

Docket: 2004-1904(IT)G

BETWEEN:

ENCAN CONSTRUCTION LTD.,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

Appeal heard on September 13, 2007 at Kelowna, British Columbia

Before: The Honourable Justice Valerie A. Miller

Appearances:

Counsel for the Appellant: D. Glenn Einfeld

Counsel for the Respondent: Victor Caux

JUDGMENT

The appeal from the reassessment made under the *Income Tax Act* ("Act") with respect to the Memorandum Assessment #35441 dated August 8, 2003 is dismissed, with costs, in accordance with the attached Reasons for Judgment.

Signed at Ottawa, Canada this 28th day of September, 2007.

“V.A. Miller”

V.A. Miller, J.

Citation: 2007TCC579
Date: 20070928
Docket: 2004-1904(IT)G

BETWEEN:

ENCAN CONSTRUCTION LTD.,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

REASONS FOR JUDGMENT

V.A. Miller, J.

[1] This is an appeal from Memorandum Assessment numbered 35441 dated August 28, 2003 made by the Minister of National Revenue (the “Minister”) pursuant to section 224 and subsection 227(10) of the *Income Tax Act* (the “Act”). The assessment in the amount of \$16,119.08 was made on the basis that the Appellant failed to comply with a requirement to pay in respect of Eagle Sheet Metal (“ESM”), the tax debtor.

[2] The issue in this appeal is whether the Appellant was liable to make a payment in the amount of \$16,119.08 to ESM on the date that the Appellant received the requirement to pay.

[3] In assessing the Appellant the Minister relied on the facts set out in paragraph 10 of the Reply to the Notice of Appeal as follows:

10. In so assessment in the Appellant and confirming the assessment, the Minister assumed the same facts as follows:

- a) ESM (the “Tax Debtor”) was an incorporated company that did business as a sub-contractor to the Appellant;
- b) the Tax Debtor was indebted to the Minister in the amount of \$175,621.40, calculated as of October 31, 2002;
- c) the Appellant received an invoice from the Tax Debtor in the amount of \$16,119.08 (the “Debt”), on October 1, 2002;
- d) the Appellant was liable to make a payment to the Tax Debtor for the Debt from October 1, 2002, and following;
- e) on October 31, 2002 the CCRA issued a Requirement to Pay to the Appellant requiring payment of an amount not to exceed \$175,621.40 in respect of amounts owed by the Tax Debtor to the Crown;
- f) the Appellant received the Requirement to Pay, dated October 31, 2002, on November 4, 2002;
- g) the Appellant issued a cheque to the Tax Debtor on November 5, 2002 in the amount of \$16,119.08 (the “Cheque”);
- h) the Cheque was issued in respect of the Debt;
- i) the Tax Debtor cashed the Cheque on November 14, 2002; and
- j) the Appellant failed to comply with the Requirement to Pay dated October 31, 2002.

[4] Mr. Michael Chapman, President of the Appellant, testified on behalf of the Appellant. He stated that the Appellant was a general contractor in the construction business. In 2002, the Appellant was the head contractor in building a Wendy’s restaurant (“Wendy’s”) in Calgary, Alberta. The Appellant engaged Eagle Sheet Metal Inc. (“ESM”) as a subcontractor on the project. On October 1, 2002 the Appellant received an invoice from ESM dated September 25, 2002 for the amount of \$16,119.08 (“the amount”). The Appellant entered the data from this invoice into

its computer system on October 7, 2002. It was Mr. Chapman's evidence that this invoice from ESM was due and payable by October 31, 2002. He also stated that on October 31, 2002 a cheque numbered 5098 was made payable to ESM postdated to November 5, 2002 for the amount. The cheque was mailed on October 31, 2002 along with other cheques to all subcontractors on the project. All cheques were postdated to November 5, 2002 as very often the payments from Wendy's were late. He wanted to make sure that there was sufficient cash available when ESM presented the cheque for payment. The cheque was cashed by ESM on November 14, 2002.

[5] A Requirement to Pay (the "Requirement") dated October 31, 2002 was received by the Appellant on November 4, 2002. It required the Appellant to pay to the Receiver General on account of ESM's tax liability the monies otherwise and immediately payable to ESM and all other monies otherwise payable to ESM which the Appellant will be, within one year, liable to pay but not to exceed the amount of \$175,621.40.

[6] Mr. Chapman stated that the Requirement was received by ordinary mail and was opened by the person at the front desk. It was not brought to his attention. The controller for the Appellant went on holidays on November 8, 2002 and did not see the Requirement until he returned on November 25, 2002. The controller informed Mr. Chapman that all remaining funds due to ESM must be held for the Canada Customs and Revenue Agency ("CCRA").

[7] At the hearing Mr. Chapman also testified that to the best of his knowledge CCRA had not been in touch with anyone at the Appellant prior to sending the Requirement. This statement and his testimony with respect to when the cheque was mailed to ESM are at odds with a document prepared by Mr. Chapman that was attached to the Notice of Appeal and included in Exhibit A-1.

