

Docket: 2006-1673(GST)I

BETWEEN:

RAMIN ASADOLLAH,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

Appeal heard on May 15 and 16, 2007 at Vancouver, British Columbia

Before: The Honourable Justice E. P. Rossiter

Appearances:

Agent for the Appellant Carl Beck, CMA

Counsel for the Respondent: David Everett

JUDGMENT

The appeal from the assessment made under the *Excise Tax Act*, notice of which is dated January 26, 2005 and bears number A104734 is dismissed, with costs to the Respondent, for and in accordance with the reasons set out in the attached Reasons for Judgment.

Signed at Charlottetown, Prince Edward Island, this 8th day of August, 2007.

"E. P. Rossiter"

Rossiter, J.

Citation: 2007TCC333
Date: 20070808
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BETWEEN:

RAMIN ASADOLLAH,

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REASONS FOR JUDGMENT

Rossiter, J.

[1] This appeal concerns a Director's liability assessment, under section 323 of the *Excise Tax Act* (the "Act"), against Ramin Asadollah ("Asadollah"), the registered Director, Secretary and Treasurer of Smart Security Systems Inc. ("Smart").

FACTS

[2] Asadollah first met Frank Guido ("Guido"), the President of Smart, in December 1996, when Asadollah was hired as a Smart employee. Smart's business involved selling alarms and in some situations offering free alarms in exchange for a five-year security contract with a monthly monitoring fee. Asadollah's role was to acquire, install and service alarm systems and supervise 5 employees, while Guido looked after sales and office administration. Asadollah was to be paid a salary which essentially covered his automobile expenses. The company had a bookkeeper, Alex Liu ("Liu"), who was responsible for maintaining the company's financial records, including completing and submitting the GST returns. While Guido generally gave instructions to Liu, Asadollah did so as well, about 10% of the time.

[3] Smart was incorporated by Guido without the involvement of Asadollah. Both parties agree that there was a written agreement between them, whereby

Asadollah would become a 50% shareholder in the company, if he worked for and remained with the company, for a period of 5 years. Guido says that in an attempt to gain Asadollah's trust and provide him with some job security, Guido also made Asadollah a Director and Officer (Secretary and Treasurer) of the company. The records of the Ministry of Consumer and Business Services of the Province of Ontario confirm that Asadollah was a registered Director and Secretary/Treasurer of Smart from May 5, 1997 to the date of the records November 30, 2004, although Asadollah asserted that he did not know that he was listed as a Director.

[4] Throughout the life of the company, the relationship between Guido and Asadollah appeared to be very informal; there was no evidence as to any Directors' meetings being held at any time, however, their interests were clearly connected. In fact, when giving their testimony, both Guido and Asadollah made numerous references to "we". In discussing the finances of the company Asadollah spoke in terms of, "We were okay and it is not true that we were going month to month." About the hiring of Asadollah, Guido spoke in terms of "We formed the new company Smart Systems." and in discussing the financial operations of the company, Guido spoke in terms of "We had enough money to support us but once we lost a major builder, we had a problem." The manner in which Asadollah and Guido spoke about Smart suggests it was their company, their business, their operation.

[5] Contrary to the position originally taken in his Notice of Appeal, at trial Asadollah denied the assertion that Guido had total financial control of Smart at all times. Asadollah had access to Smart bank accounts: he had signing authority up to \$1,000 (as did Liu), though he did not take part in arranging corporate financing. As well, both he and Guido equally used their credit cards when the company was short of money to pay suppliers and shared the company revenues to repay their credit balances.

[6] In the first year, they had enough money to support this operation. However, about six months before the company eventually closed its doors, a major builder customer decided not to proceed with the purchase of about 500 alarms. The company's financial situation rapidly deteriorated from then on and both Asadollah and Guido had to regularly pay supplier accounts with their own money. Before the company failed completely, Asadollah advocated for and was instrumental in ensuring their employees were paid, in order to avoid any problems with the Labour Board or others. Both Guido and Asadollah claim that they believed the GST returns were being filed by Liu and that they did not know that

they had fallen behind, until after the company ceased operating, some time in 2002 or 2003.

[7] Guido told Asadollah, that because the business could not be sustained, he was going to resign. He said he assumed that Asadollah would do the same. Guido said that Asadollah knew, and agreed, that they could not compete with bigger companies because they were also offering free alarms and they had deeper pockets. Guido resigned his directorship of the company in January 2000 without further discussion with Asadollah.

[8] On January 26, 2005, the CRA issued a Notice of Assessment against Asadollah, as Director of Smart.

ANALYSIS

[9] Asadollah makes three alternative arguments:

1. The Notice of Assessment is statute barred; if not, then
2. while he may have been a Director in law, he was not a Director in fact; if not, then
3. he exercised a degree of care and diligent skill that a reasonably prudent person would have exercised in comparable circumstances to prevent a failure of the corporation to remit GST as provided in subsection 323(3) of the *Act*.

Is the Notice of Assessment statute barred?

[10] Asadollah submits that subsection 323(4) of the *Act* engages sections 296 to 311, which therefore engages the four year limitation period, starting from the return due date, in section 298(1). He argues that the assessment issued on January 26, 2005 was therefore statute barred. In the alternative, Asadollah referred to subsection 323(5) of the *Act* which provides for a two year limitation period after a person last ceased to be a Director. Asadollah argues that he ceased being a Director when he initially quit the company. Therefore he suggests that under subsection 323(5), the assessment was out of time.

