

Federal Court of Appeal



Cour d'appel fédérale

Date: 20140207

Docket: A-93-13

Citation: 2014 FCA 37

**CORAM: BLAIS C.J.
GAUTHIER J.A.
MAINVILLE J.A.**

BETWEEN:

DANIEL MARCOTTE

Appellant

and

HER MAJESTY THE QUEEN

Respondent

Heard at Ottawa, Ontario, on December 11, 2013.

Judgment delivered at Ottawa, Ontario, on February 7, 2014.

REASONS FOR JUDGMENT BY:

MAINVILLE J.A.

CONCURRED IN BY:

**BLAIS C.J.
GAUTHIER J.A.**

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REASONS FOR JUDGMENT

MAINVILLE J.A.

[1] This is an appeal from a judgment by Chief Justice Rip of the Tax Court of Canada (the judge) dated February 7, 2013, bearing neutral citation 2013 TCC 49 (the judgment), dismissing an appeal against an assessment dated July 16, 2008, issued under subsection 323(1) of the *Excise Tax Act*, R.S.C. 1985, c. E-15.

Facts and background

[2] The appellant, Daniel Marcotte, is the sole administrator and shareholder of 3634451 Canada Inc., which will be called “JORA” for the purposes of this dispute. This company specializes in the construction of residential buildings.

[3] JORA, the appellant in his personal capacity, his brother Guy Marcotte and an employee, Gail Maloney, had five rental properties built on adjacent lots. Given that the buildings in question were completed on different dates and that it was difficult to spread the construction costs among them, the appellant entered into an agreement with an official from Revenu Québec to treat the buildings as a complex for the purposes of GST and QST.

[4] For the purposes of remitting these taxes, in 2004 the appellant instructed Revenu Québec to keep \$349,162.91 in input tax credits, and JORA issued a cheque to Revenu Québec in the amount of \$500,000. After splitting the amount of the cheque into two instalments of \$250,000 to the GST and QST accounts respectively, Revenu Québec allocated the total amount of the cheque to JORA's account balance. Following these operations, on March 31, 2007, Revenu Québec's books showed a \$53,691.41 credit balance in JORA's GST account.

[5] However, during the summer of 2007, the appellant asked that the previous payment of \$500,000 instead be allocated to his personal tax debts as well as those of his brother Guy Marcotte and his employee Gail Maloney. This request was granted by Revenu Québec on December 17, 2007, and the amount was allocated as follows:

-Gail Maloney	\$ 61,852.79
-Daniel Marcotte	\$285,975.38
-Guy Marcotte	\$ 38,564.21
-JORA	\$113,607.62

[6] This new allocation resulted in a retroactive adjustment of JORA's GST account. Because the adjusted tax debt on the GST account had not been paid by JORA, Revenu Québec issued against the appellant three notices of assessment in accordance with section 325 of the *Excise Tax*

Act in the amounts of \$46,612.41, \$45,642.61 and \$89,949.17, respectively. In making these assessments, Revenu Québec relied on the fact that in 2005 and 2006, JORA had declared and paid dividends of \$400,000 to the appellant during the assessment periods at issue.

[7] Subsection 325(2) of the *Excise Tax Act* provides a basis for assessing a transferee in the circumstances set out at subsection 325(1), which reads as follows:

325. (1) Where at any time a person transfers property, either directly or indirectly, by means of a trust or by any other means, to

(a) the transferor's spouse or common-law partner or an individual who has since become the transferor's spouse or common-law partner,

(b) an individual who was under eighteen years of age, or

(c) another person with whom the transferor was not dealing at arm's length, the transferee and transferor are jointly and severally liable to pay under this Part an amount equal to the lesser of

(d) the amount determined by the formula

A - B

Where

A

is the amount, if any, by which the fair market value of the property at that time exceeds the fair market value at that time of the consideration given by the

325. (1) La personne qui transfère un bien, directement ou indirectement, par le biais d'une fiducie ou par tout autre moyen, à son époux ou conjoint de fait, ou à un particulier qui l'est devenu depuis, à un particulier de moins de 18 ans ou à une personne avec laquelle elle a un lien de dépendance, est solidairement tenue, avec le cessionnaire, de payer en application de la présente partie le moins élevé des montants suivants :

a) le résultat du calcul suivant :

A - B

où :

A

représente l'excédent éventuel de la juste valeur marchande du bien au moment du transfert sur la juste valeur marchande, à ce moment, de la contrepartie payée par le cessionnaire pour le transfert du bien,

B

l'excédent éventuel du montant de la cotisation établie à l'égard du cessionnaire en application du paragraphe 160(2) de la

- | | | |
|---|--|--|
| B | transferee for the transfer of the property, and | <i>Loi de l'impôt sur le revenu</i> relativement au bien sur la somme payée par le cédant relativement à ce montant; |
| | is the amount, if any, by which the amount assessed the transferee under subsection 160(2) of the <i>Income Tax Act</i> in respect of the property exceeds the amount paid by the transferor in respect of the amount so assessed, and | b) le total des montants représentant chacun : |
| | (e) the total of all amounts each of which is | (i) le montant dont le cédant est redevable en vertu de la présente partie pour sa période de déclaration qui comprend le moment du transfert ou pour ses périodes de déclaration antérieures, |
| | (i) an amount that the transferor is liable to pay or remit under this Part for the reporting period of the transferor that includes that time or any preceding reporting period of the transferor, or | (ii) les intérêts ou les pénalités dont le cédant est redevable à ce moment. Toutefois, le présent paragraphe ne limite en rien la responsabilité du cédant découlant d'une autre disposition de la présente partie. |
| | (ii) interest or penalty for which the transferor is liable as of that time, but nothing in this subsection limits the liability of the transferor under any provision of this Part. | |

