

Docket: 2017-2096(GST)I

BETWEEN:

BADR BOURABAA,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent

[OFFICIAL ENGLISH TRANSLATION]

Appeal heard on June 13, 2018, at Sherbrooke, Quebec.

Before: The Honourable Justice Réal Favreau

Appearances:

Counsel for the Appellant: Mr. Guy Plourde
Counsel for the Respondent: Mr. Mario Pelletier

JUDGMENT

The appeal from the assessment made in respect of the Appellant under the *Excise Tax Act*, the notice of which is dated February 2, 2016 and bears the number F-061467 for the periods of December 1, 2013 to February 28, 2014, March 1 to May 31, 2014, and September 1 to November 30, 2014, is allowed and the assessment is vacated.

Signed at Ottawa, Canada, this 12th day of December 2018.

“Réal Favreau”

Favreau J.A.

Citation: 2018 TCC 245
Date: 20181212
Docket: 2017-2096(GST)I

BETWEEN:

BADR BOURABAA,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

REASONS FOR JUDGMENT

Favreau J.A.

[1] This is an appeal from an assessment made in respect of the Appellant by the Minister of Revenue Quebec, as an agent of the Minister of National Revenue (hereinafter the “Minister”) under subsection 323(1) of the *Excise Tax Act*, R.S.C. 1985, c. E-15, as amended, (the “ETA”), the notice of which is dated February 2, 2016 and bears number F-061467, for the periods of December 1, 2013 to February 28, 2014, March 1 to May 31, 2014, and September 1 to November 30, 2014 (the "reporting periods").

[2] The Appellant was held jointly and severally liable with the corporation 9282-8490 Québec Inc. (“9282”) as a director, for net tax amounts that the latter failed to remit to the Minister. The amount assessed under the assessment comes to a total of \$12,414.61 for the reporting periods.

[3] When making the assessment in respect of the Appellant, the Minister relied on the following conclusions and factual assumptions:

- a) The corporation 9282-8490 Québec Inc. (hereinafter the “Corporation”), has been an incorporated company since May 24, 2013, under the *Business Corporations Act*;
- b) The Corporation’s commercial activities essentially involve operating a restaurant;

- c) The Appellant, Mr. Badr Bourabaa, is the initial shareholder, one of the Corporation's directors, and its President since it was incorporated;
- d) All supplies made by the Corporation during the period in dispute were taxable supplies for which GST on the value of the consideration of the supply was payable to the Corporation, which was to be collected and remitted to the Minister;
- e) The Corporation failed to remit to the Minister the GST collected for the period of December 1, 2013 to May 31, 2014, and it did not file a tax return for the period of September 1, 2014 to November 30, 2014;
- f) At the end of the audit conducted by the Minister, whose observations will be set out in greater detail below, the Minister concluded that, for the reporting periods, the Corporation failed to remit to him a total of \$12,414.61 as net GST collected or to be collected, but not remitted;
- g) On July 29, 2015, a certificate of non-payment was issued against the Corporation;
- h) Since all attempts to collect the money owed by the Corporation were unsuccessful, a writ of seizure and sale was issued on October 9, 2015, and was returned unfilled on November 12, 2015;
- i) The Appellant was one of the Corporation's directors during the period of March 31, 2014 to December 31, 2014;
- j) On February 2, 2016, the Minister issued the notice of assessment bearing number F-061467 in respect of the Appellant, as a director of the Corporation, in order to claim from him the net GST amounts owed by the Corporation, all in accordance with subsection 323 (1) of the ETA;
- k) The Appellant, as President, director and shareholder of the Corporation, did not act with the degree of care, diligence and skill that a reasonably prudent person would have exercised in comparable circumstances to prevent the Corporation from failing to meet its obligations under the ETA;
- l) As a result, the Minister assessed the Appellant, as director of the Corporation, for a total amount of \$12,414.61;

[4] Mr. Bourabaa, a native of Morocco, testified at the hearing to explain the circumstances around the opening and operation of the restaurant Déjeuner Eggspresso, Café Bistro in Magog in June 2013. He explained that, when he was executive chef at the Auberge Lac-Brome, he was approached by Ms. Nicole Gallant to open a new restaurant in Magog to offer breakfasts and lunches. Ms.

