

Docket: 2016-1154(GST)I

BETWEEN:

YIN YI NGAI,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

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Appeal heard on January 23, 2017, at Toronto, Ontario

Before: The Honourable Justice B. Russell

Appearances:

For the Appellant:                   The Appellant herself  
Counsel for the Respondent:       Isida Ranxi

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**AMENDED JUDGMENT**

The appeal is allowed, without costs, and the March 10, 2014 assessment is referred back to the Minister of National Revenue for reconsideration and reassessment on the basis that, in accordance with the below amended reasons, the subject GST/HST new housing rebate application should be granted.

**This Amended Judgment is issued in substitution for the Judgment dated May 8<sup>th</sup>, 2017**

Signed at **Toronto, Ontario**, this 2<sup>nd</sup> day of May 2018.

“B. Russell”

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Russell J.

Citation: 2017TCC79  
Date: **20180502**  
Docket: 2016-1154(GST)I

BETWEEN:

YIN YI NGAI,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

### **AMENDED REASONS FOR JUDGMENT**

Russell J.

[1] This informal procedure GST/HST appeal was brought in respect of a March 10, 2014 assessment raised by the Respondent's Minister of National Revenue (Minister). The assessment reflected the Minister's denial of a GST/HST New Housing Rebate Application filed February 18, 2013 by the Appellant, seeking a rebate of \$24,000. On January 5, 2016 after considering the Appellant's notice of objection the Minister confirmed that assessment. Thereafter this appeal was launched.

[2] The basic question is whether the Minister was correct in denying the rebate application, denied on the basis that the Appellant as a "particular individual" did not meet the rebate requirement per paragraph 254(2)(b) of the *Excise Tax Act* (Canada) (*Act*) of acquiring the property, "...for **use** as the primary place of residence of the particular individual or a relation of the particular individual". The Appellant says that in respect of the transaction acquiring the subject property she did not act on her own account, but rather acted on behalf of her nephew as his agent and or trustee.

[3] In this appeal the Appellant, Yin Yi Ngai, represented herself. At the hearing, Ms. Ngai called two witnesses - she and her nephew, Jonathon Ng. Ms. Ngai testified that she was a real estate agent and as such, prospectively for a particular client, had signed a purchase/sale agreement with a developer, to purchase a condominium in Markham, Ontario. The developer intended to

construct the condominium in coming months. This was in late March 2012, with an agreed \$519,990 purchase/sale price. Ms. Ngai was on as co-purchaser solely to preserve rights for her client, also named as a co-purchaser. Shortly thereafter, within a permitted grace period, the client chose not to proceed with this transaction.

[4] At about this time Ms. Ngai's aforementioned nephew Mr. Ng thought he would buy this property, to reside in it, thus enabling him to reside closer to his mother (Ms. Ngai's sister). The developer accepted insertion into the purchase/sale agreement (by way of amendment) of Mr. Ng's name, as a purchaser in substitution for the name of the client who had chosen not to participate. At this time Ms. Ngai sought to have her name as a purchaser removed from the agreement. But the developer required her name to remain if the agreement's purchase price were to be maintained.

[5] Unlike her nephew, Ms. Ngai never intended to live in the condominium and did not desire any interest in the property. Both she and Mr. Ng anticipated and intended that Mr. Ng would purchase the property to live in it and would make all payments related to this property including for its purchase. Likewise it was anticipated and expected that he would pay all liabilities and expenses, including mortgage, utilities and tax, consistent with full ownership and use of the property.

[6] In or about April 2012 Scotiabank approved Mr. Ng for a mortgage, required to finance his purchase of the property. The transaction was scheduled to close upon completion of construction of the contemplated condominium unit.

[7] In due course the closing was scheduled for early December 2012. As that date approached, unexpectedly Scotiabank informed Mr. Ng that upon review of his then current work and income circumstances, he no longer qualified for the mortgage required to purchase this property.

