Docket: 2014-1304(IT)G

BETWEEN:

ANIBAL KAU,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

Appeal heard on December 5-6-7, 2017, at Toronto, Ontario

Before: The Honourable Justice B. Russell

Appearances:

Counsel for the Appellant: Robert D. Malen
Counsel for the Respondent: Alexandra Humphrey
Leonard Elias

JUDGMENT

The appeal from the assessment raised February 20, 2013 under the *Income Tax Act* (Canada) for the Appellant's 2011 taxation year is dismissed, with costs.

Signed at Summerville Centre, Nova Scotia, this 31st day of July 2018.

"B. Russell"

Russell J.

Citation: 2018TCC156
Date: **20180827**
Docket: 2014-1304(IT)G

BETWEEN:

ANIBAL KAU,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

AMENDED REASONS FOR JUDGMENT

These Amended Reasons for Judgment, issued in substitution for the Reasons for Judgment signed July 31st, 2018, entail one non-substantive alteration in diction, demarcated by bold font.

Russell J.

Introduction:

[1] The Appellant, Anibal Kau, appeals a February 20, 2013 *Income Tax Act* (Canada) (Act) assessment of his 2011 taxation year, raised in respect of section 116 of the Act, which addresses "dispositions by non-resident persons of certain property". In June 2011 the Appellant had purchased a Toronto condominium unit from an apparent non-resident of Canada, one Mehran Yekta of Danville, California, U.S.A. (Vendor). The transaction was completed without either the Vendor having obtained from the Minister of National Revenue (Minister) a subsection 116(2) or 116(5.02) clearance certificate or the Appellant having deducted and thereafter remitted to the Minister pursuant to paragraph 116(5)(a) of the Act 25% of the purchase price.

[2] The dispute centres on paragraph 116(5)(a) of the Act, which reads:

> (5) Where in a taxation year a purchaser has acquired from a non-resident person any taxable Canadian property (other than depreciable property of excluded property) of the non-resident person, the purchaser, unless

> (a) after reasonable inquiry the purchaser had no reason to believe that the non-resident person was not resident in Canada...is liable to pay...as tax...on behalf of the non-resident person... [underlining added]

[3] In reference to this provision the Minister made the assumption of fact that the Appellant as purchaser had, "after reasonable inquiry…reason to believe that the non-resident person…[*i.e.,* Vendor]… was not resident in Canada".

Evidence:

[4] The evidence adduced at the hearing established that after entering into the purchase/sale agreement on June 15, 2011 for the Toronto condominium, the Appellant retained an Ontario lawyer, Mr. E. Zou, to handle this real estate transaction for him. The Vendor's solicitor was Ms. S. Chung, also an Ontario lawyer. The Appellant knew from a prior visit to the subject condominium that the Vendor did not live there and that it was an investment property for him. Shortly after being retained by the Appellant, Mr. Zou established through searches and other preparation work for the closing of this transaction that the Vendor had purchased this property in 2009 and his then address for service was 3644 Deer Foot Trail, Danville, California, U.S.A. This was the same address for service as the Vendor had given for his now sale of the property.

[5] On June 17, 2011 Ms. Chung advised Mr. Zou by letter that her client the Vendor would be signing the closing documents in California.

[6] On June 21, 2011 Mr. Zou sent Ms. Chung a standard requisitions letter specifying 26 requisitions required for purposes of closing the real estate transaction. The third of these requisitions read: "REQUIRED: On or before closing, satisfactory evidence of compliance with the following legislation: (a) *The Family Law Act*, Ontario; (b) Section 116 of the *Income Tax Act*, Canada". Ms. Chung's following day letter responded *re* requisition 3(b) - "To be provided at closing."

[7] On June 22, 2011, Ms. Chung revised the draft closing documents to indicate that they would be signed in California.

[8] On June 24, 2011 the Vendor signed a one sentence unsworn statement before a California notary public in Danville, Calif., U.S.A., in what was titled "affidavit". The Vendor's statement was that, "I am not a non-resident of Canada

within the meaning of section 116 of the *Income Tax Act* (Canada) and nor will I be a non-resident of Canada at the time of closing."

[9] In the normal jurat section of this supposed affidavit the notary stated only that this statement had been "DECLARED before me". There was no reference to the statement being either a "sworn" declaration or a "solemn" declaration or that the statement had been declared under penalty of perjury.

