

Docket: 2009-1066(GST)G

BETWEEN:

JAMES BOLES,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

Appeal heard on May 4 2011, at Toronto, Ontario.

Before: The Honourable Justice Patrick Boyle

Appearances:

For the Appellant: The Appellant himself

Counsel for the Respondent: Shatru Ghan

JUDGMENT

The appeal from the assessment made under the *Excise Tax Act*, notice of which is dated February 5, 2008 and bears number A115049, is dismissed, with costs, in accordance with the reasons for judgment attached hereto.

Signed at Ottawa, Canada, this 9th day of June 2011.

"Patrick Boyle"

Boyle J.

Citation: 2011 TCC 288
Date: 20110609
Docket: 2009-1066(GST)G

BETWEEN:

JAMES BOLES,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

REASONS FOR JUDGMENT

Boyle J.

[1] The issues raised in this appeal are: 1) whether the Appellant was a director of Begley Associates Inc. (“Begley Associates”) at the relevant times or at all; 2) if so, whether he resigned more than two years before the unremitted goods and services tax (“GST”) assessment in question; and 3) whether he exercised the degree of care, diligence and skill to prevent the failure to remit GST that a reasonably prudent person would have exercised in comparable circumstances so as to absolve himself from director’s liability under subsection 323(3) of the *Excise Tax Act* (Canada) (the “GST legislation”).

I. Law

[2] The most recent pronouncement on the scope of director’s liability for unremitted GST or income tax withholdings and upon director’s possible defences thereto are set out by the Federal Court of Appeal in its recent decision in *Canada v. Buckingham*, 2011 FCA 142, dated April 21, 2011. In *Buckingham* the Federal Court of Appeal confirmed that the scope of the director’s liability provisions is potentially broad and far reaching in order to effectively move the risk for a failure to remit by a corporation from the fisc and Canadian taxpayers generally to the directors of the corporation, being those persons legally entitled to supervise, control or manage the management of its affairs. The Court also confirmed that a director seeking to be

exculpated for having exercised reasonable care, diligence and skill must have taken those steps “to prevent the failure” to remit and not to cure it thereafter. Further, the standard of care, diligence and skill required is overall an objective standard. Specifically, the Court wrote:

38 . . . Stricter standards also discourage the appointment of inactive directors chosen for show or who fail to discharge their duties as director by leaving decisions to the active directors. Consequently, a person who is appointed as a director must carry out the duties of that function on an active basis and will not be allowed to defend a claim for malfeasance in the discharge of his or her duties by relying on his or her own inaction. . .

. . .

40 . . . In order to rely on these defences, a director must thus establish that he turned his attention to the required remittances and that he exercised his duty of care, diligence and skill with a view to preventing a failure by the corporation to remit the concerned amounts.

And later:

52 Parliament did not require that directors be subject to an absolute liability for the remittances of their corporations. Consequently, Parliament has accepted that a corporation may, in certain circumstances, fail to effect remittances without its directors incurring liability. What is required is that the directors establish that they were specifically concerned with the tax remittances and that they exercised their duty of care, diligence and skill with a view to preventing a failure by the corporation to remit the concerned amounts.

II. Facts

[3] Mr. Boles was the owner-manager of a project management and construction management company known as F.D. Begley and Associates Inc. (“F.D. Begley”). In 1995, he was a director and the President as well as the controlling shareholder of F.D. Begley. At that time Mr. Clark was an employee of F.D. Begley who ran the construction side of that company’s business leaving the Appellant to run the planning and design side of the business. In 1995, the Appellant sold his shareholdings in F.D. Begley to Mr. Clark. Mr. Boles continued to work for clients and be an officer of F.D. Begley; specifically, he was the President and Mr. Clark took on the title at that time of Vice-President.

[4] Mr. Clark thereupon incorporated a new company, Begley Associates Inc., being the corporation whose failure to remit GST has given rise to the assessment in

question in this appeal, in order to carry on similar work however for a risk-based fee instead of an entirely fee for services based structure. It is clear that Mr. Boles signed himself on as a director of Begley Associates at this time.

