

Docket: 2015-57(GST)I

BETWEEN:

MUHAMMAD MUZAFFAR IQBAL,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

Appeal heard on October 27, 2015, at Toronto, Ontario

Before: The Honourable Justice Valerie Miller

Appearances:

Counsel for the Appellant: John L. Ennis

Counsel for the Respondent: Katie Beahen

JUDGMENT

The appeal from the Notice of Confirmation dated October 8, 2014 made under the *Excise Tax Act* concerning the Appellant's Good and Services Tax/Harmonized Sales Tax New Housing Rebate Application is dismissed.

Signed at Ottawa, Canada, this 17th day of March 2016.

“V.A. Miller”

V.A. Miller J.

Citation: 2016TCC68
Date: 20160317
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BETWEEN:

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Appellant,

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Respondent.

REASONS FOR JUDGMENT

V.A. Miller J.

[1] Mr. Iqbal has appealed the denial of his claim for a GST/HST New Housing Rebate (the “Rebate”) for a house purchased at 141 Elbern Markell Drive in Brampton, Ontario (the “Elbern Property”). Mr. Iqbal’s application for the Rebate was filed on October 31, 2011. The Minister of National Revenue (the “Minister”) denied the Rebate by notice dated March 15, 2013 and assessed a Rebate adjustment amount of \$24,000 and arrears interest of \$1,814.22.

[2] The Rebate in question is an Ontario rebate. In order to qualify for it, the Appellant had to demonstrate that he intended to acquire the Elbern Property for use as his primary residence or as the primary residence of a qualifying relation. The Appellant failed to satisfy this onus.

Preliminary Matter

[3] At the beginning of the hearing, counsel for the Respondent brought a motion to file an Amended Reply. The Reply was amended to clarify an assumption of fact; to include additional facts which the Respondent had to prove and to expand the “Grounds Relied On” section of the Reply. The Appellant opposed the motion.

[4] I allowed the Amended Reply to be filed and, in so doing, I considered the following:

- a) The Appellant was represented by counsel;
- b) Counsel for the Respondent forwarded the Amended Reply to Appellant's counsel on October 7, 2015 which was 20 days prior to the hearing;
- c) The proposed amendments did not raise a new argument; and
- d) The proposed amendments did not raise a new section of the *Excise Tax Act* ("ETA") or the *New Harmonized Value-Added Tax System Regulations, No. 2* (the "Regulations").

Facts

[5] The witnesses at the hearing were the Appellant and his real estate agent, Masood Khan. The Appellant's testimony conflicted with some of his documentary evidence on key points and I have found that he was not credible.

[6] The Appellant is now retired. In his professional life, he was a designer and builder of packaging materials.

Appellant's Evidence

[7] The Appellant has lived at 21 Blackmere Circle in Brampton (the "Blackmere Property" or "Blackmere") since November 2005. He continues to live in the Blackmere Property. It was his evidence that this home is 28 years old and in need of upgrades and repairs. He stated that he sought out a new "dream" home that he and his wife could live in.

[8] On March 30, 2011, the Appellant entered into an assignment agreement for the purchase of the Elbern Property. This property was in the process of being constructed and initially had an anticipated move-in date of July 30, 2011.

[9] The Appellant stated that he then advertised the Blackmere Property for sale on Kijiji, in newspapers and in postings around his community. On May 10, 2011, he sold Blackmere to Muhammad Afroz who was a friend of one of his friends. The sale price was \$450,000 and Mr. Afroz gave him a deposit of \$1,000 cash and the closing was set for July 27, 2011 which coincided with the closing date for the Elbern Property. It was the Appellant's evidence that the agreement with Mr. Afroz was a "gentlemen's agreement".

[10] The Appellant stated that he received a notice that the builder of the Elbern Property had postponed the closing date for that property to September 29, 2011. He tried to negotiate a new closing date for Blackmere with Mr. Afroz but was unsuccessful. He was required to pay Mr. Afroz \$2,000 to be released from their agreement.

[11] The Appellant said that he offered the Blackmere Property for sale for a second time in 2011 through an exclusive listing with Mr. Khan.

[12] On September 27 or 28, 2011, the Appellant and his real estate agent, Masood Khan, conducted a Pre-Delivery Inspection of Elbern and discovered numerous problems including a stove exhaust pipe that did not conform to regulations, standing water in the basement, no mirrors, no shower door, and problems with the stairs.

[13] Upon taking possession of the home on September 29, 2011, the problems persisted and additional problems were noticed which included a malfunctioning heating unit, standing water on the main floor and water leaking near an electrical panel.

[14] Masood Khan conducted a TARIION inspection on October 28, 2011. I note that this report did not indicate any problems concerning standing water or heat.