[8] This raises the issue of credibility and I refer to Chief Justice Bowman's statement in *Faulkner v. MNR*, 2006 TCC 239 at paragraph 13 where he stated:

[13] Where questions of credibility are concerned, I think it is important that judges not be too quick on the draw. In *1084767 Ontario Inc. (c.o.b. Celluland) v. Canada*, [2002] T.C.J. No. 227 (QL), I said this:

8 The evidence of the two witnesses is diametrically opposed. I reserved judgment because I do not think findings of credibility should be made lightly or, generally speaking, given in oral judgments from the bench. The

power and obligation that a trial judge has to assess credibility is one of the heaviest responsibilities that a judge has. It is a responsibility that should be exercised with care and reflection because an adverse finding of credibility implies that someone is lying under oath. It is a power that should not be misused as an excuse for expeditiously getting rid of a case. The responsibility that rests on a trial judge to exercise extreme care in making findings of credibility is particularly onerous when one considers that a finding of credibility is virtually unappealable.

[9] It is my opinion that Mr. Chapman fully explained the differences. He was a very credible witness and I accept his explanations.

[10] The relevant sections of the *Act* are as follows:

224.(1) Where the Minister has knowledge or suspects that a person is, or will be within one year, liable to make a payment to another person who is liable to make a payment under this Act (in this subsection and subsections 224(1.1) and 224(3) referred to as the “tax debtor”), the Minister may in writing require the person to pay forthwith, where the moneys are immediately payable, and in any other case as and when the moneys become payable, the moneys otherwise payable to the tax debtor in whole or in part to the Receiver General on account of the tax debtor’s liability under this *Act*.

...

(1.2) Notwithstanding any other provision of this Act, the *Bankruptcy and Insolvency Act*, any other enactment of Canada, any enactment of a province or any law, but subject to subsections 69(1) and 69.1(1) of the *Bankruptcy and Insolvency Act* and section 11.4 of the *Companies’ Creditors Arrangement Act*, where the Minister has knowledge or suspects that a particular person is, or will become within one year, liable to make a payment

(a) to another person (in this subsection referred to as the “tax debtor”) who is liable to pay an amount assessed under subsection 227(10.1) or a similar provision, or

(b) to a secured creditor who has a right to receive the payment that, but for a security interest in favour of the secured creditor, would be payable to the tax debtor,

the Minister may in writing require the particular person to pay forthwith, where the moneys are immediately payable, and in any other case as and when the moneys become payable, the moneys otherwise payable to the tax debtor or the secured creditor in whole or in part to the Receiver General on account of the tax debtor's liability under subsection 227(10.1) or the similar provision, and on receipt of that requirement by the particular person, the amount of those moneys that is so required to be paid to the Receiver General shall, notwithstanding any security interest in those moneys, become the property of Her Majesty to the extent of that liability as assessed by the Minister and shall be paid to the Receiver General in priority to any such security interest.

...

(4) Every person who fails to comply with a requirement under subsection 224(1), 224(1.2) or 224(3) is liable to pay to Her Majesty an amount equal to the amount that the person was required under subsection 224(1), 224(1.2) or 224(3), as the case may be, to pay to the Receiver General.

...

227.(10) The Minister may at any time assess any amount payable under

(a) subsection 227(8), 227(8.1), 227(8.2), 227(8.3) or 227(8.4) or 224(4) or 224(4.1) or section 227.1 or 235 by a person,

(b) subsection 237.1(7.4) by a person or partnership,

(c) subsection 227(10.2) by a person as a consequence of a failure of a non-resident person to deduct or withhold any amount, or

(d) Part XIII by a person resident in Canada,

and, where the Minister sends a notice of assessment to that person or partnership, Divisions I and J of Part I apply with any modifications that the circumstances require.

[11] The cheque sent to ESM by the Appellant was postdated to November 5, 2002. As a result, on November 4, 2002 when the Appellant received the requirement it was still liable to make a payment to ESM. Its debt to ESM was not paid until the cheque was negotiated on or after the date on the cheque which in this case was November 5, 2002. This is so because prior to the date on a postdated cheque, the cheque can always be countermanded (*Keyes v. Royal Bank of Canada*, [1947] 3 D.L.R. 161 (S.C.C.)).

[12] As quoted by Estey, J in *Keyes (supra)* from the Privy Council decision in *Bk. of Baroda Ltd. v. Punjab Nat'l Bk.*, [1944] A.C. 176:

... It is impossible to treat a cheque as paid before it is due. ...

[13] The appeal is dismissed with costs.

Signed at Ottawa, Canada this 28th day of September, 2007.

“V.A. Miller”

V.A. Miller, J.

CITATION: 2007TCC579

COURT FILE NO.: 2004-1904(IT)G

STYLE OF CAUSE: ENCAN CONSTRUCTION LTD. AND
HER MAJESTY THE QUEEN

PLACE OF HEARING: Kelowna, British Columbia

DATE OF HEARING: September 13, 2007

REASONS FOR JUDGMENT BY: The Honourable Justice Valerie Miller

DATE OF JUDGMENT: September 28, 2007

APPEARANCES:

Counsel for the Appellant: D. Glenn Einfeld
Counsel for the Respondent: Victor Caux

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