Docket: 2008-3820(GST)G

BETWEEN:

SENG CHIN SIOW,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

Appeal heard on May 6, 2011, at Toronto, Ontario

Before: The Honourable Justice F.J. Pizzitelli

Appearances:

Counsel for the Appellant:	Christine Ashton
Counsel for the Respondent:	Sharon Lee

JUDGMENT

The appeal from the assessment made under the *Excise Tax Act*, notice of which is dated March 8, 2006, and bears number 48423, is dismissed.

Costs are awarded to the Respondent.

Signed at Ottawa, Canada, this 14th day of June 2011.

"F.J. Pizzitelli"

Pizzitelli J.

Citation: 2011 TCC 301
Date: 20110614
Docket: 2008-3820(GST)G

BETWEEN:

SENG CHIN SIOW,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

REASONS FOR JUDGMENT

Pizzitelli J.

Issues

[1] The main issue to be decided in this case is whether the Appellant, as a director of 906326 Ontario Inc. (the "Corporation"), is liable for the unremitted goods and services tax ("GST") and related interest and penalties owing by the Corporation pursuant to the *Excise Tax Act* (the "*Act*") of Canada in the amount of $38,486.39 in respect of the reporting periods ending February 28, 1994 to May 31, 1999 (the "Assessment Period").

Background

[2] Most of the following facts are not in dispute between the parties and are either taken from an agreed statement of facts filed at the beginning of the trial or clear from the evidence.

[3] The Appellant was assessed by way of a director's liability assessment by Notice of Assessment dated March 8, 2006 for the above amount. The Appellant filed a Notice of Objection on June 3, 2006 and the Minister of National Revenue

(the "Minister") issued a Notice of Confirmation with respect to the director's liability assessment on August 28, 2008.

[4] The Corporation was incorporated in Ontario on or about July 30, 1990 and carried on the business of car detailing under the business name of "Handi-Jac Shampoo and Shine" in the City of Toronto. The Appellant was at all times the sole director of the Corporation. All sales made by the Corporation were taxable supplies subject to GST at a rate of 7% at the time and the Corporation was required to file quarterly returns in respect thereof.

[5] The evidence of the Appellant is that his brother-in-law actually operated the business of the Corporation at a different location than where the Appellant operated another of his own businesses. The Appellant took over the business when he says he became aware only in 1995 that the Corporation had failed to keep its GST returns up to date and that there were GST arrears owing by the Corporation. Accordingly, the Appellant says he moved its location to his own premises in Toronto, retained new accountants, and brought all GST return filings up to date until the Corporation ceased operating in the spring of 1999.

[6] The Appellant filed the outstanding GST returns applicable to the Assessment Period between October 11, 1996 and December 7, 1999, with all the returns due for the 11 filing periods ending between February 2, 1994 to August 31, 1996 filed in bulk on October 11, 1996. The returns nevertheless throughout the entire Assessment Period in question were filed late, ranging anywhere from eight days to 925 days after the filing due dates. The Appellant completed and filed or caused someone to complete and file them on behalf of the Corporation and based the sales reported and GST collected on the Corporation's issued invoices as well as input tax credits on receipted purchases.

[7] A certificate in respect of the Corporation's outstanding GST liability was registered in the Federal Court on July 15, 2005, pursuant to section 316 of the *Act* and a Writ of Seizure and Sale was issued on August 26, 2005. The Sheriff returned a *nulla bona* report with respect to said Writ on February 13, 2006. As indicated above, the Minister then assessed the Appellant on March 8, 2006 pursuant to the directors' liability provisions of section 323 of the *Act*.

Position of the Parties

[8] The Appellant takes the position the assessment against the Appellant is a nullity for two reasons: firstly, because the Appellant says the Corporation was never mailed any notice of assessment by the Minister in the first place and hence the Corporation was not validly assessed; and secondly, because the Minister was statute barred from assessing both the Corporation and the Appellant after four years from the date of filing of the Corporation's last GST return on or about May 31, 1999 (which date is to be addressed later).

[9] The Respondent's position is that the Minister did assess the Corporation and did so within the required assessment period and even if it did not, the requirement for an assessment against the primary debtor, the Corporation in this case, is not a precondition to assessing a director pursuant to section 323 of the *Act*. Moreover, the Appellant argues there is no limitation period applicable to the assessment of a director pursuant to section 323 of the *Act* other than the limitation period found in subsection 323(5), being two years from the date a person ceases to be a director.