[15] The Appellant testified that he moved into the Elbern Property. However, he brought only one full bedroom set, a dressing table, a wardrobe, a dining room table and chairs, a side table, a microwave, a small two burner stove and a small oven. He left the remainder of his belongings at the Blackmere Property so that it would show well to prospective purchasers.

[16] It was the Appellant's evidence that, for the next 4 months, he lived at Elbern 60-70% of the time with the remaining time at Blackmere. This was mainly due to the fact that the Elbern Property continued to have issues with the heating system and the Appellant has sensitivities in his extremities to cold weather. He stated that he slept and did his laundry at Blackmere. He would often shower at Blackmere as that property had a more accessible bath as opposed to the standing shower at Elbern. During one of these four months, the Appellant was in Australia; however, he testified that his wife remained at Elbern during this time.

[17] The Appellant listed the Elbern Property for sale on December 2, 2011 with Masood Khan acting as his real estate agent. The Appellant alleged that he was frustrated with the repairs needed in the Elbern Property.

[18] The Elbern Property sold on December 30, 2011 and closed on January 20, 2012 for a sale price of \$780,000. The Appellant had purchased this property from the builder for \$603,530.97.

Law

[19] Subsection 254(2) of the *ETA* provides for a Rebate where a particular individual purchases a new home from a builder under prescribed circumstances. It reads:

New housing rebate

(2) Where

(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,

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

[20] Section 256.21 of the *ETA* provides that the Minister shall pay a rebate in a prescribed manner under prescribed circumstances. It reads:

256.21 (1) If a sales tax harmonization agreement with the government of a participating province allows for rebates in respect of residential property relating to the new harmonized value-added tax system in respect of that participating province, the Minister shall pay in prescribed circumstances a rebate in respect of prescribed property to a prescribed person, or a person of a prescribed class, equal to an amount determined in prescribed manner.

[21] A person is a ‘prescribed person’ or ‘prescribed individual’ if they meet the requirements found in subsection 41(2) of the *Regulations*, which reads:

Rebate in Ontario

41(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

$$A \times B$$

where

A is 75%; and

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.

Position of the Parties

[22] The Appellant stated that it was his intention to acquire the Elbern Property as his primary residence. He moved into Elbern shortly after the closing on September 29, 2011. He sold Elbern because he was frustrated with the builder and by all the repairs which were necessary.

[23] It is the Respondent's position that the Appellant did not move into Elbern and he did not acquire Elbern with the intention that it would be the primary place of residence for him or one of his relatives.

Analysis

[24] There were key documents produced by the Appellant or Mr. Khan which contradict the Appellant's testimony that he moved into the Elbern Property. They are:

- a) On November 16, 2011, the Appellant started a Small Claims Action against the builder of the Elbern Property. In his Statement of Claim, he wrote that he had never moved into the Elbern Property; that he immediately listed it for sale upon taking possession on September 29, 2011; and, that potential buyers had been scared off by the issues with the property. As relief, he requested the costs "to keep the house vacant", among other costs.

On cross-examination the Appellant tried to explain away his statements by saying that he knowingly made untrue or exaggerated statements on the Statement of Claim in order to put pressure on the builder to fix the problems in the home. The claim was settled on March 30, 2012.

I do not believe the Appellant's explanation.

- b) In the Reply, the Minister assumed that the Appellant first listed the Elbern Property for sale on September 30, 2011 – one day after the closing. The Appellant denied this assumption. However, on June 9, 2012, the Appellant wrote to the builder to complain that he had been charged for increased development charges of \$2,812.41. He requested a refund for upgrades which he stated were never provided. In this letter, he also wrote that he did not move into the Elbern Property because of various deficiencies and he “put the house up for sale”. He also wrote that the “house did not sell for 3 months”. It is my view that this statement confirmed the Minister's assumption that the Appellant listed the Elbern Property for sale on September 30, 2011.
- c) The Appellant did submit a listing for the Elbern Property which showed that it was listed for sale on December 2, 2011. The listing was prepared by Masood Khan and it declared as an extra that the home was “Brand New” and had never been lived in. In cross-examination, Mr. Khan tried to explain away this statement by saying that it was a “trick of the trade” to say that the home had never been lived in.

[25] The Appellant stated that he moved into the Elbern Property and Mr. Khan paid all moving costs as a gift for the Appellant. However, neither the Appellant nor Mr. Khan submitted a receipt to support their evidence.

[26] It was the Appellant's evidence that he listed Elbern for sale on December 2, 2011 because he was frustrated with all the repairs which were necessary. However, according to an email from the builder to the Appellant and Mr. Khan, the builder had sent emails to them on November 17 and November 22, 2011 requesting entry into the Elbern Property so that it could complete its warranty obligations.