Gallant was the owner of Vinestrie Inc., which was operating a store selling wine production equipment. The parties agreed to establish a new corporation held on a 50-50 basis, financed by capital investments of \$25,000 each, and under which Ms. Gallant was to look after the management and administration of the restaurant, while the Appellant was to look after the kitchen and purchases from suppliers.

[5] Corporation 9282-8490 Québec Inc. was incorporated on May 24, 2013, under Quebec's *Business Corporations Act*. The shareholders and directors of 9282 were Mr. Bourabaa and Ms. Gallant, and the officers appointed were Mr. Bourabaa as President and Ms. Gallant as Secretary-Treasurer.

[6] On June 25, 2013, 9282 signed a notarized lease with the corporation 9010-9869 Québec Inc. for renting a commercial space located at 1747 Sherbrooke Street in Magog. The term of the lease was for a 10-year period starting retroactively on May 1, 2013. For the period of May 1 to June 30, 2013, the rent was free, but the tenant had to pay \$800 a month for ongoing business. For the period of July 1, 2013 to April 30, 2014, the rent was \$2,500 monthly in addition to the \$800 a month for ongoing business. For the following annual period, the base rent was \$3,000 and \$800 a month for ongoing business. For subsequent annual periods, the base rent increased from \$300 to \$400 per month with a cap of \$4,000 per month. The lease was signed by Mr. Bourabaa and Ms. Gallant on behalf of 9282 and of them personally as guarantor of the obligations under the lease.

[7] Mr. Bourabaa explained that he financed his capital outlay in 9282 with a \$25,000 loan from Mr. Jean-Guy Veilleux, the owner of corporation 9010-9869 Québec Inc. who leased the commercial premises to 9282.

[8] As president of 9282, Mr. Bourabaa signed several documents from the Caisse Desjardins of Lac-Memphrémagog, including:

- an application for admission of a corporation dated May 24, 2013, to open an account (also signed by Ms. Gallant);
- an undertaking as guarantor for a \$10,000 line of credit and for business cards, with a cumulative limit of \$10,000 (also signed by Ms. Gallant), dated July 4, 2013; and
- a resolution of 9282 using the Desjardins & Co. form to apply for and manage a Desjardins credit card account, dated July 5, 2013.

[9] As secretary of 9282, Ms. Gallant alone signed several resolutions regarding the authorized signatories of 9282's cheques and other commercial papers, including:

- an initial resolution and certification concerning the administration of a corporation requiring only one signature, namely that of the secretary or that of the president of 9282, dated July 2, 2013;
- a second resolution and certification with respect to the administration of a corporation requiring two signatories, namely that of the president and that of the secretary of 9282, dated November 27, 2013, and
- a third resolution and certification concerning the administration of a corporation requiring the signature of the secretary of 9282, dated July 16, 2014.

[10] Mr. Bourabaa further explained that the restaurant began operating in June 2013. He designed the menu and was involved in selecting suppliers and hiring the kitchen staff (4 or 5 people on rotation). The restaurant would open at 6:00 a.m., and Mr. Bourabaa would work there until around 2:00 p.m. He would then leave the restaurant to go to the Ripplecove Lakefront Hotel in Ayer's Cliff, where he had the evening shift. Mr. Bourabaa explained that he had to take that job to support his family given that the agreement with Mrs. Gallant was that the two owners would not be paid for their services during the restaurant's first year of operation to enable the restaurant to get well established.

[11] In June 2014, one year after the restaurant opened, Mr. Bourabaa again raised the salary issue with Ms. Gallant. The discussion went awry, and Ms. Gallant expelled Mr. Bourabaa from the restaurant. She then had the restaurant's locks changed and ordered him never to set foot in the restaurant again. After his expulsion, Mr. Bourabaa no longer had access to the restaurant, or to the books and records of 9282.

[12] Since it was Mr. Bourabaa's first experience as a shareholder and director of a corporation and was unfamiliar with the applicable legislation, he did not have the reflex to resign as a director of 9282 when he was expelled.