[10] It should be noted that the Appellant confirmed that he is not relying on the due diligence defence pleaded in his Notice of Appeal.

[11] The positions of the parties raises interesting questions of law in light of the admission by both parties that the Appellant has the right to challenge the underlying assessment of the Corporation in accordance with the Federal Court of Appeal's decision in *Gaucher v. Canada*, [2001] 1 C.T.C. 125 (FCA), and *Abrametz v. Canada*, 2009 FCA 70, [2009] G.S.T.C. 43 (FCA), the latter where the sole director was permitted to do so. I propose to deal with each of the issues in order.

Assessment Issues

1. Assessment of the Corporation

[12] As to the issue of whether the Corporation has been assessed by the Minister, the Minister assumed in paragraph 14(f) of the Reply as follows:

14. . . .

f) based on the returns filed by Handi-Jac [the Corporation] between October 11, 1996 and December 7, 1999, the Minister assessed Handi-Jac [the Corporation] for unremitted GST for the Assessment Period and related penalty and interest, notices of which were dated as follows:

i) for the reporting periods from December 1, 1993 - February 28, 1995, the notice of assessment was dated October 8, 1998;

ii) for the reporting periods from March 1, 1995 - February 28, 1998, the notice of assessment was dated October 8, 1998; and

iii) for the reporting periods from June 1, 1998 - May 31, 1999, the notice of assessment was dated January 11, 2000.

[13] Subsection 238(1) and paragraphs 296(1)(*a*) and 298(1)(*a*) of the *Act* are the applicable provisions dealing with the statutory assessment period against the Corporation and are reproduced below:

238(1) Every registrant shall file a return with the Minister for each reporting period of the registrant

(*a*) where the registrant's reporting period is or would, in the absence of subsection 251(1), be the fiscal year,

(i) if the registrant is a listed financial institution described in any of subparagraphs 149(1)(a)(i) to (x), within six months after the end of the year,

(ii) if subparagraph (i) does not apply, the registrant is an individual, the fiscal year is a calendar year and, for the purposes of the Income Tax Act, the individual carried on a business in the year and the filing-due date of the individual for the year is June 15 of the following year, on or before that day, and

(iii) in any other case, within three months after the end of the year; and

(*b*) in every other case, within one month after the end of the reporting period of the registrant.

. . .

296(1) The Minister may assess

(*a*) the net tax of a person under Division V for a reporting period of the person,

. . .

298(1) Subject to subsections (3) to (6.1), an assessment of a person shall not be made under section 296

(*a*) in the case of

(i) an assessment of net tax of the person for a reporting period of the person,

(ii) an amount payable under section 230.1 in respect of an amount paid to, or applied to a liability of, the person as a refund under Division V in respect of a reporting period of the person, or

(iii) an amount payable under section 230.1 in respect of an amount paid to, or applied to a liability of, the person as interest under Division V in respect of an amount paid or applied as a refund in respect of a reporting period of the person,

more than four years after the later of the day on or before which the person was required under section 238 to file a return for the period and the day the return was filed; . . .

[14] There was no argument between the parties that there was a four-year limitation period from the later of the date the Corporation was required to file a return for the reporting period under section 238 of the *Act* and the day the return was filed. There was also no dispute that as a quarterly filer, the Corporation was required to file its return for each quarterly period of its fiscal year within 30 days of the end of each such period. The evidence is also clear that as the Corporation did not file the bulk of its returns on time within the Assessment Period, that the limitation period for each quarterly period effectively ran from the day the returns were filed. Accordingly, since the evidence is that the first 11 quarterly returns within the Assessment Period were not filed until October 11, 1996, and the last quarterly return for the period ending May 31, 1999, was not filed until December 7, 1999, then the four-year limitation period fell within the period ranging from October 11, 2000 to December 7, 2003.

[15] Frankly, the Appellant's suggestion that the four-year limitation period should be calculated from the date of the last filing period ending May 31, 1999, is without merit having regard to both the above as well as the fact the evidence shows the date such return was actually filed was December 7, 1999.

