertainty into the *Income Tax Act* if clear language in a detailed provision of the Act were to be qualified by unexpressed exceptions derived from a court's view of the object and purpose of the provision": *Principles of Canadian Income Tax Law* (2nd ed. 1997), at pp. 475-76. This is not an endorsement of a literalist approach to statutory interpretation, but a recognition that in applying the principles of interpretation to the Act, attention must be paid to the fact that the Act is one of the most detailed, complex, and comprehensive statutes in our legislative inventory and courts should be reluctant to embrace unexpressed notions of policy or principle in the guise of statutory interpretation.

(*65302 British Columbia Ltd. v. Canada*, [1999] 3 S.C.R. 804, 179 D.L.R. (4th) 577 at para. 51.) While this case spoke of the *Income Tax Act*, R.S.C. 1985, c. 1 (5th Supp.) the same can be said for the *Excise Tax Act*.

[76] In this case, the Tax Court (at para. 47) followed the approach in *United Parcel Service Canada Ltd. v. The Queen*, 2006 TCC 450 at para. 23—namely, interpreting the section to achieve “a sensible, practical and common sense result” and one that is “consonant with the scheme of the Act.” It did not follow the approach of examining the text, context and purpose of section 254.

[77] The exhortation to judges in *United Parcel Service* to strive for “a sensible, practical and common sense result” is unsupported by authority. While *United Parcel Service* cites *Highway Sawmills Limited v. Minister of National Revenue*, [1966] S.C.R. 384, 56 D.L.R. (2d) 652 and *The Queen v. The Maritime Life Assurance Co.*, [1999] G.S.T.C. 1 (T.C.C.) in support of this, these cases stand for no such thing. In *Highway Sawmills*, the Supreme Court suggested only that a court might usefully compare rival interpretations to see which best “conforms to the apparent scheme of the legislation” (at p. 393 S.C.R., p. 658 D.L.R.). As this Court has recently explained, this is an approach consistent with and useful to the examination of text, context and purpose: *Williams* at para. 52. The Tax Court in *Maritime Life* spoke of the need to approach the *Excise Tax Act* “in a common-sense way, and with an eye for the reality of the transactions involved,” which is something different. On appeal, this Court did not advocate judges interpreting legislation in the manner urged by *United Parcel Service*: (2000), 261 N.R. 365, [2000] G.S.T.C. 89 (F.C.A.).

[78] Seeking “a sensible, practical and common sense result” is quite different from dispassionately and objectively examining the text, context and purpose of the legislation in issue; the latter turns on the nature of the legislation while the former depends on the nature of the judge. One judge may think a result is sensible, practical and in accordance with common sense; another may say it is nothing of the sort.

[79] Judges are only lawyers who happen to hold a judicial commission. Just like the people they serve, judges are unelected and are bound by legislation. What, then, is the right of judges to avert their eyes from the authentic meaning of legislation enacted by the elected and, instead, to choose a meaning that accords with their own particular views of sensibility, practicality and common sense?

[80] This sort of thing, akin to relying upon “what [they] think is best for Canadian society” and choosing “what [they] want the legislation to mean,” has nothing to do with the judges’ real task, which is to discern “what the legislation authentically means”: *Williams* at para. 48. Today, there is only one accepted way to do this: to cast aside any personal views and predispositions and, instead, to examine the text, context and purpose of the legislation dispassionately and objectively. Doing this might lead to a result that some might call sensible and practical and in accordance with common sense. But if that happens, it is because that is the authentic meaning of the legislation—not because some judge has made it so.

[81] Finally, an earlier decision of this Court, cited by the Tax Court, is key: *Canada v. Sneyd* (2000), 257 N.R. 262, 2000 G.T.C. 4112 (F.C.A.). In *Sneyd*, this Court considered a similar

housing rebate in a neighbouring section of the *Excise Tax Act*, section 256. It held (at para. 12 N.R., p. 4116 G.T.C.) that the *Excise Tax Act* "is a taxing statute whose purpose is to raise government revenues" and the housing rebate "is a limited exception to that purpose," constrained by its specific language. This Court interpreted section 256 in a manner highly attentive to the literal wording of the section.

