

Docket: 2015-1924(GST)I

BETWEEN:

FANJIN YU,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

Appeal heard on January 15, 2016, at Toronto, Ontario

Before: The Honourable Justice Réal Favreau

Appearances:

Counsel for the Appellant: Adam Z. Serota

Counsel for the Respondent: Isida Ranxi

JUDGMENT

The appeal from the reassessment made under Part IX of the *Excise Tax Act* with respect to a GST/HST New Housing Rebate, notice of which was dated December 11, 2013, is dismissed in accordance with the attached reasons for judgment.

Signed at Ottawa, Canada, this 18th day of May 2016.

“Réal Favreau”

Favreau J.

Citation: 2016 TCC 121
Date: 20160518
Docket: 2015-1924(GST)I

BETWEEN:

FANJIN YU,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

REASONS FOR JUDGMENT

Favreau J.

[1] Ms. Yu is appealing the disallowance of her claim for a Goods and Services Tax/Harmonized Sales Tax (“GST/HST”) for a New Housing Rebate of \$24,000 (the “Rebate”) with respect to a property located at 15 Linacre Drive, Richmond Hill, Ontario (the “Property”).

[2] The Minister of National Revenue (the “Minister”) disallowed the Rebate because neither the appellant nor a relative of the appellant intended to occupy the Property as a primary place of residence.

[3] By way of a reassessment made under Part IX of the *Excise Tax Act*, R.S.C. 1985, c. E-15, as amended (the “*ETA*”), notice of which was dated December 11, 2013, the Minister reassessed the appellant’s Rebate application which had been incorrectly allowed and credited to the builder of the Property.

[4] In determining that the appellant was not eligible for the Rebate, the Minister relied on the following assumptions of fact:

...

- b) the Appellant signed a purchase agreement to purchase the Property on May 2, 2011;

- c) the purchase price was \$588,474.65;
- d) the Appellant's residence was located elsewhere in Richmond Hill, Ontario (the "Residence");
- e) the Appellant took possession of the Property on December 20, 2012;
- f) the Appellant continued to reside at her Residence after taking possession of the Property;
- g) the Appellant did not move into the Property;
- h) the Appellant did not intend to move into the Property;
- i) the Appellant's parents resided in China and maintained their personal residence in China at all material times;
- j) the Appellant's parents visited the Appellant for some time during the Winter/Spring of 2013;
- k) the Appellant's parents stayed with the Appellant during their stay and returned to their personal residence in China at the end of their stay;
- l) the Appellant's parents did not move into the Property;
- m) the Appellant's parents did not intend to move into the Property;
- n) the average water consumption in the Property between December 20, 2012 and April 15, 2013 was 30 litres per day;
- o) the average power consumption between December 20, 2012 and July 29, 2013 was 5.33 kWh per day; and
- p) the Appellant sold the Property on June 29, 2013 for \$870,000.00

[5] Paragraph 254(2)(b) of the *ETA* sets out that the new housing rebate is available where, at the time the purchaser becomes liable or assumes liability under an agreement of purchase and sale of the property, the purchaser intends to use the property as a primary place of residence for himself or herself or for a relative.

[6] The relevant parts of subsection 254(2) reads as follows:

Where

...

(b) at the time the particular individual becomes liable or assumes liabilities under an agreement of purchase and sale of the complex or unit entered into between the builder and the particular individual, the particular individual is acquiring the complex or unit for use as the primary place of residence of the particular individual or a relation of the particular individual

...

the Minister shall, subject to subsection (3) pay a rebate to the particular individual equal to ...

[7] It is not disputed in this case that Ms. Yu entered into a contract to purchase the Property on May 2, 2011 prior to the construction of the Property. The purchase price of the Property was \$633,990. Ms. Yu had to make a \$10,000 deposit on May 12, 2011, June 12, 2011, July 12, 2011 and on August 12, 2011 and the balance of the purchase price was payable on the closing date of the transaction which was on December 20, 2012.

[8] Ms. Yu testified at the hearing. She said that she bought this Property for her retired parents who wanted to move to Canada to be close to their only child and their two young grandchildren.

[9] On December 2, 2012, her parents shipped 34 packages of household items and furniture weighing 364 kilograms from China to Canada. On December 21, 2012, the goods were delivered directly to the Property before the arrival of her parents in Canada on December 28, 2012. Once here, the parents purchased window coverings, an air conditioner, appliances and some other furniture that suit their lifestyle.

