

Docket: 2004-3050(GST)APP

BETWEEN:

4028490 CANADA INC.,

Applicant,

and

HER MAJESTY THE QUEEN,

Respondent.

Application heard October 18, 2004, at Montréal, Quebec.

Before: The Honourable Justice Paul Bédard

Appearances:

Counsel for the Applicant: Christopher Mostovac

Counsel for the Respondent: Judith Kucharsky

ORDER

Given the application made to obtain an order for an extension of time to serve a notice of objection to the assessment established under the *Excise Tax Act*, with the number 03110730 and dated June 5, 2003;

And given the parties' claims;

The application is dismissed in accordance with the attached Reasons for Order.

Signed at Ottawa, Canada, this 23rd day of February 2005.

"Paul Bédard"

Bédard J.

Citation: 2005TCC50
Date: 20050223
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BETWEEN:

4028490 CANADA INC.,

Applicant,

and

HER MAJESTY THE QUEEN,

Respondent.

REASONS FOR ORDER

Bédard J.

[1] This is an application made under section 304 of the *Excise Tax Act* (the "Act") to obtain an extension of time for the Applicant to file a notice of objection. The key question in this case is: did the Applicant have the legal capacity to make such an application, given its bankrupt status?

[2] The Applicant went bankrupt on February 4, 2003.

[3] H.H. Davis & Assoc. Inc. (the "Trustee") was appointed trustee of the Applicant's estate in bankruptcy by the official receiver.

[4] At the time of the bankruptcy, the sole director for the Applicant was Brian Gray.

[5] On June 5, 2003, the Minister of National Revenue (the "Minister") established an assessment for the Applicant for the period from June 1, 2002, to February 4, 2003.

[6] The Notice of Assessment was sent to the Trustee.

[7] On or around December 18, 2003, the accounting firm Schlesinger Newman Goldman ("SNG") filed an application for an extension of

time to file an objection. In a letter dated December 18, 2003, the Applicant authorized SNG to present such an application.

[8] Through a notice of decision dated June 21, 2004, the Minister advised the Applicant of the decision to dismiss the application for an extension of time to file an objection. As stated in the notice of decision, the application was dismissed for the following reason:

It would not be just and equitable to grant the application for an extension of time to file an objection to a GST assessment because there are no reasonable grounds for the application since you are not a legitimate representative who can act on behalf of the company in bankruptcy.

Respondent's position

[9] Since the evidence showed:

- (i) that the Trustee never mandated anyone;
- (ii) that there was never a request to transfer the Trustee's mandate to anyone; and
- (iii) that there was never a request by anyone to make representations on behalf of the bankrupt regarding the notice of assessment in question, or to use procedures or act on behalf of the bankrupt in objections to the notice of assessment,

the Respondent claimed that the Applicant did not have the legal capacity to present such an application for an extension of time to file an objection and only the Trustee, deemed to be the bankrupt's agent, could present such an application in this case.

[10] Counsel for the Respondent relied on section 2 (definition of "property"), section 37, subsection 71(2) of the *Bankruptcy and Insolvency Act* (BIA) to support her claim that only the Trustee could make such an application for an extension of time to file an objection in this case. Moreover, she relied on *Bellram*¹, *McNeill*²,

¹ *Bellham v. Strider and al.*, B.C. (1985), 57 C.B.R. (N.S.) 171.

² *McNeill (Re)*, (1986), 39 C.B.R. (3rd) 290 (B.C. Sub. Ct.).

*Biron*³, *Sinnott*⁴ and *Kalef*⁵ to support her claims. She also added that the Applicant could have asked the Trustee for the mandate to make representations regarding the notice of assessment, oppose the assessment, present an application for an extension of time to file an objection, and, if necessary, to appeal to the Court, but it did not. Finally, she claimed that the Applicant could have relied on section 37 of the BIA and addressed the Superior Court of Quebec for permission to contest the notice of assessment in case of the refusal of the Trustee to agree to such an application, but it did not.

Applicant's position

[11] Essentially, counsel for the Applicant claimed that although the Trustee is the agent of the bankrupt for the purposes of the *Act*, this fact does not prevent the bankrupt from objecting and filing an appeal when the Trustee decided not to act. Counsel for the Applicant relied on *Sinnott*⁶ and *Leith*⁷ in support of his claims.

