Docket: 2016-2767(IT)G
2016-2677(GST)I

BETWEEN:

RYAN EDMOND SOULLIERE,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

Appeal heard on March 4, 2020, at Windsor, Ontario

Before: The Honourable Justice Gaston Jorré, Deputy Judge

Appearances:

Counsel for the Appellant:	Craig J. Allen
Counsel for the Respondent:	Dustin Kenall

JUDGMENT

In accordance with the attached reasons for Judgment the Appeal is dismissed. Cost are awarded to the Respondent.

If the parties are unable to agree on costs within 45 days of the date of this Judgment they shall file submissions in writing not exceeding six pages within 60 days of the date of this Judgment[1].

Signed at Ottawa, Canada, this 23rd day of July 2020.

"Gaston Jorré"

Jorré J.

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[1] It may be of assistance to the parties to know that nothing I am aware of from the hearing would cause me to deviate from the tariff in awarding costs. However, there may be other considerations I am not aware of.

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REASONS FOR JUDGMENT

Jorre DJ.

[1] This is a director's liability case. The appellant has been assessed for unremitted income tax source deductions under section 227.1 of the *Income Tax Act* and for unremitted net GST under section 323 of the *Excise Tax Act*. Like many director's liability cases the underlying circumstances are unfortunate.

[2] There is no issue as to quantum and this is not a case where a due diligence defence is being raised.

[3] As a result of subsection 4 of section 227.1 of the *Income Tax Act* and subsection 5 of section 323 of the *Excise Tax Act* any director's liability assessment must be made within two years "… after the person last ceased to be a director of the Corporation".

[4] The assessments in issue were made on 25 July 2014. They are for amounts unremitted by Metro Catering & Vending Services (2010) Inc. I shall refer to this company as Metro 2010.

[5] The two assessments relate to unremitted amounts totalling some $65,000. In the case of the GST they relate to the monthly periods ending 31 August 2012 and 30 September 2012; in the case of income tax source deductions they relate to the 2012 taxation year[1].

[6] Metro 2010 was incorporated on 1 November 2010 and the appellant was the incorporating director and the sole director of the Corporation. According to the Corporation profile report the appellant was also the president and the secretary of the Corporation. His mother was the treasurer[2]. The appellant testified that he was unaware that his mother was the corporate treasurer.

[7] The appellant did not have an ownership interest in Metro 2010.

[8] No further directors of Metro 2010 were appointed or elected.

[9] Metro 2010 operated food trucks and vending machines.

[10] Metro 2010 ceased operations on or about 30 September 2012.

[11] The appellant submits that he ceased to be a director on 10 December 2010 and that he was assessed more than two years after he ceased to be a director. The respondent disputes this[3].

[12] The Appellant continued to work at Metro 2010 after he resigned as a director and until Metro 2010 ceased operations.

[13] If the appellant ceased to be a director in December 2010 the appeals must be allowed. Conversely, if he did not the appeals must fail.

[14] There is a factual dispute in this matter. There is also a legal dispute; the essence of that dispute turns on the underlying Ontario corporate law.

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[1] See the first page of the two reports on objection at exhibit J-2, Tab 3 and J-1, Tab 3. Because the Appellant was an employee of the corporation some portion of the unremitted source deductions would likely have been in relation to withholdings from his salary.

[2] See tab 13 of exhibit J-1.

[3] See the Notice of Appeal and the Reply to Notice of Appeal.

[15] The position of the respondent is twofold:

a. the appellant never resigned and,

b. even if he did resign, the provisions of the *Business Corporations Act* of Ontario prevented the resignation from taking effect with the consequence that he continued to be a director and the assessments are timely.

[16] There is nothing in the factual circumstances of this case or the relevant statutory provisions that would result in a different outcome for the income tax assessment and the goods and services tax assessment.

[17] Prior to the existence of Metro 2010, the appellant's father had operated a similar business which originally began in the 1960s with two food trucks and eventually grew into a fairly large and quite successful operation. I shall refer to that business as Metro Windsor. In the first decade of the 21st century Metro Windsor started having significant difficulties as a result of the economic difficulties in Windsor, particularly in the auto sector. Those difficulties eventually resulted in Metro Windsor going into receivership in 2010.

[18] The appellant grew up in Windsor and when he was in school he worked many summers at Metro Windsor. After high school he left Windsor to further his studies and, afterwards, he worked in broadcasting.

[19] In 2001 he moved back to Windsor and worked for Metro Windsor. He saw that the company was having more and more difficulties.

