Docket: 2006-2222(GST)I

BETWEEN:

ESTHER OUAHIDI,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

[OFFICIAL ENGLISH TRANSLATION]

Appeal heard on January 16, 2007, at Montréal, Quebec.

Before: The Honourable Justice Réal Favreau

Appearances:

Counsel for the Appellant:	Pierre Gonthier
Counsel for the Respondent:	Denis Émond

JUDGMENT

The appeal from the assessment against the Appellant under subsection 323(1) of the *Excise Tax Act*, bearing the number LO 04 0494, issued on June 4, 2004, in respect of the period from July 31, 1998, to January 31, 2004, in the amount of $2,407,359.16, is allowed, with costs, with the exclusion of the expert's fees, and the assessment is vacated, in accordance with the attached Reasons for Judgment.

Signed at Montréal, Quebec, this 22nd day of March 2007.

"Réal Favreau"

Favreau J.

Translation certified true
on this 25th day of September 2007
Monica F. Chamberlain, Reviser

Citation: 2007TCC119
Date: 200703222
Docket: 2006-2222(GST)I

BETWEEN:

ESTHER OUAHIDI,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

[OFFICIAL ENGLISH TRANSLATION]

REASONS FOR JUDGMENT

Favreau J.

[1] For the remittance period from July 31, 1998, to January 31, 2004 (the period in issue), Climatisation G.R. Inc. (G.R.) a corporation incorporated on January 30, 1995, under Part 1A of the *Companies Act*, R.S.Q. c. C-38, failed to pay the Minister of Revenue of Quebec (the Minister) net tax of $1,479,560.97 as required by subsection 228(1) of the *Excise Tax Act* (the Act). G.R. was also assessed for $205,995.42 in interest and $721,802.77 in penalties. On or about June 3, 2004, G.R. made an assignment of its property under the *Bankruptcy and Insolvency Act*, and the Crown submitted its proof of claim in respect of the net tax, the interest and the penalties.

[2] During the part of the period in issue which commenced on July 31, 1998, and ended on December 31, 2000, the Appellant was employed by G.R., and was in charge of the corporation's telemarketing of heat pump sales and installation, and its sales of long-term maintenance contracts. She had the authority to co-sign the corporation's cheques along with Ralph Abergel, the sole director and shareholder of G.R. during that period.

[3] During the part of the period in issue which commenced on January 1, 2001, and ended on January 31, 2004, the Appellant was director and vice-president of G.R. and was a shareholder of G.R. following the purchase for $5,000, on January 1, 2001, of 5,000 Class A shares (50% of the issued and outstanding shares) then held by Ralph Abergel.

[4] On June 1, 2004, the Appellant resigned from her position as director of G.R. According to the letter of resignation, the resolution of G.R.'s board giving effect to the letter, and the General By-Law of G.R., this resignation was to be effective December 15, 2003. On June 1, 2004, Ralph Abergel signed an amending declaration with the Registraire des entreprises du Québec seeking to remove the Appellant's name as director and vice-president in G.R.'s 2003 annual declaration.

[5] The Minister assessed the Appellant pursuant to subsection 323(1) of the Act by notice of assessment dated June 4, 2004, claiming the sum of $2,407,359.16 from her. The Appellant appealed from the assessment on the ground that she exercised the degree of care, diligence and skill to prevent the failure that a reasonably prudent person would have exercised in comparable circumstances, as required by subsection 323(3) of the Act.

[6] The Appellant submits that she is not responsible for G.R.'s failure to remit the tax because, among other things, she was only a nominal or passive director of G.R., did not participate in the corporation's administrative decisions, did not know the true financial situation of the corporation, and was herself a victim of her ex-husband's fraud. The Appellant submits that by reinvesting a significant portion of the income that she derived from G.R. in order to keep it afloat, she has demonstrated the due diligence that subsection 323(3) of the Act required her to exercise with a view to preventing G.R.'s failure to pay the tax.

[7] The Appellant is not an experienced businessperson. She undertook work on a bachelor's degree in psychology at the Université de Montréal but did not complete those studies. Before joining G.R., she was a waitress at a restaurant, and she learned telemarketing at Brouillard Lepage Inc., a corporation all of whose shares were initially held by Ralph Abergel and the Appellant on an equal basis.

[8] The Appellant became Ralph Abergel's common-law spouse in 1989 and married him on December 19, 1998, under the matrimonial regime of the partnership of acquests. There are no children of the marriage. The Appellant and Ralph Abergel separated in January 2004, and later divorced.