[5] Mr. Boles maintained in his evidence-in-chief that he did not know he was ever a director of Begley Associates until 2005 when the Canada Revenue Agency (“CRA”) began pursuing him. Specifically he said he was never consulted on any of its activities or involved in any of its activities and had no direct knowledge of its activities or business affairs or any control or input into its operations at all or at any point. The only exception he said was for a period beginning in 2000 when his consulting contract was run through Begley Associates at Mr. Clark’s request. It was his position that he must have signed the Begley Associates documents at the same time as signing a number of documents turning over F.D. Begley to Mr. Clark as well as setting up a new corporation for himself to be used in his own consulting work going forward toward retirement.

[6] The CRA assessed Mr. Boles for Begley Associates’ unremitted GST as well as interest and penalties thereon in the approximate amount of \$23,000 by Notice of Assessment dated February 5, 2008.

[7] In the circumstances, I must find that Mr. Boles did become a director of Begley Associates at the time of the incorporation of that company. All of the corporate records and filings made this clear. I do not accept Mr. Boles’ explanation of the unintended signing of the Begley Associates documentation identifying himself as director given that in his cross-examination and in the evidence of his accountant it came out that in 1997, one of its early years of operations, Begley Associates did have revenues of almost four hundred thousand dollars and, of greater concern, that Mr. Boles’ wife was a 20% shareholder of Begley Associates and received dividends in respect of the income earned by it in that year.

[8] I also find on the evidence that Mr. Boles never legally resigned as a director of Begley Associates. I accept Mr. Boles’ testimony that in April 2003, given concerns about Mr. Clark and Begley Associates, Mr. Boles asked Mr. Clark to check on his status with Begley Associates as director or officer because he wanted to resign from any such position and free Mr. Clark to operate as he prefers. This conversation is corroborated by one of Mr. Boles’ journal entries in his telephone diary. However, once one is a director, legal steps must be complied with to cease to be a director and Mr. Boles did not make any inquiry or attempt to do that. Apparently, he did not even send a confirmation letter to Mr. Clark asking for him to have the paperwork prepared to remove him as a director. The facts are somewhat

sympathetic to Mr. Boles given that he may well have forgotten by some point that he continued to be a director of Begley Associates, and the evidence is consistent with him having had no direct involvement in any activities of Begley Associates for the two years prior to the company's failure to remit tax, however that alone is insufficient under the legislation to absolve him from liability under his assessment as the two-year limitation period applies to persons who cease to be directors.

[9] This leaves the question of whether Mr. Boles did in fact exercise the degree of skill, care, diligence and prudence to prevent the company's failure to remit GST in the circumstances. There was no evidence whatsoever that Mr. Boles involved himself at all with Begley Associates in the years in question and therefore he cannot say that he did anything actively to prevent the failure to remit the GST. There was some evidence that in later years he may have helped free up some money for Mr. Clark, prior to his death, to significantly pay down or pay off any tax arrears of Begley Associates. However, it is clear that the active steps must be to prevent the failure and not merely to remedy it. It may be that, in an appropriate case, a director may entirely and genuinely forget he was a director and therefore have no involvement or be aware of any power to be involved and concerned with the company, such that no direct action could constitute an adequate degree of skill, care, diligence and prudence that a reasonable person would exercise in comparable circumstances, and that person therefore be absolved from director's liability. However, given my concerns with the lack of candour in the Appellant's testimony regarding his becoming a director of Begley Associates, I am unable to conclude that he did genuinely forget that he continued to be a director and therefore can leave this question to be decided another day if such circumstances arise.

[10] The Appellant's appeal is dismissed with costs.

Signed at Ottawa, Canada, this 9th day of June 2011.

"Patrick Boyle"

Boyle J.

CITATION: 2011 TCC 288

COURT FILE NO.: 2009-1066(GST)G

STYLE OF CAUSE: JAMES BOLES v. HER MAJESTY THE QUEEN

PLACE OF HEARING: Toronto, Ontario

DATE OF HEARING: May 4, 2011

REASONS FOR JUDGMENT BY: The Honourable Justice Patrick Boyle

DATE OF JUDGMENT: June 9, 2011

APPEARANCES:

For the Appellant: The Appellant himself

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