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Appeal
Tribunal**

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September 20, 2006

MEMORANDUM

Re: *James Prosser and GTA Leasing Corp. v. Registrar, Motor Vehicle Dealers Act*

Enclosed herewith please find a copy of the Decision of the Licence Appeal Tribunal with respect to this matter.

DISTRIBUTION LIST:

James Prosser for the Applicants
Mary Jane South for the Respondent

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JAMES PROSSER AND GTA LEASING CORP.

APPEAL FROM A PROPOSAL OF THE REGISTRAR UNDER
THE *MOTOR VEHICLE DEALERS ACT*

TO REVOKE REGISTRATION

TRIBUNAL: KENNETH W. KOPROWSKI, Vice-Chair

APPEARANCES: JAMES PROSSER, Applicant, was representing himself and GTA
LEASING CORP.

MARY JANE SOUTH, Agent, representing the Registrar,
Motor Vehicle Dealers Act

DATE OF HEARING: August 17, 2006 Toronto

REASONS FOR DECISION AND ORDER

EXHIBITS

- Exhibit 1 Notice of Proposal to Revoke Registration dated April 11, 2006
- Exhibit 2 Notice of Appeal dated April 26, 2006
- Exhibit 3 Respondent's Book of Documents
- Exhibit 4 Letter dated April 20, 2006, from the Ministry of Finance to Chris Markou
- Exhibit 5 Up-dated statement of arrears of remittances of Retail Sales Tax as at August 17, 2006.
- Exhibit 6 Offer to purchase restaurant business of Applicant James Prosser

BACKGROUND:

This hearing arises out of a written Notice of Proposal (the "Proposal") dated April 11, 2006, issued by the Registrar, under the *Motor Vehicle Dealers Act* R.S.O. 1990, c. M.42 (the "Registrar" and the "Act" respectively), to revoke the registration of GTA Leasing Corp. as a motor vehicle dealer and to revoke the registration of James G. Prosser as a motor vehicle salesperson under the Act. The dealer and James Prosser are collectively referred to as the "Applicants". The proposal sets out the reasons for seeking an order for the revocation of the Applicants' registrations. The reasons are stated as follows:

The intention and objective of the Act is to protect the public interest. The requirements of the Act include that Registrants be financially responsible in the conduct of business and that Registrants carry on business in accordance with the law and with integrity and honesty. The Registrants' conduct and financial position are inconsistent with the intention and objective of the Act, and therefore warrants (sic) disentitlement to registration under the Act.

The reasons on which the Registrar relies are stated in the proposal, as follows:

1. GTA Leasing Corp. ("the Dealer") is currently registered as a motor vehicle dealer and was originally registered on or about September 19, 2002.
2. James G. Prosser ("Prosser") is currently registered as a motor vehicle salesperson and was originally registered on or about July 6, 1999.
3. Prosser is the sole director of the Dealer.
4. The Dealer has failed to comply with the requirements of the *Retail Sales Tax Act* as to the filing of returns, remitting of tax due and paying assessments when due.
5. As a result of failure to comply with the *Retail Sales Tax Act*, the Dealer is indebted to the Ministry of Finance in the amount of \$146,325.49 as at March 31, 2006.

By Notice of Appeal dated April 26, 2006, the Applicants notified the Tribunal that they required a Hearing under section 7(2) of the Act.

THE EVIDENCE

Evidence of Jennifer Brake

Jennifer Brake is a field collections officer with the Ministry of Finance ("Ministry") and has been one for 25 years. Her responsibility is to see that there is compliance with the *Retail Sales Tax Act*. She had reviewed the file of GTA Leasing Corp. extensively in June, 2006, when she became aware of its situation.

