Docket: 2013-1987(GST)I

BETWEEN:

ROBERT GAGNÉ,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

[OFFICIAL ENGLISH TRANSLATION]

Appeal heard on February 3, 2014, at Québec, Quebec.

Before: The Honourable Justice Réal Favreau

Appearances:

For the appellant:	The appellant himself
Counsel for the respondent:	Chantale Paris

JUDGMENT

The appeal from a reassessment made under Part IX of the *Excise Tax Act*, notice of which is dated March 27, 2013, and bears number F-043465 for the period from June 3, 2008, to February 28, 2010, is dismissed in accordance with the attached Reasons for Judgment.

Signed at Québec, Canada, this 26th day of June 2014.

"Réal Favreau"

Favreau J.

Translation certified true
on this 8th day of August 2014
Margarita Gorbounova, Translator

Citation: 2014 TCC 205
Date: 20140626
Docket: 2013-1987(GST)I

BETWEEN:

ROBERT GAGNÉ,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

[OFFICIAL ENGLISH TRANSLATION]

REASONS FOR JUDGMENT

Favreau J.

[1] This is an appeal from a reassessment, notice of which is dated March 27, 2013, and bears number F-043465, for the period from June 3, 2008, to February 28, 2010 (the period at issue), made under Part IX of the *Excise Tax Act*, R.S.C. 1985, c. E-15 (the ETA) by the Minister of Revenue of Quebec, for and on behalf of the Minister of National Revenue (the Minister).

[2] In the reassessment, the Minister claimed from the appellant the payment of $5,738.85 in duties, without interest or penalties, as a director of the corporation Les Entreprises G.G. Tech Inc. for goods and services tax (GST) amounts that the corporation owed to Revenu Québec.

[3] Les Entreprises G.G. Tech Inc. was the result of the amalgamation on October 21, 2011, of Les Entreprises G.G. Tech Inc., a company incorporated on September 16, 2002, under Part 1A of the Quebec *Companies Act*, and Magtek 2008 Inc., a company incorporated under Part 1A of the Quebec *Companies Act* though a certificate of incorporation dated March 1, 2007. Les Entreprises G.G. Tech Inc. operated a business in metal recycling and mechanical work and Magtek 2008 Inc.'s business was in leasing containers and in collecting metal.

[4] On March 26, 2012, Les Entreprises G.G. Tech Inc. made an assignment of its property under the *Bankruptcy and Insolvency Act*.

[5] Based on the amending declaration of the legal person Les Entreprises G.G. Tech Inc., filed on March 20, 2008, under the *Act respecting the legal publicity of sole proprietorships, partnerships and legal persons*, the appellant was a shareholder and a director of that company at that time.

[6] Based on the Entreprise Register information statement filed on July 16, 2009, by Magtek 2008 Inc., the appellant was a shareholder and a director of that company at that time.

[7] According to the appellant's testimony, in 2008, he purchased 29 class A shares of the share capital of Les Entreprises G.G. Tech Inc., while his two sons, Mathieu and Alexis Gagné, each purchased 10 class A shares of the same company. The share subscription or purchase agreement was not filed in evidence.

[8] The evidence on the record contains no information regarding the date when the appellant became a shareholder of Magtek 2008 Inc., and no subscription or purchase agreement for the shares of this company was filed in evidence. However, according to the testimony of Sylvie Demers, a collection officer with the Canada Revenue Agency (CRA), and Nathalie Labelle, bankruptcy officer with the CRA, Les Entreprises G.G. Tech Inc. and Magtek 2008 Inc. had their offices at the same address and the same people were both shareholders and directors of both companies.

[9] Confirmation that the appellant was also a shareholder of Magtek 2008 Inc. is found in the share sale agreement concluded on July 7, 2010, but in effect as of June 23, 2010, between the appellant (the Seller), Clermont Bélanger (the Purchaser) and Magtek 2008 Inc. (the Intervener). The third "whereas" of this agreement reads as follows:

> [TRANSLATION]
> WHEREAS the Seller is the owner of thirty-nine (39) class A shares issued and in circulation of the share capital of the Intervener.

[10] In his testimony, the appellant explained that, under the sale agreement, he sold the 29 class A shares that he owned and the 10 class A shares that one of his sons owned. The sale price agreed upon for the sale of the 39 class A shares was $1. The appellant pointed out that, under paragraph 5 of the sale agreement, the purchaser undertook to release the seller from all endorsements, suretyships and personal guarantees given to the intervener's creditors, including but not limited to lines of credit in the approximate amount of $80,000 from Visa Business, GST and

Quebec sales tax of approximately $19,000, the suretyships for two (2) F-350 trucks as well as the personal liability portion of two (2) small-business loans from Desjardins Group the balances of which were approximately $6,000 and $7,000 respectively.