[8] In the words of Ms. Ngai, Mr. Ng (then 21 years old) thereupon, "...panicked and tried to sell..."; on November 23, 2012 signing an authorization that the condominium be listed for sale. Family members then rallied to help him. His aunt, Ms. Ngai, agreed to go on the mortgage as a co-borrower to assist Mr. Ng qualifying for the mortgage. Scotiabank required additionally that Ms. Ngai's husband, Gerald Kennedy (Mr. Ng's uncle), likewise a real estate agent, also join in the mortgage as a co-borrower. He agreed to do so. On this basis Scotiabank then re-approved the mortgage financing required by Mr. Ng. It was clear from testimony and undisputed by the parties that neither Ms. Ngai nor her husband Mr.

Kennedy had any intention of living in the property; they simply were seeking to help their young nephew Mr. Ng to be able to acquire the condominium for his own residential purposes.

[9] At the December 6, 2012 closing Ms. Ngai advised her lawyer that she and her husband Mr. Kennedy were only involved to assist Mr. Ng with getting approval for his mortgage so he could acquire the property. The lawyer apparently advised that their names also go on the title for “protection” as they were named as co-borrowers on the mortgage. The resultant registered title reflected that Mr. Ng had a 50% interest as tenant in common, Ms. Ngai had a 49% interest as tenant in common and Mr. Kennedy had a 1% interest as tenant in common.

[10] Subsequently, this same lawyer was contacted again by Ms. Ngai in or before June 2014 after the Minister had raised the **subject** assessment. The lawyer then prepared a “Trust Declaration” for the signatures of Mr. Ng, Ms. Ngai and Mr. Kennedy. This document, entered into evidence on consent, was consistent with the communication Ms. Ngai had had with that lawyer at the December 2012 closing as to her and Mr. Kennedy’s shared purpose in participating in the transaction, as above stated. This Trust Declaration stated in part that Ms. Ngai and Mr. Kennedy held title in trust for Mr. Ng, so that he could qualify for a mortgage, and it provided that Mr. Ng would indemnify Ms. Ngai and Mr. Kennedy for any and all costs etc. for which they might become liable.

[11] Upon completion of the closing Mr. Ng, as had been planned, resided at the property, albeit briefly, but neither Ms. Ngai nor Mr. Kennedy ever lived there. Mr. Ng testified that he moved in on December 8 or 9, 2012. His total commute time to his work was three hours daily. This took a toll. Plus, he had learned that his current consulting contract was not being renewed, which put his continued stream of income in question.

[12] So he sought to lease the condominium, as he felt he wanted to maintain ownership of it for future use. An authorization to real estate agents to lease was signed December 10, 2012. However there was no leasing interest attracted. As a final option he further pursued selling the condominium and was successful in doing so, with a purchase/sale agreement signed January 11, 2013. February 15, 2013 was the date of the sale’s closing. All net funds from the closing, i.e. after payout of the mortgage and the lawyer, were paid over solely to Mr. Ng (\$246,587.31). Nothing went to either Ms. Ngai or to Mr. Kennedy.

[13] The subject rebate application was made, by Ms. Ngai, during this time period. It had not been her intention that she would make this application herself (as opposed to Mr. Ng), but the document had been prepared for her signature by, I believe, the developer's lawyer, so she signed it. Also during this time period Mr. Ng had worked to have utility bills addressed to him, after the developer had on its own advised utilities to send invoices to Ms. Ngai. In this regard Mr. Ng achieved partial success.

[14] In brief cross-examination Mr. Ng testified that when he read over the Declaration of Trust in June 2014 prior to signing it he considered that it reflected what he thought. It was logical and made sense and isolated the property rights to him. To him the property was his place and he was not sharing it.

[15] The Respondent called no evidence.

[16] In submissions Respondent's counsel stated that the Appellant was not entitled to the HST rebate as she had not purchased the property to live in it, nor did she purchase it for a relation as defined per the *Excise Tax Act* with reference to the *Income Tax Act*. Respondent's counsel further submitted that on a balance of probabilities there was not a trust and the Appellant was seeking to re-characterize the true legal relationship. The trust declaration had been signed just two days before service of the notice of objection.