Her evidence was that when a vendor obtains a permit to sell goods and collect Provincial Sales Tax ("PST"), that vendor collects the PST on behalf of the Ministry. The

PST collected represents trust funds held by the vendor for the Ministry. As well, the vendor must file returns and remit the PST to the Ministry on time. The Dealer, GTA Leasing Corp., was on a monthly filing regime, so that the PST collected in one month had to be paid by the twenty-third day of the following month. The payment must be accompanied by the PST return form, in which the vendor records the actual sales for a month and, also, the PST actually collected on those sales. The vendor then sends, to the Ministry, the necessary cheque for the amount of the PST. If a vendor fails to do this, the vendor is in default of the *Retail Sales Tax Act*; however, the default might not be forwarded to the collections section of the Ministry until about two to three months later.

The collections process generally involves making telephone calls, sending letters to the delinquent vendor, and entering arrangements to make the necessary payment.

In the past, the Dealer, had not been in compliance with the *Retail Sales Tax Act*. The matter of its arrears at that time was referred to collections in September, 2004. Ms. Brake stated that \$25,000.00 was owing on that occasion. The collection process, she stated, was made up of 22 telephone calls, 3 letters, 2 payment arrangements, one broken payment arrangement and a suggestion that the matter would be referred to the Registrar for its consideration of revoking the registration of GTA Leasing Corp. Finally, by March, 2005, all taxes were paid and filings made.

Subsequently, again, in August, 2005, the Dealer, was in default of filing returns and remitting PST for the months of May, June and July, 2005. The filings were subsequently completed, but no money was paid. As a result, the letter of March 31, 2006, found at Tab 4 of Exhibit 3, was sent to the Ontario Motor Vehicle Industry Council ("OMVIC"). In it, the Ministry stated that, because of the arrears of PST payments, the Ministry did not consider the Dealer to be financially responsible in the conduct of its business, and requested that OMVIC issue a proposal to revoke its motor vehicle dealer registration. Schedule "B" of that letter provided a breakdown of the total amount owing, in the sum of \$146,325.49, as of March 31, 2006.

Ms. Brake also provided evidence as to the amount actually owing as at the date of this Hearing, August 17, 2006, in the amount to \$252,041.31. This outstanding amount is for the period July, 2005, to June, 2006.

Ms. Brake explained that, throughout all the Ministry's dealings with GTA Leasing Corp., James Prosser was the only contact person, although Ms. Brake, herself, never spoke to him. No payments have been received since March, 2006, and no arrangements had been made to pay the outstanding amount.

On cross-examination by Mr. Prosser, Ms. Brake again confirmed that, as of the date of this hearing, August 17, 2006, the amount outstanding, payable to the Ministry, had not been paid.

On the issue of whether the Applicants had made any arrangements to pay, Ms. Brake showed a letter, Exhibit 4, dated April 20, 2006, from the collections manager at the Ministry to the lawyer who had been acting for GTA Leasing Corp. at the time. The suggestion in the letter for the re-payment arrangement was that GTA Leasing Corp. would make an initial deposit, followed by twelve monthly post-dated cheque for the current arrears. However, the letter states that the arrangement had yet to be agreed upon. It was the Ministry that proposed this arrangement. On August 14, 2006, just three days before this hearing, Ms. Brake had spoken to the writer of that letter and was able to confirm that nothing had been paid as at August 14, 2006.

Through further cross-examination, Ms. Brake stated that no one had explained to her the problems that Mr. Prosser experienced, resulting in the non-payment of the PST, nor that the Ministry had registered some security against him. Mr. Prosser suggested that this security was registered under the Ontario *Personal Property Security Act*. She also acknowledged that Mr. Prosser needed the security to be removed so that a lender would be willing to lend him some funds. Ms. Brake stated that any security registered would not be lifted unless there was a firm undertaking from the Applicants that the outstanding amount would be paid. Nor was Ms. Brake aware that the Applicants had serious issues with their previous accounting firm about PST remittances. Regardless of those issues, Ms. Brake emphasized that the onus was still on the vendor to make such payments.