[16] Having regard to the above provisions of the *Act* and evidence as to the filing dates which I accept and which was not in dispute, if in fact the Appellant issued its Notices of Assessment as pleaded in its assumption 14(f) above, the Minister would have been well within the limitation periods within which to assess the Corporation.

[17] The only evidence of the Appellant that the Minister did not assess the Corporation was his oral testimony that he was the one who opened all the mail at his address where the Corporation operated from during the times he caused the filings to be made - a bold assertion he never received it hence it must not have been mailed - as well as his testimony that in any correspondence he received or had with the Canada Revenue Agency ("CRA"), no reference was made to any of these assessments. The Respondent, on the other hand, produced no evidence or copies of any of the three Notices of Assessment it refers to in its Reply above, let alone any evidence of their mailing or even electronic summaries of the assessments to show they had even been issued. In argument, the Respondent suggests that the institutional mailing procedures and the passage of time make it doubtful the Minister can prove the exact date the Notices of Assessment pertaining to the relevant periods were mailed to the Corporation. The Respondent, on the other hand, cross-examined the Appellant on a letter dated March 4, 2002, addressed to the Corporation to the attention of the Appellant at his home address, which was the address of the Corporation, which states in the first paragraph: "We assessed the above corporation, of which you are a director, for goods and services tax/harmonized sales tax which was not remitted as required under the law." Furthermore, argued the Respondent, the Appellant admitted he and his accountant met with several CRA officials regarding the sums owed by the Corporation, so he must have know about the assessments since the assessment against him as a director was not issued until 2008 after such meetings.

[18] There was no dispute that a Notice of Assessment is deemed to have been sent when mailed, not received. However, I have some difficulty with the Respondent's arguments that the Court should accept that the Notices of Assessment were issued simply because of the cursory wording of the above letter or because the Appellant and his accountant held discussions with the CRA.

The letter makes no specific mention of the three assessments or their details and in the reference line makes reference to GST/HST Arrears: $151,589.98, which included amounts from previous periods so it is plausible to assume the Appellant's inferred reference was being made to the arrears amount. Moreover, the second paragraph reads:

> The directors of a corporation may be held liable with a corporation to pay the corporation's unremitted goods and services tax/harmonized sales tax under section 323 of the "Excise Tax Act."

[19] The third paragraph starts off with the words: "If you need more information on your obligations as a director. . ." While the last paragraph states: "If you need more information on the potential liability of corporate directors. . ."

[20] Accordingly, the letter is clear that its main focus is to warn the Appellant about directors' liability and a potential assessment against him for unremitted taxes of the Corporation, inviting a phone call if the Appellant needed any more information on the potential liability of corporate directors. I would think that a warning letter such as this would be reason enough to hire an accountant and meet with CRA officials. The Appellant also testified he had taken over the business from his brother-in-law when he discovered problems with non-filing and financial problems and was not sure of the status of arrears or payments made.

[21] While I appreciate the Respondent's arguments that the Appellant was not very credible as a witness and concede I found the Appellant to be often evasive in answering questions, often advising he had no recollection or often times denying a fact on cross-examination and after further cross-examination conceding it, he was consistent on examination and cross-examination that he never received any assessments or correspondence from CRA referencing any assessments, other than the above letter, which I find not sufficient to suggest he must have received it. Moreover, I find the Respondent's suggestion that the passage of time would make it difficult to prove the Notices of Assessment were mailed to be unacceptable considering the ease with which the *Act* allows a Minister to submit evidence of such procedure by affidavit evidence - without the official in charge of mailing even attending to testify.

[22] The Federal Court of Appeal was clear in a similar situation addressed in *Aztec Industries Inc. v. Canada*, 95 DTC 5235 (FCA) that the Minister must prove the assessments were made. In paragraph 10 thereof, Hugessen J. stated:

> 10. Where as in the present case, a taxpayer alleges not only that he has not received the notice of assessment but that no such notice was ever issued, the burden of proving the existence of the notice and the date of its mailing must necessarily fall on the Minister; the facts are peculiarly within his knowledge and he alone controls the means of adducing evidence of them. A number of statutory provisions recognize the Minister's burden in this respect and are clearly designed to alleviate it.

