

Docket: 2015-4345(GST)I

BETWEEN:

SHOMAILA AZHAR,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

Appeal heard on July 15, 2016, at Toronto, Ontario.

Before: The Honourable Justice Patrick Boyle

Appearances:

Agent for the Appellant: Vipin Kumar
Counsel for the Respondent: Christian Cheong

JUDGMENT

For the attached reasons for judgment, the appeal from the assessment made under the *Excise Tax Act*, notice of which is dated March 3, 2014, is dismissed, without costs.

Signed at Ottawa, Canada, this 9th day of November 2016.

“Patrick Boyle”

Boyle J.

Citation: 2016 TCC 257
Date: 20161109
Docket: 2015-4345(GST)I

BETWEEN:

SHOMAILA AZHAR,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

REASONS FOR JUDGMENT

Boyle J.

[1] This is an informal HST appeal by the Appellant in respect of the denial by the Canada Revenue Agency of her claim for an HST new housing rebate for a house on Gleave Terrace in Milton, Ontario.

[2] Her entitlement to the new housing rebate turns on the requirements of the HST legislation that:

1. she purchased the house for use as the primary place of residence for herself or a relative, and
2. the first person to occupy the house as a place of residence was either herself or a relative.

[3] It is the Appellant's position that she and her husband agreed to purchase a new house to be built for them to occupy themselves. It is her further position that when the financial and employment circumstances of herself and her husband changed, they decided they had to sell the new house by the time it was built but that her mother-in-law had moved into the house in the interim.

[4] The agreement to buy the house was dated October 2011 for a price of about \$425,000. Closing on the house occurred on April 10, 2013. The house was listed

for resale on April 21, 2013 for \$517,000 as a “Brand New Never Lived in Home”. It was advertised on HomeFinder.ca as a “Brand New Never Lived in Home”. The house was sold for about \$510,000 on June 9, 2013 and closed in August.

[5] The Respondent challenged whether the Appellant and her husband intended to live in the home when she agreed to buy it. The Respondent’s doubts are grounded in the location of the house relative to where they then lived and worked, and relative to where they in fact later bought a different type and size and value of house into which they did move and reside in, and on the cost of the house and servicing its mortgage and taxes and utilities relative to their combined incomes and their previous rent.

[6] The Respondent also challenged whether the Appellant’s mother-in-law (or the Appellant or any other relative) ever occupied the house as a place of residence.

[7] The Appellant was the only witness at trial. I did not hear from her mother-in-law about her moving into the house and residing in it, from her sister-in-law who helped with the down payment for the house, nor from her husband who was originally intended to live together with the Appellant in that house. Nor was I offered the listing agent’s testimony, or even a letter from her, to corroborate that someone lived in the house she described as never lived in.

[8] The Appellant testified that her mother-in-law moved into the house one or two weeks after they got possession and that they listed two or three weeks after they got possession. Neither the Appellant nor her agent brought any documents to Court to corroborate that the mother-in-law either moved to or lived in the house. This was somewhat surprising since the Respondent had pleaded that the house had been offered for resale as brand new and never lived in. It was agreed that we would proceed to argument but nonetheless allow the Appellant 30 days to submit additional supporting documents such as a copy of the listing, the mortgage, property tax bill, utility bills during the mother-in-law’s occupation, any mail sent or redirected to her mother-in-law at that address, etc., and to allow the Respondent to submit a copy of the Home Finder advertisement. Additional documents of this nature have been received and reviewed.

[9] The evidence in this case does not satisfy me on the balance of probabilities that the Appellant’s mother-in-law ever moved into or resided in the house.

[10] My significant doubts about this arise from:

1. The only reason given for the mother-in-law moving into and living in the house once they took possession and during the period it was listed for sale was due to construction issues. No detail was given. While it is possible things remained to be done after closing to a single family freehold house, one might expect that the work could more easily be accomplished without someone living there, and that the buyer would have to sign off on the remaining contracted work being done satisfactorily regardless of whether anyone was there to watch, supervise or get in the way.
2. The listing and the advertising both refer in unqualified terms to the fact that the house was brand new and never lived in. It is hard to imagine how the presence of someone living in the house could not be apparent to prospective buyers looking at a brand new never lived in home. It is equally hard to imagine a realtor taking such a risk.
3. I did not hear anything from the mother-in-law or the real estate agent to corroborate this, nor was I given any explanation for their absence. This causes me significant doubt that their testimony, if given, would support the Appellant.
4. The Union Gas bill submitted shows an almost immaterial gas consumption. It was the Appellant's final bill. It was only the first page and did not detail what the total charges were for — that is stated to be on page 2 which I was not given. This does not satisfy me that any gas was consumed in April through August.
5. The hydroelectric and water bills submitted were the initial and final bills. The May bill was for \$13 of electricity and recorded 0.00 cubic meters of daily water use. The final bill showed \$25 of electricity and again 0.00 cubic meters of daily water consumption, which is about two gallons per day. That would only be sufficient for two flushes of a high efficiency toilet and leave nothing for bathing, showering, washing of dishes, etc.
6. There were some inconsistencies in the testimony of the Appellant, in particular involving the timing of her husband learning that his job might end relative to their purchase and sale decisions.

[11] In summary, it is entirely possible that the Appellant's mother-in-law did in fact move in and live in the house. Unfortunately, the evidence before me simply

does not allow me to conclude that this is more likely than not what happened. For that reason, I am dismissing the appeal.

[12] I would observe that this result is consistent with the fact that the Appellant was assessed income tax on the gain on the house, and I conclude that she did not object to that income tax assessment. The Appellant and her agent were given 30 days to produce a copy of a notice of objection or similar document indicating the income tax treatment had been objected to. None arrived.

Signed at Ottawa, Canada, this 9th day of November 2016.

“Patrick Boyle”

Boyle J.

CITATION: 2016 TCC 257
COURT FILE NO.: 2015-4345(GST)I
STYLE OF CAUSE: SHOMAILA AZHAR v. THE QUEEN
PLACE OF HEARING: Toronto, Ontario
DATE OF HEARING: July 15, 2016
REASONS FOR JUDGMENT BY: The Honourable Justice Patrick Boyle
DATE OF JUDGMENT: November 9, 2016

APPEARANCES:

Agent for the Appellant: Vipin Kumar
Counsel for the Respondent: Christian Cheong

COUNSEL OF RECORD:

For the Appellant:

Firm:

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