

Docket: 2010-2814(GST)I

BETWEEN:

FIDUCIE ALEX TRUST,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

[OFFICIAL ENGLISH TRANSLATION]

Appeal heard on October 12, 2012, at Montréal, Quebec

Before: The Honourable Justice Réal Favreau

Appearances:

Counsel for the appellant: Stéphane Rivard
Counsel for the respondent: Bernard Duchesneau

JUDGMENT

The appeal from the assessment, notice of which is dated January 26, 2009, and bears the number PQ 2009 12295, made under Part IX of the *Excise Tax Act*, in respect of the appellant is dismissed, in accordance with the attached Reasons for Judgment.

Signed at Ottawa, Canada, this 22nd day of January 2013.

"Réal Favreau"

Favreau J.

Translation certified true
on this 5th day of March 2013
Margarita Gorbounova, Translator

Citation: 2013 TCC 14
Date: 20130122
Docket: 2010-2814(GST)I

BETWEEN:

FIDUCIE ALEX TRUST,

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REASONS FOR JUDGMENT

Favreau J.

[1] This is an appeal from an assessment, notice of which is dated January 26, 2009, and bears the number PQ 2009 12295, made under Part IX of the *Excise Tax Act* (ETA).

[2] The issue in this case is whether, at the time when the Minister of Revenue of Quebec acting as agent for the Minister of National Revenue (the Minister) issued a requirement to pay (the requirement), the appellant was liable to pay the amount of \$17,006.83 to Avak Demirciyan (the tax debtor), and whether, consequently, the appellant must be held liable for the amount that the Minister is claiming from him, namely, \$6,916.67 as a garnishee under section 317 of the ETA.

[3] In his assessment of the appellant, the Minister relied on the following findings and assumptions of fact, among others, as set out in paragraph 17 of the Reply to the Notice of Appeal:

[TRANSLATION]

(a) The facts admitted above.

- (b) At the time when the requirement was sent to the appellant, the tax debtor was liable to pay under the ETA an overall amount in excess of \$17,006.83, which was the tax debtor's portion of the sale price balance payable by the appellant, the other portion owing to his spouse, Lyubow Shperun.
- (c) The appellant failed to comply with the requirement to pay by repaying directly to the tax debtor, after receiving the requirement, the debt it owed him under the acknowledgement of debt that it signed in his favour on January 14, 2008;
- (d) Although the appellant asserts that the debt that it owed to the tax debtor was repaid through a third-party loan on August 6, 2008 (11 days before the requirement was received), no justification or serious evidence was provided in support of this allegation, and therefore there is no basis to conclude that it is true.
- (e) Among other things and without limiting the generality of the foregoing, the appellant was unable to provide proof of the deposit of the cheque repaying the \$18,000 allegedly received by the tax debtor on August 15, 2008;

[4] The following facts are also relevant for the purposes of the case at bar:

- (a) At all times relevant to the case at bar, the tax debtor was liable to pay the Minister an overall amount of over ten (10) million dollars under the *Ministry of Revenue Act*, the *Act respecting the Québec sales tax* and the ETA.
- (b) On January 14, 2008, the tax debtor and his spouse jointly sold an immovable located at 1275 Chénard Street in Laval (the family residence) to the appellant for a consideration of \$250,000, \$34,013.65 of which should have been paid by the appellant as a down payment (the contract of sale).
- (c) On January 14, 2008, the appellant signed in favour of the tax debtor an acknowledgement of debt in the amount of \$17,010.83, that is, the part of the sale price that should have been paid by the appellant to the tax debtor under the contract of sale (the sale price balance).
- (d) On August 14, 2008, the Minister sent by registered mail to the appellant the requirement in which he required the appellant to remit to him all amounts payable to the tax debtor not exceeding \$4,062,850.21.

- (e) The requirement was received by the appellant on August 18, 2008.

Appellant's position

[5] The appellant alleges that on August 18, 2008, it owed no amounts to Avak Demirciyan.