[9] Since its creation on or about January 30, 1995, G.R. was under the exclusive control of Ralph Abergel, who looked after its general management at all times, while the Appellant looked after its telemarketing department. As the director of the telemarketing department, the Appellant worked evenings, while Ralph Abergel managed G.R.'s business during the daytime. The Appellant was paid a base salary for her services, plus a sales commission.

[10] During the period in issue, G.R. had a solid structure and had several departments: telemarketing, sales, installation and maintenance services, accounting and information technology. All the department heads reported directly to Ralph Abergel. The Appellant hired solicitors and interacted with the salespeople and installation technicians. She did not look after any other aspect of the business. She did not look after its accounting and was not involved in preparing the financial statements or the income or other tax returns. For all the administrative aspects of the business, the Appellant relied entirely on Ralph Abergel, whom she trusted unquestioningly.

[11] According to the testimony, Ralph Abergel was a very good salesperson, had a very agreeable personality, was manipulative in the sense that he knew how to obtain things, and was held in high regard by his employees, whom he treated well.

[12] Few explanations were provided as to why the Appellant agreed to become a director and shareholder of G.R. on January 1, 2001. Based on the credit documents from the National Bank of Canada, which were signed by the Appellant in February 2001 and were produced together as Exhibit I-5, this might have been a condition precedent to the bank granting G.R. up to $1,100,000 in operating credit. In fact, the Appellant and Ralph Abergel had to provide a $400,000 surety in order to guarantee the performance of G.R.'s obligations to the bank; these guarantees were secured by guarantees on deposits and by a hypothec on an index-linked GIC with the Natcan Trust Company.

[13] The Appellant's 50% holdings of the issued and outstanding share capital of G.R. appear to be consistent with the way in which the Appellant and Ralph Abergel operated. Indeed, upon reading the divorce settlement of November 14, 2006, between the Appellant and Ralph Abergel, which can be found at tab 6 of Exhibit A-1, it can be seen that

(a) initially, the Appellant owned 50% of the issued and outstanding share capital of Estéral Inc., and the other 50% was held by Ralph Abergel;

(b) initially, Appellant held 50% of the issued and outstanding share capital of Brouillard Lepage Inc., and the other 50% was held by Ralph Abergel;

(c) on September 25, 2005, the Appellant and Ralph Abergel purchased, as equal co-owners, three vacant lots in the city of Longueuil known as lots 2588664, 2588665 and 2588666, in the Quebec cadastre, Chambly registration division (the Du Cerf properties);

(d) the Appellant and Ralph Abergel also purchased a commercial building, located at 2220 Marie-Victorin Boulevard in Longueuil, as equal co-owners;

(e) on July 29, 1998, Ralph Abergel granted the Appellant a second hypothec on a commercial building located at 2174 Marie-Victorin Boulevard in Longueuil.

[14] In the Notice of Appeal, the Appellant claims that, at Ralph Abergel's repeated insistence, and because G.R. had an insufficient cash flow, she reinvested in G.R., by means of advances or debt repayments, a significant portion of the amounts that G.R. was paying her for her services. In Exhibit I-1, the affidavit that the Appellant submitted on May 7, 2004, in support of her requisition for a writ of seizure before judgment in third-party hands, she alleges that Ralph Abergel asked her to invest considerable amounts in G.R. from her personal savings, and that she was unaware, at the time, of the extent of G.R.'s troubles; she estimates that she invested $2,700,000 from 2001 to 2003 in order to hold on to the employees and ensure the corporation's survival.

[15] In or about late 2002, the Appellant found out from her cleaning lady that her husband Ralph Abergel had been having an extra-marital affair since 2000. She then hired private investigators and detectives to shed light on Ralph Abergel's professional and personal activities.

[16] Based on the investigation reports and on information obtained from G.R. employees, the Appellant discovered the following things, among others:

(a) Significant sums of money belonging to G.R. were missing, and the person responsible was Ralph Abergel, who had embezzled money for personal use.

(b) A brilliantly orchestrated scheme was implemented by Ralph Abergel in 2000, and G.R. was managed fraudulently.

(c) Ralph Abergel forged the Appellant's signature on G.R. cheques on several occasions when both directors' signatures were needed, and these forgeries enabled him to draw cheques on G.R.'s account for his personal benefit and for other uses. In fact, an expert report showing the false signatures was tendered as Exhibit A-2.

(d) Ralph Abergel paid phenomenally high salaries, granted undeclared cash amounts and gave [TRANSLATION] "lavish presents" to certain key employees of G.R. in order to buy their cooperation and silence in keeping his fraudulent conduct from the Appellant. Once alerted to these facts, the Appellant noticed that when she asked G.R. employees for certain information, they often replied that they were not allowed to provide information of various kinds without Ralph Abergel's prior authorization.

