

Docket: 2015-5164(GST)I

BETWEEN:

LUZMARINA ROJAS,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

Appeal heard on April 15, 2016 at Hamilton, Ontario

Before: The Honourable Justice Steven K. D'Arcy

Appearances:

For the Appellant: The Appellant herself

Counsel for the Respondent: Martin Hickey

JUDGMENT

In accordance with the attached reasons for judgment:

1. The appeal from the reassessment made under the *Excise Tax Act*, notice of which is dated June 26, 2014, is allowed and the reassessment is referred back to the Minister of National Revenue for reconsideration and reassessment on the basis that the supply made by the Appellant in consideration of mortgage commissions constituted an exempt supply of arranging for the lending of money; and

2. Costs are awarded to the Appellant in the amount of \$350.

Signed at Antigonish, Nova Scotia, this 27th day of July 2016.

“S. D’Arcy”

D’Arcy J.

Citation: 2016 TCC 177
Date: 20160727
Docket: 2015-5164(GST)I

BETWEEN:

LUZMARINA ROJAS,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

REASONS FOR JUDGMENT

D'Arcy J.

[1] The Minister reassessed the Appellant to, in part, include in her net tax HST collectable on commission income that she received for services rendered in respect of mortgages granted by certain third party lenders.

[2] The issue before the Court is whether the services the Appellant rendered in consideration of the commission constituted a financial service as that term is defined in subsection 123(1) of Part IX of the *Excise Tax Act* (the “*GST Act*”).

[3] The appeal was heard under the Court’s informal appeal process. The Appellant acted for herself. She was well prepared and was a credible witness.

I. Summary of Facts

[4] The Appellant acts as a real estate agent and also assists clients in obtaining mortgages on properties they intend to purchase.

[5] She testified that she is required by the Ontario government, as a result of the nature of the services she provides in respect of mortgages, to be licensed as a mortgage broker and registered under the umbrella of a mortgage brokerage firm.

[6] She provided the Court with a copy of her mortgage broker's licence issued by the Financial Services Commission of Ontario. The licence is a "Mortgage Broker/Agent Licence" and is issued in the Appellant's name. She testified that she is a member of the Canadian Institute of Mortgage Brokers and Lenders and the Canadian Association of Accredited Mortgage Professionals.

[7] With respect to the requirement of being registered under the umbrella of a mortgage brokerage firm, the Appellant stated that her brokerage firm is a company that carries on business under the name The Mortgage Centre.

[8] The Respondent filed a copy of a contract between the Appellant and The Mortgage Centre. The contract is titled "Independent Contractor Agreement". Clause 1 of the agreement states the following:

Whereas the Company desires to appoint the Mortgage Specialist as a sales representative for the Company and in consideration for the services to be performed by the Mortgage Specialist for the Company . . . the Company and the Mortgage Specialist agree as follows:

1. PERFORMANCE

The Company shall retain the Mortgage Specialist, effective as of the date of this Agreement, as a sales representative of the Company with the specific duties of originating mortgage and ancillary products and services from consumers. . . .

[9] The Appellant described her role in the issuance of mortgages as follows:

- She first determines the borrowing needs of the potential borrower (the "client").
- As part of this process she receives a written mortgage application from the client.
- Using an on-line computer program that is only available to mortgage brokers, she determines if the client qualifies for a mortgage. She also determines which lenders are willing to loan the funds and on what terms.
- She then explains to the client the various mortgage products that he/she qualifies for and the identity of the various lenders that are willing to provide the funds.

- Once the client makes a decision, he/she completes the necessary paperwork and provides the paperwork to the Appellant, who ensures that it is sent to the chosen lender.
- The Appellant works with The Mortgage Centre to obtain a lending commitment from the chosen lender.
- The lender then pays a commission to the Appellant's brokerage firm, The Mortgage Centre. The Mortgage Centre retains 25% of the commission and pays the remaining 75% to the Appellant.
- The Appellant deals with any subsequent issues that arise between the client and the lender.

II. Positions of the Parties

[10] The Appellant argued that her services constituted the arranging for the granting of mortgages and thus were exempt financial services under paragraph (l) of the definition of financial services in subsection 123(1) of the *GST Act*.

[11] The Respondent argued that the services supplied by the Appellant were in the nature of administrative services, primarily the collection of information for The Mortgage Centre. As a result, the services were not financial services due to the application of paragraph (r.4) of the definition of financial services in subsection 123(1) of the *GST Act*.

III. Application of the Law to the Facts

[12] Subsections 165(1) and (2) of the *GST Act* impose the HST on taxable supplies made in Ontario. Taxable supplies are supplies made in the course of commercial activities.

[13] The Appellant's activities with respect to acting as a real estate agent and her activity with respect to mortgages constituted a business as that term is defined in subsection 123(1) of the *GST Act*.

