

Docket: 2005-700(IT)G

BETWEEN:

ANDRÉ MORISSET,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

[OFFICIAL ENGLISH TRANSLATION]

Appeal heard on October 17, 2006, at Nicolet, Quebec.

Before: The Honourable Justice B. Paris

Appearances:

Counsel for the Appellant: Luc Therrien
Counsel for the Respondent: Chantal Jacquier

JUDGMENT

The appeal from the assessment made under the *Income Tax Act* for the 2000 taxation year is allowed, without costs, and the assessment is referred back to the Minister of National Revenue for reconsideration and reassessment on the basis that the penalty assessed under subsection 163(2) is cancelled, all in accordance with the attached Reasons for Judgment.

Signed at Ottawa, Canada, this 22nd day of February 2007.

"Brent Paris"

Paris J.

Translation certified true
on this 11th day of June 2008.

Erich Klein, Revisor

Citation: 2007TCC114
Date: 20070222
Docket: 2005-700(IT)G

BETWEEN:

ANDRÉ MORISSET,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

[OFFICIAL ENGLISH TRANSLATION]

REASONS FOR JUDGMENT

Paris J.

[1] The appellant is appealing an assessment made by the Minister of National Revenue ("the Minister") under the *Income Tax Act*, R.S.C. 1985, c. 1 (5th Supp.) ("the Act") for the 2000 taxation year. By that assessment, the Minister disallowed a tax credit claimed by the appellant under subsection 118.1(3) of the Act for two alleged charitable donations totalling \$60,000. The Minister also assessed a penalty of \$7,698 under subsection 163(2) of the Act.

[2] The appellant claims to have donated two polar bear skins with a fair market value of \$30,000 each to the Centre universitaire de recherches internationales ("CURI"), located in Trois-Rivières. The CURI was a charitable organization registered by the Minister. The two CURI charitable donation receipts submitted by the appellant show the donation of a stuffed male polar bear and a stuffed female polar bear.

[3] The Minister disallowed the credit on the grounds that the appellant did not make a donation to the CURI; that he purchased the two receipts for \$20,000 from Pierre Marchand, the CURI's president and representative; and that the fair market value of the property described on the receipts was nil.

Facts

[4] The appellant has been a dental surgeon in Trois-Rivières since 1983.

[5] He testified that, in October or November 2000, he met Mr. Marchand at his office, and Mr. Marchand proposed that he make a charitable gift to the CURI. According to the appellant, this was to be a gift of money, with which Mr. Marchand would purchase *objets d'art* that could then be [TRANSLATION] "redistributed" to the CURI as a [TRANSLATION] "charitable gift of greater value than the financial contribution."

[6] Mr. Marchand allegedly showed the appellant photographs of paintings, *objets d'art*, Indian jewellery and apparently polar bear skins that the appellant could purchase; Mr. Marchand also showed him appraisal certificates for those items and a certificate attesting that Mr. Marchand was qualified [TRANSLATION] "as an art appraiser".

[7] The appraisals for the polar bear skins indicated a market value of \$30,000 each. So Mr. Marchand proposed that the appellant [TRANSLATION] "invest" \$10,000 for each skin, and then donate them to the CURI and receive [TRANSLATION] "income tax receipts for \$60,000."

[8] The appellant says that, following this meeting, he contacted two hunting companions, Mr. Doyon and Mr. Pérusse, who had previously dealt with Mr. Marchand and who said that they had made donations to the CURI.

[9] The appellant wanted to confirm that Mr. Marchand's proposal was [TRANSLATION] "on the level" and check whether his friends had encountered problems with the [TRANSLATION] "taxation". Mr. Doyon allegedly told him that he [TRANSLATION] "made contributions under that system" for a few years and never had any problems with his tax claims. Mr. Pérusse allegedly told the appellant that he donated to the CURI for two or three years.

[10] The appellant also says that he contacted his accountant in early November to discuss his [TRANSLATION] "investment". He says that he told his accountant that he was interested in claiming charitable donations, and that his accountant told him that if he claimed one donation, he might as well claim two in order to really reduce his taxes.

