

Docket: 2009-2036(GST)I

BETWEEN:

WESTWOOD FLOORS LTD.,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

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Appeal heard on June 26, 2010 in Vancouver, British Columbia.

Before: The Honourable Justice Réal Favreau

Appearances:

Agent for the Appellant: Jeffrey Paul Hennig

Counsel for the Respondent: Whitney Dunn

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**JUDGMENT**

The appeal from the assessment made pursuant to subsection 317(9) of the *Excise Tax Act*, bearing number 698429 and dated November 21, 2008, on the basis that the Appellant failed to comply with a requirement dated December 27, 2007, to pay the amount of \$105,892, is dismissed in accordance with the attached Reasons for Judgment.

Signed at Ottawa, Canada, this 8th day of December 2010.

"Réal Favreau"

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Favreau J.

Citation: 2010 TCC 632  
Date: 20101208  
Docket: 2009-2036(GST)I

BETWEEN:

WESTWOOD FLOORS LTD.,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

### **REASONS FOR JUDGMENT**

Favreau J.

[1] This is an appeal by way of the informal procedure from an assessment made pursuant to subsection 317(9) of the Part IX of the *Excise Tax Act*, R.S.C. 1985, c. E-15, as amended, (the "*Act*"), bearing number 698429 and dated November 21, 2008, on the basis that the Appellant failed to comply with a requirement dated December 27, 2007 to pay the amount of \$105,892 pursuant to subsection 317(3) of the *Act* (the "Requirement") because the Appellant was, as of that date, liable to make a payment of \$105,892 to J.P.H. Developments Ltd. ("J.P.H.").

[2] In determining the Appellant's tax liability, the Minister of National Revenue (the "Minister") made the following assumptions of fact described in paragraph 6 of the Reply to the Appellant's Notice of Appeal:

- (a) at all material times, J.P.H. was in the residential house construction and development business; **(admitted)**
- (b) J.P.H. was incorporated in British Columbia in March 1987; **(admitted)**
- (c) J.P.H. was registered under Part IX of the *Excise Tax Act*, R.S.C. 1985, c. E-15, as amended (the "*Act*"), effective January 1, 1991 and was assigned a Goods and Services Tax ("GST") account; **(admitted)**
- (d) at all material times, J.P.H. made taxable supplies; **(admitted)**

- (e) at all material times, J.P.H. collected or was required to collect GST on its taxable supplies and to remit net GST on a quarterly basis; **(admitted)**
- (f) during the material period, Jeffrey Hennig (“Hennig”) was the sole shareholder of J.P.H.; **(admitted)**
- (g) during the material period, Hennig was the majority shareholder of the Appellant; **(admitted)**
- (h) at all material times, the Appellant and J.P.H. were not dealing at arm’s length; **(admitted)**
- (i) on December 27, 2007, the Appellant was liable to pay \$105,892.00 to J.P.H.; **(admitted)**
- (j) as of December 27, 2007, J.P.H. failed to remit to the Receiver General as required for GST net tax, including penalties and interest, in the amount of \$119,993.20 for ~~the~~ [sic] reporting the periods ending March 31, 2000 to December, 2001, inclusive, as well for the reporting period ending December 31, 2002. **(denied)**
- (k) the Minister issued the Requirement to the Appellant on December 27, 2007 pursuant to subsection 317(3) of the *Act* which directed the Appellant to pay any amounts owing to J.P.H. forthwith to the Receiver General; **(admitted)**
- (l) the Requirement was successfully delivered by registered mail to the Appellant on December 28, 2007; **(admitted)**
- (m) pursuant to the Requirement, the Appellant was required to pay \$105,892.00 forthwith to the Receiver General, and **(admitted)**
- (n) the Appellant did not remit any payment to the Receiver General in respect of the Requirement. **(admitted)**

[3] In its Notice of Appeal, the Appellant invoked the fact that it has been unable to afford to repay the loan to J.P.H. due to an operating loss in the 2007 taxation year and accumulated losses from prior years having depleted its working capital. Since the issuance of the Requirement, the Appellant has only been able to afford to pay its statutory debt (GST and payroll tax withholdings) and its current vendors. The Appellant argued that there has been no failure to comply with the Requirement considering the fact that no payment was actually made to J.P.H. and that there was no expectation that any payment would be made to J.P.H.

[4] The relevant provisions of the *Act* for the purpose of this appeal are subsections 317(3), (7) and (9) which read as follows:

**(3) Garnishment** -- Despite any other provision of this Part, any other enactment of Canada other than the *Bankruptcy and Insolvency Act*, any enactment of a province or any law, if the Minister has knowledge or suspects that a particular person is, or will become within one year, liable to make a payment

(a) to a tax debtor, or

(b) to a secured creditor who has a right to receive the payment that, but for a security interest in favour of the secured creditor, would be payable to the tax debtor,

the Minister may, by notice in writing, require the particular person to pay without delay, if the moneys are payable immediately, and in any other case as and when the moneys become payable, the moneys otherwise payable to the tax debtor or the secured creditor in whole or in part to the Receiver General on account of the tax debtor's liability under this Part, and on receipt of that notice by the particular person, the amount of those moneys that is so required to be paid to the Receiver General shall, despite any security interest in those moneys, become the property of Her Majesty in right of Canada to the extent of that liability as assessed by the Minister and shall be paid to the Receiver General in priority to any such security interest.