[20] He testified that one day his father came to him and said to them that he had to sign some papers immediately or the company would stop operations the next day. What he signed led to the creation of Metro 2010 and his being the sole director.

[21] When Metro Windsor went into receivership he continued to do much the same work at Metro 2010 as he had been doing immediately prior to the creation of Metro 2010, running day-to-day operations with much of his time devoted to, metaphorically, fire fighting.

[22] The Appellant testified that his father was responsible for overall management of Metro 2010.

[23] In practical terms it appears that Metro 2010 continued to run much the same business as Metro Windsor.

[24] Legally the situation is less clear. It appears that the receiver of Metro Windsor decided not to run the business but did agree to let the Soulliere family set up a new company to run the business of the old one in the hope that the sale of a going business would result in a better price. To do so the receiver entered into an "occupation agreement" with Metro 2010[4].

[25] In any event, nothing in the evidence shows or even suggests that Metro 2010 was ever in receivership.

[26] I am going to begin my analysis by examining the Respondent's alternative position. For this purpose I will assume, but not decide, that the Appellant resigned in the sense that he signed and delivered to the corporation a letter of resignation on 10 December 2010. I will also assume, without deciding that the Appellant's father managed Metro 2010.

[27] The following sections of the *Business Corporations Act of Ontario* are relevant:

PART IX
DIRECTORS AND OFFICERS

> **Directors**
> **115** (1) Subject to any unanimous shareholder agreement, the directors shall manage or supervise the management of the business and affairs of a corporation.
>
> …
>
> **Board of directors**
>
> …
>
> **Deemed directors**
> (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.

[4] See the second and third pages of Tab 10 of Exhibit J-1. The evidence does not disclose the terms of the occupation agreement.

Exceptions
(5) Subsection (4) does not apply to,

(a) an officer who manages the business of the corporation under the direction or control of a shareholder or other person;

(b) a lawyer, accountant or other professional who participates in the management of the corporation solely for the purposes of providing professional services; or

(c) a trustee in bankruptcy, receiver, receiver-manager or secured creditor who …

…

First directors meeting
117 (1) After incorporation, a meeting of the directors of a corporation shall be held at which the directors may,

(a) make by-laws;

(b) adopt forms of security certificates and corporate records;

(c) authorize the issue of securities;

(d) appoint officers;

(e) appoint one or more auditors to hold office until the first annual or special meeting of shareholders;

(f) make banking arrangements; and

(g) transact any other business.

Resolution in writing
(2) …

…

First directors
119 (1) Each director named in the articles shall hold office from the date of endorsement of the certificate of incorporation until the first meeting of shareholders.

Resignation
(2) Until the first meeting of shareholders, the resignation of a director named in the articles shall not be effective unless at the time the resignation is to become effective a successor has been elected or appointed.

Powers and duties
(3) The first directors of a corporation named in the articles have all the powers and duties and are subject to all the liabilities of directors.

Election of directors
(4) Subject to clause 120 (a), shareholders of a corporation shall elect, at the first meeting of shareholders and at each succeeding annual meeting at which an election of directors is required, directors to hold office for a term expiring not later than the close of the third annual meeting of shareholders following the election.

Term for directors
(5) It is not necessary that all directors elected at a meeting of shareholders hold office for the same term.

Idem
(6) A director not elected for an expressly stated term ceases to hold office at the close of the first annual meeting of shareholders following his or her election.

Idem
(7) Despite this section, if directors are not elected at a meeting of shareholders the incumbent directors continue in office until their successors are elected.

Failure to elect required number of directors
(8) …

Consent required
(9) …

Cumulative voting for directors
120

...

121 (1) A director of a corporation ceases to hold office when he or she,

(a) dies or, subject to subsection 119 (2), resigns;

(b) is removed in accordance with section 122; or

(c) becomes disqualified under subsection 118 (1).

Idem
(2) A resignation of a director becomes effective at the time a written resignation is received by the corporation or at the time specified in the resignation, whichever is later.

Removal of directors
122 (1) Subject to clause 120 (f), the shareholders of a corporation may by ordinary resolution at an annual or special meeting remove any director or directors from office.

Idem
(2) …

…

Standards of care, etc., of directors, etc.
134 (1) Every director and officer of a corporation in exercising his or her powers and discharging his or her duties to the corporation shall,

(a) act honestly and in good faith with a view to the best interests of the corporation; and

(b) exercise the care, diligence and skill that a reasonably prudent person would exercise in comparable circumstances.

