

Docket: 2012-1301(GST)G

BETWEEN:

GESTION FORTIER INC.,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

[OFFICIAL ENGLISH TRANSLATION]

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Appeal heard on August 21, 2013, at Québec, Quebec.

Before: The Honourable Justice Robert J. Hogan

Appearances:

Counsel for the appellant: Pierre-Alain Roy

Counsel for the respondent; Sylvain Lacombe

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**JUDGMENT**

The appeal from the assessment made pursuant to the *Excise Tax Act* for the periods of June 1, 2006, to June 31, 2006, January 1, 2007, to March 31, 2007, October 1, 2007, to March 31, 2008, July 1, 2008, to September 30, 2008, January 1, 2009, to March 31, 2009, October 1, 2009, to December 31, 2009, and April 1, 2010, to June 30, 2010, the notice for which is dated March 1, 2011, is dismissed with costs, in accordance with the attached Reasons for Judgment.

Signed at Ottawa, Canada, this 25th day of October 2013.

"Robert J. Hogan"

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Hogan J.

Translation certified true  
on this 26th day of February 2014.

François Brunet, Revisor

Citation: 2013 TCC 337  
Date: 20131025  
Docket: 2012-1301(GST)G

BETWEEN:

GESTION FORTIER INC.,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

[OFFICIAL ENGLISH TRANSLATION]

### **REASONS FOR JUDGMENT**

Hogan J.

[1] On March 1, 2011, the respondent, through the Minister of National Revenue (the Minister), assessed the appellant pursuant to Part IX of the *Excise Tax Act* (the ETA), R.S.C. (1985), c. E-15, for the periods of June 1, 2006, to June 31, 2006, January 1, 2007, to March 31, 2007, October 1, 2007, to March 31, 2008, July 1, 2008, to September 30, 2008, January 1, 2009, to March 31, 2009, October 1, 2009, to December 31, 2009, and April 1, 2010, to June 30, 2010 (the period in question). This assessment resulted from two distinct elements. First, the Minister submits that Gestion Fortier Inc. (Gestion Fortier) was not eligible for the input tax credits (ITC) it had claimed regarding, first, the purchase of a motor home and second, for maintenance of said motor home. With regard to the ITC, the assessment was made outside the normal assessment period set out in the ETA. It is therefore the Minister's burden to prove that the appellant made a misrepresentation of the facts, whether by neglect, carelessness or wilful default. Essentially, the Minister alleges that the motor home was purchased for personal, not commercial, purposes.

[2] Second, the Minister submits that Gestion Fortier should have collected taxes on the benefits represented by Réal Fortier's use of the company's vehicles for his personal travel. With regard to these benefits, the assessment was made during the normal assessment period. It is, therefore, the appellant who must show that the assessment is without merit.

[3] On April 20, 2006, the appellant acquired a 2001 Vantare Vogue motor home for US\$245,000 (around CAN\$260,000). According to Mr. Fortier, a friend had told him that the motor home was for sale. A month and a half after receiving this information, Mr. Fortier purchased it, through the appellant.

[4] According to Mr. Fortier's testimony, Gestion Fortier sometimes [TRANSLATION] "sold rolling stock". This represented a very small part of its activities and, generally, trailers were sold, all done by word of mouth. Mr. Fortier estimated the actual value of the motor home at the time of purchase was \$350,000 to \$380,000.

[5] The purchase was made with a line of credit from the Caisses Desjardins. In 2006, Mr. Fortier invested \$28,000 to \$30,000 to improve the motor home. The work on the motor home was merely to make it more attractive looking; no essential repairs were required. The total cost of the motor home was therefore around \$295,000.

[6] According to Mr. Fortier, over the winter, he rented the motor home for two or three weeks total. The motor home was parked at a campground in Florida every winter. Mr. Fortier admitted that he spent two to three months per year in Florida and claimed that he lived in a condo. Occupation of the condo was not proven. According to Mr. Fortier, the rest of the year, meaning other than in the winter, the motor home was parked in a warehouse belonging to Gestion Fortier.

[7] Certain discrepancies were identified with regard to the motor home rentals. First, payments were made directly to Mr. Fortier. The amount of these payments was then deducted from Mr. Fortier's advances from the company to reflect the transactions in the company's accounting. Additionally, the rental contracts were rather incomplete (no proof of insurance or driver's licence, etc.), Mr. Fortier explained that he only leased to friends who did not even drive the motor home and who had sufficient insurance.

[8] The motor home was decorated with metal plates with Mr. Fortier's and his wife's first names. Mr. Fortier explained that friends had given him these plates and engraved them, for the purpose of making the motor home more [TRANSLATION] "attractive and different".