[17] In response to a question from me, Respondent's counsel accepted that the purpose of the Appellant and Mr. Kennedy's involvement in this matter had been to assist Mr. Ng to purchase the property, but counsel said that they had not done this correctly.

[18] Respondent's counsel cited several informal procedure decisions of this Court, most particularly noting *Al-Houssain v R*, 2014 TCC 379 (IP), at para. 27 where, on "similar facts" (*per* counsel), the Court *per* Lyons, J. considered that on a balance of probabilities the appellant in arguing agency was seeking to re-characterize the true legal relationship. Other cases cited included *Ho v R*, 2015 TCC 10 (IP), *Henoa v R*, 2015 TCC 81 (IP), *Malik v R*, 2015 TCC 83 (IP), *Javaid v R*, 2015 TCC 94 (IP) and *Crooks v R*, 2016 TCC 52 (IP). Also noted was *Cheema v R*, 2016 TCC 251 (IP). *Javaid* was distinguished by the Respondent on counsel's assertion that the agency relationship and trust had been entered into prior to the sale.

[19] The Appellant argued that Mr. Ng was a relative – he was her nephew. And the family including herself as his aunt had to help him. In April 2012 Scotiabank had approved his mortgage application but as the closing date grew close, suddenly Scotiabank said no. What could they do? The Appellant relied on the *Javaid* decision.

[20] At conclusion of oral submissions I questioned whether the Respondent could validly now raise the argument that Mr. Ng was not a relative for purposes of subsection 254(2) of the *Act*, as this had not been pleaded in the Reply, thus providing no notice to the self-represented and non-legally trained Appellant, in this informal procedure appeal. Written submissions on this point were filed.

[21] I found both the Appellant Ms. Ngai and Mr. Ng to have been entirely credible in giving their evidence. Having reviewed the facts of this case and relevant jurisprudence, virtually all of which was Informal Procedure jurisprudence and therefore non-precedential, I am inclined to the view that the Appellant should succeed in this appeal. In this regard I am largely assisted by the above-cited *Javaid* decision, *per* Woods, J. as she then was.

[22] In *Javaid* the dominant issue was whether the therein appellant Mr. J. was entitled to a new housing rebate under the Act where a friend, Mr. Z., had signed the amended purchase and sale agreement with Mr. J. for the purpose of assisting Mr. J. to meet the mortgage requirements so that Mr. J. could obtain the mortgage to finance his purchase of the particular property. In so assisting, Mr. Z. had no intention to own or reside in the new property Mr. J. wished to purchase.

[23] After signing the purchase and sale agreement, but before the closing of the transaction, Mr. Z. changed his mind and backed out of participating.

[24] But in the meantime Mr. Z. had signed the purchase/sale agreement as a purchaser by way of amendment on August 29, 2010. As a proposed guarantor of the mortgage, Mr. Z. was added to the agreement as an additional purchaser. More than two months after Mr. Z signed the purchase/sale agreement as an additional purchaser, he on November 2, 2010 signed a “Declaration of Trust” in which he agreed to co-sign the mortgage documents relating to the property as a guarantor in order to assist Mr. J. to meet the mortgage requirements, with apparently a trust being reflected in this Declaration of Trust and Undertaking, as implied by that title. The *Javaid* reasons for judgment **do** not provide any actual wording of that Declaration of Trust and Undertaking.

[25] On these facts in *Javaid*, the Crown assumed that Mr. Z. was a “particular individual” per paragraph 254(2)(a) of the *Act*. This was on the basis that Mr. Z. was supplied the subject property when he signed the agreement of purchase and sale (section 133 of the *Act*) and that he was a “recipient” as defined, because he was liable for the consideration under the agreement. The Crown further submitted that it did not matter that Mr. Z. backed out of the deal before closing.

