Docket: 2010-540(GST)I

BETWEEN:

DANIEL ROUX,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

[OFFICIAL ENGLISH TRANSLATION]

Appeal heard on July 3, 2012, at Montréal, Quebec.

Before: The Honourable Justice François Angers

Appearances:

For the appellant	The appellant himself
Counsel for the respondent:	Éric Labbé

JUDGMENT

The appeal from the assessment made under Part IX of the *Excise Tax Act*, notice of which is numbered BR 092002 and dated May 14, 2009, is dismissed.

Signed this 15th day of August 2012.

"François Angers"

Angers J.

Translation certified true
on this 26th day of September 2012
Monica F. Chamberlain, Translator

Citation: 2012 TCC 249
Date: 20120815
Docket: 2010-540(GST)I

BETWEEN:

DANIEL ROUX,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

[OFFICIAL ENGLISH TRANSLATION]

REASONS FOR JUDGMENT

Angers J.

[1] The appellant, as a director of the company Systèmes de traitement d'eau Rainsoft Rive-Sud inc. (hereafter Rainsoft), received an assessment dated May 14, 2009, for $31,479.04 for the period during which he was a director, specifically for the period from August 1, 2005, to January 31, 2007. The appellant resigned from his position as director of Rainsoft on May 1, 2008.

[2] Rainsoft began its activities in 2004. It is a company that specialized in the sale of water softening treatment systems. The appellant held 50% of the shares of Rainsoft and was the vice-president of the company. Rainsoft was registered for the purposes of the goods and services tax (GST) and filed its returns quarterly.

[3] According to the auditor's report, during the period in issue, Rainsoft reported lower sales figures such that the amounts of the GST and the Quebec Sales Tax (QST) were thereby reduced as well. The appellant does not dispute this. However, the difference between the actual sales and those reported by Rainsoft resulted in net QST owing in the amount of $72,856.63 and net GST owing in the amount of $60,951.55.

[4] This information was disclosed to the tax authorities by voluntary disclosure made by Rainsoft on March 5, 2007, for the period in issue. On July 17, 2007, Rainsoft signed a [TRANSLATION] "settlement agreement and waiver of the right to object and appeal under a voluntary disclosure" (Exhibit I-3). This agreement confirms that the GST and QST paid by Rainsoft are insufficient with respect to the actual sales made by Rainsoft and states that the amount owing to the tax authorities is assessed at $133,808.28. Rainsoft agreed to pay the amount due over an eighteen-month period, namely, from August 1, 2007, to January 1, 2009, in remittances of $9,014.

[5] The appellant was in business with Nathalie Laviolette, who was the president of Rainsoft and held 50% of the shares of the company. They agreed to end their business relationship and, on June 6, 2008, they signed a separation agreement. This agreement, to which Rainsoft was also a party, came into effect on May 1, 2008, the date on which the appellant resigned as a director. In this agreement, the appellant and Ms. Laviolette agreed that the balance owing by Rainsoft following the voluntary disclosure agreement for the payment of consumption tax (GST and QST) arrears, which the appellant and Ms. Laviolette were personally responsible for, was about $65,000. In addition, Ms. Laviolette and Rainsoft undertook to take all necessary steps to meet their payment commitments related to the voluntary disclosure and keep the appellant informed of anything that could affect the payment commitments. The separation agreement provides the appellant with a right to recourse against Rainsoft and Ms. Laviolette to recuperate anything the appellant could be obliged to pay under the voluntary disclosure agreement.

[6] The appellant claims that before his departure he made sure that Rainsoft met its payment obligations set out in the separation agreement. After the appellant's departure, Rainsoft did not continue to honour the agreement. Rainsoft went bankrupt on November 24, 2008, and Ms. Laviolette filed an assignment in bankruptcy on that same date.

[7] The question is therefore whether the appellant acted with the degree of care, diligence and skill to prevent the failure under subsection 323(1) of the *Excise Tax Act* (ETA) that a reasonably prudent person would have exercised in comparable circumstances.

[8] The solidary liability of directors of a corporation applies where a corporation fails to remit an amount of net tax as required under subsection 228(2) or (2.3) of the ETA, and any interest thereon or penalties relating thereto. I reproduce below the relevant sections of the ETA.

> **323.(1) Liability of directors** — 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) Limitations** — A director of a corporation is not liable under subsection (1) unless
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> (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) Diligence** — 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.
>
> . . .
>
> **(6) Amount recoverable** — Where execution referred to in paragraph (2)(*a*) has issued, the amount recoverable from a director is the amount remaining unsatisfied after execution.

[9] Rainsoft declared bankruptcy on November 24, 1998, and a proof of claim was filed on December 12, 2008 (Exhibit I-6).