[27] Mr. Khan testified that all deficiencies had been satisfied and all repairs had been completed prior to listing Elbern for sale on December 2, 2011.

[28] The Appellant has not convinced me that the Blackmere Property was offered for sale in 2011. He gave no documentary evidence to show that he advertised Blackmere for sale. He did not call Mr. Afroz as a witness at the hearing. Counsel for the Respondent had asked the Appellant for Mr. Afroz's address so that she could subpoena him and the Appellant refused to give it. I have drawn an adverse inference from the Appellant's failure to call Mr. Afroz as a witness.

[29] The New Housing Rebates officer (the "Officer") with the Canada Revenue Agency ("CRA") requested a copy of the agreement of purchase and sale between the Appellant and Mr. Afroz. The Appellant stated that it was a gentleman's agreement. However, he sent the Officer an Agreement of Purchase and Sale on a 2013 version of the Ontario Real Estate Association form (along with a Mutual Release). Both Mr. Khan and the Appellant testified that the CRA requested that the Agreement of Purchase and Sale be on a "proper document in a proper format". The Appellant provided an excerpt from a working paper prepared by the Officer which he stated confirmed that she had asked him to put the agreement on a proper form.

[30] The working paper does not support Mr. Khan and the Appellant's testimony. It reads:

"I said that the Purchase Agreement which he sent dated 2011 was on a form dated 2013 and I would not be able to accept his information, I told him I will disallow the rebate and he has the right to appeal that decision. He said that they had originally done the agreement on plain paper since it was a private deal. He said that when I asked for a copy he thought I would want it more presentable than what he had, so he went to the person he had the deal with and they agreed to put it on a form."

[31] The Appellant alleged that after he took possession of the Elbern Property in 2011, the Blackmere Property was listed for sale through an exclusive listing with Masood Khan. No sale occurred. Neither he nor Mr. Khan submitted this alleged listing as an exhibit and I do not believe that it existed.

[32] Although the inconsistencies in the evidence and the lack of essential documents are sufficient for me to conclude that the Appellant did not have the intention to acquire the Elbern Property as his primary residence, there was additional evidence which reinforced my conclusion.

[33] In 2007, the Appellant purchased the property at 3189 Cabano Crescent, Mississauga, Ontario (the “Cabano Property”) prior to its construction. The purchase price was \$344,792.95. He took possession of the Cabano Property on December 12, 2007 and sold it on January 30, 2008 for \$385,000. The Appellant claimed and received a Rebate of \$7,447.53 which he assigned to the builder. In cross-examination, the Appellant stated that he purchased the Cabano Property to “make some money”.

[34] On the same day that he purchased the Elbern Property, March 30, 2011, the Appellant also purchased a property at 37 Bear Run Road, Brampton, Ontario (the “Bear Run Property” or “Bear Run”). This property was also purchased by way of an assignment agreement. It was the Appellant’s evidence that the Bear Run Property was purchased for his daughter who was estranged from her spouse; she was unable to obtain a mortgage on her own and he purchased the property for her. The Appellant held the title for this property. The purchase price of the Bear Run Property was \$524,769.91.

[35] According to the Appellant, his daughter and her spouse reunited and she moved out of the Bear Run Property and he moved into it on July 23, 2012. On August 28, 2012, the CRA received an application for a New Housing Rebate for this property from the builder; the Appellant and his spouse were the claimants and they had assigned the Rebate to the builder. The amount of the Rebate was \$24,000 and it was allowed. The Appellant sold the Bear Run Property on November 9, 2012 for \$685,000 to his cousin.

[36] The Appellant has resided in the Blackmere Property since 2005 and at the time of the hearing of this appeal he continued to reside in the Blackmere Property. In the meantime, he has purchased and sold the Cabano Property, the Bear Run Property and the Elbern Property and he claimed the Rebate for each of these properties. It appears to me that the Appellant is in the business of buying and selling homes and while this practice is not prohibited, it definitely disentitles him from claiming a GST/HST New Housing Rebate.

[37] The appeal is dismissed.

Signed at Ottawa, Canada, this 17th day of March 2016.

“V.A. Miller”

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COURT FILE NO.: 2015-57(GST)I
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REASONS FOR JUDGMENT BY: The Honourable Justice Valerie Miller
DATE OF JUDGMENT: March 17, 2016

APPEARANCES:

Counsel for the Appellant: John L. Ennis
Counsel for the Respondent: Katie Beahen

COUNSEL OF RECORD:

For the Appellant:

Name: John L. Ennis
Firm: Nanda & Assoc.

For the Respondent:

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