[9] The evidence shows that Gestion Fortier was a member of the Fédération québécoise de camping et de caravaning, meaning it benefited from a discount on insurance for the motor home. Mr. Fortier stated that Gestion Fortier was only a member in order to benefit from the discount. The insurance policy had a special proviso that commercial activities, including commercial rental, was not covered. In short, the insurance only covered personal use.

[10] The evidence also showed that Mr. Fortier had already rented a motor home before acquiring the one in question in this case. This was therefore an activity with which he had some experience.

[11] Mr. Fortier submits that in 2008 or 2009—the evidence is unclear on this—he asked Mr. Turgeon to help sell the motor home. Mr. Turgeon is an acquaintance of Mr. Fortier. Apparently, at the time the mandate was given, Mr. Turgeon had just started working as a self-employed worker, buying motor homes. The mandate consisted of trying to find a buyer, but Mr. Fortier did not provide any details about the asking price or Mr. Turgeon's compensation.

[12] The motor home is an American brand and not very well known in Quebec. For example, the motor home in question is not listed in the reference books used by buyers. Mr. Turgeon explained during his cross-examination that a buyer's first question is always the brand. It is surprising that Mr. Fortier had not thought of this impediment during the month and a half he considered purchasing it. It seems that the lack of popularity of the brand and the model in question is a factor that could prevent resale. Moreover, Mr. Fortier seems like an experienced businessman. I am sure he was aware of this fact.

[13] The evidence shows that it was only in 2011 that proactive steps were taken to sell the motor home. Ads were taken out in newspapers and specialized magazines and on the Internet; the motor home was put up for sale at two auctions and on consignment with VR Émond. These steps were allegedly taken on Mr. Turgeon's advice, after he realized how much trouble he was having selling it by word of mouth.

[14] In 2012, the motor home was finally sold for \$125,000.

[15] Counsel for the appellant cited cases that hold that when the Court must decide an issue that falls in a grey area, such as whether there has been a capital gain or business income, the burden on the Minister is heavier if he seeks to justify assessments outside the normal assessment period. In case of doubt, the appellant has the benefit and the appeal must be allowed.

[16] I have reviewed this issue in *Cameron v. The Queen*,<sup>1</sup> the relevant passages of which state the following:

20 The starting point is *Regina Shoppers Mall Limited v. The Queen*, a Federal Court decision. The central issue in that case was whether the taxpayer should have included the profit of the sale of a lot in its income tax return as a capital gain or as income. The taxpayer had included it as a capital gain, and the Minister found that there was a misrepresentation that allowed him to assess after the normal

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<sup>1</sup> 2011 TCC 107, 2011 DTC 1111.

period. Addy J., at paragraph 10 of the decision, explained that when a taxpayer files an income tax return on what he believes to be the proper method, after thoughtful, deliberate and careful assessment, there can be no misrepresentation. This position was accepted by the Federal Court of Appeal at paragraph 7 of its decision.

21 Moreover, at paragraph 15 of his judgement, Addy J. explained that the act does not impose on taxpayers the duty to report in a manner which the Minister prefers. If the taxpayer carefully considers his position and does not attempt to deceive the Minister, there is no misrepresentation.

22 *Petric v. The Queen* shows the courts have broadly interpreted the principle propounded in *Regina Shoppers Mall*. That case was not about an issue of capital gain or income, but the fair market value of the property. Madam Justice Lamarre stated:

38 ...The matter of fair market value is a controversial issue, to be settled on the basis of the interpretation of the facts in evidence, as is the question of whether proceeds of disposition should be characterized as income or as a capital gain (*Regina Shoppers Mall Limited*) or of whether corporations are associated (*1056 Enterprises Ltd.*)...

23 And later, she added:

40 Although fair market value is ultimately a question of fact to be resolved by the trier of fact, it is mostly a question of opinion answered by analysing different methodological approaches. Certainly the Minister is entitled to disagree with a taxpayer's view of fair market value and can reassess, within the limitation period, on the basis of his own evaluation. However, where the issue is whether the Minister should be allowed the benefit of an exception to the application of the limitation period, it must be shown that the taxpayer made a misrepresentation in filing his or its tax return. In the case at bar, I am of the view that unless it can be said that the appellants' view of fair market value was so unreasonable that it could not have been honestly held, there was no real misstatement.

