Citation: 2013 TCC 325
Date: 20131011
Docket: 2013-760(GST)I

BETWEEN:

ELANCHCHELVI SIVAKUMAR,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

## REASONS FOR JUDGMENT

(Edited from the transcript of Reasons for Judgment delivered orally from the Bench on September 9, 2013 at Toronto, Ontario)

Campbell J.

[1] Let the record show then that I am delivering oral reasons in the appeal of Ms. Sivakumar, which I heard earlier today.

[2] The issue in this appeal is whether the Appellant is entitled to a new housing rebate under the *Excise Tax Act*. The issue is dependent on whether the Appellant acquired the subject property for use as her and her family's primary place of residence. The property at issue is located at 6 Blairmore Terrace in Brampton.

[3] The offer to purchase was signed on October 8, 2009. The original closing date was scheduled for June 24 of the following year, 2010, but the builder delayed the closing until October 22, 2010.

[4] The Appellant testified that, on October 20, two days prior to the closing, they completed an inspection of the property, at which time they raised safety concerns with the builder over attic hatches in the loft and the low location of a window. The concerns were in respect to their youngest daughter, age 3 at that time.

[5] During this period, the family, together with the Appellant's parents, were residing at 5 Eastway, which had been purchased as a residence on July 6, 2005. According to the Appellant, she and her husband "partially" – and those are her words – moved into the Blairmore property, but the two daughters continued to reside with her parents at the Eastway property.

[6] In her explanation to me of what she meant by "partially move in", she stated that curtains were installed and a bed was placed at the property. The Blairmore property was listed for sale on December 8, 2010, approximately six weeks after possession and title had been transferred to the Appellant.

[7] Throughout this period, Eastway continued to be listed as their mailing address.

[8] The Blairmore property was sold on March 17 of the following year, 2011, for a profit of approximately $85,000. When the Blairmore property was purchased, the Appellant assigned the rebate to the builder and, consequently, the builder credited the Appellant with the amount of the rebate which, in this appeal, is in excess of $24,000.

[9] The Appellant's rebate application was denied because she did not acquire the Blairmore property for use as her primary residence.

[10] During the period in late 2010, and subsequently in 2011 and 2012, there were three other properties that the Appellant acquired in addition to the Eastway and Blairmore properties.

[11] On October 4, 2010, the Appellant signed an agreement of purchase and sale for 4 Apple Valley Way. This was just prior to her purchase of the Blairmore property on October 22, 2010. The Apple Valley property was transferred on November 8, 2011.

[12] On February 6, 2011, the Appellant signed an agreement of purchase and sale in respect of 6 Gentry Way, which was transferred on October 18, 2011.

[13] Finally, the Appellant signed an offer of purchase and sale on January 24, 2011, for 45 Education Road, which was transferred on May 3, 2012.

[14] Rebates were applied for and paid in respect to all of these properties, including the initial Eastway property.

[15] The Appellant testified to a number of things, including the fact that it was the intention of both she and her husband that the Blairmore property was to become their primary residence because the Eastway property had become too small for their family. She also stated that the safety concerns at the inspection of Blairmore were put in writing to the builder.

[16] However, the Appellant did little else to support these assertions and, to satisfy her burden of proof, which is to establish evidence that would lead me to conclude that some of the most crucial assumptions made by the Minister in the Reply to the Notice of Appeal are incorrect and/or incomplete.

[17] She did not meet the onus which is upon her in this appeal. She could have corroborated her statements of the safety concerns by producing a copy of what she claims she wrote to the builder at the time of inspection. Her husband could have been called as a witness to corroborate her testimony. Her parents may also have assisted in my determination of the Appellant's subjective purpose and intent respecting the Blairmore property.

[18] As former Chief Justice Bowman of this Court stated, at paragraph 10 in the case of *Coburn Realty Ltd. v The Queen*, 2006 TCC 245, "…(t)he actual use is frequently the best evidence of the purpose of the acquisition." It is not that evidence in the form of statements alone by an appellant may not suffice, but it is always preferable that corroborating evidence be provided where available; assertions without supporting evidence will generally be insufficient to overcome assumptions of fact when the onus is upon an appellant.

[19] When I see the timelines and dealings with these five different properties over a very short period of time, it leads to a conclusion that the Appellant is involved in investing in properties, at the very least, and at the most, in a so-called "flipping" of properties.

[20] Her actions support an investment history and an investment strategy.

[21] It is also noteworthy that, just several weeks prior to taking possession and title to the Blairmore property, the Appellant made an offer of purchase on the Apple Valley property, which eventually became her residence.

[22] Between October 22, 2010, and March 17, 2011, which was the period of ownership of the Blairmore property by the Appellant, I believe the Appellant's primary residence would have been either her Eastway property, where her children continued to reside and where apparently most of the furnishings remained, or the newly acquired Apple Valley property.

[23] That, however, is not the issue before me, nor is it an issue of whether or not the Blairmore property was a commercial project. The issue is simply whether I believe the Appellant's assertions that the Blairmore property was the family's primary residence during this period and I do not accept that this property was ever intended to be a primary residence for the family. There may have been a brief, fleeting intent on the Appellant's part, but it never came to full fruition, particularly with the execution of the October 4 offer on the Apple Valley property.

[24] I am still not sure what the Appellant meant by her explanations of "partially" moving in. I have no evidence, in fact, that she and her husband actually resided in this property for any nights, and she referred to only moving a bed or beds in, and putting up drapes. These are not actions that make a property a primary residence.

[25] The family, as a unit, continued for the most part to be primarily based out of their Eastway residence, according to the evidence. The Appellant stated that she listed the Blairmore property to "test the market." That statement and the actions of listing the property so quickly, together with the execution of an offer of purchase and sale on the Apple Valley property, are all indicative of an investment property and strategy and not supportive of her assertion that the Blairmore property was a primary residence.

[26] Although, as Respondent counsel pointed out, there can be mitigating factors that a court may consider that can frustrate a taxpayer's intent and purpose to have a property as their primary residence, such circumstances do not exist in this appeal. I view such mitigating factors, which are absent in this appeal, as those over which an individual has little or no control, such as a loss of a job, illness, death or necessary relocation.

[27] Although I recognize that children's safety issues are legitimate concerns, I also believe that attic hatches and one low window could have been secured in a reasonable fashion if the Appellant's true intent had been to obtain and use the Blairmore property as the family's primary residence.

[28] Therefore, I am dismissing the Appellant's appeal, without costs, because I do not accept her assertions and statements that the Blairmore property was intended to be her primary residence in light of the evidence which supports an alternate conclusion.

[29] Those are my Reasons in the appeal from this morning, and that concludes the work for the Tax Court for today, until tomorrow morning at 10:30. Thank you.

Signed at Ottawa, Canada this 11th day of October 2013.

"Diane Campbell"

Campbell J.

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| STYLE OF CAUSE: | ELANCHCHELVI SIVAKUMAR and HER MAJESTY THE QUEEN |
| PLACE OF HEARING: | Toronto, Ontario |
| DATE OF HEARING: | September 9, 2013 |
| REASONS FOR JUDGMENT BY: | The Honourable Justice Diane Campbell |
| DATE OF ORAL JUDGMENT: | September 9, 2013 |

APPEARANCES:

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| For the Appellant: | The Appellant herself |
| Counsel for the Respondent: | Alicia Apostle |

COUNSEL OF RECORD:

For the Appellant:

Name:

Firm:

For the Respondent: William F. Pentney
Deputy Attorney General of Canada
Ottawa, Canada