Date: 20071101

Docket: A-407-06

Citation: 2007 FCA 353

CORAM: **LÉTOURNEAU J.A.**
NOËL J.A.
TRUDEL J.A.

BETWEEN:

HER MAJESTY THE QUEEN

Appellant

and

PIERRE ROY

Respondent

Hearing held at Québec, Quebec on October 30, 2007.

Judgment rendered at Québec, Quebec on November 1, 2007.

REASONS FOR JUDGMENT BY: NOËL J.A.

CONCURRED IN BY: LÉTOURNEAU J.A.
TRUDEL J.A.

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REASONS FOR JUDGMENT

NOËL J.A.

[1] This is an appeal from a decision by Judge Tardif of the Tax Court of Canada which allowed an appeal against an assessment made pursuant to Part IX of the *Excise Tax Act*, R.S.C. 1985, c. E-15 (the Act) for the period from November 1, 1996 to January 31, 2000, and quashed the assessment.

[2] The appellant submitted on behalf of the Minister of National Revenue that Judge Tardif made a palpable and overriding error by overturning the assessment on the ground that the respondent had acted with care, diligence and skill to prevent the failure by the company to pay the amount of net taxes collected under the Act.

RELEVANT FACTS

[3] During the period at issue, from 1996 to 2000, the respondent was the sole director of Piemar Son et Vision Inc., a company registered for purposes of the goods and services tax (GST) and the Quebec sales tax (QST). For a better understanding of the matter, it is worth pointing out that the QST is a tax levied and administered by the Quebec Department of Revenue (Revenu Québec), and the GST is a tax levied by the Department of National Revenue (Revenue Canada), but the administration of which is handled by Revenu Québec through a federal-provincial administrative agreement.

[4] Following an audit in October 1996, Revenu Québec, acting pursuant to the *Act respecting the Quebec sales tax*, R.S.Q. c. T-0.1 (the *Sales Tax Act*) assessed the company for QST not collected on commissions for the period from August 1, 1992 to April 30, 1996.

[5] Pierre Roy, who as director of the company was dissatisfied with this assessment, undertook a veritable crusade. First, he objected and submitted to Revenu Québec that the commissions were

not taxable supplies under the *Sales Tax Act*, since they were received from companies outside Quebec.

[6] Second, the appellant arranged for the company to delay or cease making its payments as of 1997. It would appear that, initially at least, the respondent made this decision gambling that he would be successful in his dispute concerning the QST, and that the QST overpayments would offset the unpaid taxes (Transcript, p. 47). Accordingly, the company filed its returns late and without payments for the periods ending on January 31, April 30 and October 31, 1997. It also ceased filing its returns for the periods from November 1, 1997 to January 31, 2000 (Appeal Book, at p. 146: Transcript, at pp. 49, 66 and 89).

[7] On or about January 23, 2001 the interpretation branch of Revenu Québec arrived at the conclusion that the commissions received by the company from customers located outside Quebec were not taxable supplies under the *Sales Tax Act*. An agreement was reached between Revenu Québec and the company on December 18, 2001, by which unpaid QST of $8,191 was cancelled and the interest adjusted accordingly.

[8] Shortly after this agreement was signed the company, through the respondent, agreed to file the returns it had failed to file and amended those that were inaccurate, but still without any payment of taxes.

[9] On November 9, 2001 a certificate was registered in the Federal Court against the company for $6,024.02 in unpaid GST as well as the related interest and penalties. A second certificate was registered on October 25, 2002 in the amount of $18,624.25, again for unpaid GST, interest and penalties (Appeal Book, at pp. 118 and 121).

[10] In a letter written on May 23, 2003 the respondent asked Revenu Québec to cancel the penalties and interest for the period at issue, on the ground that amounts greater than the taxes due (combined GST and QST) had been paid by the company (Appeal Book, at p. 74). Specifically, he argued that QST of $11,365.45 and GST of $37,188.43 were owed by the company for this period. On the other hand, he maintained that the sum of $62,616.64 had been paid towards these taxes during the period.