[11] The Respondent takes the position that subsection 298(1) does not apply,

based upon *Kern v. Canada*, [2006] F.C.J. No. 1094 (F.C.A.). The Respondent further suggests that since there is nothing in the *Act* to establish when a person ceases to be a Director, the Court should turn to the appropriate provincial corporate legislation, based upon *Kalef v. Canada*, [1996] 2 C.T.C. 1 (F.C.A.).

[12] In my view, the Respondent's submissions are correct.

[13] *Kern, supra*, conclusively states that subsection 298(1) does not apply to Director's liability assessments and the only limitation period that is applicable is that under subsection 323(5) of the *Act*. At paragraphs 8 and 9, Létourneau J.A., on behalf of the Court, stated as follows:

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.

[14] *Kalef, supra* provides authority for looking to the provincial corporate statute to determine when a person ceases to be a Director. In that case, the Court looked to the *Ontario Business Corporations Act*. In this appeal, the appropriate statute is the *British Columbia Business Corporations Act* (the "BCBCA"), and in particular subsection 128(1), which states as follows:

128 (1) A director ceases to hold office when

- (a) the term of office of that director expires in accordance with
 - (i) this Act or the memorandum or articles, or
 - (ii) the terms of his or her election or appointment,
- (b) the director dies or resigns, or
- (c) the director is removed in accordance with subsection (3) or (4).

[15] On the facts, Asadollah did not satisfy any of paragraphs 128(1)(a), (b) or (c) of the *BCBCA*. Since he did not cease to hold the office of Director, the two-year time limit in subsection 323(5) of the *Act* did not start running and the assessment is not statute barred.

Was Asadollah a de facto Director?

[16] Asadollah asserts that he was not a *de facto* Director because (a) he did not participate in the day to day management of the company; (b) he did not have control over or influence the company's finances; (c) he did not act as a Director; (d) he did not consider himself a *de facto* Director; (e) he ceased to be a *de facto* Director when the operation shut down in June 1999.

[17] The Respondent takes the position that Asadollah was both a *de jure* and *de facto* Director and even if he was not a *de facto* Director, he is not relieved from liability. He also suggests that the mere fact that a company ceases to operate does not mean the Director ceases to be a Director.

[18] On rare occasions, this Court has ruled that a *de jure* Director was not a *de facto* Director, and therefore not liable under section 323 of the Act: *François Lambert v. Her Majesty the Queen*, [2005] G.S.T.C. 76 (T.C.C.); *Gordon Fitzgerald et al. v. The Minister of National Revenue*, 92 DTC 1019 (T.C.C.); *Emilio Dirienzo v. Her Majesty the Queen*, 2000 DTC 2230 (T.C.C.). However, these cases turned on the fact that the parties were family members, and the Director's *de jure* power or authority could not be exercised without impacting family harmony. Such is not the case here.

[19] Asadollah was clearly a *de jure* Director from May 5, 1997 and continuing through the relevant time period. Considering the evidence as a whole, I find that Asadollah was also a *de facto* Director.

[20] In his testimony Asadollah claimed that he never had discussions with Guido with respect to company operations and suggested he was not really involved with any decisions with respect to the company. He attempted to downplay his knowledge and involvement in the management of the company and its affairs; trying to leave the impression he was nothing more than a technician. This characterization is simply not consistent with that provided by Guido. In this matter, I accept Guido's testimony over Asadollah's. In my view, Asadollah was a Director in fact and in law. He was actively involved in the management and operations of Smart.

Did Asadollah exercise a degree of care and diligent skill to avail himself of the protection in subsection 323(3) of the Act?

[21] Directors who have been assessed under subsection 323(1) may raise the due diligence defence in subsection 323(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.

[22] What would a reasonably prudent person have done in comparable circumstances? Some suggest the appropriate test is to apply an objective subjective standard, one that takes into account the Director's personal knowledge and background: *Soper v. Canada*, [1997] 3 C.T.C. 242 (F.C.A.). Others argue that this test has been replaced by a strictly objective standard, one that takes into account the Director's surrounding circumstances, but not his or her subjective intention: *Peoples Department Stores Inc. (Trustee of) v. Wise*, [2004] 3 S.C.R. 461 (S.C.C.).

[23] I leave that debate for another day. In my view, Asadollah did not act with the diligent care and skill required to meet either standard. On the facts, he had the authority, the opportunity and the responsibility, to act. He took no positive acts to prevent Smart's failure to remit GST. In fact, he chose to satisfy Smart's other obligations (e.g. payroll, suppliers), in preference of Smart's GST liability. This is clearly insufficient to satisfy the due diligence defence in subsection 323(3) of the *Act*, viewed objectively, subjectively, or otherwise.

[24] The Appeal is dismissed, with costs, to the Respondent.

Signed at Charlottetown, Prince Edward Island, this 8th day of August, 2007.

"E. P. Rossiter"

Rossiter, J.

CITATION: 2007TCC333

COURT FILE NO.: 2006-1673(GST)I

STYLE OF CAUSE: RAMIN ASADOLLAH AND HER
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PLACE OF HEARING: Vancouver, British Columbia

DATE OF HEARING: May 15 and 16, 2007

REASONS FOR JUDGMENT BY: The Honourable Justice E. P. Rossiter

DATE OF JUDGMENT: August 8, 2007

APPEARANCES:

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