On questioning the amount of the tax collected and not paid, in the sum of \$129,260.30, Ms. Brake confirmed that this figure was taken directly from the very assessment forms that were filed on behalf of the Applicants.

On further questioning, Ms. Brake confirmed that, although she had been told of the possibility, she never received any written confirmation that the Applicants were entitled to a repayment of the sum of \$60,000.00, representing a refund of payments of Goods and Services Tax ("GST"). Ms. Brake, in any event, had checked earlier on the date of this hearing, but there was no record of such a payment being made on behalf of the Applicants, nor was there evidence of any direction to have such funds directed to the Ministry.

Evidence of Mary Jane South

Ms. South referred this Tribunal to Tab 3 of Exhibit 3. This is a copy of a corporate search from the Ontario Ministry of Consumer and Commercial Relations, done on April 11, 2006 on the Corporate Applicant, GTA Leasing Corp. There, the information confirmed that Mr. Prosser was shown to be the Office Manager and first Director of the corporate Applicant. No other name appears as an Officer or Director of that corporation.

On cross-examination by Mr. Prosser, Ms. South stated that the record of the corporate Applicant was not good because the Ministry had concerns about it since 2004, when

the Corporate Applicant first failed to send in its PST remittances. Aside from the problems with failing to remit PST payments, Ms. South was not aware of any other serious concerns related to the Applicants.

Upon questioning from this Tribunal, Ms. South confirmed that it did not matter to the Registrar whether the amount owed by the Applicants was the lower sum of \$146,325.49 or the higher sum of \$252,041.31; the fact remained that money was outstanding under the *Retail Sales Tax Act*. It is the fact that there is money outstanding, regardless of amount, that led the Registrar to issue its Proposal in this matter.

Evidence of James Prosser

Mr. Prosser started his evidence by saying that it was his intention to pay all outstanding PST obligations, both past arrears and future obligations, as they would arise. There was no dispute that PST remittances were owed. He said that he would make arrangements to satisfy the outstanding balance within sixty days, and not in twelve months, as was suggested in the letter of April 20, 2006 (Exhibit 4).

He stated that the first accountant that he had hired did not cope well with the volume of business that the Applicants had, so that PST remittances were missed. He fired his first accountant and hired a second firm of accountants, who had to wait several months to receive all records from the first accounting firm. Mr. Prosser even commenced legal proceedings against that first firm.

He also stated that he was "prejudiced" when he unknowingly sold three vehicles that had been stolen. That negatively affected his cash flow, so that he couldn't pay the PST.

He also said that he planned to mortgage his house in the amount of \$300,000.00 to pay the arrears of PST owing. But, he stated that the Ministry would first have to remove its security before the lender would advance any funds.

He also stated that his new accountants discovered that he was owed the sum of \$60,000.00 as a GST refund. He could use that amount to pay down the PST arrears.

Mr. Prosser was insistent that he had paid his obligations for the months of May, June and July, 2006. He also anticipated paying off all his obligations to the Ministry by mid-October, 2006.

He also stated that he had entered into an agreement to sell his restaurant business by September 18, 2006, and expected to receive net proceeds of \$140,000.00. As proof, he filed Exhibit 6, which was an unsigned copy of an agreement of Purchase and Sale of a restaurant of which he was a part owner. The sale price itself was only

\$140,000.00. This Tribunal would question, therefore, whether the net proceeds to Mr. Prosser, after all expenses were paid, would also be \$140,000.00.

To Ms. South, Mr. Prosser confirmed that he is the sole officer of GTA Leasing Corp, and that he is the person in charge of that business. The business has been registered as a dealer since September, 2002. Its business is that of leasing, selling and repairing vehicles. He acknowledged that he owed the sum of \$129,260.30 to the Ministry as a March 31, 2006. He has paid nothing on that amount, but did insist that he has paid the necessary monthly remittances for May, June and July, 2006. The reason that he fell into arrears was that he did not have the money to pay the outstanding PST. In response to questioning from this Tribunal, Mr. Prosser stated that he did not have the money because he used it to pay other expenses.