[11] According to the appellant, Mr. Marchand called him back one or two weeks after their first meeting, at which time he expressed his interest in putting up \$20,000 [TRANSLATION] "to get receipts for the polar bear skins and then donate the skins to the charity."¹ At that time, Mr. Marchand allegedly requested that payment be made in cash.

[12] The appellant says that he found this request a bit suspicious, but that Mr. Pérusse confirmed that this was how it had been done in his case as well. Mr. Marchand allegedly then set up an appointment to meet the appellant at the appellant's office.

[13] In order to get the money, the appellant wrote two cheques payable to himself, and cashed them at his bank on December 21, 2000. According to him, he went to the bank twice that day, and did not cash both cheques at the same time.

[14] He then met Mr. Marchand, gave him the cash, and got the two charitable gift receipts from him. He says that Mr. Marchand also [TRANSLATION] "lent" him one of the two skins for temporary use at his home, saying that he would call him with regard to taking it back; but the appellant had no further contact with Mr. Marchand. The appellant says that he did not try to phone Mr. Marchand or the CURI, and that he had to throw out the skin about a year later because it was starting to smell bad — a fact that he suspected was attributable to improper tanning.

[15] The charitable donation receipts indicated that the appellant had donated to the CURI one stuffed male polar bear and one stuffed female polar bear, and that each had a value of \$30,000 according to Mr. Marchand's appraisals.

[16] The appellant did not get a copy of the appraisals, but he apparently saw them in Mr. Marchand's binder at their first meeting. He says that he was comfortable with the amount of \$30,000 shown on the receipts as the value of each skin. Being a hunter, he was aware of the costs necessarily involved in going on a polar bear hunt, and an acquaintance whom he met on a hunting trip in Colorado estimated that such a hunt would cost at least \$25,000. In addition, the appellant allegedly saw advertisements in magazines offering polar bear skins for prices ranging from \$25,000 to \$30,000.

¹ Page 29 of the transcript.

[17] The appellant was unable to explain why the receipt showed October 15, 2000 as the date on which the CURI received the donation. As for the date of the receipt itself, December 19, 2000 — that is, a few days before the appellant met Mr. Marchand to give him the money — the appellant thought that perhaps Mr. Marchand entered the date on which he had notified Mr. Marchand over the telephone that he would take the skins.

[18] The appellant says that he sent the charitable gift receipts to his accountant, who prepared his 2000 income tax return, in which was claimed a tax credit in respect of \$60,000 in charitable donations.

[19] In May 2002, Marc Proulx, a Canada Customs and Revenue Agency (CCRA) auditor, commenced an audit of the CURI for the years 1997 to 2001 and of the donations allegedly made by the appellant. This was the first time that the appellant had had problems with the Agency.

[20] In the course of his audit, Mr. Proulx met with Pierre Marchand and asked to see the CURI's records. The only thing that he was given was a synoptic journal detailing the expenditures made by the organization. He had no inventory of donations, no minutes book, no general ledger, no journal, and no record of the donations made to the CURI in 2000. According to the CURI's bank statements and those of Mr. Marchand and his spouse, Simone Galois,² which were obtained by Mr. Proulx, there was no deposit corresponding to the amounts that the appellant paid Pierre Marchand.

[21] Mr. Proulx visited the premises in Ste-Anne-de-la-Pérade and St-Mathieu-du-Parc where the CURI kept its property. The first location was a sort of warehouse, in which there was in no apparent order. At St-Mathieu, Mr. Proulx saw a tent in which there was a display including small stuffed animals in a simulated nature scene. He estimated that there were 50 to 100 stuffed animals at the St-Mathieu location. He saw no polar bear skins or stuffed polar bears at either place.

[22] On May 30, 2002, Mr. Proulx sent a letter to the appellant asking for the receipts and any other supporting documents related to the donations. Since he did not get a response from the appellant, Mr. Proulx wrote to him again on June 27, 2002, saying:

² Mr. Marchand's spouse was also on the board of the CURI.

[TRANSLATION]

...

