

Docket: 2009-3659(GST)I

BETWEEN:

DAVID BRICKMAN,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

Appeal heard on January 13, 2011, at London, Ontario

Before: The Honourable Justice G. A. Sheridan

Appearances:

For the Appellant: The Appellant himself
Counsel for the Respondent: Hong Ky (Eric) Luu

JUDGMENT

In accordance with the attached Reasons for Judgment, the appeal from the assessment of the Minister of National Revenue dated August 25, 2008, made under the *Excise Tax Act*, is dismissed.

Signed at Vancouver, British Columbia, this 1st day of February, 2011.

“G. A. Sheridan”

Sheridan J.

Citation: 2011TCC42
Date: 20110201
Docket: 2009-3659(GST)I

BETWEEN:

DAVID BRICKMAN,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

REASONS FOR JUDGMENT

Sheridan J.

[1] The Appellant, David Brickman, is appealing the assessment of the Minister of National Revenue disallowing his application under the *Excise Tax Act* for a New Housing Rebate of Goods and Services Tax (“New Housing Rebate”) of \$8,750.

[2] Although dated January 4, 2005, the application was not filed with the Minister until October 18, 2006. Mr. Brickman indicated in his application that construction had been substantially completed in January 2004. The Minister disallowed his application under subparagraph 256(3)(a)(iii) of the *Excise Tax Act* which prohibits the payment of a New Housing Rebate unless the application is filed within two years from the date of substantial completion. Mr. Brickman then wrote to the Minister explaining the circumstances surrounding his having missed the deadline and requesting the Minister to reconsider his decision under paragraph 256(3)(b) of the *Act*. Although Mr. Brickman had some discussion with officials during the review of his fairness request, it was ultimately denied.

[3] Mr. Brickman represented himself at the hearing and was the only witness to testify. He did not dispute the above deadlines or the applicability of subparagraph 256(3)(a)(iii) to his situation. He appealed the Minister’s decision in the hope that this Court would have the power to look at the reasons behind his

having failed to submit his application within the time provided and to order that the rebate be paid.

[4] I found Mr. Brickman to be a very credible witness who presented the facts of his case in a clear, reasonable and unembellished fashion. At the time he made (or ought to have made) his application, he was not fully aware of the requirements for applying for the New Housing Rebate. His ignorance of the procedure and, in particular, of the various deadlines imposed by the legislation was exacerbated by a litany of unfortunate events which arose during the construction of his new home including a bankrupt builder, the onset of medical problems and certain misinformation from well-meaning officials.

[5] That said, as explained by counsel for the Respondent in his thorough review of the applicable jurisprudence and as further discussed with Mr. Brickman at the conclusion of the hearing, the Tax Court of Canada has no power to review the Minister's exercise of his discretionary power under paragraph 256(3)(b). Nor is there anything in the legislation conferring on this Court the authority to extend the time for filing of a New Housing Rebate application.

[6] Upon learning that it was unlikely that the Court could grant the remedy sought, Mr. Brickman indicated that he would ask the Minister to reconsider the fairness request decision. As they may be of assistance to the Minister in making his reconsideration and as I have had the benefit of hearing Mr. Brickman's sworn testimony, the findings of fact from the hearing of his appeal are set out below. Mr. Brickman's appeal, however, must be dismissed.

Facts

[7] Mr. Brickman had long had the dream of constructing his own home on a piece of lakeside property he owned in southwest Ontario. In the summer of 2000, he retained a builder with a view to starting construction in September with an anticipated completion date early in the new year. As it happened, construction did not even begin until November 2000. By August of the following year, with construction only two-thirds complete, the builder declared personal bankruptcy and work ground to a halt. Unfortunately, Mr. Brickman had paid a significant amount of the construction costs up front. This money had not been passed on to the various trades and suppliers and soon Mr. Brickman found his property encumbered by liens totalling some \$51,000.

[8] With nowhere else to live, in September 2001, Mr. Brickman was forced to move into the partially constructed home: at that point, but for one working toilet, there was no plumbing and no heat. The building had obviously not received the requisite approval for occupation. Meanwhile, Mr. Brickman was being hounded by creditors and tradespeople who, quite understandably, wanted to be paid for their work. Legal bills piled up. With costs spiraling, Mr. Brickman had to borrow more and more funds to ensure the completion of construction. By August 2004 the liens were paid off, with nearly the same again paid to his lawyers. Although there was still a significant amount of work to be done on the exterior, the house was, at least, livable and Mr. Brickman finally obtained the required occupancy clearances from the municipal authorities.

[9] Meanwhile, what was to have been Mr. Brickman's dream home had become instead a source of anxiety. The stress of the past several months took its toll and his health suffered: his weight ballooned; he began to suffer from migraines; he grew anxious and fearful. He sought medical attention and received counselling. He found that when he was at work, that is to say, away from the source of his stress, his anxiety diminished somewhat. It was for that reason that he declined to take medical leave while the construction continued. But in the midst of this chaos, Mr. Brickman did not have it in him to think about the New Housing Rebate requirements.

[10] In early 2005, however, as things became more manageable, Mr. Brickman finally turned his mind to this issue. He filled in the New Housing Rebate application (which is why the application the Minister received in October 2006 was dated January 4, 2005) but before sending it spoke to what seems to have been a "Helpline" New Housing Rebate official about the deadlines for applying. Somehow during the course of their conversation Mr. Brickman mentioned that he had "moved into" the house in September 2001 and was informed that it was too late for him to apply. It is unlikely that their discussion involved a review of the circumstances of his "moving in" and whether that would amount to his having "occupied" the home as contemplated by the legislation. After hearing Mr. Brickman's testimony, counsel for the Respondent took the view (I think, quite rightly) that he had not, in law, "occupied" his home in 2001. In any case, the effect of receiving this information was to discourage Mr. Brickman from filing the application at a time when he still might have been eligible for the New Housing Rebate. Meanwhile, the clock continued to tick.

[11] Some months later, it occurred to Mr. Brickman to make further inquiries with the New Housing Rebate officials. He submitted his application in the fall of 2006 but the rebate was denied because he was beyond the two-year deadline under

subparagraph 256(3)(a)(iii) of the *Act*. He was advised to make a request to the Minister under the fairness provisions to reconsider his decision under paragraph 256(3)(b) of the *Act*. This Mr. Brickman did; he included with his other materials, medical reports from the healthcare professionals who had seen to his care during the construction process¹.

[12] At some point, Mr. Brickman was told by officials that the medical reports had not been taken into account because he had been able to work throughout the construction period. And so it was that Mr. Brickman found himself in the Tax Court of Canada.

Disposition

[13] For the reasons set out above, the appeal of the assessment of the Minister of National Revenue dated August 25, 2008, is dismissed.

Signed at Vancouver, British Columbia, this 1st day of February, 2011.

“G. A. Sheridan”

Sheridan J.

¹ Exhibit A-1.

CITATION: 2011TCC42

COURT FILE NO.: 2009-3659(GST)I

STYLE OF CAUSE: DAVID BRICKMAN AND HER MAJESTY
THE QUEEN

PLACE OF HEARING: London, Ontario

DATE OF HEARING: January 13, 2011

REASONS FOR JUDGMENT BY: The Honourable Justice G. A. Sheridan

DATE OF JUDGMENT: February 1, 2011

APPEARANCES:

For the Appellant:	The Appellant himself
Counsel for the Respondent:	Hong Ky (Eric) Luu

COUNSEL OF RECORD:

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