Citation: 2019 TCC 104
Date: 20190506
Docket: 2018-1345(GST)I

BETWEEN:

MOHAMMAD GHOSI,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

REASONS FOR JUDGMENT

(Delivered orally from the bench on April 11, 2019, in Toronto, Ontario.)

Campbell J.

[1] Let the record show that I am delivering oral reasons in the matter of an appeal of Mohammad Ghosi, which I heard earlier today. The issue in this appeal is whether the Appellant is entitled to a New Housing Rebate ("rebate") in the amount of $24,000 in relation to a property located at 128 Novan Crescent in Aurora, Ontario.

[2] Mr. Ghosi has been teaching for over 17 years. During the period he claimed the rebate, he was a substitute teacher working in different schools. He and his spouse moved into a property located at 103 Vine Cliff Boulevard in Markham in 2005.

[3] In 2015, he made the decision to assist a family friend, Mahshad Mehrabian, with the purchase of the property located on Novan Street in Aurora. He testified that he wanted to assist her financially with obtaining a mortgage on the property, as her income alone would not qualify her for a bank loan. She wanted a residence for her son due to disputes between the son and his father.

[4] According to his testimony, the Appellant and his spouse intended to reside in the property with Ms. Mehrabian's son to give her peace of mind respecting that son.

[5] The Agreement of Purchase and Sale for the Aurora property was executed by the Appellant, his spouse, and the friend on April 5, 2015. The evidence supports that Ms. Mehrabian was not a relation of the Appellants but simply a family friend. Title to the property was transferred to these three individuals as co-owners on January 27, 2016, and possession was taken on that date.

[6] At all times, the son resided at this Aurora property. Some repairs were completed after the purchase and during the first month after the purchase.

[7] In mid-March 2016, the Appellant testified that he and his wife moved into the Aurora property. A friend who owned a truck helped him move. He testified that he moved only the everyday necessities.

[8] He stated on cross-examination that he thought he could try to renovate the former residence in Markham and rent it out as a furnished house. He did not change his mailing address for the purposes of his bill payments, driver's licence, CRA communications, or banking because he said he was too busy at the time.

[9] The Markham property was never rented out or sold, and the Appellant and his wife moved back into that property a few months later, in mid-June. He had no explanations for why utility costs for three people living in the Aurora residence would be lower than expected.

[10] The property was located only 18 kilometres further from the Appellant's work location than the Markham property had been. He testified that they moved back to the former property because of the increased stress from driving and getting to work on time. Even though it was only 18 kilometres further, he testified that the traffic was slower moving and higher volume, so it took more time than the 11 minute driving increase in time that the Minister had alleged.

[11] After the Appellant and his wife moved back to their Markham property in June, the friend's son continued to live at the Aurora address until the house was sold in February, 2017.

[12] To qualify for this rebate, the Appellant must bring himself within the requirements of section 254 of the *Excise Tax Act* (the "*Act*"). This rebate will only be paid if the Appellant can meet the requirements set out in paragraph 254(2)(a) through (g) of the *Act*:

> 254(2) **New housing rebate [purchased home] -** Where

(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,

(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,

(c) the total (in this subsection referred to as the "total consideration") of all amounts, each of which is the consideration payable for the supply to the particular individual of the complex or unit or for any other taxable supply to the particular individual of an interest in the complex or unit, is less than $450,000,

(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 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

(g) either

> (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
>
> (A) in the case of a single unit residential complex, the particular individual or a relation of the particular individual, and
>
> (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
>
> (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,
>
> the Minister shall, subject to subsection (3), pay a rebate to the particular individual …

[13] Where more than one individual is a recipient of a rebate, then reference must also be made to subsection 262(3) of the *Act*, and also Section 40 of the Regulations to the *Act*:

> 262(3) **Group of individuals** – 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.
>
> **40. Group of individuals** – 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.

[14] In the present appeal, the supply of the residence in Aurora was made to the three individuals: the Appellant, his wife, and their friend. Consequently, the references in section 254 to a particular individual are to be read as references to all these three individuals as a group even though only one of them may apply for the rebate. This means that all three owners of the property must individually satisfy the requirements set out in subsection 254(2) of the *Act*.

[15] Ms. Mehrabian qualifies even though she did not occupy the property, as her son resided there until it was sold. The Respondent's position is that neither the Appellant nor his spouse qualify, as they did not occupy the property as their primary place of residence, nor did they acquire it for a qualifying relative for use as a primary residence.

[16] The onus is on the Appellant to establish that he is entitled to the rebate. This is a question of fact. Based on the evidence before me, I conclude that the Appellant has not introduced sufficient evidence that will demolish the Minister's assumptions of fact in this regard.

[17] His position is based almost entirely on his oral testimony that CRA cannot know his intent respecting the property and that factors such as change of address or work distance cannot be sufficient to replace his stated intention to use the Aurora residence as a primary place to reside when, in fact, he left his Markham address where he had resided since 2005 or 2006 and moved into this property for a period of several months.

[18] It is not one factor taken alone that either supports or does not support a taxpayer's subjective intent, but it is all of the facts and circumstances taken together as a whole that will or will not support that the taxpayer's subjective intent is actually the reality of what occurred.

[19] Justice Lamarre Proulx in *Bérubé v Her Majesty the Queen*, [2000] TCJ No. 415, set out a number of criteria that a Court may look at in determining if a residence is a primary or secondary residence for the taxpayer.