[11] Following the sale of the shares that the appellant held in the share capital of Magtek 2008 Inc., the appellant stopped being a director of Magtek 2008 Inc. and Les Entreprises G.G. Tech Inc.

[12] During the period when the appellant was a director of Magtek 2008 Inc., the company failed to remit to the Minister the GST amounts collected between September 1, 2008, and May 31, 2010. Following the amalgamation of Les Entreprises G.G. Tech Inc. and Magtek 2008 Inc. on October 21, 2011, the obligation to remit the GST amounts collected became the responsibility of the corporation resulting from the amalgamation. The appellant was never a shareholder or director of the corporation resulting from the amalgamation.

The appellant's position

[13] In his testimony, the appellant referred to the fact that he was in no way involved in the administration of Les Entreprises G.G. Tech Inc. and Magtek 2008 Inc. and that he had neither the knowledge nor the skills needed to manage the corporations. He has not completed his Secondary II, and he has worked in construction his entire life.

[14] According to him, the administration of Les Entreprises G.G. Tech Inc. and Magtek 2008 Inc. was done entirely by Clermont Bélanger, who held the majority of class A shares in both corporations.

[15] Clermont Bélanger is a professional accountant, who has his own accounting firm. He kept the corporations' books, prepared financial statements and filed the corporations' income tax and tax returns. He managed the corporations' bank accounts in addition to managing the accounts payable and collecting the accounts receivable. Mr. Bélanger was responsible for finding the funding needed for the corporations to operate. He was responsible for insurance and claims to the Commission de la Santé et Sécurité au Travail (and labour relations with employees (hiring, wages, etc.)).

[16] The appellant explained that he had not taken part in any board of directors' meetings for either Les Entreprises G.G. Tech Inc. or Magtek 2008 Inc., that he

had never signed any board of directors' resolutions of either corporation and that he had never signed any financial statements or tax returns for either corporation.

[17] According to the appellant, Clermont Bélanger seemed to have everything under control and everything seemed to be in order. The appellant trusted Mr. Bélanger because, in addition to being his friend, he had a great deal of experience in managing companies. He had no reason to doubt him.

[18] The appellant explained that Clermont Bélanger had not informed him of the corporations' financial difficulties until 2009. At that time, the lines of credit for Les Entreprises G.G. Tech Inc. and Magtek 2008 Inc. were increased. The corporations' clients were called to speed up the payment of accounts receivable and a business recovery consultant, Sébastien Girard, was hired. Following those measures, there was a cash receipt and the situation improved somewhat but, after that, the financial situation of Magtek 2008 Inc. deteriorated again. He therefore decided to dispose of his shares in Magtek 2008 Inc. releasing himself from his endorsements and suretyships and from his tax liabilities owed to the tax authorities.

The respondent's position

[19] The respondent considers that the share sale agreement dated July 7, 2010, is unenforceable against third parties because it was done under private writing, and that, as a result, it cannot release the appellant from his solidary liability for the failure to remit the GST amounts collected.

[20] The appellant was aware of the tax obligations of Magtek 2008 Inc. and had been aware since 2009 that the corporation was failing to comply with its obligations in this regard. In addition, it is for that reason that the appellant requested the inclusion in the share sale agreement dated July 7, 2010, of a provision regarding his release from all his endorsements, suretyships and personal guarantees including approximately $19,000 in GST and Quebec sales tax.

[21] The appellant had not put in place an adequate system to prevent numerous failures to remit GST by Magtek 2008 Inc. of which he was a director.

Analysis

[22] The assessment at issue is a reassessment vacating and replacing the notice of assessment dated May 25, 2012, and bearing the number F-037631. The amount

assessed under subsection 323(1) of the ETA was $9,188.31, that is, $7,999.42 in duties and $1,188.90 in interest. The reassessment followed the appellant's submissions and became necessary in order to subtract the GST amounts for the periods when the appellant was not a director of the defaulting corporation. The amount of the reassessment was $5,738.85 in duties; the penalties and interest had been removed.

[23] The original assessment was made within the two-year period after the appellant last ceased to be a director of Magtek 2008 Inc.