[23] The only evidence referencing an assessment in *Aztec* above was the use of the words "you were recently assessed" in a Final Request for Payment form. Hugessen J. made it clear such words were not sufficient in paragraph 16 thereof:

> 16. As the underlined words indicate, these notices are at best an indication that the Minister was of the view that an assessment had been made at some earlier unspecified date. There was no evidence of any kind of notice of such assessment ever having been sent to the taxpayer.

[24] In the case at hand, the Minister pleaded in his assumptions that in fact three assessments were sent and cannot produce even one, let alone prove any of them were mailed. In *Kovacevic v Canada,* 2002 DTC 1986, Bonner J., relying on the *Aztec* case above, found there was no evidence of such mailing of assessment even where an electronic journal appearing to record the skeletal form of the mailing of the Notice of Assessment existed when the CRA officer testified he had no independent recollection of the issuing of the assessment. In the case at hand, there had not even been an electronic summary of any of the three assessments let alone proof of mailing.

[25] Counsel for the Respondent states that both the *Aztec* and *Kovacevic* cases were concerned with applications to extend time for filing Notices of Objection and should not be considered as applicable in this matter but I do not agree. The issues are the same - whether an assessment was mailed and I see no reason to distinguish those cases from the one at hand.

[26] Accordingly, I find that the Minister has not satisfied its onus of proving any of the three assessments were mailed and hence, four years have, regardless of which quarterly return is in issue, expired from the date such returns have been filed and the Minister is statute barred from assessing the Corporation for any of the reporting periods within the Assessment Period.

2. Assessment against the Appellant

[27] The next question to be determined is whether the Minister was statute barred from assessing the Appellant in this matter, particularly in light of the fact I have found it would be statute barred against assessing the Corporation. In other words, does the four-year limitation period under paragraph 298(1)(*a*) apply also to the Appellant in light of subsection 323(4) as suggested by the Appellant?

[28] Section 323 deals with liability of directors where a corporation fails to remit an amount of net tax under the *Act* pursuant to subsection 228(2). The relevant subsections are set out below:

> 228(2) Where the net tax for a reporting period of a person is a positive amount, the person shall, except where subsection (2.1) or (2.3) applies in respect of the reporting period, remit that amount to the Receiver General,
>
> (a) where the person is an individual to whom subparagraph 238(1)(a)(ii) applies in respect of the reporting period, on or before April 30 of the year following the end of the reporting period; and
>
> (b) in any other case, on or before the day on or before which the return for that period is required to be filed.
>
> . . .
>
> 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.

(2) A director of a corporation is not liable under subsection (1) unless

(a) a certificate for the amount of the corporation's liability referred to in that subsection has been registered in the Federal Court under section 316 and execution for that amount has been returned unsatisfied in whole or in part;

(b) the corporation has commenced liquidation or dissolution proceedings or has been dissolved and a claim for the amount of the corporation's liability referred to in subsection (1) has been proved within six months after the earlier of the date of commencement of the proceedings and the date of dissolution; or

(c) the corporation has made an assignment or a bankruptcy order has been made against it under the Bankruptcy and Insolvency Act and a claim for the amount of the corporation's liability referred to in subsection (1) has been proved within six months after the date of the assignment or bankruptcy order.

(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.

(4) The Minister may assess any person for any amount payable by the person under this section and, where the Minister sends a notice of assessment, sections 296 to 311 apply, with such modifications as the circumstances require.

(5) An assessment under subsection (4) of any amount payable by a person who is a director of a corporation shall not be made more than two years after the person last ceased to be a director of the corporation.

[29] The Appellant's position is simply that since subsection 323(4) imports sections 296 to 311 into any Notice of Assessment against such director that the four-year limitation period also applies to the Appellant.

[30] With respect to the Appellant, I cannot agree that such provision limits the period for assessing a director under section 323 to the same four-year limitation period applicable against the Corporation for two reasons.