[10] On July 18, 2012, the appellant subscribed her father to a \$100,000 one-year insurance policy to become effective December 28, 2012. The policy was underwritten by the Co-operators Life Insurance Company and was called "JG Optimum Visitor". The appellant was the sole beneficiary of the insurance policy.

[11] While in Canada, the appellant's parents were responsible for paying all the usual expenses of the Property, such as water, sewer, electricity, gas and internet services and they changed the front door glass insert for privacy. The appellant's father used a pay-as-you-go mobile phone service.

[12] During her testimony, the appellant referred to three transfers of funds that were allegedly used to pay for the Property. Two transfers of funds came from her father on September 12 and 15, 2012 amounting to \$51,085 and \$50,985 respectively and one transfer came from Dong Xiao Wang, the appellant's mother, dated September 12, 2012 amounting to \$50,165. These transfers of funds were made to the order of the appellant and to Choo-Beng Quah, the appellant's former spouse.

[13] Ms. Yu stated that two events forced her and her parents to change their plans. The first was her husband's car accident on November 1, 2012. As a result of that accident, three criminal charges were laid against him. No conviction resulted from these charges but the appellant's life was a total disaster at that time and she started to suffer from mental illness and memory loss.

[14] Ms. Yu and her spouse have lived separately since July 15, 2011 and they started to live together again on July 18, 2012 in an unsuccessful attempt to reconcile. Ms. Yu and her spouse finally filed for divorce which became effective on December 19, 2013.

[15] The second event was her father's heart attack that occurred on May 20, 2013. Her father was admitted at the Southlake Regional Health Centre where he had to wait seven hours before he could see a doctor. As a result of his experience at that hospital, the appellant's parents decided to return to China where they are more at peace considering the condition of their health. The appellant's parents moved out from the Property on May 24, 2013 and they returned to China on May 29, 2013. The appellant listed the Property for sale in mid-June and the Property was sold on June 29, 2013 for \$870,000.

[16] When cross-examined by counsel for the respondent, the appellant confirmed that her parents kept their house in China and that when they left Canada, they returned living in that same house. She also confirmed that she did report on her income tax return for the 2013 taxation year, the gain realized on the sale of the Property. Ms. Yu also recognized that her income for each of the 2011, 2012 and 2013 taxation years was under \$20,000 and that during those years, she was self-employed on a part-time basis, working on weekends.

[17] The appellant was also questioned concerning the history of claiming housing rebates. A sworn affidavit by Teresa D'Sa, a litigation officer with the Canada Revenue Agency ("CRA"), showing that the appellant made six claims within a five-year period, was filed as an exhibit. The following list of claims belonged to the appellant's business number:

1906 – 90 Stadium Road, Toronto

- the date of the agreement of purchase and sale was July 30, 2008;
- the date of possession was March 3, 2011;
- the purchase price of the property was \$434,359.20;
- the amount of the rebate that was claimed and allowed was \$985.37.

18 Heron Hollow Avenue, Richmond Hill

- the date of the agreement of purchase and sale was April 6, 2011;
- the date of possession was July 12, 2012;
- the purchase price of the property was \$668,503.76;
- the amount of the rebate that was claimed and allowed was \$24,000.

20 Linacre Drive, Richmond Hill

- the date of the agreement of purchase and sale was April 6, 2011;
- the date of possession was November 30, 2012;
- the purchase price of the property was \$664,508.71;
- the amount of the rebate that was claimed and allowed was \$24,000.

15 Linacre Drive, Richmond Hill

- the date of the agreement of purchase and sale was May 2, 2011;
- the date of possession was December 20, 2012;
- the purchase price of the property was \$588,474.65;
- the amount of the rebate that was claimed and allowed was \$24,000.

8 – 21 Coneflower Crescent, North York

- the date of the agreement of purchase and sale was August 31, 2013;
- the purchase price of the property was \$371,672.56;
- the amount of the rebate that was claimed and allowed was \$24,000.00.

1707 – 170 Avenue Road, Toronto

- the date of the agreement of purchase and sale was February 27, 2011;
- the purchase price of the property was \$664,508.71;
- the amount of the rebate that was claimed and allowed was \$24,000.00.

[18] Ms. Yu pointed out that the purchase price of the Property was \$633,990 and not \$588,474.64, as indicated in the above-mentioned affidavit, and she explained that the 1906 – 90 Stadium Road property was a condo that she acquired with her ex-spouse, that the 8 – 21 Coneflower Crescent property was a small townhouse that she rented out and that the 1707 – 170 Avenue Road property was also rented out.

