

Federal Court of Appeal



Cour d'appel fédérale

Date: 20160415

Docket: A-344-15

Citation: 2016 FCA 116

**CORAM: DAWSON J.A.
NEAR J.A.
BOIVIN J.A.**

BETWEEN:

HENGAMEH RANJBAR

Appellant

and

HER MAJESTY THE QUEEN

Respondent

Heard at Toronto, Ontario, on April 13, 2016.

Judgment delivered at Ottawa, Ontario, on April 15, 2016.

REASONS FOR JUDGMENT BY:

DAWSON J.A.

CONCURRED IN BY:

**NEAR J.A.
BOIVIN J.A.**

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REASONS FOR JUDGMENT

DAWSON J.A.

[1] For reasons delivered orally on February 6, 2015, in Court File Numbers 2014-1454 (GST)I and 2014-1480 (GST)I, a Judge of the Tax Court of Canada dismissed the appellant's appeals from an assessment made under the *Excise Tax Act*, R.S.C. 1985, c. E-15 (Act). The appeals raised the issue of whether the appellant was entitled to claim the GST/HST new housing rebate in respect of the separate purchases of two residences: a condominium referred to as the

“Thornhill property” and a townhome referred to as the “Richmond Hill property”. This is an appeal from the judgment of the Tax Court in respect of the Richmond Hill property only.

[2] As the Judge correctly noted, purchasers are entitled to claim the new housing rebate if they satisfy the numerous conditions found in subsection 254(2) of the Act. According to the Judge, the two relevant conditions were those contained in paragraph 254(2)(b) and clause 254(2)(g)(i)(A).

[3] The Judge found, based on the appellant’s testimony, that paragraph 254(2)(b) was satisfied because, at the time the appellant entered into the agreement of purchase and sale, she intended to use the Richmond Hill property as her primary place of residence.

[4] The Judge went on to find that clause 254(2)(g)(i)(A) was not satisfied because the appellant never occupied the property.

[5] On this appeal the appellant argues that the Judge erred in law by failing to consider that the appellant satisfied subparagraph 254(2)(g)(ii) of the Act, and so would qualify for the new housing rebate.

[6] The respondent agrees, stating that on the basis of the evidentiary record before the Tax Court, the appellant satisfied subparagraph 254(2)(g)(ii) of the Act and she did not have to satisfy subparagraph 254(2)(g)(i) of the Act in order to satisfy subsection 254(2). I agree. While the condition in each paragraph of subsection 254(2) must be met in order to qualify for the new

housing rebate, paragraph 254(2)(g) sets out alternative conditions in its two clauses, only one of which must be met.

[7] The respondent submits, however, that this concession does not assist the appellant because the Judge erred in law by relying solely upon the appellant's evidence about her intent when the Judge was also required at law to have regard to objective manifestations of purpose (*Symes v. Canada*, [1993] 4 S.C.R. 695, at page 736, 110 D.L.R. (4th) 470). In support of her submission the respondent points to the Judge's statement that "[a]fter hearing the testimony of the Appellant, I have concluded that at the time she entered into the agreement of purchase and sale, she had the intention to use ... the Richmond Hill property" as her "primary place of residence".

[8] I have two difficulties with this submission.

[9] First, the evidence of objective manifestations was adduced by the Crown through the appellant's oral testimony. This makes the Judge's reference to "[a]fter hearing the evidence of the Appellant" at the least somewhat ambiguous.

[10] My second difficulty with the respondent's submission is that the Supreme Court has stated that "[t]rial judges are presumed to know the law with which they work day in and day out" (*F.H. v. McDougall*, 2008 SCC 53, [2008] 3 S.C.R. 41, at paragraph 54, citing *R. v. Burns*, [1994] 1 S.C.R. 656, at page 664, 165 N.R. 374.).

[11] It follows that the Judge is entitled to the presumption that he knew and understood the law applicable to ascertaining the appellant's intent, even though the Judge did not explicitly articulate the relevant legal principles.

[12] Applying this presumption, I am unable to conclude that the Judge made a palpable and overriding error when he found the appellant's testimony to be sufficiently credible to overcome the circumstantial evidence relied on by the respondent to assert the inference that at the relevant time the appellant lacked the requisite intent.

[13] More troubling is the fact that during closing argument the Judge stated that he did not "need to hear" from counsel for the respondent with respect to the Richmond Hill property. The respondent does not argue that this, in the particular circumstances of this case, vitiates the Judge's decision. Rather, she submits that had the Judge heard her submissions the Judge "might not" have fallen into error.

[14] It is a fundamental principle of our adversarial system that a party has the right to be heard before a court makes a decision adverse to the party's interest.

[15] This said, the issue of the appellant's intention was squarely raised by the respondent in her Reply to the Notice of Appeal. In determining that the appellant was not eligible for the rebate the Minister assumed that at "no time following the purchase of the [Richmond Hill] property did the Appellant intend that she or an individual related to her would reside at the

[Richmond Hill property] and use it as their primary place of residence”. The appellant was cross-examined on the Minister’s assumptions.

[16] In this circumstance, I am satisfied that the issue of intent was in play such that the respondent was heard on this issue.

[17] It follows that, despite the cogent submissions of counsel for the respondent, I would allow the appeal and set aside the judgment of the Tax Court in part as it relates to the Richmond Hill property, and, pronouncing the judgment that should have been made, I would return the assessment to the Minister for re-assessment on the basis that the appellant is entitled to the GST/HST new housing rebate in respect of the Richmond Hill property.

[18] Having regard to the totality of the facts and circumstances, I would not make an award of costs.

“Eleanor R. Dawson”

J.A.

“I agree.

D.G. Near J.A.”

“I agree.

Richard Boivin J.A.”

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

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MAJESTY THE QUEEN
PLACE OF HEARING: TORONTO, ONTARIO
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CONCURRED IN BY: NEAR J.A.
BOIVIN J.A.
DATED: APRIL 15, 2016

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