[11] In a letter dated October 17, 2003 (Appeal Book, at p. 142), Revenu Québec refused to cancel the penalties and interest for the reasons which follow:

> [TRANSLATION]
>
> You indicate that the QST/GST fees for the period from April 1996 to October 2000 came to $48,842.88 and that the payments made on these fees were $62,616.64. A review of your file indicates that for the period in question the fees were $49,666.20 and the payments made on these fees were $44,982.74. The difference in payments is explained by the fact that payments you identified were used to pay amounts owed other than for the period in question.

[12] The sum of $23,068 was subsequently assessed in the hands of the respondent, as director of the company, to account for the amounts which the company had failed to pay (less the sum of

$1,580 presumably credited in the interim). This assessment, which is the one at issue, was made pursuant to section 323 of the Act. The amount assessed represents GST of some $11,973.31 and interest and penalties of $4,368.11 and $6,726.94 respectively. A summary table of QST/GST returns received and credits built up for the periods relating to this assessment is set out at page 145 of the Appeal Book.

[13] After unsuccessfully objecting to this assessment, the respondent appealed to the Tax Court of Canada. On July 4, 2006 Judge Tardif allowed the appeal and quashed the assessment on the ground that the respondent had acted with diligence to prevent the failure by the company to discharge its tax obligations.

[14] In support of her appeal the appellant maintained that the evidence did not allow for this conclusion. In her submission, Judge Tardif made a palpable and overriding error by relying on irrelevant factors and ignoring the evidence in concluding that the respondent had acted with diligence.

LEGISLATIVE BACKGROUND

[15] Subsections 323(1) and (3) of the Act are applicable in resolving the matter. They provide, respectively:

323. (1) If a corporation fails to remit	**323.** (1) Les administrateurs d'une

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.	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.
Diligence (3) A director of a corporation is not liable for a failure under subsection (1) where the director exercised the degree of care, diligence and skill to prevent the failure that a reasonably prudent person would have exercised in comparable circumstances.	Diligence (3) L'administrateur n'encourt pas de responsabilité s'il a agi avec autant de soin, de diligence et de compétence pour prévenir le manquement visé au paragraphe (1) que ne l'aurait fait une personne raisonnablement prudente dans les mêmes circonstances.

[Emphasis added.]

ANALYSIS AND DECISION

[16] Before Judge Tardif the appellant conceded that the company legally owed the GST that was assessed in his hands. It was also conceded that at the time of trial the company had no property and had ceased all activities. Judge Tardif accordingly had to consider whether the respondent had acted with diligence to prevent this "failure" within the meaning of subsection 323(3).

[17] The gist of Judge Tardif's reasoning to support the conclusion at which he arrived is contained in paragraphs 15 to 19 of his reasons. It is useful to set out these paragraphs in full:

> [TRANSLATION]
>
> [14] On several occasions I have said [in pending cases] that excise in our tax system is based on self-assessment, by which a reasonably coherent system of accounts must be kept by the taxpayer so it can be analyzed and checked at any time. Such a system of accounts also requires the keeping of all relevant vouchers and documents to validate the information recorded in various books.
>
> [15] In the absence of such accounting, people who are audited run the risk of unfortunate consequences.
>
> [16] Conversely, the government must be able to give any taxpayer all the explanations requested, in accessible accounting language so that the taxpayer can fully understand the situation. What is clear is that every taxpayer has the right to a report in clear accounting language. Saying that the work was done by a computer and that the result obtained was reliable, correct and beyond question simply is not sufficient, especially if the person in question or his or her representative does not understand the information being provided.
>
> [17] In the case at bar, not only was the appellant not careless, negligent, reckless or irresponsible, he demonstrated a continuing interest in resolving his case. His determination to understand his case is irrefutable proof that he was concerned about it and did not want to be subject to the amounts he owed the treasury: that is all. It was a completely legitimate request and he was fully entitled to be given clear answers to his questions.
>
> [18] I see absolutely nothing in this case that would lead me to conclude that the appellant failed to demonstrate vigilance and was negligent or careless: on the contrary, the weight of the evidence is that he was very active, even aggressive, when that proved necessary, in resolving his case. This comes across very clearly from the appellant's testimony, but also in a very eloquent and persuasive way from certain transcripts included by the person responsible for his case on the exceptional number of actions taken by the appellant, who wanted to know precisely how the respondent had administered its work.
>
> [19] For these reasons, the appeal is allowed and the assessment quashed.