We are now In the process of examining the deduction(s) listed in the attached appendix, which you claimed in respect of gifts of property to the charity "CENTRE UNIVERSITAIRE DE RECHERCHES INTERNATIONALES". We require the following information for the year indicated:

1. When (exact date) did you purchase the donated property listed in the appendix, for which you claimed a deduction in your income tax return for the year indicated?
2. From whom did you purchase the donated property? Attach a copy of the invoice.
3. How was the purchase price determined?
4. How did you pay for your purchase of the donated property? Attach a copy of the front and back of your cancelled cheque or the payment document.
5. Did you insure the donated property while you owned it? If so, please provide a copy of the insurance policy rider.
6. Please provide a copy of the appraisal of the donated property and specify the name and address of the expert who did the appraisal.
7. How did you come into contact with the above charity?
8. Why did you give the property to the above charity?

...

[23] The appellant retained a lawyer, and the lawyer answered Mr. Proulx's letter on July 30 but did not provide any details about the purchase of the property that was supposedly donated. On December 2, 2002, the auditor notified the appellant's lawyer that he intended to disallow the tax credit and assess a penalty under subsection 163(2) of the Act, and, on January 30, 2003, the lawyer replied, stating *inter alia*:

[TRANSLATION]

. . . Mr. Marchand solicited cash donations from our clients, telling them that the money given would be used to acquire collections and other valuable items on

their behalf. Our clients would then give these collections to the charity represented by Mr. Marchand. The collections purchased by our clients were appraised by Mr. Marchand, who claimed to be fully qualified to do so. Mr. Marchand issued to our clients a charitable donation receipt for an amount equal to the value of the collections that our clients donated to the Centre universitaire de recherches internationales.

[24] However, the auditor still has not received any details concerning the purchase of the property referred to on the charitable donation receipts.

[25] By notice of reassessment dated February 20, 2004, the Minister disallowed the tax credit and assessed the penalty provided for in subsection 163(2) of the Act.

[26] On April 7, 2004, the appellant served a notice of objection to the reassessment, and, on October 20, 2004, he sent the appeals officer a copy of the two cheques dated December 20 and 21, 2000, payable to himself and in the amounts of \$10,000 each.

[27] The appellant testified that he had had trouble obtaining the cheques from his bank because they were stored elsewhere.

The parties' arguments

[28] Counsel for the appellant submits that the evidence shows that the appellant donated two polar bear skins having a total fair market value of \$60,000, and that the receipts issued by the CURI complied with the requirements of the Act. Further, he submits that the appellant did not make in his 2000 income tax return any false statement under circumstances amounting to gross negligence.

[29] In the event that the Court should decide that the appellant did not donate polar bear skins to the CURI, counsel for the appellant submits that the appellant is still entitled to a charitable donation tax credit in respect of the \$20,000 that he handed over to Mr. Marchand.

[30] Counsel for the respondent submits that there is no evidence before the Court that the appellant did make a donation to the CURI. It was not shown that polar bear skins were delivered to the CURI or even that the appellant had such property. The auditor found no trace of the skins either in the CURI's records or on his visit to the CURI's places of business. Even if there were any evidence that the skins existed, the appellant still has not, in counsel for the respondent's submission, succeeded in proving their fair market value.

[31] Moreover, counsel for the respondent says that there is no evidence either that the appellant donated \$20,000 in cash to the CURI. There is no evidence that this amount was handed over to the organization. Lastly, counsel for the respondent submits that the appellant herein was wilfully blind to Mr. Marchand's scheme, which was to offer charitable donation receipts for triple the amount paid by the taxpayer. This wilful blindness was, argued counsel, sufficient to warrant the penalty assessed under subsection 163(2) of the Act.

Analysis

[32] Is the appellant entitled to the tax credit for charitable gifts under subsection 118.1(3) of the Act? In order to be entitled to the credit, a taxpayer must have made a gift to a registered charity.

[33] The first issue, then, is whether the appellant made any gift whatsoever to the CURI.

[34] In making the assessment in issue, the Minister assumed that the appellant, instead of making a charitable gift, purchased the charitable donation receipts from Mr. Marchand for a third of the amount of the receipts. Naturally, a purchase of a charitable donation receipt is not a gift. The burden is on the appellant to show that this assumption of fact is wrong.

[35] On the whole of the evidence, I find that the appellant has not discharged this burden. In my opinion, the appellant's testimony was not credible. It contained several inconsistencies and contradictions, and certain events of which he spoke were completely implausible.