[26] The Court in *Javaid* determined that the Crown’s submissions should not be accepted (*Javaid*, paragraphs 23-26). Mr. Z. had acted only in the capacity of agent in signing the agreement of purchase and sale. This, the Court said, “...is clear on the evidence as the agency arrangement was documented in [the aforementioned] Declaration of Trust and Undertaking” (*Javaid*, paragraph 23).

[27] In the case at bar we have a Trust Declaration, which makes clear that Ms. Ngai and her husband Mr. Kennedy were trustees of the property, held in trust so Mr. Ng could qualify for a mortgage, and that Mr. Ng indemnified Ms. Ngai and Mr. Kennedy against any and all claims and any other amounts payable resulting from the property transaction. In *Javaid*, as noted, there was a Declaration of Trust and Undertaking, which the Court referred to, although without setting out text, as documenting an agency arrangement.

[28] In any event the equating of a bare trust (property held by a trustee with no duties, apart from preservation and maintenance, other than to surrender the property to the beneficiary on demand) and agency is well established in law. In *Cheema*, cited above, authorities on this point were reviewed, supporting that the trustee of a bare trust for beneficial owners likewise is an agent for those beneficial owners, being the agent’s principals (*Cheema*, paragraphs 41 to 45, incl.). So where effectively a bare trust has been evidenced as per the Trust Declaration in the case at bar, an agency relationship would reasonably co-exist.

[29] I further note that in the case at bar the Trust Declaration was executed well after the agreement of purchase and sale as amended had been signed by Mr. Ng, Ms. Ngai and Mr. Kennedy - shortly before Ms. Ngai’s notice of objection was filed. The same is true in *Javaid*, although with a much lesser intervening period of time. In *Javaid* the Trust Declaration and Undertaking was signed more than two months after Mr. Z had already signed as co-purchaser the amended agreement of purchase and sale.

[30] In any event I conclude that the agency and trust relationships in the case at bar existed on an implied basis, given the undisputed evidence as to intent of the

witnesses well prior to the actual execution of the Trust Declaration. This intent was evident from the uncontroverted evidence as to the amended purchase/sale agreement being signed by Ms. Ngai and both she and her husband going on title with Mr. Ng to enable Mr. Ng to own the property. I note again Respondent counsel's acknowledgment at the close of oral submissions that Ms. Ngai and Mr. Kennedy had participated simply to assist Mr. Ng - to obtain financing so that he could acquire ownership of the condominium.

[31] The Court in *Javaid* went on to note the administrative position of Canada Revenue Agency that for purposes of the *Act* an agent is not a recipient of a supply; rather it is the principal that is recipient. This is because it is the principal ultimately who is liable to pay the consideration for the supply (*Javaid*, paragraph 24).

[32] Lastly, in *Javaid* the Court observed (paragraph 25), from a common sense perspective, that it,

...would not make sense if an agent who signed an agreement of purchase and sale was required to comply with the occupancy requirements of the rebate provision. I would be loath to support the position of the Crown on this point unless the legislation is very clear, which it is not.

[33] I concur. The "particular individual" occupancy requirements of paragraph 254(2)(g) of the *Act* should not apply, purposively viewed, to an agent. But they should apply to the agent's principal, which in the case at bar was Mr. Ng. The evidence is undisputed that Mr. Ng did occupy the subject premises as a place of residence after substantial completion of construction of the condominium.

[34] It was on the bases of these above points that the Court in *Javaid* found that Mr. Z. was acting as agent for Mr. J. in intending to facilitate Mr. J. qualifying for a mortgage needed for Mr. J. to obtain the residential property he wished to own. As discussed, in my view these same points are applicable in the case at bar.

