

Docket: 2012-4385(GST)G

BETWEEN:

AMNON BENAROCH,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

[OFFICIAL ENGLISH TRANSLATION]

Appeal heard on October 16, 2014, at Montréal, Quebec

Before: The Honourable Justice Réal Favreau

Appearances:

Counsel for the appellant: Pierre Martel
Counsel for the respondent: Nicolas C. Ammerlaan

JUDGMENT

The appeal from the assessment, notice of which is dated July 13, 2012, and bears number F-038521, made under the *Excise Tax Act* is allowed with costs, and the assessment is vacated in accordance with the attached reasons for judgment.

Signed at Montréal, Quebec, this 16th day of April 2015.

“Réal Favreau”

Favreau J.

Translation certified true
On this 14th day of August 2015

François Brunet, Revisor

Citation: 2015 TCC 93
Date: 20150416
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BETWEEN:

AMNON BENAROCH,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

[OFFICIAL ENGLISH TRANSLATION]

REASONS FOR JUDGMENT

Favreau J.

[1] This is an appeal from an assessment, notice of which is dated July 13, 2012, and bears number F-038521, made under section 325 of the *Excise Tax Act*, R.S.C. 1985, c. E-15, as amended (the ETA), with respect to a transfer of property made by Ahuva Malnik Kroch Benaroch to the appellant, her husband, even though she owed \$67,424.15 under the ETA.

[2] At the hearing, counsel for the appellant informed the Court that the assessment made under the ETA with respect to the corporation 4158831 Canada Inc., dated March 30, 2005, for the June 1, 2003, to August 31, 2004, period was not being challenged.

[3] Counsel for the appellant further stated that the event chronology was no longer being disputed. Consequently, the facts on which Quebec's Minister of Revenue (the Minister) relied to assess the appellant are admitted. These facts are as follows:

- (a) The appellant and Ms. Benaroch have been married since February 13, 1979;
- (b) In 2005, Ms. Benaroch owed \$67,424.15 under the ETA;

- (c) On May 26, 1988, the appellant and Ms. Benaroch bought a condominium at 307 Samson in Laval (hereafter the condominium);
- (d) The appellant and Ms. Benaroch were equal co-owners of the condominium;
- (e) On May 25, 2005, the appellant purchased a house (hereafter the house) at 964 Place D'Alençon in Laval for \$277,500;
- (f) The appellant was the sole purchaser of the house;
- (g) To purchase the house, the appellant took out two loans: a bridge loan for \$60,000 and a hypothecary loan for \$160,000 with TD Bank;
- (h) The balance of the purchase price, \$57,500, was paid for with money that Ms. Benaroch's parents gave to the appellant;
- (i) On June 27, 2005, the appellant and Ms. Benaroch sold the condominium to third parties;
- (j) The condominium was sold for \$137,000;
- (k) The notary handling the sale was Nicolas Polyzos;
- (l) The appellant and Ms. Benaroch were paid for the condominium in two installments;
- (m) On June 28, 2005, the appellant and Ms. Benaroch received a first payment of \$70,920.92.
- (n) On June 30, 2005, the appellant deposited the cheque in his personal bank account;
- (o) The appellant and Ms. Benaroch also received the second payment, \$60,000, on June 28, 2005;
- (p) Both cheques were deposited in the appellant's bank account number [REDACTED];
- (q) The appellant used the money to pay off the loans he used to purchase the house, of which he is the sole owner.
- (r) The two cheques, of \$70,920.92 and \$60,000 (\$130,920.92 in total), represent the net selling price of the condominium;

- (s) Ms. Benaroch transferred \$65,460.46 ($\$130,920.92 \times 50\%$) to the appellant even though she owed \$67,424.15 in taxes.
- (t) The appellant did not provide a consideration for the \$65,460.46 he received from Ms. Benaroch;

[4] Finally, counsel for the appellant admitted that the balance of the net tax of 4158831 Canada Inc. has always been positive and that, consequently, the corporation has always had to pay net tax rather than being entitled to a net tax refund.

[5] On the basis of the admissions described above, the issues are (1) the validity of the assessment made with respect to Ms. Benaroch as a director of 4158831 Canada Inc., and (2) the validity of the underlying assessment made with respect to the appellant following the property transfer made by his wife.

[6] The assessment of Ms. Benaroch is dated March 28, 2007, and numbered PL2006-451. Ms. Benaroch was the director in office on the dates on which 4158831 Canada Inc. failed to remit amounts it was required to pay under the ETA for the audited period; consequently, she became solidarily liable, together with 4158831 Canada Inc., to pay the amounts owed to the Minister and any interest on, or penalties relating to, these amounts. The amount claimed under the assessment is \$67,424.15.