[14] As a result, pursuant to the definition of commercial activity in subsection 123(1) of the *GST Act*, the services she provided in the course of this business were supplied in the course of a commercial activity, unless the supply involved the making of an exempt supply.

[15] The supply of a financial service that is not zero-rated constitutes an exempt supply (Part VII of Schedule V to the *GST Act*). Financial service is defined in subsection 123(1).

[16] Paragraph (l) of the definition reads as follows:

“financial service” means

...

- (1) the agreeing to provide, or the arranging for, a service that is
 - (i) referred to in any of paragraphs (a) to (i), and
 - (ii) not referred to in any of paragraphs (n) to (t).

[17] The Appellant argues that the services she rendered in respect of mortgages constituted the arranging for the lending of money. The lending of money is referred to in paragraph (g) of the definition of financial service.

[18] On the evidence before me, I agree with the Appellant. I have concluded that, as a question of fact, the Appellant made a single supply that was arranging for the lending of money. My conclusion is based upon the following facts.

- The Appellant was a licensed mortgage broker.
- She identified the potential borrower and determined whether the borrower qualified for a mortgage.
- She identified lenders who were willing to provide a mortgage loan to the borrower and the various terms under which the mortgage loan would be provided.
- Once the borrower chose a lender and a specific mortgage, the Appellant took steps to obtain a lending commitment from the lender.
- She then completed the lending process by obtaining the applicable forms from the borrower and providing them to the lender.

[19] In short, she facilitated the entire lending process by identifying both the borrower and lender and then bringing the parties together to complete the

agreement to lend and borrow money. It is difficult to think of a clearer situation in which a person (the Appellant) is arranging for the lending of money.

[20] The Respondent argues that paragraph (l) of the definition of financial service does not apply because the service provided by the Appellant is a service referred to in paragraph (r.4) of the definition of financial service and thus is excluded from paragraph (l) as a result of subparagraph (ii) of paragraph (l).

[21] Paragraph (r.4) of the definition of financial service reads as follows:

Financial service means

...

but does not include

...

(r.4) a service (other than a prescribed service) that is preparatory to the provision or the potential provision of a service referred to in any of paragraphs (a) to (i) and (l), or that is provided in conjunction with a service referred to in any of those paragraphs, and that is

(i) a service of collecting, collating or providing information, or

(ii) a market research, product design, document preparation, document processing, customer assistance, promotional or advertising service or a similar service.

[22] Paragraph (r.4) only applies if the service in question is a service that is preparatory to the provision or the potential provision of a service referred to in any of paragraphs (a) to (i) or (l) of the definition of financial service or if the service is provided in conjunction with a service referred to in any of those paragraphs.

[23] In my view, paragraph (r.4) will only apply if the service in question is supplied separately from the supply of the financial service that is referred to in any of paragraphs (a) to (i) or (l) of the definition of financial service.

[24] In the current appeal, the Appellant only made one supply, the supply of arranging for the lending of money. She did not make a second separate supply that

could be found to have been preparatory to or provided in conjunction with the supply of the service of arranging for the lending of money.

[25] Counsel for the Respondent referred me to the decision of the Federal Court of Appeal in *Global Cash Access (Canada) Inc. v. The Queen*, 2013 FCA 269. My finding is consistent with the finding of the Federal Court of Appeal in the *Global Cash Access* appeal. The Federal Court of Appeal found that there was a single supply of a service set out in paragraph (g) of the definition of financial service, namely “the making of any advance, the granting of any credit or the lending of money”. Further the Court held, at paragraphs 37 and 38, that paragraph (r.4) did not apply since the only supply before the Court was a single supply of a financial service described in paragraph (g) of the definition of financial service.

[26] For the foregoing reasons, the appeal is allowed and the reassessment dated June 26, 2014 is referred back to the Minister for reconsideration and reassessment on the basis that the supply made by the Appellant in consideration of the mortgage commissions constituted an exempt supply of arranging for the lending of money.

[27] Costs are awarded to the Appellant in the amount of \$350.

Signed at Antigonish, Nova Scotia, this 27th day of July 2016.

“S. D’Arcy”

D’Arcy J.

CITATION: 2016 TCC 177
COURT FILE NO.: 2015-5164(GST)I
STYLE OF CAUSE: LUZMARINA ROJAS v. HER MAJESTY
THE QUEEN
PLACE OF HEARING: Hamilton, Ontario
DATE OF HEARING: April 15, 2016
REASONS FOR JUDGMENT BY: The Honourable Justice Steven K. D'Arcy
DATE OF JUDGMENT: July 27, 2016

APPEARANCES:

For the Appellant: The Appellant herself
Counsel for the Respondent: Martin Hickey

COUNSEL OF RECORD:

For the Appellant:

Name: n/a

Firm: n/a

For the Respondent:

William F. Pentney
Deputy Attorney General of Canada
Ottawa, Canada