[31] Firstly, the Federal Court of Appeal in *Kern v. Canada*, 2006 FCA 257, 2006 DTC 6502 (FCA), adopted by this Court in *Asadollah v. Canada*, 2007 TCC 333, [2007] G.S.T.C. 102, conclusively determined that subsection 298(1) does not apply to directors' liability assessments. Létourneau J.A. stated in paragraphs 8 and 9 of the Federal Court of Appeal's decision:

> 8. In respect of the Tax Court's judgment covering the GST, the appellants raised before us an argument that the assessment in the amount of $51,000 for the 1997 year was made out of time, i.e. out of the four-year limitation period found in paragraph 298(1)(*a*) of the *Excise Tax Act*.
>
> 9. With respect, the limitation period regarding assessments made pursuant to section 323, as in the present instance, is found in subsection 323(5). In a nutshell, the period is two years from the date that the person assessed last ceased to be a director of the Corporation.

[32] In a recent decision of the Federal Court of Appeal in *Jarrold v. Canada*, 2010 FCA 278, [2010] G.S.T.C. 158 (FCA), the Court held that a director's liability assessment made over ten years after the underlying Corporation was assessed was acceptable. The taxpayer had argued that he could not reasonably be expected to contest assessments after that length of time yet the Court confirmed in paragraph 5 of that decision that the only statutory time limit imposed on the Minister for assessing a person under section 323 is found in subsection 323(5), two years after the person last ceased to be a director of the corporate tax debtor. Sharlow J.A. stated in said paragraph 5:

> 5. . . . Mr. Jarrold is essentially asking this Court to devise a further time limitation based on reasonableness. We cannot accede to that request . . .

[33] In my view, the Federal Court of Appeal has been clear in its enunciation of the law, that the only statutory time limitation period applicable to a director's liability assessment is found in subsection 323(5) of the *Act* and the four-year limitation period in subsection 298(1) has no application and this Court is bound by such decision.

[34] The second reason is one of statutory interpretation. While not necessary to enunciate having regard to the Federal Court of Appeal decision above, I must add that I am in agreement with the arguments made by the Respondent that the rules of statutory interpretation would support the result of the Court. Clearly, subsection 323 has its own limitation period and is clear in not identifying any other period.

[35] The Appellant's argument that the use of the words found in subsection 323(4): "The Minister may assess any person for any amount payable by the person under this section and, where the Minister sends a notice of assessment, sections 296 to 311 apply, with such modifications as the circumstances require." import the four-year limitation period into section 323 is not supported by either the clear wording of section 323 nor by the contextual interpretation. The use of the words "where the Minister sends a notice of assessment" refers to an assessment "under this section" and accordingly, it is clear a director's liability assessment occurs under section 323 only, not under any other section of the *Act*.

[36] The Appellant's argument that the four-year limitation period is imported due to the wording in subsection 323(4) is not sound. Clearly, subsection 298(1) above says ". . . an assessment of a person shall not be made under section 296. . ." and clearly only contemplates assessments made under section 296 and not those made under section 323. Paragraph 296(1)(*a*), of course, clearly refers to the ability of the Minister to assess the "net tax of a person under Division V for a reporting period of the person" and accordingly refers to the person who is required to remit net tax for a reporting period, being the Corporation in this case. It would be impossible to substitute the Appellant as director in paragraph 298 and find he qualified as the person required to remit the net tax for the reporting period contemplated by section 296.

[37] Accordingly, I cannot find that the four-year limitation period of subsection 298(1) applies to the Appellant, and accordingly, the Minister was not statute barred from assessing the Appellant more than four years after the Corporation filed its returns.

The Need for an Assessment

[38] Having found that the Minister failed to validly assess the Corporation in this matter and that an assessment against the Corporation would have been statute barred, the Court is now being asked to find that the amount owed by the Corporation is nil or zero and hence the Appellant cannot be liable for assessment of any other amount under section 323. In other words, if the Minister has no rights to proceed against the Corporation for any amount then it must have no rights to proceed against a director of the Corporation assessed under the directors' liability provisions of the *Act*; namely section 323.

[39] I must confess that there is a certain logic to the Appellant's position. Moreover, as the Appellant suggested, if the Appellant would be able to challenge

an underlying assessment of the Corporation where an assessment stated an assessed amount, why, as a principal of natural justice, should a taxpayer be required to challenge or how in effect could he challenge, if there was no assessment.

[40] The Respondent argues that the liability of a director does not flow from any underlying assessment but from the operation of the *Act* itself, namely section 323 which is reproduced again for convenience below. I must agree with the Respondent's submission.