[82] We are bound by the approach our Court has taken in *Sneyd* to this kind of rebate provision. And this approach has been vindicated by later decisions of the Supreme Court.

[83] Taxation statutes are "instrument[s] dominated by explicit provisions dictating specific consequences" and this invites "a largely textual interpretation": *Canada Trustco* at para. 13; see also *CIBC World Markets Inc. v. Canada*, 2011 FCA 270, [2013] 3 F.C.R. 3 at para. 29 and *Canada v. Quinco Financial Inc.*, 2014 FCA 108 at paras. 5-7. Where the particular words of a provision are precisely worded and unequivocal, the ordinary meaning of those words plays a "dominant role" in the process: *Canada Trustco* at para. 10.

[84] On another occasion, the Supreme Court stated that where a provision in a taxation statute is "clear and unambiguous" its words "must simply be applied" in a way that is not tendentious or result-oriented: *Shell Canada Ltd. v. Canada*, [1999] 3 S.C.R. 622, 178 D.L.R. (4th) 26 at paras. 39-40.

[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.

[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.

B. Application of these principles to this case

[87] Section 254 sets out the prerequisites for a taxpayer to claim a new housing rebate. The prerequisites are set out in very precise wording. Two of several prerequisites are relevant in this case.

[88] The first is not in doubt on the facts of this case: a builder of a single unit residential complex must make a taxable supply by way of sale to a particular individual (para. 254(2)(*a*)).

[89] In this transaction the builder sold the complex to Mr. Cheema and Dr. Akbari. In law, Mr. Cheema and Dr. Akbari were the purchasers. The first requirement was met.

[90] The second is more controversial in this case: at the time the particular individual assumes liability under the agreement of purchase and sale of the complex, the particular

individual must be "acquiring the complex…for use as the primary place of residence of the particular individual or a relation of the particular individual" (para. 254(2)(*b*)). The appellant says that this prerequisite was not met.

[91] Section 40 of *New Harmonized Value-added Tax System Regulations*, *No. 2*, SOR/2010-151, which applies in this case (see section 256.21 of the *Excise Tax Act*), provides that if supply of the complex is made to two or more individuals, the references to "a particular individual" are to be read as references to all of those individuals as a group. Under the agreement of purchase and sale, the supply of the complex was made to both Dr. Akbari and Mr. Cheema. Thus, the second prerequisite—use of the complex as the primary place of residence—must be satisfied by both Dr. Akbari and Mr. Cheema.

[92] Mr. Cheema acquired the complex as his primary place of residence. Dr. Akbari did not. He never intended to occupy the property as his primary residence. Thus, the second requirement was not met.

[93] Mr. Cheema submits that the Court should have regard to a trust agreement under which Dr. Akbari held his ownership interest in trust for Mr. Cheema. Thus, Dr. Akbari held no beneficial interest in the property.

[94] The prerequisite in para. 254(2)(*b*) is drawn up in a way that makes those facts irrelevant. It speaks of the particular individual's reason for acquiring the complex at the time that person "becomes liable or assumes liability under an agreement of purchase and sale of the complex."

It is the relationship of the person acquiring the complex to the builder—one of purchase and sale—that is relevant, not the relationship between co-purchasers.

[95] The fact that Dr. Akbari was acquiring the complex only as a trustee is of no consequence. The agreement of purchase and sale does not distinguish between Dr. Akbari and Mr. Cheema as purchasers. Nor does section 254 provide any exception for trustees.

[96] In any event, para. 254(2)(*b*) requires us to examine the purchaser's intended use of the complex at the time the purchaser "becomes liable or assumes liability under an agreement of purchase and sale of the complex." Even if we are to give effect to the trust agreement, it did not exist at that point in time.

