

BETWEEN:

LOUISEVILLE AUTOMOBILE LIMITÉE,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

[OFFICIAL ENGLISH TRANSLATION]

Appeal heard on March 11, 2010, at Montréal, Quebec.

Before: The Honourable Justice Gaston Jorré

Appearances:

Counsel for the appellant: Serge Fournier

Counsel for the respondent: Kim Marcil

JUDGMENT

The appeal from the assessment made under the *Excise Tax Act*, notice of which is dated September 21, 2007, for the period from October 1 to October 31, 2003, is dismissed, with costs, in accordance with the Reasons for Judgment delivered from the bench.

Signed at Ottawa, Canada, this 19th day of March 2010.

"Gaston Jorré"

Jorré J.

TAX COURT OF CANADA
RE: EXCISE TAX ACT

Citation: 2010 TCC 505
2008-2199(GST)G

BETWEEN: **LOUISEVILLE AUTOMOBILE LIMITÉE,**
Appellant,

-and-

HER MAJESTY THE QUEEN,
Respondent.

[OFFICIAL ENGLISH TRANSLATION]

Held before the Honourable Justice **GASTON JORRÉ**, Tax Court of Canada, in the offices of the Courts Administration Service, Montréal, Quebec, on **March 11, 2010**.

REASONS FOR JUDGMENT

APPEARANCES:

SERGE FOURNIER
Counsel for the appellant.

KIM MARCIL
Counsel for the respondent.

Registrar/technician: Claude Lefebvre

RIOPEL, GAGNON, LAROSE & ASSOCIÉS
215 Saint-Jacques Street, Suite 1020
Montréal, Quebec
H2Y 1M6

GST-5443

Per: JEAN LAROSE.

REASONS FOR JUDGMENT

[Revised transcript of reasons for judgment delivered orally
on March 11, 2010, at Montréal, Quebec.]

[1] HIS HONOUR: I will render my judgment in *Louiseville Automobile limitée v. The Queen*.

[2] The appellant appealed from an assessment dated September 21, 2007, for the period from October 1, 2003, to October 31, 2003, in which the respondent had disallowed an input tax credit of \$16,100 in respect of a Freightliner Revolution 2003 recreation vehicle, which I will be referring to as the RV.

[3] On October 21, 2003, the appellant purchased the RV for \$230,000 plus tax. The vehicle had 13,750 km on it, and the vendor had bought it new six months earlier.

[4] The appellant has existed for over 50 years. During the period at issue, Normand Lessard was its president, employee and sole director. He has been its director for over 40 years.

[5] On October 30, 2003, the appellant rented the RV to Mr. Lessard for \$1,000 plus tax per month for a period of 10 years.

[6] Based on the lease, the residual value is \$110,000, and article 7 of the lease provides that, at the end of the lease period, Mr. Lessard will be able to buy the RV for \$110,000.

[7] Accordingly, during the lease period, the appellant would potentially receive 120 months X \$1,000, which equals \$120,000, and if Mr. Lessard used his right of purchase at the end of the lease (\$110,000), the total would be \$230,000, the exact price paid by the appellant at the time of purchase.

[8] The appellant operates a Pontiac Buick GMC dealership that sells around 500 vehicles per year. When the RV was purchased, the appellant did not sell that type of vehicle.

[9] Mr. Lessard testified that he had wanted to purchase an RV for personal and business use. The appellant bought it to make a profit, among other reasons.

[10] To get an idea of how much rent should be, he phoned RV dealerships to find out the depreciation.

[11] The company had enough money in the bank, which had a very low rate of return, and purchasing the RV was profitable. According to Mr. Lessard, the \$1,000 in rent per month was composed of \$800 for depreciation and \$200 profit.

[12] Based on the residual value agreement, I do not see how there could be profit within that \$1,000 amount, since, if Mr. Lessard had continued renting the RV for the full term of the contract and then used his option, the company would have received the exact amount it had paid at the outset, but over a period of 10 years.

[13] In November 2003, Mr. Lessard took the RV to Florida for three weeks. At the end of the three weeks, he left the RV in Florida, where he returned in March 2004 for three weeks. At the end of the trip in March 2004, he returned home with the RV, which he then parked in the appellant's lot with the other vehicles for sale.

[14] In October 2004, he took the RV and went to a General Motors meeting in Toronto for four days. Right after the meeting, he went on a five- to six-week trip in the western United States.

[15] At the end of that trip, he left the RV in Las Vegas until April 2005, when he returned to Las Vegas. He picked up the RV and went on another five- to six-week trip in the United States, at the end of which, he brought the RV back to Canada. It was parked in the appellant's lot and put up for sale.

[16] Mr. Lessard said that he had used the RV a little for business in the summer, going to various events in the area surrounding the appellant, and that he had once taken a couple who were good clients to Ogunquit, Maine, with him and his wife.

[17] The appellant filed in evidence invoices dated June 16, 2005, and July 7, 2005, for ads that it had put out to sell the RV.

[18] On August 2, 2006, the appellant sold the RV to A. Roberge for \$190,000 plus tax. At the time of the sale, the odometer read 46,220 km.

