

Federal Court of Appeal



Cour d'appel fédérale

Date: 20160209

Docket: A-115-15

Citation: 2016 FCA 45

**CORAM: RYER J.A.
WEBB J.A.
RENNIE J.A.**

BETWEEN:

DMITRI SHERMAN

Appellant

and

HER MAJESTY THE QUEEN

Respondent

Heard at Toronto, Ontario, on February 9, 2016.
Judgment delivered from the Bench at Toronto, Ontario, on February 9, 2016.

REASONS FOR JUDGMENT OF THE COURT BY:

RYER J.A.

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REASONS FOR JUDGMENT OF THE COURT
(Delivered from the Bench at Toronto, Ontario, on February 9, 2016).

RYER J.A.

[1] This is an appeal by Mr. Dmitri Sherman (the “Taxpayer”) from a decision of Justice David Graham of the Tax Court of Canada (the “Judge”), dated February 9, 2015, in Tax Court Docket 2014-2081(GST)I. The Judge dismissed the Taxpayer’s appeal from an assessment, dated April 12, 2013 (the “Assessment”), made by the Minister of National Revenue (the “Minister”) under the *Excise Tax Act*, R.S.C. 1985 (the “Act”), c. E-15, disallowing the

Taxpayer's claim for a rebate of goods and services tax pursuant to subsection 254(2) (the "New Housing Rebate") in respect of the purchase by the Taxpayer of a property located at 24 Thomas Cook Avenue in Vaughan, Ontario (the "Property"). In these reasons, unless otherwise indicated, all statutory references are to the corresponding provisions of the Act.

[2] Subsection 254(2) contains a number of requirements that must be met before an individual will be entitled to the New Housing Rebate. In this appeal, only the requirements in paragraphs 254(2)(b) and (g) are in issue. Those provisions read as follows:

254(2) Where

...

(b) at the time the particular individual becomes liable or assumes liability 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,

...

(g) either

(i) the first individual to occupy the complex or unit as a place of residence at any time after substantial completion of the construction or renovation is

(A) in the case of a single

254(2) Le ministre verse un remboursement à un particulier dans le cas où, à la fois :

[...]

b) au moment où le particulier devient responsable ou assume une responsabilité aux termes du contrat de vente de l'immeuble ou du logement conclu entre le constructeur et le particulier, celui-ci acquiert l'immeuble ou le logement pour qu'il lui serve de lieu de résidence habituelle ou serve ainsi à son proche;

[...]

g) selon le cas :

(i) le premier particulier à occuper l'immeuble ou le logement à titre résidentiel, à un moment après que les travaux sont achevés en grande partie, est :

(A) dans le cas de

unit residential complex,
the particular individual or
a relation of the particular
individual, and

l'immeuble, le particulier
ou son proche,

(B) in the case of a
residential condominium
unit, an individual, or a
relation of an individual,
who was at that time a
purchaser of the unit under
an agreement of purchase
and sale of the unit, or

(B) dans le cas du
logement, le particulier, ou
son proche, qui, à ce
moment, en était l'acheteur
aux termes d'un contrat de
vente,

(ii) the particular individual
makes an exempt supply by
way of sale of the complex or
unit and ownership thereof is
transferred to the recipient of
the supply before the complex
or unit is occupied by any
individual as a place of
residence or lodging,

(ii) le particulier effectue par
vente une fourniture exonérée
de l'immeuble ou du logement,
et la propriété de l'un ou l'autre
est transférée à l'acquéreur de
cette fourniture avant que
l'immeuble ou le logement n'ait
été occupé à titre résidentiel ou
d'hébergement.

[3] In the reply to the Taxpayer's notice of appeal from the Assessment, the Minister assumed that the Taxpayer did not intend to reside in the Property and did not occupy the Property.

[4] In his reasons, the Judge determined that the key issue was the requirement in paragraph 254(2)(b). He determined that the Taxpayer failed to demolish the Minister's assumption that the Taxpayer did not have the intention to occupy the Property as his primary place of residence, and that this failure was a sufficient reason to dismiss the appeal from the Assessment. In reaching this conclusion, the Judge found that the evidence of the Taxpayer and his cousin lacked credibility and did not satisfy him that the Taxpayer had the requisite intention to occupy the Property, as required by paragraph 254(2)(b).