Duty to comply with Act, etc.
(2) Every director and officer of a corporation shall comply with this Act, the regulations, articles, by-laws and any unanimous shareholder agreement.

Cannot contract out of liability
(3) …

PART XVIII
GENERAL

Notice to directors or shareholders
262 (1) …

Idem
(2) …

Director
(3) A director named in the articles or the most recent return or notice filed under the Corporations Information Act, or a predecessor thereof, is presumed for the purposes of this Act to be a director of the corporation referred to in the articles, return or notice.

Where notice returned

…

Notice to corporation
263 (1) Except where otherwise provided in this Act, a notice or document required to be sent to a corporation may be sent to the corporation by prepaid mail at its registered office as shown on the records of the Director or may be delivered personally to the corporation at such office and shall be deemed to be received by the corporation on the fifth day after mailing.

…

[28] The Appellant submits that under subsection 121(2) of the *Ontario Business Corporations Act* the resignation became effective when received by the corporation. Subsection 121(2) reads:

(2) A resignation of a director becomes effective at the time a written resignation is received by the corporation or at the time specified in the resignation, whichever is later.

[29] Given that the Appellant testified that he prepared it, signed it, walked over to his father's office at the corporate premises on the 10 December 2010, the Appellant further submits that the resignation took effect on that day.

[30] In response, the Respondent relies on subsection 119(2) of the *Ontario Business Corporations Act*; it reads:

Resignation
(2) Until the first meeting of shareholders, the resignation of a director named in the articles shall not be effective unless at the time the resignation is to become effective a successor has been elected or appointed.

[31] The corporation never had a first meeting of shareholders and the Respondent submits that as a consequence of subsection 119(2) the resignation never took effect and, as a result, the Appellant continued to be a director[5].

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[5] See *Zwierschke v. MNR* [1991] 2 CTC 2783 where Justice Mogan concluded that subsection 119(2) of the *Business Corporations Act* of Ontario prevented a resignation from being effective where no successor was elected or appointed. In that case, it was not argued that there was a *de facto* director who was appointed by the deeming provision in subsection 115(4). Although *Zwierschke* was distinguished by Justice Tesky in *Bozzo v. HMTQ* [2001] 1 CTC 2461 on the basis that subsection 119(2) had been amended subsequently, I am unable to agree as the amendment does not change the substantive operation of the Ontario *Business Corporations Act*. Indeed, *Zwierschke* was followed by Justice Rossiter, as he then was, in *Shepard v. HMTQ* 2008 TCC 361 and by Justice D'Auray in *Doncaster v. HMTQ* 2015 TCC 127. The Appellant also referred me to *Moll v. HMTQ* 2008 TCC 234. I do not understand *Moll* to reach a different conclusion than *Zwierschke*. While there is a general statement at paragraph 18 of the decision that a director can resign, it must be read in the context that it was unnecessary for the Court to

[32] The Appellant's response to this last point is that one must consider subsection 115(4) which says:

> (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.

[33] The Appellant submits that what subsection 115(4) does in deeming a person to be a director amounts to the individual being appointed within the meaning of "appointed" in subsection 119(2).

[34] As a consequence, given that Appellant's father carried out the overall management of Metro 2010 and was thereby "appointed" by operation of subsection 115(4), subsection 119(2) had no application with the result that the resignation was effective on 10 December 2010[6].

[35] I disagree with the Appellant's submission and agree with the Respondent for two reasons.

[36] First, I agree with the Respondent that, sequentially, the deeming of a person managing a corporation to be director pursuant to subsection 115(4) of the Business Corporations Act can only come into effect if all the directors have resigned or been removed. Since the Appellant's resignation could not come into effect by virtue subsection 119(2) of that Act it follows that an essential precondition to the deeming under subsection 115(4) did not exist and the appellant's father could not have become a deemed director pursuant to 115(4).

[37] Second, I am also satisfied that the deeming of a director pursuant to subsection 115(4) would, in any event, not constitute an appointment referred to in subsection 119[2] for the following reasons.

---

consider the application of subsection 119(2) of the Ontario *Business Corporations Act* – see the last sentence of paragraph 17 of *Moll* where it is clear that there was no evidence that the Appellant was named a director in the articles of incorporation.

[6] No such argument appears to have been made in *Zwierschke*.

[38] The Business Corporations Act uses “appointed” in a number of sections and it is clear looking at that Act as a whole that it refers to very specific mechanisms of appointment. For example in section 107 there is a process for Court appointed directors[7].