[20] At paragraph 11, she included the following:

Mailing address, income tax, voting, municipal/school taxes, telephone listing, personal effects that are moved into the new property, use of the property stated on insurance policy, evidence that the former residence, if one is owned or leased, is offered for sale or rental at or before occupancy at the new location. If the former

residence is not sold or leased, then factors such as location of each property relative to work, amount of time spent at the new residence compared to the old, its suitability and availability of personal amenities will all be used to determine which residence is the primary residence as opposed to the taxpayer's secondary home.

[21] There was insufficient evidence to establish that the Appellant acquired the Aurora property as his primary place of residence or for a qualifying relative. His testimony was that he wanted to assist a family friend who wanted a residence for her son due to family issues with the father, but who could not financially afford the property on her own. He stated it was part of the culture to assist close friends in this manner.

[22] In correspondence dated May 30, 2017, from Mr. Ghosi to CRA, he indicated clearly that he and his wife were named as buyers of the property on the Agreement of Purchase and Sale for security reasons. It was subsequent to the purchase and after a month-long period for completion of renovations that the three co-owners came to an agreement that the Appellant and his wife should move into the property and share expenses with the son.

[23] The letter goes on to state that, after three and a half months in the property, the Appellant and his wife moved back to their Markham property because he was stressed over the extra commuting time to his work location.

[24] However, the Appellant works as a substitute teacher with the Toronto District School Board, which means he can be asked to work at various locations. This fact simply does not support the Appellant's testimony that he had to return to Markham based on that drive alone, as the distance to work had the potential of changing at different points in time because he was substituting.

[25] The evidence supports my conclusion that, at the time he and his wife signed the Agreement of Purchase and Sale, he did not have the requisite intent that the property being acquired was for use as his primary place of residence. Rather, the evidence suggests he signed the Agreement of Purchase and Sale simply to assist a family friend in resolving family issues involving her son by assisting her in obtaining bank financing to purchase the Aurora property. The Appellant is asking me to accept his stated subjective intention, which is not supported by the objective evidence.

[26] As Chief Justice Bowman pointed out in his reasons in *Coburn Realty Ltd. v Her Majesty the Queen*, 2006 TCC 245, at paragraph 10:

> Statements by a taxpayer of his or her subjective purpose and intent are not necessarily and in every case the most reliable basis upon which such a question can be determined. The actual use is frequently the best evidence of the purpose of the acquisition. …

[27] He went on to state at paragraph 11:

> It should be noted that the expression "for use primarily …" requires the determination of the purpose of the acquisition, not the actual use. Nonetheless, I should think that as a practical matter if property is in fact used primarily for commercial purposes, it is a reasonable inference that it was acquired for that purpose.

[28] In this case, the actual use of the residence in Aurora was clearly for the son's residence.

[29] The Appellant did not have the requisite intent of occupying the Aurora property as the primary place of residence at the time of executing the Agreement of Purchase and Sale. This factor alone disqualifies him from meeting one of the requirements set out in subsection 254(2) of the *Act*, and more specifically, the wording contained in paragraph 254(2)(b).

[30] If there was intent by the Appellant to utilize the Aurora residence as his primary place of residence – which, however, I do not believe even occurred at a later date - it did not exist at the time of executing the Agreement of Purchase and Sale as required under that provision when he assumed liability under the agreement.

[31] Although he moved into the property for several months after the purchase, the objective independent facts surrounding this move do not support the Appellant's stated subjective intent. He moved very little personal belongings into the new residence - just a few necessities and certainly none of the amenities that support long-term living arrangements.

[32] He testified that he wanted to renovate the Markham residence and sell it or lease it as a furnished premise. However, that never occurred, and I had no evidence before me respecting where such day-to-day essentials, such as larger appliances, beds, tables, and chairs came from, or whether they even moved these

items into the property at any point in time. The friend that moved the Appellant was not present in Court, and so I did not hear evidence in this regard. In addition, there was no attempt to change the mailing address he had since 2005 for any purpose.

[33] I believe the Appellant's testimony and his cross-examination support my conclusion when he agreed that he partially moved into the Aurora residence as he wanted to test out those living arrangements and if it worked for him and his wife, they would stay on at this property, but if it did not, then they would move back into the property in Markham. This, again, supports the conclusion that the Appellant never had a settled intention at any point in time to treat the Aurora property as his primary and permanent place of residence.

[34] Nor can it be considered a secondary residence in my opinion in respect to the Appellant's circumstances. He more or less tested the waters for a few months on a speculative basis, and when it did not work with his current work location, which in any event had the potential of changing at any given point in time, he simply returned to his Markham residence and the property was listed for sale in Aurora.

[35] Lastly, the Respondent also pointed out that the Appellant is unable to meet the requirements set out in paragraph 254(2)(g) of the *Act*. This subsection, (g), states that either the first individual to occupy the complex or unit as a place of residence will be that individual or a relation of that particular individual in the case of a single unit residential complex. And in respect to a condominium unit, an individual or a relation of the individual who was at the time a purchaser under an Agreement of Purchase and Sale or the particular individual makes an exempt supply by way of sale of the complex or unit and that individual's ownership is transferred to the recipient of that supply before it is occupied by any individual as a place of residence.

[36] The evidence clearly supports that Ms. Mehrabian's son was the first occupant of the Aurora property, and therefore, none of the facts in the present appeal satisfy the elements set out in (g). For all of these reasons, the appeal is dismissed without costs.

Signed at Ottawa, Canada, this 6th day of May 2019.

"Diane Campbell"

Campbell J.

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