[6] The appellant alleges that it borrowed \$18,000 from David Bafri on June 26, 2008, in order to pay the sale price balance owing to the tax debtor and instructed him to personally give that \$18,000 to Avak Demirciyan. The payment was made by a cheque cashed by the tax debtor in David Bafri's presence.

The testimony

[7] Avak Demirciyan testified at the hearing. He explained that at the time he had been having serious problems with the Quebec tax authorities and that, for that reason, he had consulted Jacques Matte in order to protect the family residence from creditors. On Mr. Matte's recommendation, Avak Demirciyan and his spouse agreed to create a trust so that it would become the owner of the family residence.

[8] Fiducie Alex Trust was created through a notarial deed dated December 4, 2007. The settlor was Arsaluys Demirciyan, the tax debtor's mother, while the trustees were Eyda and Aline Demirciyan, two sisters of the tax debtor, and Lyubow Shperun, the tax debtor's spouse. Lyubow Shperun was also the sole beneficiary of the trust. The trust deed, which was drafted in French, was filed as Exhibit A-3.

[9] On January 14, 2008, Fiducie Alex Trust purchased the family residence from the tax debtor and his spouse for a price of \$250,000, paid through a down payment of \$34,013.65, which the sellers acknowledged having received from the trust and for which they released it, and, with respect to the balance of \$215,986.35, through assuming the hypothec owing to the Scotia Mortgage Corporation. The notarial deed of sale, which was drafted in French, was filed as Exhibit A-4.

[10] Although the notarial deed of sale specified that release was given following receipt of the \$34,013.65 down payment, on January 14, 2008, Fiducie Alex Trust signed an acknowledgment of debt stating that it owed \$17,010.83 to Avak Demirciyan under the deed of sale entered into before the notary

Pierre-Paul Blais on the same day. The acknowledgment of debt, which was drafted in French, was filed by the respondent as Exhibit I-3.

[11] Avak Demirciyan explained that the portion of the sale price balance that was owing to him, namely, \$17,006.83 was paid by Fiducie Alex Trust from a loan of \$18,000 granted by David Bafri, a family friend.

[12] Through a private loan agreement dated June 26, 2008, David Bafri loaned \$18,000 to Fiducie Alex Trust to enable it to repay the debt owing to Avak Demirciyan following the purchase of the family residence. The loan was to be disbursed before August 31, 2008, and was to bear interest of 6% per annum, payable one (1) year after the last disbursement date. Fiducie Alex Trust authorized David Bafri to pay the loan amount directly to Avak Demirciyan to whom the trust was in debt. The loan agreement, which was drafted in French, was filed as Exhibit A-1.

[13] Avak Demirciyan explained that David Bafri had written a cheque dated August 6, 2008, in the amount of \$18,000 payable to him, which he had endorsed and cashed on August 15, 2008, at the Place Vertu branch of the Bank of Montreal while he was with David Bafri. A copy of the cheque was filed as Exhibit A-2 in a bundle.

[14] Avak Demirciyan specified that he had cashed the cheque on site in \$50 and \$100 bills because his bank accounts had been frozen by the tax authorities. Avak Demirciyan declared bankruptcy in January 2009.

[15] David Bafri, a business analyst, testified at the hearing and acknowledged that he had known Avak Demirciyan and his spouse since 2001 and that they had introduced him to his wife. He acknowledged that he had signed the loan agreement at the office of Mr. Matte, prepared the cheque dated August 6, 2008, and transferred \$15,000 from his business account to his personal bank account on August 13, 2008. He confirmed that he had accompanied Avak Demirciyan to the Place Vertu branch of the Bank of Montreal, when Mr. Demirciyan cashed the cheque in small denominations of \$100. The signatures on the back of the cheque are those of the teller and the branch manager on the right, his own in the middle and that of Avak Demirciyan on the left. A copy of David Bafri's personal bank account statement for the period ending on August 22, 2008, was filed as Exhibit A-2 in a bundle.

