

Docket: 2017-3105(GST)I

BETWEEN:

DAWN CHRISTINE SHECK,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

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Appeal heard on February 15, 2018, at Vancouver, British Columbia

Before: The Honourable Justice B. Russell

Appearances:

Agent for the Appellant:

Ray Barnes

Counsel for the Respondent:

Jamie Hansen

Patrick Cashman

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**JUDGMENT**

This appeal of the assessment raised September 9, 2016 under the *Excise Tax Act* (Canada) is dismissed, without costs.

Signed at Ottawa, Canada, this 29th day of June 2018.

“B. Russell

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Russell J.

Citation: 2018TCC125  
Date: 20180629  
Docket: 2017-3105(GST)I

BETWEEN:

DAWN CHRISTINE SHECK,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

### **REASONS FOR JUDGMENT**

Russell J.

[1] In this informal procedure matter the Appellant appeals a September 9, 2016 assessment *per* subsection 325(2) of the *Excise Tax Act* (Canada) (Act). It is for the amount of \$17,500 in respect of a non-arm's length transfer of property (funds in the amount of \$17,500) to her from her husband, Mr. Sheck. The Minister of National Revenue (Minister) was of the view that the husband at the time of the transfer was a tax debtor under the Act for more than \$17,500 and also that the said transfer was completed without consideration therefor.

[2] Subsections 325(1) and (2) of the Act, which deal with such transfers, provide:

Tax liability re transfers not at arm's length

325 (1) Where at any time a person transfers property, either directly or indirectly, by means of a trust or by any other means, to

- (a) the transferor's spouse or common-law partner or an individual who has since become the transferor's spouse or common-law partner,
- (b) an individual who was under eighteen years of age, or
- (c) another person with whom the transferor was not dealing at arm's length,

the transferee and transferor are jointly and severally, or solidarily, liable to pay under this Part an amount equal to the lesser of

(d) the amount determined by the formula

$$A - B$$

where

A is the amount, if any, by which the fair market value of the property at that time exceeds the fair market value at that time of the consideration given by the transferee for the transfer of the property, and

B is the amount, if any, by which the amount assessed the transferee under subsection 160(2) of the Income Tax Act in respect of the property exceeds the amount paid by the transferor in respect of the amount so assessed, and

(e) the total of all amounts each of which is

(i) an amount that the transferor is liable to pay or remit under this Part for the reporting period of the transferor that includes that time or any preceding reporting period of the transferor, or

(ii) interest or penalty for which the transferor is liable as of that time,

but nothing in this subsection limits the liability of the transferor under any provision of this Part.

[3] There is no issue that the subject transfer of the funds in the amount of \$17,500 to the Appellant from her husband occurred on August 18, 2008.

[4] Unchallenged assumptions pleaded in the Reply and evidence adduced at the hearing establish that at all material times Mr. Sheck was the sole owner and director of a company doing business as Absolutely Best Cleaning Services Ltd. (Company). By January 22, 2015 the Company had a debt of \$113,288 under the Act for un-remitted net tax. This debt total was made up in part by un-remitted net tax of \$24,019 plus penalties and interest. This was the amount of debt as of the end of the period October 31, 2005 to July 31, 2008, *i.e.* just prior to the aforementioned transfer date of August 18, 2008.

[5] On February 6, 2015 a certificate for the amount of \$113,318 plus penalty and interest was registered in the Federal Court. That Court that same day issued a writ of seizure and sale of Company property to realize that certified sum. On January 13, 2016 that writ was returned unsatisfied.

[6] On February 25, 2016 the husband transferor of the \$17,500, Mr. Sheck, was assessed *per* subsection 323(4) of the Act (*i.e.* a director's liability assessment) in respect of the Company's debt under Part IX of the Act, then standing at \$117,426.

[7] The Appellant's primary argument for why she is not liable for the non-arm's length transfer of property assessment is her submission that at the time of the transfer (August 18, 2008) her husband did not have liability under Part IX of the Act. The argument is founded on paragraph 323(2)(a), being part of section 323 which deals with director's liability assessments. I have underlined those words in subsections 323(1) and (2) of the Act, as follow:

Liability of directors

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.

Limitations

(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.

[8] The Appellant's submission is that at the time of the August 18, 2008 transfer, her husband the transferor was not under any liability to pay and remit an amount under Part IX of the Act. While subsection 323(1) made him, as a director of the Company, jointly and severally liable with the Company for the Company's un-remitted amounts of net tax, subsection 323(2) delays that liability upon the

director until any of paragraphs (a), (b) and (c) of subsection 323(2) applies. And this is due to subsection 323(2)'s clear opening words, that a director was "not liable under subsection (1) unless" one or other of those three statutory paragraphs applied.

[9] The only one that since has come to apply is paragraph (a), which stipulates the filing of a certificate in Federal Court for the owed amount, and issuance and return unsatisfied of a writ of seizure against the Company. The last of those steps was completed January 13, 2016 - more than seven years after the subject August 18, 2008 transfer. Only upon that happening, the Appellant's argument goes, did the husband transferor become, *per* paragraph 323(2)(a), jointly and severally liable for the Company's debt under the Act - more than seven years after the August 18, 2008 transfer.

