

Docket: 2012-3741(GST)I

BETWEEN:

GUS NAPOLI,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

Appeal heard on September 6, 2013, at Toronto, Ontario

Before: The Honourable Justice B. Paris

Appearances:

Agent for the Appellant: Sam Culmone
Counsel for the Respondent: Rita Araujo

JUDGMENT

The appeal from the reassessment of a GST/HST New Housing Rebate made under Part IX of the *Excise Tax Act* dated July 5, 2011 is dismissed in accordance with the attached Reasons for Judgment.

Signed at Ottawa, Canada, this 30th day of September 2013.

“B.Paris”

Paris J.

Citation: 2013 TCC 307
Date: 20130930
Docket: 2012-3741(GST)I

BETWEEN:

GUS NAPOLI,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

REASONS FOR JUDGMENT

Paris J.

[1] This is an appeal from the denial of the GST/HST New Housing Rebate (“New Housing Rebate”) claimed by the appellant in respect of the purchase of a newly constructed house located at 33 Tanager Crescent, Wasaga Beach, Ontario.

[2] The rebate was denied on the basis that, at the time of purchase: i) the appellant did not intend to use the property as his primary place of residence or as the primary place of residence of someone related to him; and ii) neither the appellant nor anyone related to him was the first person to occupy the property as a place of residence. These conditions for the New Housing Rebate are set out in paragraphs 254(2)(b) and (g) of the *Excise Tax Act*. (“ETA”)

[3] The appellant and his spouse entered into the agreement of purchase and sale for the property with the builder on October 13, 2007. The closing date for the purchase was October 31, 2007.

[4] On October 26, 2007, the appellant and his spouse entered into an agreement to rent the property to Ms. Natalie King for a one-year term. The agreement provided that the tenancy was to commence November 15, 2007. Ms. King was not related to the appellant.

[5] According to the statement of adjustments for the purchase of the property, the transaction closed on October 31, 2007. On that date the appellant and his spouse completed and signed a number of documents relating to the New Housing Rebate, including the New Housing Rebate application form, an assignment of the New Housing Rebate to the builder and a statutory declaration. On the New Housing Rebate application form, the box indicating that the house was the primary place of residence of the applicant or of a relation of the applicant was ticked. In the statutory declaration the appellant and his spouse stated that they were purchasing the property as a primary place of residence for themselves or for a relative.

[6] According to the testimony of both the appellant and his spouse, when they entered into the agreement to purchase the property on October 13, 2007, it was their intention that the appellant's spouse's elderly parents would live in it as their primary residence. At the time, her parents were residing in their own home and two of their adult children were living with them. The appellant's spouse testified that difficulties had arisen with respect to her parents' living arrangements and said that she and her spouse wished to help her parents by providing a place for them to live away from their two adult children. Both the appellant and her spouse appeared to be sincere in relating the details of this situation, and I accept that at the time the agreement of purchase and sale was signed, they intended that her parents would live there.

[7] However, the appellant and his spouse also testified that her parents were ambivalent about the plan from the start. The appellant and his spouse testified that, for that reason, they decided to rent out the property as a "back-up plan." The appellant's spouse indicated that even after the tenancy agreement was entered into on October 26, 2007, she was still hoping to convince her parents to move in. She and the appellant said that her parents stayed at the house on a couple of occasions after they took possession on October 31, 2007 and before November 17, 2007 when the tenant moved in.

[8] I do not accept that the appellant and his spouse were still intending to have her parents occupy the property after they entered into the tenancy agreement with Ms. King. I also find it highly unlikely that the appellant's spouse's parents would spend some nights at the property between October 31 and November 17, 2007 while work was still being done by the builder on the property to correct deficiencies.

Furthermore, Ms. King, the tenant, said that when she moved in, she could see no sign that anyone had used the property or lived in it. Finally, it makes no sense to me that the appellant's spouse's parents would spend time in the property after the decision to rent the property had been made. Even if I had accepted that they did sleep at the property on occasion before the tenant moved in, the evidence falls far short of showing that those overnight stays amount to occupying the property as their residence.

[9] I also note that the appellant did not call either of his spouses' parents to testify at the hearing. While the appellant's spouse said that her mother had problems with her knees and her father had health problems, there was no request to adjourn the hearing to allow them to attend and no convincing evidence to show that they were prevented by health problems from attending. I draw a negative inference from the appellant's failure to call either of them as witnesses.

[10] As for the suggestion by the appellant's representative that the appellant and his spouse occupied the property as a place of residence after they took possession, I note that the appellant testified that after each occasion on which they visited the property between October 31 and November 17 (to hang curtains, install a dishwasher and do various small jobs) they returned home each night.

[11] For these reasons, I find that neither the appellant's spouse's parents nor the appellant and his spouse occupied the property as a place of residence after October 31, 2007 and before the tenant moved in on November 17, 2007. This is fatal to the appellant's claim for a New Housing Rebate since clause (i)(A) of paragraph 254(2)(g) of the *ETA* requires that the applicant or a relation of the applicant be the first individual to occupy the unit as a place of residence after substantial completion of the unit.

[12] The appellant's representative submitted in the alternative that if the appellant is denied the New Housing Rebate, he should be allowed to claim a GST/HST New Residential Rental Property Rebate ("Rental Property Rebate") in respect of the property because he met all of the conditions for that rebate.

[13] However, as pointed out by counsel for the respondent, the deadline for applying for a Rental Property Rebate is two years after the end of the month in which GST first became payable on the purchase. This deadline is found in paragraph 256.2(7)(a) of the *ETA*.

[14] Since GST became payable on the purchase of the property on the closing date, October 31, 2007, the time limit for applying for a rental property rebate would have been October 31, 2009. The appellant only filed a Rental Property Rebate application in 2011 after the Minister denied his New Housing Rebate claim.

[15] I have no jurisdiction to waive or extend the time limit set out in paragraph 256.2(7)(a). Therefore, I have no power to order the Minister to allow the appellant's Rental Property Rebate application.

[16] The appellant stated that other taxpayers who purchased property from the same builder and who claimed the New Housing Rebate but who rented out their properties were allowed by the CRA to file the Rental Property Rebate applications in place of their New Housing Rebate applications, and were in fact granted those rebates.

[17] Again, I agree with counsel for the respondent that I cannot take into account the CRA's treatment of those other taxpayers. I am required to apply the provisions of the *ETA* to the facts of this case, and as I have indicated, the application by the appellant for the rental property rebate was out of time.

[18] This is a harsh result for the appellant, and I am sympathetic to his position. However, I must dismiss the appeal.

Signed at Ottawa, Canada, this 30th day of September 2013.

“B.Paris”

Paris J.

CITATION: 2013 TCC 307

COURT FILE NO.: 2012-3741(GST)I

STYLE OF CAUSE: GUS NAPOLI AND HER MAJESTY THE QUEEN

PLACE OF HEARING: Toronto, Ontario

DATE OF HEARING: September 6, 2013

REASONS FOR JUDGMENT BY: The Honourable Justice B. Paris

DATE OF JUDGMENT: September 30, 2013

APPEARANCES:

Agent for the Appellant: Sam Culmone
Counsel for the Respondent: Rita Araujo

COUNSEL OF RECORD:

For the Appellant:

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Firm:

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