At the end of his cross-examination, this Tribunal ordered a recess to have Ms. Brake try to determine if the records at the offices of the Ministry revealed that the necessary payments had been made for May, June and July, 2006, as Mr. Prosser said had been done. Upon resuming the hearing, Ms. Brake stated that she had called the Ministry office. No such payments were made. The last payment was received June 16, 2006, but that was for the tax collected in March, 2006. It was filed June 15, 2006, and not by April 23, 2006, as it should have been. Mr. Prosser said that, during the break, he confirmed with his accountants that remittances for March and April, 2006, had been filed and paid. For May, a return was filed, but no payment was made because there were no sales in May that attracted PST.

As for the month of June, that return would be completed on Monday, August 21, 2006. July's return was not filed, but would not be due until August 23, 2006. This information conflicts with his initial evidence that all payments had been made for May, June and July, 2006. In view of this, this Tribunal would prefer the evidence of Ms. Brake over that of Mr. Prosser wherever there is a conflict between the record-keeping of the two of them.

THE LAW

Section 10 of the *Retail Sales Tax Act* referred to earlier in these Reasons, provides as follows:

10. Every vendor is an agent of the Minister and as such shall levy and collect the taxes imposed by this Act upon the purchaser or consumer.

To illustrate just how serious is the non-remittance of tax under that Act, section 13 of that Act provides as follows:

13 (1) All taxes and all amounts collected as or on account of tax by a vendor under this Act shall, subject to subsections 2(16) and (16.3) be remitted to the Minister at the time or times and in the manner prescribed by the regulations.

(2) Every person who contravenes subsection (1) is guilty of an offence and is liable on conviction to one or both of the following penalties in addition to any penalty otherwise provided by this Act:

1. A fine that is,
 - i. a minimum of \$100 or 25 per cent of the amount of tax and amounts collected as, or on account of, tax under this Act that were not remitted, whichever is greater, and
 - ii. a maximum of double the amount of tax and amounts collected as, or on account of, tax under this Act that were not remitted, if the maximum so calculated is greater than \$100.

Amounts collected by a vendor under this Act are funds, which are held in trust for the Ministry. Section 22 provides:

22(1) Any amount collected or collectable as or on account of tax under this Act by a vendor shall be deemed, despite any security interest in the amount so collected or collectable, to be held in trust for Her Majesty in right of Ontario and separate and apart from the vendor's property and from property held by any secured creditor that but for the security interest would be the vendor's property and shall be paid over by the vendor in the manner and at the time provided under this Act and the regulations.

The Registrar issued its proposal to revoke the registrations of the Applicants under authority of the *Motor Vehicle Dealers Act*, referred to earlier in these Reasons. Section 5 of that Act states as follows:

- 5.(1) An applicant is entitled to registration or renewal of registration by the Registrar except where,
- (a) having regard to the financial position of the applicant, the applicant cannot reasonably be expected to be financially responsible in the conduct of business; or
 - (b) the past conduct of the applicant affords reasonable grounds for belief that the applicant will not carry on business in accordance with law and with integrity and honesty;

Section 6(2) of that Act is the authority to revoke a registration:

6(2) Subject to section 7, the Registrar may refuse to renew or may suspend or revoke a registration for any reason that would disentitle the registrant to registration under section 5 if the registrant were an applicant, or where the registrant is in breach of a term or condition of the registration.

Section 7(4) outlines the Powers of this Tribunal on a Hearing such as this:

7(4) Where an applicant or registrant requires a hearing by the Tribunal in accordance with subsection (2), the Tribunal shall appoint a time for and hold the hearing and, on application of the Registrar at the hearing, may by order direct the Registrar to carry out the Registrar's proposal or refrain from carrying it out and to take such action as the Tribunal considers the Registrar ought to take in accordance with this Act and the

regulations, and for such purposes the Tribunal may substitute its opinion for that of the Registrar.