> 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.
>
> [Emphasis added]

[41] The clear wording of the above provision crystallizes a director's liability to pay the net tax not remitted by the Corporation "at the time the corporation was required to remit or pay, as the case may be, the amount. . .".

[42] The provision makes no reference to any requirement for assessment or that the amount must be related to an assessed amount. The "amount" referenced is clearly the "amount of net tax as required under subsection 228(2)", applicable here, which subsection requires a registrant to remit net tax. There is no ambiguity in the textual wording of subsection 323(1).

[43] Moreover, I am in agreement with the Respondent that the same "amount" is referenced in paragraph 323(2)(*a*), requiring a certificate setting out the "amount" instead of an "assessed amount" for purposes of registering a certificate in Federal Court under section 316 and the requirement that an execution for "that amount" be returned unsatisfied in whole or in part; referenced also in subsection 323(6) which defines the amount recoverable from a director as the "amount" remaining unsatisfied after execution.

[44] This interpretation is confirmed by subsection 299(2) of the *Act* which reads as follows:

> 299(2) Liability under this Part to pay or remit any tax, penalty, interest or other amount is not affected by an incorrect or incomplete assessment or by the fact that no assessment has been made.

[45] Clearly, the liability under this Part, (which includes all of Part IX of the *Act* under which all of the above provisions fall), to pay any tax or other amount is not affected by the fact no assessment has been made.

[46] In *Beaupré v. Canada*, 2005 FCA 168, 2005 G.T.C. 1420 (FCA), Létourneau J.A. confirmed in paragraph 12 that "The tax debt arises not from the assessment but from the Act: . . ." and, in paragraph 13, after referencing subsection 299(2) of the *Act*, stated that "The notice of assessment merely states the amount of the debt and informs the tax debtor of that amount." In that case, the Federal Court of Appeal, noting that the provisions of subsection 272.1(5) of the *Act* holds a partnership and each member of the partnership jointly and severally liable for the payment or remittance of all amounts payable or remittable by the partnership, (a provision similar in wording to subsection 323(1)) decided, in paragraph 11, "it unnecessary to assess the partnership in order to assess a member of the partnership."

[47] This principle was adopted in several decisions of this Court including in *Lau v. Canada*, 2002 DTC 2212, and *Suffolk v. Canada*, 2010 TCC 295, 2010 DTC 1201, and is, in my view, accepted law.

[48] The Appellant suggests such an interpretation would be inconsistent with the *Act* and specifically suggests that reading sections 315 and 316 together suggest that the issuance of an assessment is a condition to the issuance of a certificate under section 316 by the Federal Court and so it must follow that the "amount" must refer to an assessed amount. I do not agree. Former Chief Justice Bowman in the *Lau* case above acknowledged in paragraphs 33 to 35 thereof that failure to assess would effectively prevent the Minister from succeeding in enforcement proceedings against the Corporation under section 316 of the *Excise Tax Act* if such assessment was not valid and that assessments "starts time limits running," in fact pointing out the advantages and consequences of assessments, but agreed that even an invalid assessment ". . . does not in my view prevent the Minister from pursuing his remedies against the directors."

[49] The Appellant also suggests that it would be contrary to the principles of natural justice, being the underlying principles the Federal Court of Appeal used in finding that a director should have the ability to challenge the underlying

assessment of the Corporation in *Gaucher*, if no assessment existed for the taxpayer to challenge. The Appellant argues that its interpretation is also supported by the fact there is symmetry between the provisions of paragraph 323(2)*(a)* and paragraphs 323(2)*(b)* and *(c)*, the latter of which deal with the circumstances where the corporation has commenced liquidation or dissolution proceedings or where it has become bankrupt respectively and where in either case the director will only be liable if the corporation's tax liability has first been proven. In other words, argues the Appellant, each of the above paragraphs of subsection 323(2) is founded on the precondition that the Corporation must first have the opportunity to oppose the Minister's assessment before a director can become liable, which in the case of paragraph 323(2)*(a)*, the Corporation can oppose by objecting and appealing an assessment. As evidence of its inability to do so in this matter, the Appellant specifically suggested that due to changes in total amounts owing from various correspondence with CRA that it could not be sure what the exact quantum it was that was to be challenged hence the reason an assessment must exist.