[97] Parliament was detailed and precise in the wording of the prerequisites for the rebate set out in section 254 and it is not for this Court, in the words of *Placer Dome* (at para. 23), "to create an unexpressed exception" or "supplant" the clear language in section 254.

[98] It follows that the Tax Court erred. It relied on the trust arrangement between Dr. Akbari and Mr. Cheema, an arrangement extraneous to para. 254(2)(*b*). It did not base its finding on who was legally liable to the builder under the agreement of purchase and sale, which is the focus of para. 254(2)(*b*).

[99] I wish to say a few words about my colleague's reasons. Some of the difference between us stems from our understanding of what the "supply" is in this case.

[100] Where there is an agreement to provide property or a service, supply is "deemed" upon entering into an agreement of purchase and sale (section 133). As Mr. Cheema and Dr. Akbari both signed the agreement of purchase and sale, they are deemed to receive a supply of the property at the time they entered into the agreement. Since both received a supply, section 40 of the Regulations requires that they must *both* meet the rebate prerequisites in section 254.

[101] My colleague insists that Parliament evinced an intention for "supply" under the housing rebate regime to mean the transfer of beneficial ownership. In doing so, he attempts to displace the application of section 133 by pointing to the words "by way of sale" in para. 254(2)(*a*). In my view, the insertion of "by way of sale" does not nullify the deeming effects of section 133:

- The words "by way of sale" simply specify the type of supply required to meet the rebate requirements. Other types of supply, like a rental or lease, do not qualify for the rebate. This makes sense. The rebate is only available for new home *sales* – not leases.

- The fact that Mr. Cheema's home did not exist at the time he signed the agreement of purchase and sale does not render section 133 inapplicable (see my colleague's reasons at paras. 43-47). Section 133 is a deeming provision. Deeming provisions create legal fictions. They assume things to exist even when they do not in reality—like, for example, the supply of a home that is not yet constructed. To suggest that Parliament did not intend for the deemed supply rule

to apply because the supply could not *in fact* occur would be to undermine the purpose of enacting a deeming provision in the first place.

- Nor does the fact that para. 254(2)(*e*) requires that ownership must be transferred *after* construction or substantial renovation render section 133 inapplicable (see my colleague's reasons at paras. 48-49). Section 133(b) implicitly acknowledges that there will be an actual (*i.e.* not deemed) provision of the property. Para. 254(2)(*e*) simply requires that this actual ownership transfer (*i.e.* the actual provision of the property) occurs after construction or substantial renovation. Further support for this point is found in the fact that Parliament did not use the words "supply" or "supply by way of transfer" in para. 254(2)(*e*) indicating that para. 254(2)(*e*) falls outside the purview of section 133 – which applies only to the definition of supply.

- The phrase "supply by way of sale" appears 154 times in the *Excise Tax Act*. If Parliament intended for supplies "by way of sale" to be immune from the deeming effects of section 133, it would have done so. Not only did Parliament not do this, it expressly provided that the definition of supply in section 123 is subject to section 133 and its deeming effects.

[102] Other elements found in the text, context and purpose of the statute support the interpretation that supply means the signing of an agreement of purchase and sale and not a transfer of beneficial ownership. I turn to these now.

– I –

[103] If supply is the transfer of beneficial ownership, a carefully designed and narrow exception in the legislation would be ignored and made meaningless. Normally, to receive the housing rebate, an individual must both purchase and occupy the new home. There is an exception though. An individual can purchase the home for a “relation” who can satisfy the occupancy requirements in paras. 254(2)(*b*) and (*g*). For example, a parent purchasing a home for their child to occupy can still receive the rebate. From this, it is clear that the rebate is intended only for occupants or relatives of occupants.

[104] If, as my colleague suggests, supply is the transfer of beneficial ownership, a non-relative who does not intend to reside in the new home could receive the rebate. For example, an individual like Dr. Akbari could sign an agreement of purchase and sale, pay the purchase price, receive a 1% interest in trust and—so long as beneficial ownership is transferred to the occupant—obtain the rebate. This would expand who is eligible for the rebate beyond occupants and relatives of the occupants—something clearly not intended by the rebate scheme. What purpose does the exception for relatives play if non-relatives can also benefit from the rebate?

