

BETWEEN:

MORGAN EASTMAN and ANN CAVRAK

Appellants,

and

HER MAJESTY THE QUEEN,

Respondent.

Appeal heard on September 18, 2009 at Toronto, Ontario

By: The Honourable Justice Judith Woods

Appearances:

Agent for the Appellants: Morgan Eastman

Counsel for the Respondent: Ricky Y. M. Tang

JUDGMENT

The appeal with respect to an assessment made under the *Excise Tax Act* by notice dated March 6, 2007 is dismissed. The parties shall bear their own costs.

Signed at Ottawa, Canada this 29th day of September 2009.

“J. M. Woods”

Woods J.

Citation: 2009 TCC 482
Date: 20090929
Docket: 2008-4074(GST)I

BETWEEN:

MORGAN EASTMAN and ANN CAVRAK,

Appellants,

and

HER MAJESTY THE QUEEN,

Respondent.

REASONS FOR JUDGMENT

Woods J.

[1] The appellants, Morgan Eastman and Ann Cavrak, appeal with respect to an assessment issued to them under the *Excise Tax Act*. The assessment denied the appellants' application for a rebate of a portion of the goods and services tax (GST) that was paid in connection with the purchase of a condominium.

[2] The rebate, which is equal to one percent of the purchase price of the condominium, is a transitional measure that was introduced in connection with the reduction of the GST from seven percent to six percent on July 1, 2006.

[3] In order to be entitled to the rebate, ownership and possession of the property must be transferred on or after July 1, 2006. The relevant provision, s. 256.3(1), provides:

256.3 (1) If a particular person, other than a cooperative housing corporation,

(a) pursuant to an agreement of purchase and sale, evidenced in writing, entered into on or before May 2, 2006, is the recipient of a taxable supply by way of sale from another person of a residential complex in respect of which ownership and possession under the agreement are transferred to the particular person on or after July 1, 2006,

(b) has paid all of the tax under subsection 165(1) in respect of the supply calculated at the rate of 7%, and

(c) is not entitled to claim an input tax credit or a rebate, other than a rebate under this subsection, in respect of the tax referred to in paragraph (b),

the Minister shall, subject to subsection (7), pay a rebate to the particular person equal to 1% of the value of the consideration for the supply.

[Emphasis added.]

[4] The circumstances of this appeal involve a condominium that the appellants agreed to purchase before the building had been constructed.

[5] Owners were given possession as units were completed. Some owners, including the appellants, moved in before July 1, 2006, and others moved in after. The Minister denied the rebate to the appellants on the ground that possession was not transferred on or after July 1, 2006 as required by the above provision.

[6] The appellants submit that it would be unfair to apply the possession requirement strictly because it has uneven application to owners in their condominium building. Some of the owners took possession after July 1, 2006 and were granted the rebate. The appellants suggest that, since the move-in dates were set by the builder, the possession requirement has an unfair application to the owners. They also suggest that some of the owners may have been granted rebates even though they took possession prior to July 1, 2006 and should not have qualified.

[7] Counsel for the respondent does not dispute that the possession requirement in s. 256.3(1) is unfair. He also does not dispute that the Canada Revenue Agency may have granted rebates to owners who were not entitled.

[8] Counsel submits, however, that the Court cannot grant relief on this basis. Reference was made to the decision of the Federal Court of Appeal in *Chaya v. The Queen*, 2004 FCA 327, 2004 DTC 6676, at paragraph 4:

4 The applicant says that the law is unfair and he asks the Court to make an exception for him. However the Court does not have that power. The Court must take the statute as it finds it. It is not open to the Court to make exceptions to statutory provisions on the grounds of fairness or equity. If the applicant considers the law unfair, his remedy is with Parliament, not with the Court.

[9] I agree with the respondent on this point. It is clear that relief cannot be granted on grounds of fairness when the legislation is clear. Unfortunately for the

appellants, the legislation is clear that possession of the condominium must have occurred on or after July 1, 2006.

[10] Before concluding, I would mention that the parties referred to another appeal that was pending in this Court that could be relevant. In *Reynolds and Pei v. The Queen*, the facts involve two taxpayers who had purchased a condominium in the same building as the appellants. In circumstances that were similar to this appeal, the taxpayers argued that possession was not transferred until after July 1, 2006 even though they began occupying the condominium on March 28, 2006.

[11] I indicated to the appellants that if the appeal in *Reynolds and Pei* were allowed, I would consider giving them an opportunity to provide evidence regarding the date of possession.

[12] The decision has now been released: 2009 TCC 470. Justice Paris has dismissed the appeal on the basis that possession was transferred when the taxpayers commenced to occupy the condominium on March 28, 2006. In light of this decision, there is no need to reopen the hearing of this appeal.

[13] The appeal will be dismissed. Each party shall bear their own costs.

Signed at Ottawa, Canada this 29th day of September 2009.

“J. M. Woods”

Woods J.

CITATION: 2009 TCC 482

COURT FILE NO.: 2008-4074(GST)I

STYLE OF CAUSE: MORGAN EASTMAN and ANN CAVRAK
and HER MAJESTY THE QUEEN

PLACE OF HEARING: Toronto, Ontario

DATE OF HEARING: September 18, 2009

REASONS FOR JUDGMENT BY: The Honourable Justice J. M. Woods

DATE OF JUDGMENT: September 29, 2009

APPEARANCES:

Agent for the Appellants: Morgan Eastman

Counsel for the Respondent: Ricky Y. M. Tang

COUNSEL OF RECORD:

For the Appellant:

Name: N/A

Firm:

For the Respondent: John H. Sims, Q.C.
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