APPLICATION OF LAW TO THE FACTS

This Tribunal accepts the evidence that the Applicants were in arrears of remittances of PST in 2004, and that such arrears were made up by March, 2005.

This Tribunal also accepts the evidence as it applies to the case at hand that the Applicants are, once again, in arrears of remittances of PST and that those arrears are still outstanding. This is in contravention of the *Retail Sales Tax Act*. Therefore, having breached that Act again, the conduct of the Applicants also affords reasonable grounds for belief that the Applicants will not carry on business in accordance with the law and with integrity and honesty.

The PST which the Applicants collected from customers in the course of the Applicants' business represents trust funds, and were not to be spent on ordinary operating expenses of the Applicant dealership, as the evidence of Mr. Prosser confirms had been done. Section 22 of the *Retail Sales Tax Act* makes that quite clear.

The Dealer, represented by James Prosser, its sole officer and Director, collected retail sales tax from its customers. The Applicants do not dispute this. Nor did the Applicants dispute their obligation to account to the Ministry for the tax that they collected. This amount represents trust monies collected by the Dealer as agent for the Ministry.

The repeated failure of the Dealer and Mr. Prosser to remit trust funds in its possession is indicative of the Applicants' conduct in not acting with honesty and integrity and in accordance with law. The failure to remit these trust monies is ongoing. It represents a course of conduct, which is in violation of the *Retail Sales Tax Act*. The fact that Mr. Prosser stated that he used the PST collected to pay other expenses, and the fact that the Applicants had been guilty of this once before, indicate to this Tribunal that the Applicants cannot reasonably be expected to be financially responsible in the conduct of business.

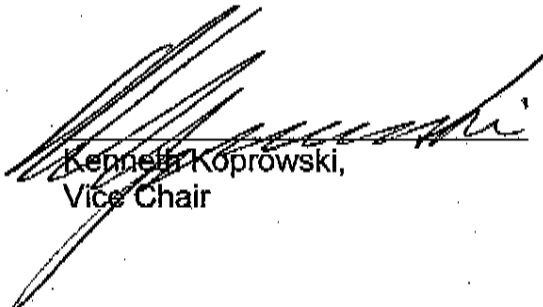
Mr. Prosser was the sole Director and manager of the Dealership. As such, he was in control of its operation and is equally responsible for the failure to account to the Ministry for trust funds held by the Dealer on behalf of the Ministry.

Although this Tribunal might have much sympathy for the Applicants and the problems they had with their first accounting firm and with the sale of stolen vehicles and with the inability to obtain funds from a lender because of the security registered by the Ministry, nevertheless, the *Retail Sales Tax Act* places the responsibility to remit the PST solely on the shoulders of the vendor. This is section 10 of the Act, referred to earlier in these Reasons. Nowhere does the Act permit a delegation of this duty, which would absolve the Applicants of this responsibility.

DECISION

Pursuant to the authority vested in it by section 7(4) of the *Motor vehicle Dealers Act*, the Licence Appeal Tribunal directs the Registrar to carry out its proposal dated April 11, 2006, to revoke the registration of GTA Leasing Corp. as a motor vehicle dealer and the registration of James Prosser as a motor vehicle salesperson.

LICENCE APPEAL TRIBUNAL



Kenneth Koprowski,
Vice Chair

RELEASED: September 20, 2006

File name: 3537.mvda.prosser.doc

The hearing was recorded. Transcripts can be made available at your expense. The period to appeal a decision to the Superior Court of Justice or Divisional Court is 30 calendar days from the date of release of the decision. Please arrange to pick up your Exhibits within 30 days after that period has passed. The Tribunal requires seven days notice prior to releasing Exhibits.

This decision, which is being released to the parties in this proceeding, will also be posted on the Licence Appeal Tribunal's website <http://www.lat.gov.on.ca/> in approximately two weeks time. The decision will also be available on Quicklaw at a later date.