

Date: 20090506

Docket: A-429-07

Citation: 2009 FCA 146

**CORAM: LINDEN J.A.
SEXTON J.A.
RYER J.A.**

BETWEEN:

CHARLES BREMNER

Appellant

and

HER MAJESTY THE QUEEN

Respondent

Heard at Toronto, Ontario, on May 6, 2009.

Judgment delivered from the Bench at Toronto, Ontario, on May 6, 2009.

REASONS FOR JUDGMENT OF THE COURT BY:

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REASONS FOR JUDGMENT OF THE COURT
(Delivered from the Bench at Toronto, Ontario, on May 6, 2009)

RYER J.A.

[1] This is an appeal from a decision of Chief Justice Rip of the Tax Court of Canada (2007 TCC 509) dismissing the appeal of Mr. Charles Bremner (the “appellant”) from an assessment, dated October 1, 2002, that was issued to him pursuant to subsection 323(4) of the *Excise Tax Act*, R.S.C. 1985, c. E-15 (the “ETA”). Under the assessment, the appellant became liable to pay an outstanding liability of Excel Highway Support Service Inc. (the “Corporation”) for unremitted

goods and services tax (“GST”), and related interest and penalties, in respect of the period from March 1, 1999 to May 31, 2000.

[2] Subsection 323(1) of the ETA imposes joint and several liability on the directors of a corporation at the time it fails to remit certain amounts specified in that provision. The Minister may assess directors, pursuant to subsection 323(4) of the ETA, for any amount payable by them pursuant to subsection 323(1) of the ETA. Subsection 323(5) of the ETA provides an important limitation on the Minister’s assessing power. The assessment cannot be levied against a person more than two years after that person last ceased to be a director of the corporation. These provisions of the ETA are reproduced in the appendix to these reasons.

[3] The appellant admitted that he became a deemed director of the Corporation (a “deemed director”), pursuant to subsection 115(4) of the Ontario *Business Corporations Act*, R.S.O. 1990, c. B.16 (the “BCA”), as a consequence of his engagement in the management of the business and affairs of the Corporation after his wife resigned as the sole director of the Corporation in 1997 and the Corporation failed to appoint or elect a replacement director. That provision is also reproduced in the appendix to these reasons.

[4] Before the Tax Court of Canada, the appellant argued that he ceased to be a deemed director of the Corporation in September of 2000, when the business operations of the Corporation terminated. As a result, he argued that the assessment, which was issued on October 1, 2002, was

invalid, by virtue of subsection 323(5) of the ETA, because it was issued outside the two year period that commenced on the date that he ceased to be a director of the Corporation.

[5] The Tax Court Judge accepted the appellant's admission that he was a deemed director of the Corporation from the time of his wife's resignation as a director of the Corporation but did not agree with the appellant's argument that he ceased to be a director of the Corporation in September of 2000. Instead, the Tax Court Judge found that the appellant's engagement in the management of the Corporation continued until at least April 10, 2001, the date of a letter that the appellant wrote to the Canada Customs and Revenue Agency (the "CCRA"), as it was then known, in response to a letter it wrote. In his letter to the CCRA, the appellant requested that future correspondence from the CCRA should be sent to him, and not to his wife.

[6] The Tax Court Judge found that in corresponding with the CCRA, the appellant demonstrated that he was still managing the actions of the Corporation, however minimal those actions may have been.

[7] In our view, this finding is unassailable and is sufficient to dispose of the appeal, since it establishes that the two year limitation period for the assessment would not expire before April of 2003, a date subsequent to October 1, 2002, the date of the assessment.

[8] While no authority was provided to the Court with respect to the interpretation of subsection 115(4) of the BCA, the language of that provision supports the conclusion that the directorship of a

person that arises by virtue of that provision must be considered to endure at least as long as that person manages or supervises the management of the business and affairs of the corporation in question.

[9] The Tax Court Judge found that by virtue of his having written the April 10, 2001 letter to the CCRA, the appellant engaged in the management of the business and affairs of the Corporation on that date. This factual finding was open to the Tax Court Judge and in making this finding, we are not persuaded that he committed a palpable and overriding error. While the appellant contends that this letter was written on behalf of his wife, this contention is not supported by the record. In fact, in testimony given in the Tax Court of Canada, the appellant stated that he was a director of the Corporation when he wrote that letter. It follows that the appellant was a deemed director of the Corporation on April 10, 2001, and consequently, the two year limitation period in subsection 323(5) of the ETA does not protect the appellant from liability under the assessment.

[10] For the foregoing reasons, the appeal will be dismissed but without costs because of the failure of counsel for the Minister to appear at the hearing.

“C. Michael Ryer”

J.A.

APPENDIX

Subsections 323(1), (4) and (5) of the *Excise Tax Act*, R.S.C. 1985, c. E-15

323(1) 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.

(4) 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) 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.

323(1) Les administrateurs d'une personne morale au moment où elle était tenue de verser, comme l'exigent les paragraphes 228(2) ou (2.3), un montant de taxe nette ou, comme l'exige l'article 230.1, un montant au titre d'un remboursement de taxe nette qui lui a été payé ou qui a été déduit d'une somme dont elle est redevable, sont, en cas de défaut par la personne morale, solidairement tenus, avec cette dernière, de payer le montant ainsi que les intérêts et pénalités afférents.

(4) Le ministre peut établir une cotisation pour un montant payable par une personne aux termes du présent article. Les articles 296 à 311 s'appliquent, compte tenu des adaptations de circonstance, dès que le ministre envoie l'avis de cotisation applicable.

(5) L'établissement d'une telle cotisation pour un montant payable par un administrateur se prescrit par deux ans après qu'il a cessé pour la dernière fois d'être administrateur.

Subsection 115(4) of the *Business Corporations Act*, R.S.O. 1990, c. B.16

(4) Where all of the directors have resigned or have been removed by the shareholders without replacement, any person who manages or supervises the management of the business and affairs of the corporation shall be deemed to be a director for the purposes of this Act. 1994, c. 27, s. 71 (12).

(4) Si tous les administrateurs démissionnent ou sont destitués par les actionnaires sans être remplacés, quiconque dirige ou supervise les activités commerciales et les affaires internes de la société est réputé un administrateur pour l'application de la présente loi. 1994, chap. 27, par. 71 (12).

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET: A-429-07

(AN APPEAL FROM THE ORDER OF THE HONOURABLE MR. CHIEF JUSTICE GERALD J. RIP, OF THE TAX COURT, DATED AUGUST 28, 2008, IN TAXCOURT DOCKET NO. 2004-1135 (GST) I.)

STYLE OF CAUSE: CHARLES BREMNER v. HER MAJESTY THE QUEEN

PLACE OF HEARING: TORONTO, ONTARIO

DATE OF HEARING: MAY 6, 2009

REASONS FOR JUDGMENT OF THE COURT BY: (LINDEN, SEXTON & RYER JJ.A.)

DELIVERED FROM THE BENCH BY: RYER J.A.

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No Appearance FOR THE RESPONDENT

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