[10] At the same time, *per* Exhibit R-6, the Vendor gave a Solemn Declaration before the same California notary public on the same date being June 24, 2011, also in Danville, California, regarding certain "HST" matters arising under the *Excise Tax Act* (Canada). Unlike the above section 116 one sentence affidavit, which had no introductory or closing lines, this Solemn Declaration opened stating, "I, Mehran Yekta, SOLEMNLY DECLARE that:", and closed stating, "AND I make this solemn Declaration conscientiously believing it to be true, and knowing that it is of the same force and effect as if made under oath."

[11] On the June 30, 2011 date of closing Ms. Chung's office couriered this now signed affidavit to Mr. Zou, together with other signed closing documentation plus the key to the purchased property. At closing, the Appellant's lawyer Mr. Zou did not withhold 25% ($92,000) or any amount of the $368,000 purchase price on account of section 116. The entire purchase price was paid to the Vendor's lawyer, Ms. Chung.

[12] Clause 20 of the two parties' OREA (Ontario Real Estate Association) standard form "agreement of purchase and sale (condominium resale)" reads:

> Buyer shall be credited towards the Purchase Price with the amount, if any, necessary for the Buyer to pay to the Minister of National Revenue to satisfy Buyer's liability in respect of tax payable by Seller under the non-residency provisions of the *Income Tax Act* by reason of this sale. Buyer shall not claim such credit if Seller delivers on completion the prescribed certificate or a statutory declaration that Seller is not then a non-resident of Canada.

[13] Ms. Chung testified and in so doing her January 28, 2014 letter was admitted into evidence, subject to weight, which letter stated that she had verified the Vendor's residence status as being Canadian, before the closing. However citing solicitor-client privilege she declined to provide details of this verification. I thus attach no weight to this evidence which in any event does not address the actual issue in this appeal which is whether the Appellant through his lawyer Mr. Zou had, in the words of paragraph 116(5)(a), "after reasonable inquiry…no reason to

believe that the [Vendor] was not resident in Canada." What Ms. Chung as Vendor's solicitor did or did not know or do relating to whether the Vendor was resident in Canada, apart from information she had conveyed to Mr. Zou prior to completion of the closing of the transaction, is irrelevant to this particular proceeding.

[14] Mr. Zou testified also, stating his understanding that it was standard practice in Ontario to rely on affidavits for determination of residence. No evidence was called rebutting this. Mr. Zou testified also that in his (relatively modest) experience as a real estate lawyer a seller's address for service was not significant in determining residency. He stated that it was not uncommon for Canadian residents to close sales of Canadian real property while abroad, such as being in China or the U.S.

[15] As stated the issue is whether the Appellant is liable for the withholding tax on the purchase of the Toronto condominium as assessed pursuant to subsection 116(5), on the basis that he through his lawyer Mr. Zou had not met the paragraph 116(5)(a) requirement that, "after reasonable inquiry…[they had] no reason to believe that the [Vendor] was not resident in Canada."

Analysis and Decision:

[16] The Appellant himself did not make enquiry as to the residency of the vendor Mr. Yekta. However, he did, entirely reasonably, engage his solicitor Mr. Zou to at all times act in his best interests in efficiently bringing this real estate transaction to successful conclusion. This would include ensuring no liability attached to the Appellant *per* section 116 of the Act. Therefore the question is whether Mr. Zou on behalf of his principal the Appellant satisfied paragraph 116(5)(a) by having made "reasonable inquiry" resulting in "no reason to believe that [the Vendor] was not resident in Canada."

[17] In the run-up to the June 30, 2011 closing, Mr. Zou became fixed with knowledge that the Vendor's address for service was an address in Danville, Calif., U.S. He became aware also that two years earlier in 2009 the Vendor had had that same address for service when purchasing the subject Toronto condominium. Also Mr. Zou knew that the Vendor did not reside the Toronto condo he was selling – rather, a tenant of the Vendor had lived there. Mr. Zou testified he was of the view that an address for service was not indicative of residency.

[18] Did Mr. Zou make "reasonable inquiry"? The one thing he did in respect of the residency matter was on June 21, 2011 requisition from Ms. Chung, "satisfactory evidence of compliance with section 116". This request yielded from Ms. Chung a draft unsworn "affidavit" and nine days later an actual unsworn "affidavit" signed by the Vendor who declared therein before a California notary public that, "I am not a non-resident of Canada within the meaning of Section 116 of the Income Tax Act (Canada)". The real estate transaction proceeded to close without $92,000 or any of the purchase price being withheld on account of non-resident tax.

[19] My understanding from the above clause 20 of the OREA standard form purchase and sale agreement is that in requiring a "statutory declaration that Seller is not then non-resident of Canada", it required the "satisfactory evidence" as to section 116 compliance to have been **sought** as a matter of course. Thus, it seems the "satisfactory evidence" request which elicited the "I am not a non-resident of Canada…" unsworn affidavit had not been made because of Mr. Zou's acquired awareness that the Vendor would execute closing documents in the U.S. and that his address for service remained the same California address as two years earlier when the Vendor had acquired this Toronto property.