[16] David Bafri specified that the loan had been granted to Fiducie Alex Trust without consideration and without any security. To this date, he has not received any interest or principal payments for this loan.

[17] Lyubow Shperun, who is a designer by profession, also testified at the hearing. She explained that her husband had told her about Mr. Matte's recommendation to create a trust to purchase the family residence. She stated that she had signed the trust deed, drafted in French, which she does not understand very well, after the notary had explained the main terms and conditions of the deed in question. Lyubow Shperun stated that she had asked David Bafri to lend her some money in June 2007, when he was at her house. She stated that she had borrowed money from David Bafri and given it to her husband. She also stated that she had made the initial payment of \$34,000 when the family residence was purchased by Fiducie Alex Trust from her personal bank account. She also confirmed that she had insisted that the loan bear 6% interest and that the loan granted by David Bafri had not been repaid.

[18] Lyubow Shperun also confirmed that no acknowledgment of debt similar to that signed in favour of her husband (Exhibit I-3) had been given to her. She also stated that the hypothec payments were made by Fiducie Alex Trust from a bank account registered in the trust's name to which she transferred money from her personal bank account.

[19] Lyubow Shperun acknowledged that she had received a requirement to provide documents and information dated July 17, 2008, in which the Minister required that a double-sided copy of the payment issued to Avak Demirciyan for the balance of the sale price of the family residence be sent to him. The requirement was filed as Exhibit I-4. Lyubow Shperun stated that she had given the requirement to her husband so that he may discuss it with Mr. Matte. Avak Demirciyan then denied having seen the documents in question. Regardless, Mr. Matte followed up on that requirement and on those issued to Fiducie Alex Trust and to Ayda Demirciyan Akcakiryan by sending the loan agreement between Fiducie Alex Trust and David Bafri. Mr. Matte's letter dated August 14, 2008, was filed as Exhibit I-5.

[20] Lyubow Shperun confirmed that she had never seen or had prepared any financial statements or tax returns for Fiducie Alex Trust. Avak Demirciyan then confirmed that no financial statements had been prepared for Fiducie Alex Trust's fiscal years and no tax return had been filed for Fiducie Alex Trust because neither his accountant nor Mr. Matte had told him that Fiducie Alex Trust was required to do so.

[21] André Berrouard, a collections officer with the ministère du Revenu du Québec, testified at the hearing, among other things, to put in evidence the tax assessments issued in respect of 9142-2899 Québec Inc. on November 22, 2007, filed

as Exhibit I-2. The assessments were not disputed. Avak Demirciyan was the sole shareholder of 9142-2899 Québec Inc. Avak Demirciyan was also personally assessed as a director of 9142-2899 Québec Inc. by a notice of assessment dated July 16, 2008, for a total of \$4,040,381.15. The notice of assessment was filed as Exhibit I-2.

[22] Notices to a garnishee from the Quebec Minister of Revenue and requirements to pay were issued to Ayda Demirciyan Akcakiryan and Lyubow Shperun as trustees of Fiducie Alex Trust in a letter dated August 14, 2008, and received by Ayda Demirciyan Akcakiryan on August 18, 2008 (Exhibit I-6), and in a letter received by Lyubow Shperun on September 15, 2008.

[23] In letters dated September 22, 2008, the Minister informed Lyubow Shperun and Ayda Demirciyan Akcakiryan that they had failed to meet their obligation to pay a tax amount (Exhibit I-7 in a bundle).

[24] André Berrouard also stated that, on September 30, 2008, he had received a call from Ayda Demirciyan Akcakiryan, who told him that she was not aware of the transactions performed by Fiducie Alex Trust and that her role was limited to being a signing authority.

Analysis

[25] The issue centres on the terms and conditions of cashing the \$18,000 cheque made out by David Bafri to Avak Demirciyan. The cheque was taken out in cash, and there is no documentary evidence that the money was actually given to Avak Demirciyan. He could have deposited the cheque or the money in another bank account or performed any other transaction with the money obtained from David Bafri. In his testimony, Avak Demirciyan stated that he had needed the money to be able to work and to be able to purchase property. No such information was put in evidence.