[12] Finally, it must be pointed out that counsel for the Applicant brought to the Court's attention the possible problem of solidary obligation, which Mr. Gray could face as the Applicant's director. According to counsel for the Applicant, on this issue, the Minister would try to hold Mr. Gray jointly and severally liable for the Applicant's tax liability, which is the subject of the present case. He claimed that the recent decision by Bowie J. of this Court, in *Zaborniak*,⁸ which states that the provisions of section 323 of the *Act* do not allow a director to contest the quantum of the assessment established for the company for which it is the director, made it all the more important that I allow this application for an extension of time to file a notice of objection so that the Applicant can contest the assessment that is the subject of the present case. In other words, counsel for the Applicant claimed that he feared Mr. Gray would eventually be unable to contest the quantum of the

³ *Biron v. M.N.R.*, 98 DTC 1186 (T.C.C.).

Biron v. The Queen, 2000 DTC 6675 (F.C.A.).

⁴ *Sinnott v. The Queen*, 2000 DTC 2459 (T.C.C.).

⁵ *The Queen v. Kalef*, 96 DTC 6132 (F.C.A.).

⁶ *Sinnott v. Canada*, *supra* note 4.

⁷ *Leith v. Minister of National Revenue*, 1979 CarswellNat 46, [1970] Tax A.B.C. 204.

⁸ *Zaborniak v. The Queen*, 2004 TCC 560.

assessment established for the Applicant in another case, given the decision in *Zaborniak*. It was therefore essential, in his opinion, that the Applicant be able to contest its assessment since this might be the only forum at which Mr. Gray could indirectly contest the quantum of the assessment established for the Applicant, and also limit his responsibility as its director.

Analysis

[13] In my opinion, despite the Applicant's claims, the BIA cannot be ignored. According to the BIA, bankruptcy removes all of the bankrupt's property, which is passed on to the Trustee. When bankruptcy occurs, under subsection 71(2) of that Act, the Trustee obtains all the bankrupt's rights of action except personal ones and those affecting property not liable to seizure. A non-discharged bankrupt does not have the power to appear in court, as it is the Trustee who is deemed to have been granted this power. The Applicant therefore did not have the capacity to make such an application for an extension of time. Not only did the Applicant not show that it had obtained authorization from the Trustee to make such an application, but the evidence showed that the Applicant did not even attempt to obtain such an authorization.

[14] As for *Leith*⁹ and *Sinnott*,¹⁰ on which counsel for the Applicant relied in support of the claim that although the Trustee is the bankrupt's agent for the purposes of the *Act*, this fact does not deprive the bankrupt of his rights to object, I must first point out that in *Sinnott*, Bowman A.C.J. of this Court recognized the right of a bankrupt to object to an assessment or file an appeal against it in order to obtain a refund that belongs to the bankrupt and that is not considered property subject to division among the bankrupt's creditors. In that case, it was an income tax return regarding the bankrupt's wages or other compensation that was paid after the bankruptcy. These returns, according to the provisions of the *Income Tax Act* in effect at the time, clearly belonged to the bankrupt and not the Trustee. I find that Bowman A.C.J. made this finding considering the facts that were very specific to the case before him, and that counsel for the Applicant could therefore not rely on the conclusions of *Sinnott* in the present case.

Signed at Ottawa, Canada, this 23rd day of February 2005.

⁹ *Leith v. Minister of National Revenue*, 1979 CarswellNat 46, [1970] Tax A.B.C. 204.

¹⁰ *Sinnott v. The Queen*, *supra* note 4.

"Paul Bédard"

Bédard J.

REFERENCE: 2005TCC50

COURT FILE NUMBER: 2004-3050(GST)APP

CAUSE OF STYLE: 4028490 Canada Inc. and Her Majesty
the Queen

PLACE OF HEARING: Montréal, Quebec

DATE OF HEARING: October 18, 2004

REASONS FOR ORDER BY: The Honourable Justice Paul Bédard

DATE OF ORDER: February 23, 2005

APPEARANCES:

For the Appellant: Christopher Mostovac

For the Respondent: Judith Kucharsky

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