[39] In interpreting statutes, unless there are good reasons to conclude the contrary, one must presume that the legislator intended to use words consistently. Thus, one must assume that the reference to an appointed director in 119[2] is intended to refer to people who have been appointed under the other provisions of the Act.

[40] It follows that the Appellant remained a director under the corporate law of Ontario[8].

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[7] Other examples of the use of appointed are in subsections or paragraphs 124(1) and (2), 186(3)(b) and 248(3)(e) of the *Business Corporations Act*.

[8] Given the conclusion I have reached, it is not strictly necessary for me to reach any conclusion on the remaining issues: 1) Did the Appellant’s father manage Metro 2010? 2) i) Did the Appellant sign the letter of resignation on 10 December 2010 and ii) deliver it to his father on the same date at the corporate premises? 3) If the answer to both is yes, was that sufficient to constitute a resignation?

However, I will deal briefly with these questions. The first two are questions of fact while the third is essentially a question of law given the facts.

First, on the evidence, I find no reason to doubt the Appellant’s evidence that his father had overall management of the business; it is consistent with the overall history of Metro Windsor and the purpose of Metro 2010, to operate Metro Windsor. I find that the Appellant’s father did manage the enterprise.

Second, with respect to the resignation, I would note that the exhibits were agreed upon and admitted with respect to, *inter alia*, their authenticity (See page 6 of the Transcript). The letter of resignation was part of those exhibits (Tab 10 of Exhibit J-1). Although there are other elements in the evidence which might support a different conclusion, given the admission of authenticity I must take it as a given that the letter was signed by the Appellant on 10 December 2010.

That leaves the delivery of the letter. Once I start from the perspective that the letter was indeed signed on 10 December 2010 I see nothing in the evidence that would lead me not to accept the Appellant’s testimony that, after signing it, he left his office to go to his father’s office and handed it to his father.

I am satisfied the Appellant delivered the letter of resignation to his father on the company premises on 10 December 2010.

Finally, on the question whether writing and signing the letter of resignation together with delivery to his father at the company premises is sufficient to constitute an effective resignation, the starting point is found in the following portions of sections 121 and 263 of the *Business Corporations Act*:

> **121** (1) A director of a corporation ceases to hold office when he or she,
>
> > (a) … resigns;
> >
> > (b) …
>
> **Idem**
>
> (2) A resignation of a director becomes effective at the time a written resignation is received by the corporation or at the time specified in the resignation, whichever is later.
>
> …

[41] For these reasons, the appeal is dismissed with costs.

Signed at Ottawa, Canada, this 23rd day of July 2020.

"Gaston Jorré"

Jorré J.

Notice to corporation

263 (1) Except where otherwise provided in this Act, a notice or document required to be sent to a corporation may be sent to the corporation by prepaid mail at its registered office as shown on the records of the Director or may be delivered personally to the corporation at such office and shall be deemed to be received by the corporation on the fifth day after mailing.

There are no other formalities requires by that *Act*.

Given that this is a legal question and it is not strictly necessary to answer it, I choose not to do so.

However, I will make the following observations.

Subsection 134(1) provides that:

Standards of care, etc., of directors, etc.

134 (1) Every director and officer of a corporation in exercising his or her powers and discharging his or her duties to the corporation shall,

(a) act honestly and in good faith with a view to the best interests of the corporation; and

(b) exercise the care, diligence and skill that a reasonably prudent person would exercise in comparable circumstances.

It follows from that obligation that a director must exercise diligence in resigning. I agree with the Respondent that a director could not simply go to a corporation's address and simply hand a letter of resignation to a mere stranger who he happens to find in the lobby.

Handing the letter to his father may well have been appropriate but, as stated, I am not going to decide the point. While we know that the father was responsible for overall management, he was not an officer of the Corporation and, on the evidence, we do not know if he was an employee; indeed, the evidence does not appear to disclose whether he was a shareholder.

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COURT FILE NO.:	2016-2767(IT)G 2016-2677(GST)I
STYLE OF CAUSE:	RYAN EDMOND SOULLIERE AND HER MAJESTY THE QUEEN
PLACE OF HEARING:	Windsor, Ontario
DATE OF HEARING:	March 4, 2020
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APPEARANCES:

Counsel for the Appellant:	Craig J. Allen
Counsel for the Respondent:	Dustin Kenall

COUNSEL OF RECORD:

For the:

Name:	Craig J. Allen
Firm:	Craig Allen Law Windsor, Ontario
For the Respondent:	Nathalie G. Drouin Deputy Attorney General of Canada Ottawa, Canada