[18] In short, the judge said, the respondent was entitled to clear answers and did not get them. Not only was he not irresponsible, but he demonstrated an ongoing interest in resolving his case. In the circumstances, he was justified in acting vigorously, even aggressively. According to Judge

Tardif, the respondent's conduct was the exact opposite of a careless director, and so he concluded that the respondent had acted with due diligence.

[19] With respect, this reasoning relates to the appellant's conduct after the company had failed to discharge its obligation to pay the taxes owed. It does not take into account the respondent's conduct at the time of the omissions, especially the fact that it was the appellant who decided that as of 1997 the company would cease making the GST payments due under the Act and filing its returns. If Judge Tardif had taken into account the fact that it was the appellant who was responsible for the company's failures, I do not see how he could have concluded that the appellant had acted with diligence "to prevent" these failures as required by subsection 323(3) of the Act.

[20] In fact, the respondent never denied that it was he who decided that the company would cease making its payments, or that the latter owed the GST as assessed. The respondent's real complaint was that Revenu Québec had wrongly allocated the amounts at its disposal by paying itself the QST before the GST (Transcript, at p. 54). In the appellant's view, the company would owe nothing for GST and for the related interest and penalties if the amounts had been correctly allocated.

[21] If the respondent sought to avoid his joint and several liability on the ground that his company had already paid the amounts claimed from him, he had to lead evidence to this effect. Despite the many questions raised on this front, Tardif J. was unable to draw any conclusion in this respect.

[22] It is true that the respondent was hoping that the credits resulting from an eventual reimbursement would be allocated to the GST, and that this was not done. However, the *Act respecting the Ministère du Revenu*, R.S.Q., c. M-31, provides in section 31 that money from a refund under of a Quebec tax statute may be allocated first to the payment of debts due under another Quebec tax statute. The evidence was that during the relevant period the company owed QST as well as source deductions under the *Taxation Act*, R.S.Q., c. I-3, which explains why the reimbursement was not allocated to the GST.

[23] I would add that the respondent admitted before the trial judge that he was aware of the policy applicable to the GST/QST offset (Transcript, at p. 55), which is reproduced on the remittance forms (Appeal Book, at pp. 132 to 140):

> [TRANSLATION]
>
> The Minister may refuse to allow a GST/HST-QST offset to be made by a taxpayer who has other debts to the Government of Canada or Government of Quebec (even if an agreement exists for the settlement of tax debt), or who has not filed a return for an earlier period.

It can be seen that apart from the fact that amounts were owed under Quebec tax legislation, pursuant to this policy, Revenu Québec had no duty to allocate the amounts to the payment of GST before the respondent filed his return in 2002.

[24] For these reasons, the appeal will be allowed, the decision of Judge Tardif set aside and, giving the judgment which Tardif J. should have given, the respondent's appeal to the Tax Court of

Canada will be dismissed and the assessment dated November 18, 2003 affirmed. In accordance with section 18.25 of the *Tax Court of Canada Act*, R.S.C. 1985, c. T-2, the respondent will nevertheless be entitled to reasonable costs incurred as a result of the appeal at bar.

"Marc Noël"
J.A.

"I agree,
Gilles Létourneau J.A."

"I agree,
Johanne Trudel J.A."

Certified true translation

Brian McCordick, Translator

FEDERAL COURT OF APPEAL

SOLICITORS OF RECORD

DOCKET:	A-407-06
STYLE OF CAUSE:	Her Majesty the Queen v. Pierre Roy
PLACE OF HEARING:	Québec, Quebec
DATE OF HEARING:	October 30, 2007
REASONS FOR JUDGMENT BY:	Noël J.A.
CONCURRED IN BY:	Létourneau J.A. Trudel J.A.
DATED:	November 1, 2007

APPEARANCES:

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Pierre Roy	FOR HIMSELF

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