[35] I briefly add the following observations. Respondent's counsel relied on the statement of Ms. Ngai's counsel at the closing that she and Mr. Kennedy should be on title to "protect" them given they were on the mortgage as co-borrowers. Ms. Ngai took at 49% interest and Mr. Kennedy a 1% interest, both as tenants in common. Mr. Ng held title to the remaining 50%. Respondent's counsel submitted that on a balance of probabilities, in subsequently claiming they held their property



interests in trust, and as agents for Mr. Ng, Ms. Ngai and Mr. Kennedy were seeking to re-characterize their actual legal relationships.

[36] However, I find, in considering the evidence in its totality as noted herein, that on a balance of probabilities the actual legal relationships established were that of agent and bare trustee on the parts of Ms. Ngai and Mr. Kennedy, vis-à-vis their respective interests in the subject property held by them for Mr. Ng in furtherance of their intention to aid him in obtaining a mortgage so as to permit his acquisition of beneficial title in the property.

[37] The “protect” reference by the lawyer at time of closing does not itself overturn what to me, in considering all of the evidence, was the clear intent throughout of both Ms. Ngai and Mr. Kennedy, being to assist Mr. Ng ultimately in acquiring beneficial ownership to the condominium.

[38] It also must be remembered that there is no dispute that with the February 2013 closing of the subsequent sale of the subject property, Mr. Ng and only Mr. Ng received all the net proceeds of the sale. Ms. Ngai and Mr. Kennedy did not receive any proceeds for signing off on the conveyances or their respective 49% and 1% interests in the property, held in trust or in agency for Mr. Ng.

[39] This key fact is strongly supportive of my conclusion that Ms. Ngai and Mr. Kennedy were acting solely as agents and bare trustees for Mr. Ng. Although not a subject raised in the hearing, in my view this agency and bare trustee relationship clearly extends to Ms. Ngai having made the rebate application itself, in her capacity as agent and bare trustee for Mr. Ng. I readily infer from all the evidence that Mr. Ng would be recipient of the benefit of any of the subject rebate being granted, as reimbursement of an adjustment item Mr. Ng paid or financed at the December 2012 closing when he acquired beneficial title to the new condominium.

[40] In consideration of all of the foregoing, I conclude that Ms. Ngai acted throughout as agent and bare trustee for Mr. Ng, including in making the application for the rebate. Thus per *Javaid* she was not a “particular individual”; but rather Mr. Ng, as principal of the agency relationship, did satisfy the requirements of being a “particular individual”.

[41] I would add as a postscript, while unnecessary in light of my conclusion that the Appellant herein operated as an agent and bare trustee, that in my view the Respondent’s Reply pleading did not reasonably give notice to the Appellant (self-represented as many are in Informal Procedure appeals) of an argument of the

Respondent expressed at the hearing. That argument was that the Appellant was not a “particular individual” because provisions of the *Act* and an incorporated by reference provision of the *Income Tax Act* (Canada), taken together, do not include the relation of nephew as a “relation” for purposes of paragraph 254(2)(b) as set out in relevant part in paragraph 2 above.

**This Amended Reasons for Judgment is issued in substitution for the Reasons for Judgment dated May 8<sup>th</sup>, 2017**

Signed at **Toronto, Ontario**, this 2<sup>nd</sup> day of May 2018.

“B. Russell”

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Russell J.

CITATION: 2017TCC79

COURT FILE NO.: 2016-1154(GST)I

STYLE OF CAUSE: YIN YI NGAI AND HER MAJESTY THE QUEEN

PLACE OF HEARING: Toronto, Ontario

DATE OF HEARING: January 23, 2017

REASONS FOR JUDGMENT BY: The Honourable Justice B. Russell

DATE OF JUDGMENT: May 8, 2017

DATE OF AMENDED JUDGMENT AND REASONS FOR JUDGMENT: **May 2, 2018**

APPEARANCES:

For the Appellant: The Appellant herself  
Counsel for the Respondent: Isida Ranxi

COUNSEL OF RECORD:

For the Appellant:

Name:

Firm:

For the Respondent:

**Nathalie G. Drouin**  
Deputy Attorney General of Canada  
Ottawa, Canada