[13] During his testimony, Mr. Bourabaa stated and signed a statement under oath that, prior to his expulsion, he was never informed of 9282's non-compliance with respect to taxes (GST and QST) and that there was no indication from the employees, suppliers or governments suggesting to him the taxes were not being remitted. Ms. Gallant was responsible for the management and administration of 9282. She was the one who would submit with the invoices, reports and other documents to the accountant for the bookkeeping, tax reporting, and financial statements. In September 2013, Ms. Gallant told Mr. Bourabaa that she was remitting the taxes through Desjardins AccèsD. Mr. Bourabaa further stated that he had no access to the figures showing the restaurant's operating results and that every time he would ask Ms. Gallant about it, she would tell him that they were covering their costs.

[14] According to Bourabaa, Ms. Gallant continued to operate the restaurant after his expulsion, and she signed a new lease with the company that owns the building. She operated the restaurant until November 2014, the month in which she closed the restaurant, taking with her all of the restaurant's books of account, reports from the sales recording module ("SRM"), administrative documents and cash registers.

[15] Following his expulsion from the restaurant, Mr. Bourabaa hired an agent to try to recover his \$25,000 investment, but was unsuccessful. However, he had to repay the \$25,000 loan that he had received from the owner of 9010-9869 Québec Inc.

[16] Mr. Bourabaa continued his story explaining that, following the restaurant's closure in November 2014, the owner of 9010-9869 Québec Inc. offered to start operating the restaurant again. To that end, he granted him another personal loan in the amount of \$10,000, and 9010-9869 Québec Inc. signed a new lease with Mr. Bourabaa personally for a period of five years starting December 1, 2014. Therefore, Mr. Bourabaa re-opened the restaurant and hired some of the former employees. As a sole proprietorship, Mr. Bourabaa obtained new tax numbers and a liquor licence on April 7, 2015.

[17] Lastly, Mr. Bourabaa testified that, after his expulsion from the restaurant in June 2014, he signed no documents pertaining to 9282. However, he did acknowledge that he had signed blank cheques that he gave to Mrs. Gallant during the period when the two signatures of 9282's officers were required.

[18] Mr. Jean-Paul Boudreau also testified at the hearing as the owner of the company Gestion Multiservices PME, which was doing the bookkeeping for 9282 and whose offices were above the premises where 9282 was operating its restaurant.

[19] Mr. Boudreau stated that his company was doing the bookkeeping for 9282 further to a mandate from Ms. Nicole Gallant, who appeared to be the driving force of 9282. Ms. Gallant was the contact person and was the one who provided him with the invoices, data and other information needed for doing the bookkeeping and preparing the employees' pay. He stated that he had had no contact with Mr. Bourabaa other than at the start of the restaurant's operations when he introduced himself.

[20] Mr. Boudreau, whose university education was in economics and administration (therefore not a C.A. or C.P.A.) admitted having signed, without authorization and by forging Mr. Bourabaa's signature, form MR69 and 9282's tax return for the fiscal year ending April 30, 2014, in order to have 9282 use a tax credit that would likely be lost. Both documents were dated April 28, 2015. Mr. Boudreau also acknowledged that he knew that Mr. Bourabaa had been expelled from the restaurant in June 2014, and he was unable to provide reasons why he had forged Mr. Bourabaa's signature and not that of Ms. Gallant, with whom he dealt with regularly because she was the one responsible for the accounting of 9282.

[21] According to Mr. Boudreau, 9282 was running a deficit and not generating a profit. There were too many employees for the volume of business. The labour cost was 60%. The in-house financial statements attached to the Quebec income tax return show that 9282 incurred an operating loss of \$78,387 at April 30, 2014, the end of its first fiscal year. According to the witness, 9282's operations had been running a deficit since the start of the restaurant's operations, so that by the end of November 2013, the shareholders' initial capital outlay of \$50,000 had been exhausted.