**(7) Failure to comply** -- Every person who fails to comply with a requirement under subsection (1), (3) or (6) is liable to pay to Her Majesty in right of Canada an amount equal to the amount that the person was required under subsection (1), (3) or (6), as the case may be, to pay to the Receiver General.

**(9) Assessment** -- The Minister may assess any person for any amount payable under this section by the person to the Receiver General and, where the Minister sends a notice of assessment, sections 296 to 311 apply, with such modifications as the circumstances require.

[5] The application of these provisions has already been considered by this Court and by the Federal Court of Appeal, specifically in *Toronto Dominion Bank v. R.* (2009), G.S.T.C. 162 (T.C.C.) (Informal Procedure), *Wa-Bowden Real Estate Reports Ltd. v. R.*, (1997) G.S.T.C. 49 (T.C.C.) confirmed by the Federal Court of Appeal (1998) G.S.T.C. 46 and *Absolute Bailiffs Inc. v. R.*, (2002), G.S.T.C. 116 (General Procedure), also confirmed by the Federal Court of Appeal, (2003), G.S.T.C. 160.

[6] In most of the cases reported, concerning subsection 317(3) of the *Act*, the issue was whether the bankruptcy of the tax debtor affected the right of the Receiver

General to receive payment under the Requirement to Pay issued prior to the date of bankruptcy. That was also the situation in this case, as J.P.H. declared bankruptcy at an undisclosed date presumably after the issue of the Requirement but this issue was not raised by the Appellant in its pleadings.

[7] The issue in this case is simply to determine if the absence of payment by the Appellant to J.P.H. and the lack of expectation of any payment to J.P.H. could nevertheless constitute a failure on the part of the Appellant to comply with the Requirement. Unfortunately for the Appellant, I am of the opinion that the absence of payment of any amount owed by the Appellant to J.P.H. constituted a failure to comply with the Requirement. A person who receives a garnishment notice cannot avoid his liability by simply not paying anything more to the tax debtor. In both *607730 B.C. Ltd. v. R.*, (2007) G.S.T.C. 183 (T.C.C.) and *Quaite v. Avorado Resort Ltd.*, (2009) G.S.T.C. 10 (BCSC), a company was held liable for not honouring garnishment notice even though it did not pay the tax debtor. As stated in paragraph 3 above, the Appellant chose to pay its statutory debts and its current vendors instead of making the payment required in accordance with the Requirement.

[8] The evidence showed that, as of December 27, 2007, J.P.H. owed the Canada Revenue Agency ("CRA") the amount of \$119,993.20 on account of GST net tax, including penalties and interests. The amount owing to CRA resulted from a notice of reassessment dated March 19, 2007. J.P.H. filed a notice of objection but the reassessment was confirmed by CRA. No appeal to this Court has been filed by J.P.H. within the prescribed time limit.

[9] Based on the financial statements of J.P.H. as of December 31, 2007, and the information provided by the Appellant's accountant, the Appellant still owed \$105,892 to J.P.H. which was \$10,000 lower than the \$115,892 owed to J.P.H. as of December 31, 2006. The \$10,000 repayment by the Appellant to J.P.H. occurred during the year 2007 but before the Requirement was served on the Appellant.

[10] By virtue of the Requirement, the Appellant was required to pay to the Receiver General, on account of J.P.H.'s liability forthwith, the monies otherwise and immediately payable to J.P.H., up to \$119,904.49. The Requirement was duly delivered to the Appellant on December 28, 2007.

[11] By virtue of a notice of assessment dated November 21, 2008, the Appellant was held liable, under subsection 317(7) of the *Act*, for the amount of \$105,892 because it failed to comply with the Requirement concerning the debt payable to J.P.H. This notice of assessment was validly delivered by registered mail.

[12] In light of the foregoing, it has been clearly established that the Receiver General was entitled to receive the payment from the Appellant. The amount of the tax debt of J.P.H. was determined after the expiry of its right of appeal, the debt payable by the Appellant to J.P.H. has been confirmed and the Requirement and the assessment against the Appellant were valid in all respects.

[13] The fact that the Appellant was not financially able to make the full payment to the Receiver General cannot constitute an excuse for not complying with the Requirement. The Appellant then becomes liable to the Receiver General for an amount equal to the amount that it was required, under subsection 317(3) of the *Act*, to pay to the Receiver General.

[14] The Appellant cannot succeed in its appeal because it has not met its burden of proof of showing that it was not liable to J.P.H. for the amount of \$105,892, as assumed by the Minister. Accordingly, the appeal is dismissed.

Signed at Ottawa, Canada, this 8th day of December 2010.

"Réal Favreau"

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Favreau J.

CITATION: 2010 TCC 632

COURT FILE NO.: 2009-2036(GST)I

STYLE OF CAUSE: Westwood Floors Ltd. v. Her Majesty the Queen

PLACE OF HEARING: Vancouver, British Columbia

DATE OF HEARING: June 26, 2010

REASONS FOR JUDGMENT BY: The Honourable Justice Réal Favreau

DATE OF JUDGMENT: December 8, 2010

APPEARANCES:

Agent for the Appellant: Jeffrey Paul Hennig

Counsel for the Respondent: Whitney Dunn

COUNSEL OF RECORD:

For the Appellant:

Name:

Firm:

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