[36] For example, I have a great deal of difficulty believing that his accountant would have advised him to make the alleged gifts if he had explained to the accountant that what had been proposed to him was a charitable donation receipt for an amount three times higher than his outlay.

[37] The appellant's explanation for writing two cheques and going to the bank twice to get the cash on December 21, 2000, is problematic as well. The appellant says that after going to the bank the first time, he phoned his accountant to get his opinion on Mr. Marchand's proposal, and that his accountant told him to make two donations, which required him to write a second cheque and make a second visit to the bank. This version of the facts contradicts the appellant's earlier testimony that

he had phoned his accountant in early November and was advised at that time to make two gifts.

[38] I also find it hard to believe that the appellant would not have verified the receipts upon giving \$20,000 in cash to Mr. Marchand, and would not have asked him any questions about the apparently erroneous information on the receipts, such as the date on which the gift was received (October 15, 2000), the description of the property (stuffed bears as opposed to bear skins), and lastly, the date of the receipts (December 19, 2000), which was not the date on which the appellant supposedly gave Mr. Marchand the money. The appellant's explanation concerning this latter point, which is that Mr. Marchand entered the date on which the appellant agreed to make the donations, does not hold up because he says that he confirmed that he would be donating two skins in a telephone conversation with Mr. Marchand that took place in early November.

[39] In addition, it strikes me as improbable that Mr. Marchand arrived at the appellant's office with a polar bear skin, which the appellant described as [TRANSLATION] "gigantic" and [TRANSLATION] "monstrous", or that the appellant would not have sought advice as to whether he should accept the loan of the skin. It is also incredible that the appellant would have thrown out a polar bear skin that he believed to be initially worth \$30,000 without trying to contact Mr. Marchand to return it to him, even though his address and telephone number were on the CURI receipts.

[40] There are other obvious discrepancies in the appellant's testimony. For example, the appellant said that he checked with Mr. Pérusse and Mr. Doyon whether the arrangement proposed by Mr. Marchand worked for income tax purposes, and that both men confirmed that it did; but later in his testimony the appellant asserted that Mr. Pérusse merely told him he had had dealings with Mr. Marchand without saying how [TRANSLATION] "it was done." The appellant said that he actually had no idea how Mr. Pérusse went about making his donations to the CURI.

[41] In addition, the appellant would testify that the \$20,000 payment was a gift to the CURI, only to explain subsequently that the money was used to purchase the skins and that he was going to donate these to the CURI.

[42] All in all, I find that I cannot rely on the appellant's testimony. No other witness, such as Mr. Pérusse, Mr. Doyon or the appellant's accountant, was called to corroborate his testimony.

[43] The Minister also assumed that the fair market value of the two stuffed polar bears referred to on the receipts in issue was nil. The appellant has not managed to demolish this assumption either.

[44] First of all, I note that the appellant adduced no expert evidence with respect to the market value of the polar bear skins referred to on the CURI receipts. Even if I accepted the appellant's testimony that the cost of a polar bear hunt would range from \$25,000 to \$30,000, this is not evidence of fair market value. The costs involved in obtaining property are not relevant in determining the fair market value of the property, which is the price that it would fetch on the market upon its disposition: see *Conn v. M.N.R.*, [1986] T.C.J. No. 801 (QL).

[45] I note that the appellant's testimony regarding the hunting magazine advertisements offering polar bear skins was not corroborated and, in any event, it does not show how much was actually received upon the sale of the skins.

[46] Having failed to demolish the assumptions on which the assessment in issue is based, the appellant is not entitled to the charitable gift tax credit that he is seeking.

