Federal Court of Appeal | Cour d'appel fédérale

Date: 20231130

Docket: A-200-22

Citation: 2023 FCA 235

CORAM: **GLEASON J.A.**
MONAGHAN J.A.
HECKMAN J.A.

BETWEEN:

COREY LIBFELD

Appellant

and

HIS MAJESTY THE KING

Respondent

Heard at Toronto, Ontario, on November 30, 2023.

Judgment delivered from the Bench at Toronto, Ontario, on November 30, 2023.

REASONS FOR JUDGMENT OF THE COURT BY: HECKMAN J.A.

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REASONS FOR JUDGMENT OF THE COURT

(Delivered from the Bench at Toronto, Ontario, on November 30, 2023).

HECKMAN J.A.

[1] We have before us an appeal from a judgment of the Tax Court in *Corey Libfeld v. Her Majesty the Queen*, 2022 TC 91 (*per* Smith J.) dismissing the appellant's appeal of the Minister of National Revenue's decision to disallow the appellant's application for a new housing rebate (NHR) in respect of a property he acquired.

[2] It is not disputed that the appellant had the burden to establish on a balance of probabilities that he met all the conditions in subsection 254(2) of the *Excise Tax Act*, R.S.C. 1985, c. E-15 (ETA). The Minister denied the appellant's NHR application since she concluded that, contrary to the requirements of subsection 254(2):

1) the appellant had not acquired the property from a builder of a residential complex, as defined in subsection 123(1) of the ETA, who had made a taxable supply by way of the sale to the appellant (paragraph 254(2)(*a*));

2) the appellant had not paid GST/HST on the purchase of the property (paragraph 254(2)(*d*)); and

3) the property was occupied as a place of residence before the appellant obtained possession and he was not the first individual to occupy the property after substantial completion of the construction or renovation (paragraphs 254(2)(*f*), 254(2)(*g*)).

[3] The Tax Court dismissed the appellant's appeal. It decided that the appellant met none of these requirements.

[4] On this appeal, the standard of review is correctness for a question of law, and palpable and overriding error for a question of fact or mixed fact and law, where there is no extricable question of law: *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235. An error is palpable when it is plainly seen, and overriding when it affects the result: *Canadian Imperial Bank of Commerce v. Canada*, 2021 FCA 10, 456 D.L.R. (4th) 722 at para. 55.

[5] Subsection 123(1) of the ETA defines "builder" as including a person who engages another person to carry on the construction of a residential complex in the course of a business or an adventure or concern in the nature of trade.

[6] In concluding that the appellant had not established that he had acquired the property from a "builder", the Tax Court correctly identified the factors relevant to determining whether the vendor was engaged in a business or an adventure or concern in the nature of trade. These factors are set out in *Happy Valley Farms Ltd. v. Minister of National Revenue*, [1986] 2 C.T.C. 259, 1986 CarswellNat 375 (Fed. T.D.), cited by the Tax Court.

[7] The appellant claims that the Tax Court's observation, at paragraph 44 of its reasons, that "[t]he Court is thus unable to conduct the required analysis to reach a conclusion that the Vendor was a 'builder'" amounts to a refusal to apply the *Happy Valley Farms* factors and is a reversible error of law. He claims that the Tax Court erred in law by concluding, at paragraph 44 of its reasons, that, absent direct evidence from the vendor, it could not find that the vendor was a builder.

[8] Reading the Tax Court's reasons in their entirety and placing its statements in their proper context, we are of the view that the appellant's claims are unfounded.

[9] The Tax Court did not refuse to apply the *Happy Valley Farms* factors. It simply found that the evidentiary record was insufficient to allow it to draw the inferences necessary to conclude that the vendor was a "builder".

[10] We do not read the Tax Court's observation that the appellant had failed to adduce direct evidence from the vendor or other independent witnesses relating to three of the *Happy Valley Farms* factors – the frequency of similar transactions, the vendor's intention when she acquired the property and her motive for selling – as a finding that such evidence is always required. Rather, the Tax Court's point was that, in the cases cited by the appellant in argument before it, such evidence had helped the court ascertain the taxpayers' intention and conclude that the taxpayers were builders.

[11] The Tax Court declined to draw the inference urged by the appellant because 1) there was a lack of evidence as to what had transpired between the vendor's acquisition of the property and its listing of the property in 2018, and 2) the vendor's Declaration and Indemnity, titled "Exempt Real Property Supply", to which the appellant did not object on closing, certified and declared that the sale of the property "does not constitute a taxable supply" and that the property was not acquired in the course of business or adventure or concern in the nature of trade.

[12] The appellant has not convinced us that in preferring this uncontroverted evidence of the vendor's intention over the inferences proposed by the appellant, the Tax Court committed a reviewable error.

[13] Since the appellant has not shown that the Tax Court made a reviewable error in deciding that the vendor was not a "builder" for the purposes of subsection 254(2) of the ETA and because all conditions outlined in that provision must be satisfied for this appeal to succeed, this appeal is therefore dismissed.

"Gerald Heckman"

J.A.

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

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