[20] Of course, an "address for service" is not necessarily a person's residential address. Should Mr. Zou upon receipt of the Vendor's affidavit from Ms. Chung have made more specific inquiry as to why, if the Vendor were resident in Canada, his address for service was in California, and also had been California two years earlier, and also he was signing all documents in California?

[21] As noted the inquiry Mr. Zou carried out was the basic inquiry that I expect he would have done in any event, required by clause 20 of the OREA standard form contract. That would have been adequate had there not been red flags signalling a potential that residency was outside Canada, but here there were such red flags. The response he received to his "satisfactory evidence" request was insufficient to resolve those red flags in the absence of follow-up questions. Note as well that what was received - the one sentence "affidavit" - was unsworn, and it was stated as having been "declared" however absent any statement that it was a solemn declaration and any indication that the declared statement was intended to have the same force and effect as if given under oath and or that it had been declared under penalty of perjury.

[22] If the unsworn affidavit had at all responded to the specific red flags as to potential non-residency (unlikely as Mr. Zou seems not to have asked about such

flags), and assuming such responses were corroborative of the Vendor being a resident of Canada, that almost certainly would have been sufficient to constitute for Mr. Zou a "reasonable inquiry". It is obvious that "reasonable inquiry" entails consideration of not just what was asked, but also of response(s) received. Here, follow-up questions would have been appropriate. To say a brief and bald unsworn statement was sufficient to quell concerns raised or that should have been raised by the California-related red flags is not sufficient. Such statements as to residency can well be wrong, intentionally or not. In my view it is not reasonable that they should unconditionally be accepted where, as here, the option of further enquiry exists. Speaking completely generally, in terms of trustworthiness it must not be overlooked that what is said in these statements, including those unsworn, can mean an immediate lessening by 25% of a seller's proceeds of sale.

[23] Thus I conclude that what happened in this case did not constitute "reasonable inquiry". I find this taking into account that what is "reasonable" could be any of a range of actions, or inaction, determined by the pertinent factual context. The factual context here was such that it was not reasonable to not pursue the matter beyond receipt of the unsworn affidavit. Simple questions such as what was the Vendor's permanent address as opposed to "address for service" and provision of a copy of the Vendor's driver's license, would have done much to bring clarity to this situation without undue further efforts. (It is recognized that answers to these questions would often (but not always) lead to an accurate understanding as to residency, noting as well in this regard subsections 250(3) and (5) of the Act.) The statutory provision involved, subsection 116(5)(a), calls for and deserves more than a brief, baldly stated affidavit or solemn declaration when there are factual red-flags potentially suggestive of non-residency. The matter should then be pursued, to give due effect to the fiscal concern that Parliament sought to address in its drafting of subsection 116(5)(a).

[24] If I should be wrong on this point in deciding there was not "reasonable inquiry" in this case then I would conclude for similar reasons as above that here the purchaser did have, in the words of paragraph 116(5)(a), "reason to believe that the [Vendor] was not resident in Canada". The reasons are the above-noted California red flags, as well as the fact that the brief and bald section 116 statement given by the Vendor was expressed neither in a sworn affidavit nor as a solemn declaration having force as if given under oath, or acknowledging being under penalty of perjury. At the same time the Vendor had given a Solemn Declaration as noted above on a matter involving the *Excise Tax Act*, so why not also for this matter *re* section 116? These factors, taken together particularly, but also individually, constitute suitably significant grounds for belief that the Vendor was

not resident in Canada - subject of course to further enquiry, thereby providing the Vendor through counsel an opportunity to clarify these matters potentially pertaining to residency.

Conclusion:

[25] The appeal is dismissed, with costs.

Signed at Halifax, Nova Scotia, this 27th day of August 2018.

"B. Russell"

Russell J.

CITATION:	2018TCC156
COURT FILE NO.:	2014-1304(IT)G
STYLE OF CAUSE:	ANIBAL KAU AND HER MAJESTY THE QUEEN
PLACE OF HEARING:	Toronto, Ontario
DATE OF HEARING:	December 5-6-7, 2017
REASONS FOR JUDGMENT BY:	The Honourable Justice B. Russell
DATE OF JUDGMENT:	July 31, 2018
DATE OF AMENDED REASONS FOR JUDGMENT:	**August 27, 2018**

APPEARANCES:

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Counsel for the Respondent:	Alexandra Humphrey Leonard Elias

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