[50] In this regard, the Appellant's counsel seems to ignore that, as former Chief Justice Bowman alluded to in *Lau* above, the assessment starts the time limits running, and accordingly, if there has been no assessment, the taxpayer is not precluded from demanding one on behalf of the Corporation if it still exists and filing a Notice of Objection; to start the process anew if in fact he had reason to question the amount assessed against the Corporation or simply, and more pragmatically, to question it as a matter of right given to him qua director as a result of the *Gaucher* and *Abrametz* cases. The Appellant is clearly not denied his right to challenge, nor can it be argued was the Corporation ever denied its right to object to and appeal its assessment as it remains open to do so if an assessment has not been issued or is invalid. I also note that even paragraphs 323(2)*(b)* and *(c)* make no reference to a requirement for an "assessment", but only that the "amounts" be proven. If anything, the symmetry in the three paragraphs referencing amounts instead of assessed amounts supports the Respondent's position.

[51] Moreover, as the sole director, who admittedly actually filed the GST returns which led to the determination of amounts owing, since they were accepted as filed, I fail to understand the argument that the Appellant somehow was deprived of process or the ability to know or question the amounts. The amounts of net GST to be remitted by the Corporation were determined from the filings he made and the amounts of penalties and interest are determined by specific provisions of the *Act*. The Appellant did not in his evidence suggest he filed incorrectly nor did he lead any evidence to suggest these amounts were not correct. The suggestion that total amounts given differed substantially over periods of time is easily explainable by the fact interest runs until payment. In fact, the evidence shows he and his accountant had meetings with the CRA to discuss cheques supposedly uncashed and clearly amounts owed by the Corporation as well, so he clearly had the opportunity to discuss them and he did.

[52] His sole argument really comes down to the fact that the Minister cannot assess a director if he failed to assess the Corporation or if such assessment is invalid by reason of being statute barred or for other reason. Unfortunately, the law, as stated above is clear and disagrees with him. To make an assessment against the corporation a precondition to proceeding against a director under subsection 323(2) would render subsection 299(2) meaningless, which would be a ridiculous result. Parliament intended such subsection to have meaning and the Appellate Courts have confirmed its application as the basis for a director's liability. Clearly, the right of the Minister to proceed against a director is not based on a purely derivative action, as supposed by the Appellant's counsel in argument, but on the basis that due to sections 323 and 299 of the *Act*, a director is jointly and severally liable for an unremitted amount, regardless of whether there was an assessment against the corporation.

[53] The Federal Court of Appeal in the cases of both *Gaucher* and *Abrametz* confirmed a director's rights under the principle of natural justice to challenge the amounts owed as certified under section 316 of the *Act* and I do not find such a fundamental right to only apply in the case of where an assessment is issued against the corporation. To do so would be to weaken such principle to something less than one of natural justice which I do not find the learned Justices did in their said decisions.

[54] Whatever limitations the Minister may have in enforcing collection against a corporation for lack of valid assessment do not limit the Minister in enforcing against a director unless specifically set out in the legislation. The only limitations apparent to me are that the Minister cannot collect more than owed in the first place as subsection 323(6) limits the amount collectable from a director to be the amounts not paid by the corporation, which is clearly a bar against double recovery, itself a principle of natural justice, and the principles of natural justice entitling a director to challenge the underlying amount owing, regardless if assessed against the corporation or not, unless of course a director can successfully argue he or she was assessed more than two years after ceasing to be a director pursuant to the limitation period of subsection 323(5) or has a due diligence defence under subsection 323(4) of the *Act*, neither of which are applicable here.

[55] Accordingly, having regard to the above reasons, the appeal is dismissed with costs to the Respondent.

Signed at Ottawa, Canada, this 14th day of June 2011.

"F.J. Pizzitelli"

Pizzitelli J.

CITATION:	2011 TCC 301
COURT FILE NO.:	2008-3820(GST)G
STYLE OF CAUSE:	SENG CHIN SIOW and HER MAJESTY THE QUEEN
PLACE OF HEARING:	Toronto, Ontario
DATE OF HEARING:	May 6, 2011
REASONS FOR JUDGMENT BY:	The Honourable Justice F.J. Pizzitelli
DATE OF JUDGMENT:	June 14, 2011

APPEARANCES:

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