– II –

[105] The rebate rules require a particular individual (or his or her relation) to intend to use the complex as the “primary place of residence” at the time the particular individual signs the agreement of purchase and sale (para. 254(2)(*b*)). If supply is only the transfer of beneficial

ownership, why is the particular individual's occupancy intention assessed at the time of signing the agreement of purchase and sale rather than at the time they receive beneficial ownership?

– III –

[106] I do not consider the result I propose in this case to run counter to the purpose of the scheme. If one wants the benefit of the rebate, one must structure their transaction to satisfy the prerequisites set out with great particularity by Parliament.

[107] In this case, the transaction was structured by having Dr. Akbari sign the agreement of purchase and sale for the complex so that Mr. Cheema could get financing. The record is silent on why this transaction structure was necessary. Normally there is no reason why financing could not be obtained or guaranteed in another way; indeed, in this case, there is nothing in the record suggesting that Dr. Akbari could not loan or gift the money to Mr. Cheema or give the bank a full, secured guarantee for Mr. Cheema's obligations rather than co-signing the agreement of purchase and sale. The rebate exists to ensure that the GST does not pose a barrier to affordable housing; it is not a scheme to facilitate financial assistance more generally.

[108] On my view of the matter, the rebate remains easily accessed by those for whom it is intended.

– IV –

[109] It must be recalled that we are dealing with a self-assessment system comprised of millions of tax returns verified through audits.

[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.

[111] The interpretation I urge makes it easier than that of my colleague to verify if a person has qualified for the rebate. In the case of the two prerequisites discussed above, on my interpretation a taxpayer in response to a query need only produce the agreement of purchase and sale to show the legal acquirer of the complex and easily obtained personal documents, such as utility bills, other standard invoices, and drivers' licences to show who is personally residing in the complex. On my colleague's view of the matter, other documents may be necessary to go behind the agreement of purchase and sale, and perhaps even other evidence and interviews may be necessary as well to shed light on who is the "real" or beneficial owner. Suddenly a straightforward verification exercise morphs into a sprawling examination for discovery.

[112] It goes without saying that if I am wrong and Parliament intended the result favoured by my colleague, it can amend section 254 to make that clear. Absent that clarity, however, I cannot agree with the reasons of my colleague.

C. Proposed disposition

[113] For the foregoing reasons, I would allow the appeal, quash the judgment dated November 4, 2016 of the Tax Court in file 2015-5407(GST)I and restore the Minister's reassessment made under Part IX of the *Excise Tax Act*, R.S.C. 1985, c. E-15.

[114] In the Tax Court, this was an informal proceeding. In light of section 18.25 of the *Tax Court of Canada Act*, R.S.C. 1985, c. T-2, "the reasonable and proper costs of the taxpayer in respect of the appeal shall be paid by Her Majesty in right of Canada." In light of this, I would award Mr. Cheema his costs of the appeal. In the circumstances, I would exercise my discretion against making an award of costs concerning the informal proceedings in the Tax Court.

"David Stratas"

J.A.

"I agree.

M. Nadon"

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

APPEAL FROM A JUDGMENT OF THE TAX COURT OF CANADA DATED NOVEMBER 4, 2016, NO. 2015-5407(GST)I

DOCKET:	A-447-16
STYLE OF CAUSE:	HER MAJESTY THE QUEEN v. MOHAMMAD N. CHEEMA
PLACE OF HEARING:	TORONTO, ONTARIO
DATE OF HEARING:	SEPTEMBER 20, 2017
REASONS FOR JUDGMENT BY:	STRATAS J.A.
CONCURRED IN BY:	NADON J.A.
DISSENTING REASONS BY:	WEBB J.A.
DATED:	FEBRUARY 27, 2018

APPEARANCES:

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