[5] In support of this conclusion, the Judge made a number of findings including that:

- a) the Taxpayer gave inconsistent explanations with respect to his occupancy of the Property;
- b) the Taxpayer provided the Canada Revenue Agency with inconsistent moving expense invoices without a plausible explanation of their differences;
- c) the Taxpayer implausibly urged the Judge to believe that he occupied the Property but did not consume any water during a significant portion of the period of such occupancy; and
- d) the Taxpayer's evidence that he sold the Property because he was not able to live alone, for medical reasons, was belied by his purchase of another residential property, before the date of that sale, in respect of which he also claimed the New Housing Rebate.

[6] In appellate review of a decision of the Tax Court of Canada, the standard of review of questions of law is correctness. Questions of fact and mixed fact and law, in respect of which there is no readily extricable question of law, are reviewed on the standard of palpable and overriding error (*Housen v. Nikolaisen*, 2002 SCC 33 at paragraphs 8, 10, 36, [2002] 2 S.C.R. 235).

[7] In this appeal, the Taxpayer takes issue with the Judge's factual findings referred to above and offers explanations as to why it would have been open to the Judge to make different findings. In effect, we are urged to reweigh the evidence that was before the Judge and to reach conclusions more favourable to the Taxpayer. This we cannot do. In our view, there was ample evidence before the Judge that supports his conclusions. Moreover, this Court owes considerable deference to a trial judge who makes credibility findings based upon the evidence and demeanor of the witnesses who testify before him or her.

[8] Counsel for the Taxpayer asserts that the Judge erred in making his credibility findings by failing to consider the state of the Taxpayer's mental health. The Judge's reasons clearly indicate that he was aware of the Taxpayer's assertions with respect to his mental health and memory issues. In that regard, the Judge observed that the Taxpayer testified that his medication was not properly balanced until 2014. In our view, there was no evidence before the Judge that ought to have led him to conclude that the Taxpayer was unable to meaningfully participate in the appeal before the Judge by virtue of his mental condition or concerns with respect to his memory. In addition, pursuant to the order of Justice Webb, dated July 15, 2015, the Taxpayer's motion for leave to introduce new medical evidence on this appeal was denied.

[9] It is important to recall that the testimony of the Taxpayer that the Judge found lacking in consistency and credibility was given by the Taxpayer on February 4, 2015. The evidence of the Taxpayer's cousin recounted his recollections of the Taxpayer's condition during the years 2010 to 2013, a period considerably earlier than the date that the Judge assessed the Taxpayer's credibility (Appeal Book at page 153). Indeed, the Taxpayer's own evidence appears to indicate that he had been "okay" since 2014 (Appeal Book at page 150 and 151). Thus, the Taxpayer's medical issues in the years 2010 to 2013 were not shown to have had any bearing upon the issue of the Judge's assessment of the Taxpayer's credibility when he gave evidence on February 4, 2015.

[10] In conclusion, we are of the view that the Judge made no palpable and overriding error when he found that the evidence presented to him was not sufficient to demolish the Minister's assumption that the Taxpayer did not have the intention to occupy the Property as his primary

place of residence and, in addition, that the Taxpayer did not occupy the Property. Additionally, the Judge was correct in his conclusion that the Taxpayer's failure to meet the requirements of either of paragraphs 254(2)(b) and (g), was a sufficient reason to uphold the Assessment.

Accordingly, the appeal will be dismissed with costs.

"C. Michael Ryer"

J.A.

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET: A-115-15

(APPEAL FROM A JUDGMENT FROM THE HONOURABLE MR. JUSTICE DAVID GRAHAM OF THE TAX COURT OF CANADA DATED FEBRUARY 9, 2015, (DOCKET NUMBER: 2014-2081(GST)I))

STYLE OF CAUSE: DMITRI SHERMAN v. HER MAJESTY THE QUEEN

PLACE OF HEARING: TORONTO, ONTARIO

DATE OF HEARING: FEBRUARY 9, 2016

REASONS FOR JUDGMENT OF THE COURT BY: RYER J.A.
WEBB J.A.
RENNIE J.A.

DELIVERED FROM THE BENCH BY: RYER J.A.

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