[7] Subsection 325(1) of the ETA reads as follows:

Non arm's length's transfer liability

325. (1) Where at any time a person transfers property, either directly or indirectly, by means of a trust or by any other means, to

(a) the transferor's spouse or common-law partner or an individual who has since become the transferor's spouse or common-law partner,

(b) an individual who was under eighteen years of age, or

(c) another person with whom the transferor was not dealing at arm's length,

the transferee and transferor are jointly and severally liable to pay under this Part an amount equal to the lesser of

(d) the amount determined by the formula

A – B

where

A is the amount, if any, by which the fair market value of the property at that time exceeds the fair market value at that time of the consideration given by the transferee for the transfer of the property, and

B is the amount, if any, by which the amount assessed the transferee under subsection 160(2) of the *Income Tax Act* in respect of the property exceeds the amount paid by the transferor in respect of the amount so assessed, and

(e) the total of all amounts each of which is

(i) an amount that the transferor is liable to pay or remit under this Part for the reporting period of the transferor that includes that time or any preceding reporting period of the transferor, or

(ii) interest or penalty for which the transferor is liable as of that time,

but nothing in this subsection limits the liability of the transferor under any provision of this Part.

[8] Subsections 323(1) and (2) of the ETA read as follows:

Liability of directors

323. (1) If a corporation fails to remit an amount of net tax as required under subsection 228(2) or (2.3) or to pay an amount as required under section 230.1 that was paid to, or was applied to the liability of, the corporation as a net tax refund, the directors of the corporation at the time the corporation was required to remit or pay, as the case may be, the amount are jointly and severally, or solidarily, liable, together with the corporation, to pay the amount and any interest on, or penalties relating to, the amount.

Limitations

(2) A director of a corporation is not liable under subsection (1) unless

(a) a certificate for the amount of the corporation's liability referred to in that subsection has been registered in the Federal Court under section 316 and execution for that amount has been returned unsatisfied in whole or in part;

(b) the corporation has commenced liquidation or dissolution proceedings or has been dissolved and a claim for the amount of the corporation's liability referred to in subsection (1) has been proved within six months after the earlier of the date of commencement of the proceedings and the date of dissolution; or

(c) the corporation has made an assignment or a bankruptcy order has been made against it under the *Bankruptcy and Insolvency Act* and a claim for the amount of the corporation's liability referred to in subsection (1) has been proved within six months after the date of the assignment or bankruptcy order.

[9] At paragraph 36 of the Notice of Appeal, the appellant asked that the respondent establish that the conditions for section 323 of the ETA had been met. At the hearing, the question whether counsel for the respondent could prove that Quebec's Minister of Revenue had complied with paragraph 323(2)(a), that is, whether execution of the writ of seizure and sale was returned unsatisfied, was raised.

[10] Counsel for the respondent had in his possession the certificate registered with the Federal Court, the writ of seizure and sale, and the bailiff's return of *nulla bona*, but he did not adduce these documents into evidence. The bailiff's return of *nulla bona* was not included in the respondent's list of documents, and counsel for the respondent did not call any witnesses who had personal knowledge of the fact that execution of the writ was returned unsatisfied.

[11] The purpose of paragraph 323(2)(a) is to require the Minister to exhaust his remedies against the debtor corporation before permitting him the extraordinary remedy of assessing a third party, its director.

[12] The evidence showing that the Minister satisfied the conditions set out in paragraph 323(2)(a) is essential for making a director liable. Here, the Minister has produced no evidence to show that the execution of the writ of seizure and sale was returned unsatisfied. Consequently, the director of 4158831 Canada Inc. cannot be

held solidarily liable for the amounts owed to the Minister by this corporation and the assessment on which this liability is based cannot be considered to be valid.

[13] In a notice of motion filed with the Court on October 17, 2014, that is, the following day, counsel for the respondent attempted to remedy the default and asked the Court to issue an order to allow it to adduce the following documents by affidavit:

- (a) the certificate registered with the Federal Court under section 316 of the ETA;
- (b) the writ of seizure and sale dated February 27, 2007;
- (c) the return of *nulla bona* dated February 28, 2007.

[14] Counsel for the appellant opposed the production of these documents, and the motion was heard on March 31, 2015. After hearing the parties, the Court dismissed the motion in an order dated April 16, 2015.

[15] Given that the Minister did not prove that execution of the writ of seizure and sale was returned unsatisfied in whole or in part, as required by paragraph 323(2)(a) of the ETA, the assessment made with respect to Ms. Benaroch must be vacated. This decision is to the same effect as the decision rendered by Justice Sheridan of this Court in *Roy Walsh* (appellant) and *Her Majesty the Queen* (respondent), 2009 TCC 557, regarding paragraph 227.1(2)(a) of the *Income Tax Act*, which is the equivalent of paragraph 323(2)(a) of the ETA.

[16] As Ms. Benaroch does not owe any taxes under the ETA, the appellant cannot be held solidarily liable to pay any amount whatsoever with respect to Ms. Benaroch's tax debt.

[17] For all the above reasons, the appeal is allowed with costs, and the assessment is vacated.

Signed at Montréal, Quebec, this 16th day of April 2015.

“Réal Favreau”

Favreau J.

Translation certified true
On this 14th day of August 2015

François Brunet, Revisor

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STYLE OF CAUSE: AMNON BENAROCHE AND HER
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DATE OF HEARING: October 16, 2014

REASONS FOR JUDGMENT BY: The Honourable Justice R al Favreau

DATE OF JUDGMENT: April 16, 2015

APPEARANCES:

Counsel for the appellant: Pierre Martel
Counsel for the respondent: Nicolas C. Ammerlaan

COUNSEL OF RECORD:

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