[24] The relevant provisions of the ETA for the purposes of this appeal are subsection 299(4) and section 323, which read as follows:

> **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.
>
> **323.(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) Limitations** — A director of a corporation is not liable under subsection (1) unless
>
> (*a*) a certificate for the amount of the corporation's liability referred to in that subsection has been registered in the Federal Court under section 316 and execution for that amount has been returned unsatisfied in whole or in part;
>
> (*b*) the corporation has commenced liquidation or dissolution proceedings or has been dissolved and a claim for the amount of the corporation's liability referred to in subsection (1) has been proved within six months after the earlier of the date of commencement of the proceedings and the date of dissolution; or
>
> (*c*) the corporation has made an assignment or a bankruptcy order has been made against it under the Bankruptcy and Insolvency Act and a claim for the amount of the corporation's liability referred to in subsection (1) has been proved within six months after the date of the assignment or bankruptcy order.
>
> **(3) 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.

> **(4) Assessment** — The Minister may assess any person for any amount payable by the person under this section and, where the Minister sends a notice of assessment, sections 296 to 311 apply, with such modifications as the circumstances require.
>
> **(5) Time limit** — An assessment under subsection (4) of any amount payable by a person who is a director of a corporation shall not be made more than two years after the person last ceased to be a director of the corporation.
>
> **(6) Amount recoverable** — Where execution referred to in paragraph (2)(*a*) has issued, the amount recoverable from a director is the amount remaining unsatisfied after execution.
>
> **(7) Preference** — Where a director of a corporation pays an amount in respect of a corporation's liability referred to in subsection (1) that is proved in liquidation, dissolution or bankruptcy proceedings, the director is entitled to any preference that Her Majesty in right of Canada would have been entitled to had the amount not been so paid and,. where a certificate that relates to the amount has been registered, the director is entitled to an assignment of the certificate to the extent of the director's payment, which assignment the Minister is empowered to make.
>
> **(8) Contribution** — A director who satisfies a claim under this section is entitled to contribution from the other directors who were liable for the claim.

[25] Since the share sale agreement dated July 7, 2010, is governed by the laws of Quebec, article 1440 of the *Civil Code of Québec* should be referred to. It reads as follows:

> **1440.** A contract has effect only between the contracting parties; it does not affect third persons, except where provided by law.

[26] The documentary evidence filed clearly showed that the appellant was a director of Les Entreprises G.G. Tech Inc. and Magtek 2008 Inc.

[27] Even though the appellant did not deal with the day-to-day management of Les Entreprises G.G. Tech Inc. and Magtek 2008 Inc, or prepare and file their financial reports, he would still have been involved in the financial transactions performed by these corporations in order to have given endorsements, suretyships and personal guarantees for significant amounts to the various creditors of Magtek 2008 Inc.

[28] The appellant would also have been familiar with the formalities of remitting GST in order to have signed a tax remittance cheque in the amount of $1,938.81 dated September 30, 2008, drawn on a bank account of Les Entreprises G.G. Tech Inc.

[29] There is no evidence on the record that the appellant took any measures to ensure that GST was paid to Revenu Québec. There is no evidence of the recovery mandate given to Sébastien Girard, and Clermont Bélanger did not testify to corroborate the recovery mandate and other measures taken by the directors of Magtek 2008 Inc. to remedy the failure to remit the GST.

[30] The appellant has not shown that he has met the conditions to successfully use the due diligence defence under subsection 323(3) of the ETA. In order to use the due diligence defence, directors of the defaulting corporation must establish that they exercised the degree of care, diligence and skill to prevent the failure that a reasonably prudent person would have exercised in comparable circumstances.

[31] For these reasons, the appeal is dismissed.

Signed at Québec, Quebec, this 26th day of June 2014.

"Réal Favreau"

Favreau J.

Translation certified true
on this 8th day of August 2012
Margarita Gorbounova, Translator

CITATION:	2014 TCC 205
COURT FILE NO.:	2013-1987(GST)I
STYLE OF CAUSE:	Robert Gagné and Her Majesty the Queen
PLACE OF HEARING:	Québec, Quebec
DATE OF HEARING:	February 3, 2014
REASONS FOR JUDGMENT BY:	The Honourable Justice Réal Favreau
DATE OF JUDGMENT:	June 26, 2014

APPEARANCES:

For the appellant:	The appellant himself
Counsel for the respondent:	Chantale Paris

COUNSEL OF RECORD:

For the appellant:

Name:

Firm:

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