[22] To Mr. Boudreau's knowledge, Ms. Gallant was signing the tax return forms (GST and QST) and was remitting the taxes. The tax returns were filed throughout the fiscal year ending April 30, 2014, but the tax remittances stopped being made starting November 2013. The payroll deductions from employees' salaries stopped being paid starting February 2014.

[23] In closing, Mr. Boudreau confirmed that Mr. Bourabaa did not receive a salary in the fiscal year ending April 30, 2014, whereas Ms. Gallant did receive one.

[24] Mr. Stéphane Houle, a cook who worked at the restaurant operated by 9282 from June to November 2014, testified at the hearing and confirmed that Ms. Gallant was the boss and the owner and that he never saw Mr. Bourabaa at the restaurant. She was the one who announced the closing of the restaurant to the employees in November 2014 and who offered to the employees to take the available food. The witness did not have any problems with his pay, but he mentioned that some suppliers from whom he use to make purchases would complain about not being paid for supplies delivered to the restaurant.

Analysis and Conclusion

[25] The provisions of the ETA that apply in this case are subsections 299(4) and 323(1) and 323(3), which read as follows:

S. 299(4) Assessment deemed valid – An assessment shall, subject to being reassessed or vacated as a result of an objection or appeal under this Part, be deemed to be valid and binding, notwithstanding any error, defect or omission therein or in any proceeding under this Part relating thereto.

S. 323. Liability of Directors

(1) Liability of Directors

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

[. . .]

(2) Diligence – A director of a corporation is not liable for a failure under subsection (1) where the director exercised the degree of care, diligence and skill to prevent the failure that a reasonably prudent person would have exercised in comparable circumstances.

[26] Section 299(4) of the ETA provides that a notice of assessment issued is deemed valid. The onus is therefore on the opponent to “demolish” that presumption by presenting *prima facie* evidence (see *Hickman Motors Ltd. v. Canada*, [1997] 2 SCR 336).

[27] In addition, subsection 323(1) of the ETA establishes a liability for directors of a corporation who fail to pay a net tax amount in a timely manner. The directors so liable are jointly and severally liable with the corporation to pay the net tax amount as well as the interest and penalties relating to it.

[28] However, under subsection 323(3) of the ETA, an administrator is not liable if he or she has exercised the degree of care, diligence and skill to prevent the failure that a reasonably prudent person would have exercised in comparable circumstances.

[29] 9282 failed to remit to the *Agence du Revenu du Québec* (the “ARQ”) amounts pertaining to the Goods and Services Tax and was assessed accordingly. The periods assessed are December 1, 2013 to February 28, 2014, March 1 to May 31, 2014, and September 1 to November 30, 2014. The corporation 9282 did not file a notice of objection against those assessments.

[30] On July 29, 2015, a certificate specifying the amount for which the corporation 9282 is liable was obtained and registered with the Federal Court on August 4, 2015. The writ of seizure and sale against 9282 dated October 9, 2015, identified the total default on the amount claimed.

[31] The reporting periods in dispute are the 3rd and 4th reporting period of the restaurant’s first year of operation and the 2nd reporting period of the restaurant’s second year of operation. The reporting periods in dispute are therefore not consecutive.

[32] The due diligence defence provided for in subsection 323(3) of the *ETA*, invoked by the Appellant, has been the subject of many decisions by this Court and the Superior Courts. The criteria for applying this exception to director liability were considered in *Buckingham v. The Queen*, 2011 FCA 142. It was apparent in that decision that the standard to apply is an objective standard as evidenced by the following:

[38] This standard has set aside the common law principle that a director’s management of a corporation is to be judged according to his own personal skills,

knowledge, abilities and capacities: *Peoples Department Stores*, paragraphs 59 to 62. To say that the standard is objective makes it clear that the factual aspects of the circumstances surrounding the actions of the director are important as opposed to the subjective motivations of

the director:: *Peoples Department Stores*, at paragraph 63. [. . .]

[33] In *Buckingham*, however, the Federal Court of Appeal held that contextual factors are part of an analysis of the objective standard:

[30] An objective standard does not however entail that the particular circumstances of a director are to be ignored. These circumstances must be taken into account, but must be considered against an objective “reasonably prudent person” standard. [. . .]