[17] It has been proven that the scheme consisted of getting current or former GR employees to cash cheques payable to "Cash" or to the bearer from customers who purchased goods or services from G.R., and then having those employees remit the proceeds to Ralph Abergel or deposit them into bank accounts designated by him.

[18] The Appellant showed that Ralph Abergel embezzled G.R.'s funds in order to purchase, among other things, the Manoir Laval seniors' residence, a condominium in Brossard for his mistress, and the Porsche that he drove.

[19] Paragraph 47 of the motion to institute proceedings, which the Appellant filed on July 24, 2004, and which can be found at tab 5 of Exhibit A-1, states as follows:

> [TRANSLATION]
>
> Moreover, in the "motion for leave for a receiving order", which constitutes Exhibit R-8 and will be produced at the hearing, the Deputy Minister of Revenue of Quebec submits, at paragraphs 10 and 11 (reproduced below), that the respondent Mr. Abergel did indeed manage Climatisation G.R. and that his accounting activities were known only to Ralph Abergel and his outside accountant Mr. Haïm:

> 10. The debtor uses three different accounting systems that are separate from each other so that it can generate confusion to prevent those responsible for day-to-day management from understanding the true nature of transactions, monitoring those transactions and recording them accurately. In fact, the debtor has no internal comptroller.
>
> 11. Thanks to this approach, the people who have true control over the debtor — notably Ralph Abergel, who, along with his external accountant Haïm Pinto, truly manages the debtor's accounting activities — were the only ones who were aware of the true transactions. By doing this, they ensured that the debtor showed the applicant a reality that was completely different from the company's true state of affairs.

[20] In the affidavit referred to above at paragraph 14, the Appellant alleges that Ralph Abergel spread rumours that she was crazy and did not know what she was doing with respect to the management of G.R. He allegedly did this in front of G.R.'s bankers and employees in order to undermine the Appellant's credibility and ridicule her.

[21] In late 2002, the relationship between Appellant and Ralph Abergel was rather stormy, and, following an altercation in G.R.'s office, the police intervened and expelled Ralph Abergel. From that date onward, he continued to operate G.R. from his home. The Appellant tried to manage G.R., and trusted the employees. Since she was not experienced enough, the employees continued to report to Ralph Abergel, and, consequently, he continued to exert influence on the management of the business even though he no longer went to the office.

[22] The Appellant lived separate and apart from Ralph Abergel starting in October 2002, but resumed cohabitation on or about September 15, 2003, after Ralph Abergel promised to save the company and improve their personal and professional relationship. It was in this context that the Appellant dropped her claims for damages and released Mr. Abergel from the seizures before judgment. But life together became unbearable for the couple, which separated again in January 2004.

Application of the due diligence standard

[23] In the instant case, the Appellant had no involvement in the failure to withhold and remit amounts payable to Her Majesty.

[24] The Appellant was systematically excluded from the management of G.R.'s affairs in every circumstance, so she could not have known about the omission that gave rise to the assessment in issue.

[25] The Appellant was the victim of her ex-spouse's intentionally fraudulent conduct and invested considerable amounts in G.R. in order to enable it to remunerate its employees and pay its suppliers and creditors.

[26] Although the Appellant can be considered an internal manager, her limited experience and her restricted influence (to say the least) on the management of the affairs of the business meant that she could neither prevent nor remedy the violation.

[27] Like Ms. Cirello in *Ciriello v. Canada*, [2000] T.C.J. No. 829, the Appellant was not aware of G.R.'s failure to remit GST, and even if she had been, she would not have been in any position to do anything about it because her spouse had total control over the management of G.R.'s affairs.

[28] There is no evidence that the Appellant was a de facto director during the period prior to January 1, 2001. She had no more influence on the management of the business than she had from January 1, 2001, onward. The fact that one is an authorized signatory on a company's bank accounts is not, in and of itself, sufficient for the signatory to be considered a director.

[29] For all these reasons, it is my opinion that the Appellant has discharged her burden of proof and has shown, to the Court's satisfaction, that she exercised the requisite degree of care, diligence and skill to prevent the failure that gave rise to the assessment under appeal.

[30] Consequently, Ms. Ouahidi's appeal is allowed with costs (with the exception of the expert fees, because they were incurred in connection with other court proceedings) and the assessment is vacated.

[31] Given the disposition of this appeal, the Court need not make a determination with respect to the effective date of Ouahidi's resignation from her position as a director of G.R.

Signed at Montréal, Quebec, this 22nd day of March 2007.

"Réal Favreau"

Favreau J.

Translation certified true
on this 25th day of September 2007
Monica F. Chamberlain, Reviser

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APPEARANCES:

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