[8] These assessments were vacated by the judge of the Tax Court of Canada in a judgment dated September 27, 2012, bearing neutral citation 2012 TCC 336. The judge held that JORA had a credit balance of \$53,691.14 with Revenu Québec until December 17, 2007, the date on which the amount of \$500,000 was reallocated, and that section 325 of the *Excise Tax Act* therefore did not apply, since no taxes were owed by JORA at the time the dividends at issue were paid.

[9] However, the matter did not end there. Another assessment was issued to the appellant on July 16, 2008, under section 323 of the *Excise Tax Act*, which deals with director liability.

Subsections 323(1) and (3) read as follows:

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.

(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.

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.

(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.

[10] This last assessment was at issue in the judgment under appeal.

Judgment of the Tax Court of Canada

[11] The sole issue raised before the judge of the Tax Court of Canada was whether it was open to the appellant to invoke the defence of due diligence provided for by subsection 323(3) of the *Excise Tax Act*, reproduced above, in order to be released from his liability under subsection 323(1).

[12] The judge held that “[r]emitting an amount and then withdrawing it does not constitute a payment” (at para. 14 of the judgment) in setting aside the appellant’s claim that JORA had paid its tax debts during the relevant periods.

[13] The judge also held that the appellant had failed to show that he had exercised the degree of care and diligence required by subsection 323(3), on the grounds that in proceeding with the reallocation of the amount of \$500,000 in late 2007, the appellant knew, or should have known, that this operation would result in the creation of a tax debt for JORA.

Analysis

[14] The appellant’s first ground of appeal is that the judge erred in failing to consider his own findings in relation to the assessments issued under section 325. The judge essentially held in another judgment that JORA had no tax debt during the 2005 and 2006 taxation years. The appellant submits that the conditions for applying director liability under section 323 have therefore not been met.

[15] I cannot accept this ground of appeal.

[16] The conditions for the application of sections 325 and 323 of the *Excise Tax Act* are different, and the judgment of the Tax Court of Canada judge, which concluded in the appellant’s favour under section 325, does not necessarily lead to the same conclusion under section 323. The evidence shows that it was the appellant who asked that the amount of \$500,000 credited to JORA’s account be reallocated to his personal tax debts and those of his brother and employee. In the

circumstances, it was inevitable that this would result in a retroactive adjustment of JORA's GST account. This is a sufficient basis for a finding that section 323 of the *Excise Tax Act* applies.

[17] As a second ground of appeal, the appellant adds that Revenu Québec had accepted the new allocation of the amount of \$500,000 without informing him that he would be held personally liable for JORA's resulting tax debt. He submits that he was misled and that he should therefore be able to invoke the defence of due diligence provided for at subsection 323(3) of the *Excise Tax Act*.

[18] Again, I cannot accept this second ground of appeal.

[19] I note first that the evidence in the record does not support the appellant's claims. The official from Revenu Québec in charge of this file testified that he had informed the appellant that the new allocation of the amount of \$500,000 would lead to collection measures: see the Appeal Book at pages 638, 640-41, 801 and 805.

[20] Furthermore, applying the objective standard of care, diligence and skill required by subsection 323(3) of the *Excise Tax Act* and taking into account this Court's decision in *Canada v. Buckingham*, 2011 FCA 142, [2013] 1 F.C.R. 86, I am firmly of the view that any reasonably diligent director would understand that reallocating amounts from JORA's tax account for the benefits of other individuals would result in a tax debt for the company in question. This is an elementary calculation that is easy to understand. In this respect, I adopt the following conclusions of the judge at paragraph 15 of his judgment:

A reasonable businessman placed in the same circumstances would thus have been aware of the extent of JORA's tax obligations and would by virtue of that fact have

realized that amending the allocation of the payment would result in the creation of a debt for JORA. In such circumstances, it would be absurd to find that Mr. Marcotte acted diligently and that JORA paid an amount of net tax for a reporting period. In the end, JORA remains liable to pay an amount to the Crown for one or more reporting periods. Indeed, it is Mr. Marcotte who created the situation that resulted in the revival of JORA's debt.

[21] I would therefore dismiss the appeal with costs.

“Robert M. Mainville”

J.A.

“I agree.
Pierre Blais C.J.”

“I agree.
Johanne Gauthier J.A.”

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET: A-93-13

**APPEAL FROM A JUDGMENT OF THE TAX COURT OF CANADA DATED
FEBRUARY 7, 2013 (THE HONOURABLE CHIEF JUSTICE RIP), DOCKET NO. 2010-
1210 (GST)G**

STYLE OF CAUSE: DANIEL MARCOTTE v. HER
MAJESTY THE QUEEN

PLACE OF HEARING: OTTAWA, ONTARIO

DATE OF HEARING: DECEMBER 11, 2013

REASONS FOR JUDGMENT

BY: MAINVILLE J.A.

CONCURRED IN BY: BLAIS C.J.
GAUTHIER J.A.

DATED: FEBRUARY 7, 2014

APPEARANCES:

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