[34] Therefore, in this case, the Court must assess, against an objective standard, whether the Appellant exercised the degree of care, diligence and skill to prevent the failure that reasonably prudent person would have exercised in comparable circumstances.

[35] The Federal Court of Appeal further specified in *Buckingham* that the review of the due diligence defence had to include the measures taken to prevent the corporation’s failure to remit the required amounts. The Federal Court of Appeal said:

[40] The focus of the inquiry under subsections 227.1(3) of the *Income Tax Act* and 323(3) of the *Excise Tax Act* will however be different than that under paragraph 122(1)(b) of the *CBCA*, since the former require that the director’s duty of care, diligence and skill be exercised to prevent failures to remit. In order to rely on these defences, a director must thus establish that he turned his attention to the required remittances and that he exercised his duty of care, diligence and skill with a view to preventing a failure by the corporation to remit the concerned amounts.

[36] In this case, we have the situation of a taxpayer who is in his first experience as a director and officer of a corporation. He invested \$25,000 in corporation 9282, presumably in the form of share capital. He secured the obligations of the lease with corporation 90109869 Québec Inc. as well as the banking obligations with Desjardins. He went without a salary for a full year to ensure that the restaurant got off to a good start and, during that time, he had to take a second job to support his family.

[37] Mr. Bourabaa's testimony at the hearing is credible, and Mr. Bourabaa seems to me to be a reasonable person who acted in good faith in fulfilling his financial commitments. Also, I believe his version of the facts that he was excluded from the management of the restaurant (reference to Mr. Jean-Paul Boudreau's testimony) and that he did not receive any indicators from Ms. Gallant, Mr. Jean-Paul Boudreau, other employees, the suppliers and the federal or Quebec governments that corporation 9282 was having financial difficulties and was not meeting its tax obligations. The evidence revealed that, in September 2013, Mr. Bourabaa was told by Ms. Gallant that she was remitting the taxes through Desjardins AccèsD and that the taxes were paid. Also, the reporting periods assessed are those starting December 1, 2013, not those between June 1 and November 30, 2013. In his testimony, Mr. Bourabaa indicated that, every time he asked Ms. Gallant about the restaurant's operating results, she would reassure him by telling him that they were covering their costs.

[38] When he was expelled from the restaurant in June 2014, Mr. Bourabaa did not know and had no reason to believe that corporation 9282 was in financial difficulty. Also, the tax reporting period for corporation 9282 starting on June 1, 2014 and ending August 31, 2014, is not among the periods assessed.

[39] Mr. Bourabaa also showed, with supporting evidence, that as of June 2014, he was excluded from the restaurant and that he had no access to the restaurant or to the books and records of corporation 9282 and that he was in no way involved in the business of corporation 9282, despite the fact that he did not officially resign as a director of corporation 9282 and remained a shareholder of the corporation 9282.

[40] In light of the foregoing, the circumstances specific to Mr. Bourabaa must be taken into account in applying the objective standard of a reasonably prudent person. Mr. Bourabaa definitely lacked business experience and had to hold a second job to support his family. He was deceived by Mrs. Gallant, who did not respect the initial agreement to not be paid a salary during the restaurant's first year of operation, and she made representations to him that the taxes were being paid and that they were covering their costs. Mr. Bourabaa was not aware of any indicators that corporation 9282 was in financial difficulty. Lastly, as of June 2014, Mr. Bourabaa was unable to take any action as a director of corporation 9282.

[41] For these reasons, the appeal is allowed and the assessment is vacated with costs.

Signed at Ottawa, Canada, this 12th day of December 2018.

“Réal Favreau”

Favreau J.A.

CITATION: 2018 TCC 245

COURT FILE NO.: 2017-2096(GST)I

STYLE OF CAUSE: BADR BOURABAA v. HER MAJESTY
THE QUEEN

PLACE OF HEARING: Sherbrooke, Quebec

DATE OF HEARING: June 13, 2018

REASONS FOR JUDGMENT BY: The Honourable Justice Réal Favreau

DATE OF JUDGMENT: December 12, 2018

APPEARANCES:

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