[Emphasis added]

24 In *Savard v. The Queen*, the Tax Court of Canada stated again that taxpayers have the right to disagree with the Minister in their interpretation of the Act, without this necessarily being considered a misrepresentation. Tardif J. stated:

78 Does a person have to include, when he or she fills out a tax return, everything that might be income, based not on his or her own analysis but on speculation as to what the Agency might want to

attribute to him or her? I do not believe so. In this case, there was enough information to justify the interpretation adopted by the Appellant: that he had no obligation to declare the payments of fees by his employer as taxable benefits. In fact, the debate as to who really benefited from the services for which the fees were paid is clear evidence of how complex the case was and how much confusion surrounded it.

[Emphasis added]

25 Recently, in *Chaumont v. The Queen*, the taxpayer's interpretation was clearly incorrect, but the fact he had acted in good faith led the Court to find that there was no misrepresentation. Tardif J. stated:

15 Although the appellant's submissions were unusual and even surprising, they were neither far-fetched nor unreasonable enough for it to be concluded that he made a wilful default or mistake with the intent to escape from his Canadian tax obligations.

16 Firstly, he expressed his objection, and secondly, he took initiatives to show that his allegations had merit, while taking into consideration the fact that certain income, specifically, pension income paid to a citizen who lives in a country other than the one that pays the pension, is not taxed.

...

18 To conclude that the appellant's conduct was a wilful default or that it constituted a sufficient error to permit the Minister to assess beyond the normal period, would affect any taxpayer's right to contest the merits of an assessment, and would cause the limitation period imposed by Parliament to be essentially theoretical.

26 In the light of the above-noted decisions, it appears that adopting a thoughtfully considered position that contradicts the Minister's position does not in itself mean the taxpayer made a misrepresentation that would allow the Minister to assess outside the normal period.

[17] In the present case, there is no grey area. The respondent was able to prove that the appellant purchased the motor home for personal reasons and not for the purpose of reselling it.

[18] The overall evidence shows that no serious action was taken to sell the motor home before 2011. It is strange that Mr. Fortier was so quick to make improvements

only to then not be proactive about reselling it. I do not believe that a seasoned businessman would wait so long before putting ads in the newspapers and on the Internet. If his true goal was to flip the motor home, more concrete steps would have been taken than mere word of mouth. Added to that is the evidence suggesting a more private than commercial use of the vehicle. In short, for all these reasons, I believe that the Minister has met his burden of proving the appellant's misrepresentation due to negligence. The evidence shows that the appellant did not have the intention to resell the motor home when he claimed the ITC. Having reached this conclusion, I feel that the Minister has met his burden of proving the existence of circumstances that allow for an assessment to be made outside the normal assessment period.

[19] Mr. Fortier described the travel for which he used the company's vehicles. He explained that he had to go to the various buildings owned by the company on a daily basis, mainly to render services to the tenants and ensure that the warehouses were secure. He also had to go to the bank, make purchases, attend business meetings, etc .

[20] A travel log was provided as evidence. This log was created at the request of the auditor to illustrate a typical year, because there is no contemporaneous log. The log provided was therefore created from recollections, credit card statements, etc. Its probative value is therefore not very high.

[21] Mr. Fortier alleges that his personal use of the company's vehicles did not exceed 10%. He stated that he used his spouse's vehicle for his personal transportation. Indeed, as of 2008, he no longer had a personal vehicle in his name, and simply used his spouse's.

[22] As to the issue of the benefits related to the use of the vehicles, Mr. Fortier has the burden to show that the Minister erred in his assessment. Since the periods during which these benefits were received were within the normal assessment periods, the parties agree on this issue. Mr. Fortier provided unconvincing evidence, based on his testimony and the log reconstructed from his memory of events. Since he did not have a personal vehicle in his name, it would not be surprising if Mr. Fortier had used the company's vehicles for his personal travel.

[23] In short, Mr. Fortier was unable to prove that the Minister erred when making the assessment regarding the benefits related to the use of the vehicles .

[24] For all these reasons, the appeal is dismissed, with costs.



Signed at Ottawa, Canada, this 25th day of October 2013.

"Robert J. Hogan"

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Hogan J.

Translation certified true  
on this 26th day of February 2014.

François Brunet, Revisor

CITATION: 2013 TCC 337

COURT FILE NO.: 2012-1301(GST)G

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PLACE OF HEARING: Québec, Quebec

DATE OF HEARING: August 21, 2013

REASONS FOR JUDGMENT BY: The Honourable Justice Robert J. Hogan

DATE OF JUDGMENT: October 25, 2013

APPEARANCES:

Counsel for the appellant: Pierre-Alain Roy  
Counsel for the respondent: Sylvain Lacombe

COUNSEL OF RECORD:

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