Penalty

[47] It must now be decided whether subsection 163(2) of the Act applies to the facts of this appeal. That provision reads as follows:

163(2) False statements or omissions -- Every person who, knowingly, or under circumstances amounting to gross negligence, has made or has participated in, assented to or acquiesced in the making of, a false statement or omission in a return, form, certificate, statement or answer (in this section referred to as a "return") filed or made in respect of a taxation year for the purposes of this Act, is liable to a penalty of the greater of \$100 and 50% of the total of

(a) the amount, if any, by which

(i) the amount, if any, by which

(A) the tax for the year that would be payable by the person under this Act

exceeds

(B) the amounts that would be deemed by subsections 120(2) and (2.2) to have been paid on account of the person's tax for the year

if the person's taxable income for the year were computed by adding to the taxable income reported by the person in the person's return for the year that portion of the person's understatement of income for the year that is reasonably attributable to the false statement or omission and if the person's tax payable for the year were computed by subtracting from the deductions from the tax otherwise payable by the person for the year such portion of any such deduction as may reasonably be attributable to the false statement or omission

exceeds

(ii) the amount, if any, by which

(A) the tax for the year that would have been payable by the person under this Act

exceeds

(B) the amounts that would be deemed by subsections 120(2) and (2.2) to have been paid on account of the person's tax for the year had the person's tax payable for the year been assessed on the basis of the information provided in the person's return for the year

...

[48] It must be determined whether the evidence adduced by the respondent is sufficient to discharge the burden on the respondent to prove, on a balance of probabilities, that the appellant made a false statement in his 2000 income tax return and that the false statement was made knowingly or under circumstances amounting to gross negligence.

[49] In my opinion, the respondent cannot succeed in the case at bar. The respondent did not adduce evidence tending to show the existence of Mr. Marchand's alleged scheme consisting in selling charitable receipts for a third of the amounts shown thereon. In addition, the evidence presented by the respondent did not show, on a balance of probabilities, that the appellant did not make a gift to the CURI. It is true that Mr. Proulx, the auditor, said he did not find during his investigation at the CURI's premises any evidence — whether in the CURI's records, or in the bank statements of Mr. Marchand and his spouse, or among the stuffed animals stored by the CURI — of the gifts allegedly made by

the appellant; however, Mr. Proulx does not seem to have asked Mr. Marchand any direct questions about the alleged gifts.

[50] It is clear that the CURI's records were totally inadequate. For example, there was no inventory of the gifts in kind to the CURI, no copy of the charitable gift receipts issued by the CURI, and, apparently, no copy of Mr. Marchand's appraisals. The accounting records consisted of a synoptic journal in which the expenditures and deposits made by the organization were entered. Mr. Proulx said himself that it was impossible, when he visited the CURI warehouses, to connect the items found there with the receipts issued by the CURI because the CURI's records were not in order. However, Mr. Proulx did not say whether he asked Mr. Marchand to explain the lack of records or to tell him whether there was some other way to determine what gifts the CURI received in the years at issue.

[51] Since it was not shown that Mr. Proulx made any particular effort to see the skins in question, that Mr. Marchand was unable to show them to him or that he could not explain the circumstances of their absence, the evidence in this regard remains ambiguous.

[52] Lastly, the fact that there was no deposit of \$20,000 into the CURI's account or into Mr. Marchand and his spouse's account in 2000 or 2001 does not, in itself, constitute evidence that the appellant did not donate two polar bear skins to the CURI.

[53] In conclusion, it is my opinion that the evidence before the Court is insufficient to sustain the penalty assessed under subsection 163(2) of the Act.

[54] The appeal will therefore be allowed in part, without costs, and the penalty assessed in the case at bar will be cancelled.

Signed at Ottawa, Canada, this 22nd day of February 2007.

"Brent Paris"

Paris J.

Translation certified true
on this 11th day of June 2008.

Erich Klein Revisor

CITATION: 2007TCC114

COURT FILE NO.: 2005-700(IT)G

STYLE OF CAUSE: ANDRÉ MORISSET v. HER MAJESTY
THE QUEEN

PLACE OF HEARING: Nicolet, Quebec

DATE OF HEARING: October 17, 2006

REASONS FOR JUDGMENT BY: The Honourable Justice B. Paris

DATE OF JUDGMENT: February 22, 2007

APPEARANCES:

Counsel for the Appellant: Luc Therrien
Counsel for the Respondent: Chantal Jacquier

COUNSEL OF RECORD:

For the Appellant:

Name: Luc Therrien

Firm: Lambert Therrien Bordeleau Soucy
Trois-Rivières, Quebec

For the Respondent: John H. Sims, Q.C.
Deputy Attorney General of Canada
Ottawa, Canada