[19] Ms. Yu was asked to explain why the water meter reading of 30 liters per day at the Property was so low. Her explanation was that the meter was giving wrong readings and was fixed later on. She did not remember when it was fixed. She also added that her parents were taking only one shower per week.

[20] Mr. Choo-Beng Quah, the appellant's former spouse, also testified at the hearing. He is an accountant and has been working for Trans-Globe since 2012, a property management company. He confirmed that the appellant's parents sent the money to buy the Property, that they came to Canada in the winter/spring of 2013, that they shipped some personal goods to Canada and that they stayed at their own place when they were here.

[21] Concerning the real estate properties, Mr. Quah indicated that he was a co-owner of the 1906-90 Stadium Road and of the 18 Heron Hollow Avenue properties and that he did not have ownership interest in the other properties listed in the affidavit. He further stated that the 18 Heron Hollow Avenue property was sold after their divorce.

Analysis

[22] The onus is on the appellant to satisfy on a balance of probabilities that on May 2, 2011, she agreed to acquire the Property with the intent it would be her parents' primary place of residence. Based on the evidence, I do not see any indication that the appellant purchased the Property with the stated intention of having her parents reside in it as their primary place of residence.

[23] The year 2011 has been a busy year for the appellant. On February 27, 2011, she signed the agreement of purchase and sale of the 1707 – 170 Avenue Road property. On March 3, 2011, she acquired ownership of the 1906 – 90 Stadium Road property. On April 6, 2011, she signed the agreement of purchase and sale of the 18 Heron Hollow Avenue property and of the 20 Linacre Drive property. On May 2, 2011, she signed the agreement of purchase and sale of the Property. On July 15, 2011, she started to live separate from her husband.

[24] The investments made in real estate properties by the appellant in 2011 were very substantial considering her family's situation and her declared income.

[25] In the circumstances, I give little weight to Ms. Yu's stated intention of May 2, 2011. The first indication that her parents may have had the intention to move to Canada were the three transfers of funds made in September 2012, more than a year after the signature of the agreement of purchase and sale of the Property.

[26] The appellant alleged that the funds from her parents were used to pay for the Property. Unfortunately, there is no indication that the said funds were in fact so used. No bank statements were filed and no evidence was provided as to how and when the payments to acquire the Property were made.

[27] It is not contested that the appellant's parents came to Canada at the end of 2012 but the issue is to determine in what capacity, as visitors or as immigrants. No immigration papers, declarations for immigration purposes, visas or supervisas were filed as evidence. All what we know is that the appellant's father had a medical condition which required her to take a one-year insurance policy for him while he was here. The type of insurance subscribed to by the appellant was a policy for a temporary visitor. The appellant's father had no Ontario Health Insurance Plan.

[28] I consider that the appellant's parents came to Canada to help her while she was going through a difficult period, financially and emotionally. They never had

the intention to move to Canada and to establish their primary residence in Canada. They did not appear in Court to confirm their real intention. They kept their house in China and they could not speak English.

[29] The facts that the appellant's parents brought some personal goods to Canada, stayed in the Property for a few months, purchased window coverings, an air conditioner, appliances and some other furniture and paid for the various utility bills, internet and the mobile phone service fall short of proving that they actually resided here with the intention of using the Property as their primary place of residence.

[30] The argument raised by counsel for the appellant, based on paragraph 254(2)(g) of the *ETA*, is not relevant because all the conditions of subsection 254(2), that is to say, paragraphs (a) to (g), must be met before the appellant is entitled to the rebate. Obviously, this is not the situation in this appeal.

[31] For these reasons, I find that the appellant is not entitled to the GST/HST rebate and her appeal is dismissed.

Signed at Ottawa, Canada, this 18th day of May 2016.

“Réal Favreau”

Favreau J.

CITATION: 2015 TCC 121
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PLACE OF HEARING: Toronto, Ontario
DATE OF HEARING: January 15, 2016
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DATE OF JUDGMENT: May 18, 2016

APPEARANCES:

Counsel for the Appellant: Adam Z. Serota
Counsel for the Respondent: Isida Ranxi

COUNSEL OF RECORD:

For the Appellant:

Name: Adam Z. Serota
Firm: BRS Tax Lawyers, LLP
Toronto, Ontario

For the Respondent:

William F. Pentney
Deputy Attorney General of Canada
Ottawa, Canada