[19] In her testimony, Christine Landry, an auditor with the Canada Revenue Agency, stated, among other things, that, during the audit, no one ever doubted that it was the president's RV. The respondent also filed Exhibit I-1, which is the insurance contract for the RV. At the bottom of the first page it reads as follows:

[TRANSLATION]

It is understood and agreed that all property related to professional activities is not covered by this insurance contract.

[20] The respondent also filed Exhibit I-3, which demonstrates the fair market value calculations done by the respondent. Ms. Landry explained how the respondent determined the residual value and interest rate used.

[21] The respondent concluded that the fair market value was \$1,463.63 per month. For reasons that will become evident, I do not believe it is necessary to examine in detail Ms. Landry's testimony with regard to how the interest rate and residual value were determined.

Analysis

[22] The respondent claims that paragraph 170(1)(b) of the *Excise Tax Act* applies because the RV was purchased exclusively for Mr. Lessard's personal consumption or use and that the exemption in subparagraph 170(1)(b)(i) does not apply because the RV was not rented at fair market value.

[23] The appellant claims that subsection 170(1)(b) does not apply because, first, the RV was not purchased exclusively for Mr. Lessard's personal use and, second, it was rented at fair market value.

[24] Was the RV purchased exclusively for Mr. Lessard's use? The word "exclusive" is defined in subsection 123(1) as meaning all or substantially all. It is well known that the Canada Revenue Agency's practice is to interpret this as 90% or more, while in jurisprudence, as little as 80% is sometimes considered to be equivalent to all or substantially all.

[25] In this case, the appellant does not claim that the few times that Mr. Lessard used the RV for business in the area or the time he went to Ogunquit are sufficient to consider his personal use of the RV as being less than all or substantially all of its use. Given the evidence, I agree. The appellant rather states that the RV was not purchased exclusively for Mr. Lessard's use because the appellant intended to make money off the RV, particularly, from its sale.

[26] I cannot agree with that approach for the following reasons. The evidence is not consistent with the conclusion that the RV was purchased for resale over a more or less short term. First, signing a 10-year lease is contradictory to a short-term resale. Second, I note that Mr. Lessard testified that, at first, it was he who wanted to

buy an RV, and that he later decided that the company could benefit from it. Third, other than Mr. Lessard's testimony, the first evidence of the intention to resell is the invoice for the sale ad dated June 2005. The fact that the RV was parked in Florida during winter 2003–04 and in Las Vegas during winter 2004–05 is inconsistent with a shorter-term resale.

[27] In addition, although this has very little weight because business is unpredictable, I note that the company, in fact, lost money on the RV: it was purchased for \$230,000, and the appellant received 33 months X \$1,000, which equals \$33,000, from Mr. Lessard and \$190,000 from Mr. Roberge, which, in total, equals \$223,000, that is, a loss of \$7,000. An amount of \$230,000 invested in Canada Savings Bonds, for example, would have had a better return.

Does \$1,000 per month equal fair market value?

[28] The appellant criticized the Minister's calculations, but I do not believe that it is necessary for me to analyze those calculations in detail except to observe that, in the absence of direct comparable data (since neither party presented comparable rental data), I agree with the respondent that an assessment of rent at fair market value must take into account not only the residual value and, consequently, the amount to depreciate during the lease, but also an interest rate that would enable the lessor to make a profit in exchange for the capital used.

[29] In this case, if I consider only the residual value provided by the appellant, that is, the \$110,000 used in the lease, which is clearly higher than the amount used by the respondent, it becomes clear that, based on the lease, all the appellant should receive during the lease is \$120,000, that is, the depreciation anticipated, and it also expects a residual value of \$110,000 (the RV). (If Mr. Lessard used his option, it would be exactly \$110,000).

[30] Given that the appellant disbursed \$230,000 and that, over 10 years, the appellant was expecting to receive \$230,000 in total, \$1,000 contains no profit and, thus, no interest. In other words, there is an interest rate of 0%. Regardless of what the appropriate interest rate is, it must necessarily be more than 0%; a company that rents something out to make money would include an element of profit in the rent.

[31] Regardless of the fair market value of the monthly rent for the RV, the rent must necessarily be more than \$1,000.

[32] Accordingly, the rent was not at fair market value and the appeal will be dismissed with costs.

Translation certified true
on this 8th day of December 2010
Margarita Gorbounova, Translator

CITATION: 2010 TCC 505

COURT FILE NO.: 2008-2199(GST)G

STYLE OF CAUSE: LOUISEVILLE AUTOMOBILE
LIMITÉE v. HER MAJESTY THE
QUEEN

PLACE OF HEARING: Montréal, Quebec

DATE OF HEARING: March 11, 2010

REASONS FOR JUDGMENT BY: The Honourable Justice Gaston Jorré

DATE OF REASONS FOR JUDGMENT
RENDERED ORALLY: March 11, 2010

DATE OF JUDGMENT: March 19, 2010

DATE OF EDITED TRANSCRIPT
OF REASONS FOR JUDGMENT: October 22, 2010

APPEARANCES:

 Counsel for the appellant: Serge Fournier

 Counsel for the respondent: Kim Marcil

COUNSEL OF RECORD:

 For the appellant:

 Name: Serge Fournier

 Firm: BCF, LLP
 Montréal, Quebec

 For the respondent: Myles J. Kirvan
 Deputy Attorney General of Canada
 Ottawa, Ontario