[26] The witnesses' testimony was generally credible, but some contradictions were noted. Lyubow Shperun was not very involved in the transactions and trusted her husband and his counsel. She believed that it was she who had borrowed the money from David Bafri and who had given it to her husband. In his testimony, Avak Demirciyan said that he had never seen Exhibit I-4, namely, the requirement to provide documents and information, but his counsel had followed up on it. In his testimony, David Bafri seemed to remember quite well what had happened on August 15, 2008, at the bank, but he was not too sure of the purpose of the loan and

he did not remember the details of the transactions performed with Fiducie Alex Trust. In his testimony, he said that Avak Demirciyan had received \$100 bills when he had cashed the cheque, while Avak Demirciyan said that he had received \$100 and \$50 bills.

[27] David Bafri's testimony, although credible, was not that of a completely independent person who had no relationship with the parties involved. Indeed, he is a personal friend of the family who had agreed to loan \$18,000 without security, which was still not repaid four years later.

[28] Under subsection 299(4) of the ETA, an assessment is deemed valid and binding and the taxpayer has an initial onus to "demolish" the exact presumption of the assessment's validity by making a *prima facie* case of its inexactness. A *prima facie* case is usually defined as one that is supported by evidence which raises such a degree of probability in its favour that it must be accepted if believed by the Court unless it is rebutted or the contrary is proved. When a taxpayer presents that type of case, the burden of proof is reversed, and the Minister must then rebut the *prima facie* case and prove the assessment by assumptions. To quote the Court of Appeal of Québec in *St-George c. Québec (Sous-ministre du Revenu)*, 2007 QCCA 1442:

[TRANSLATION]

[11] The taxpayer's evidence must, however, contain a certain degree of precision and probability in his or her favour as apposed to vague and ambiguous allegations. In general, simply the taxpayer's statement will not suffice, it would be better to support it with documentary or circumstantial evidence.

[29] In the case at bar, the taxpayer's obligations are not vague or ambiguous and there is documentary evidence that a loan was granted by David Bafri and that a cheque payable to Avak Demirciyan by David Bafri was cashed at the Place Vertu branch of the Bank of Montréal, but there is no documentary evidence showing that Avak Demirciyan actually obtained the money from the cashing of the cheque. Only David Bafri's and Avak Demirciyan's testimony tend to support this fact.

[30] In my view, given the facts described above, it is just as likely or possible that David Bafri left the bank with his own money as it is that the money was indeed given to Avak Demirciyan in accordance with the loan agreement and the acknowledgment of debt.

[31] Given the context in which the transactions were performed, given the testimony of the parties involved and the documentary evidence filed and given the

fact that Fiducie Alex Trust did not comply with its financial and tax obligations in terms of preparing financial statements and filing tax returns, which would have confirmed Fiducie Alex Trust's transactions, the Court finds that the appellant did not rebut the presumption that the assessment dated January 26, 2009, was valid.

[32] For these reasons, the appeal is dismissed and the assessment made under subsection 317(9) of the ETA for non-compliance with the requirement to pay dated August 14, 2008, and received August 18, 2008, in respect of Fiducie Alex Trust, is confirmed.

Signed at Ottawa, Canada, this 22nd day of January 2013.

"Réal Favreau"

Favreau J.

Translation certified true
on this 5th day of March 2013
Margarita Gorbounova, Translator

CITATION: 2013 TCC 14

COURT FILE No.: 2010-2814(GST)I

STYLE OF CAUSE: FIDUCIE ALEX TRUST AND HER
MAJESTY THE QUEEN

PLACE OF HEARING: Montréal, Quebec

DATE OF HEARING: October 12, 2012

REASONS FOR JUDGMENT BY: The Honourable Justice Réal Favreau

DATE OF JUDGMENT: January 22, 2013

APPEARANCES:

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