[10] The appellant maintains that he cannot be held liable with respect to amounts owing after he had resigned as a director since Rainsoft was not obliged to pay the respondent more than what had been provided in the payment agreement, and only the remaining Rainsoft director is liable. The appellant argues that following his resignation he no longer had to exercise reasonable diligence to make sure that the agreed payments were made. He claims that while he was a Rainsoft director, he exercised diligence to ensure that Rainsoft met its payment obligations.

[11] The Federal Court of Appeal set out the standard of review applicable to this case in *Canada v. Buckingham*, 2011 FCA 142. I reproduce below paragraphs 37, 38 and 39 of the judgment.

> [37] Consequently, I conclude that the standard of care, skill and diligence required under subsection 227.1(3) of the *Income Tax Act* and subsection 323(3) of the *Excise Tax Act* is an objective standard as set out by the Supreme Court of Canada in *Peoples Department Stores*.
>
> [38] This objective standard has set aside the common law principle that a director's management of a corporation is to be judged according to his own personal skills, knowledge, abilities and capacities: *Peoples Department Stores* at paras. 59 to 62. To say that the standard is objective makes it clear that the factual aspects of the circumstances surrounding the actions of the director are important as opposed to the subjective motivations of the directors: *Peoples Department Stores* at para. 63. The emergence of stricter standards puts pressure on corporations to improve the quality of board decisions through the establishment of good corporate governance rules: *Peoples Department Stores* at para. 64. 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: Kevin P. McGuinness, *Canadian Business Corporations Law*, 2nd ed. (Markham, Ontario: LexisNexis Canada, 2007) at 11.9.
>
> [39] An objective standard does not however entail that the particular circumstances of a director are to be ignored. These circumstances must be taken into account, but must be considered against an objective "reasonably prudent person" standard. As noted in *Peoples Department Stores* at paragraph 62:
>
> > The statutory duty of care in s. 122(1)(*b*) of the CBCA emulates but does not replicate the language proposed by the Dickerson Report. The main difference is that the enacted version includes the words "in comparable circumstances", which modifies the statutory standard by requiring the context in which a given decision was made to be taken into account. This is not the introduction of a subjective element relating to the competence of the director, but rather the introduction of a contextual element into the statutory standard of care. It is clear that s. 122(1)(*b*) requires more of directors and officers than the traditional common law duty of care outlined in, for example, *Re City Equitable Fire Insurance, supra* [[1925] 1 Ch. 407]

[12] In this case, it is important to recall that, under subsections 228(1) and (2) of the ETA, Rainsoft was required to file reports and remit the net tax payable in respect of the goods sold or services provided by the company during the period at issue from August 1, 2005, to January 31, 2007. The due diligence duty in subsection 323(3) of the ETA is expressly intended to prevent a failure of a corporation (Rainsoft in this case) to remit the net tax and the director (the appellant in this case) must establish that he exercised the degree of care, diligence and skill to prevent the failure. It is therefore clear that the purpose of these provisions of the ETA is to prevent non-payment.

[13] In this case, and based on the appellant's own admission, Rainsoft failed to report and pay the net tax during the period at issue. The appellant, as a director of Rainsoft, was responsible for ensuring that things got done, and he acknowledges this. Rainsoft, supported by the appellant, did precisely what section 323 is intended to prevent, that is, a company directs money that is owed to the Crown to other purposes. It thus becomes impossible for the appellant, under such circumstances, to claim the defence under subsection 323(3) of the ETA because he made no effort during the period at issue to prevent failure to comply with the payment obligations.

[14] The due diligence defence raised by the appellant by reason of Rainsoft's voluntary disclosure and his resignation as a director has nothing to do with the obligations under the ETA. It is not because there was a voluntary disclosure that the defence of due diligence applies to the appellant's efforts to ensure that Rainsoft complied with its payment obligations. There is no link between a voluntary disclosure and the due diligence defence referred to in subsection 323(3) of the ETA.

[15] For these reasons, the appeal is dismissed.

Signed this 15th day of August 2012.

"François Angers"

Angers J.

Translation certified true
on this 26th day of September 2012
Monica F. Chamberlain, Translator

CITATION:	2012 TCC 249
COURT FILE NO.:	2010-540(GST)I
STYLE OF CAUSE:	Daniel Roux v. Her Majesty the Queen
PLACE OF HEARING:	Montréal, Quebec
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REASONS FOR JUDGMENT BY:	The Honourable Justice François Angers
DATE OF JUDGMENT:	August 15, 2012

APPEARANCES:

For the appellant	The appellant himself
Counsel for the respondent:	Éric Labbé

COUNSEL OF RECORD:

For the appellant:

Name:	
Firm:	

For the respondent:	Myles J. Kirvan Deputy Attorney General of Canada Ottawa, Canada