[10] In this case, *per* the wording of paragraph 323(2)(a) the director "is not liable under subsection (1) unless...". But upon the "unless" proviso being satisfied, it follows that the director then "is...liable under subsection (1)".

[11] And what is the actual subsection (1) liability? It is, adopting the words of that provision, joint and several liability with the particular corporation "to pay the amount and any interest on or penalties relating to the amount". And, "the amount" is any amount of net tax that the corporation has failed to remit under the Act. Accordingly the subsection (1) liability arises at time of corporate failure to remit, and it is that liability for which the director is jointly and severally liable.

[12] Thus, upon the paragraph 323(2)(a) "unless" provision being satisfied, the director's consequential liability "under subsection (1)", is as subsection (1) contemplates, joint and several liability that arose as of the time of the corporation's failure to remit. Here, as noted above, the date that liability arose is prior to August 18, 2008.

[13] If Parliament had intended what the Appellant has argued, that a director's liability would only take effect as of and from the date the writ was returned unsatisfied, then the wording of this legislation would simply have been that the director becomes jointly and severally liable for corporate failure to remit upon the writ having been returned unsatisfied, rather than as here commencing the legislative provisions by providing in subsection (1) for joint and several liability of the director arising at the time that the corporation has failed to remit.

[14] I consider that this is consistent with jurisprudence of this Court including *Filippazzo v. R.*, 2000 CarswellNat 1260, 2000 DTC 2326 (general procedure) and *Pliskow v. R.*, 2013 TCC 283 (informal procedure).

[15] The Appellant argued that a long period of time passed between the subject transfer on August 18, 2008 and the September 9, 2016 date of the assessment. This was hard on the Appellant. However, the Act *per* subsection 325(2) does permit the Minister, for non-arm's length transfers from tax debtors for nil or inadequate consideration, to assess at "any time". This is a provision that Parliament considers appropriate to aid and abet tax collection, for the benefit of all Canadian taxpayers.

[16] I here briefly refer to subparagraph 325(1)(e)(i) (above), which reads, "an amount that the transferor is liable to pay or remit under this Part for the reporting period of the transferor that includes that time or any preceding reporting period of the transferor, or" [underlining added]. This provision addresses the quantum of the director's tax debt in calculating the amount of the subsection 325(1) liability. I merely note that here there was no pleaded Ministerial assumption or evidence that the transferor husband, Mr. Sheck, was a registrant under the Act so as to have a "reporting period of the transferor". This is resolved by subsection 245(1) of the Act which provides that, "...the reporting period of a person who is not a non-registrant is a calendar month". I add that if the transferor husband was a registrant as of the August 18, 2008 date of transfer, then reference to subsection 245(1) would not be required as he would on his own account have a "reporting period".

[17] The Appellant's other submission is that some consideration was paid for the subject \$17,500 transfer, in the form of a \$12,000 loan the Appellant made to her husband at his request to satisfy certain debts of his other company, Nu-Energy Window Cleaning Co. Ltd. There was no written loan agreement pertaining to this alleged loan, and as such no documentary evidence of any legal obligation to repay. The two spouses testified that they anticipated that this money would be repaid upon Mr. Sheck receiving funds from his father's estate.

[18] However, in cross-examination the Appellant admitted that in correspondence with Canada Revenue Agency (CRA) officials regarding the \$12,000, she had never asserted that there was a contract between her and her husband requiring repayment of the \$12,000. She had written to CRA approximately three years ago, although well after the August 18, 2008 transfer to her of the \$17,500, saying that she "never got [the \$12,000] paid back". The Appellant testified also that on February 6, 2018 her accountant had written to

CRA stating in respect of the August 18, 2008 transfer that she, “did not know why [her husband] transferred more to her than what was stipulated in the Will [which was nil for the Appellant]”. The Respondent submitted that this was indicative of the transfer not having been made pursuant to a legal contract because she the Appellant was admitting she did not know the reason for the transfer. In this response the Appellant acknowledged that it was “difficult to understand” her letter.

[19] On the basis of the foregoing I am unable to conclude that there was a legal obligation to repay the \$12,000, although quite possibly there was an extra-legal intent on the part of the husband, on a best efforts basis, to do so.

[20] I have found against the Appellant on each of the two issues she has raised and argued. I thus conclude that the appealed assessment is valid. Accordingly the appeal is dismissed, although without costs.

Signed at Ottawa, Canada, this 29th day of June 2018.

“B. Russell”

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Russell J.

CITATION: 2018TCC125  
COURT FILE NO.: 2017-3105(GST)I  
STYLE OF CAUSE: DAWN CHRISTINE SHECK AND HER  
MAJESTY THE QUEEN  
PLACE OF HEARING: Vancouver, British Columbia  
DATE OF HEARING: February 15, 2018  
REASONS FOR JUDGMENT BY: The Honourable Justice B. Russell  
DATE OF JUDGMENT: June 29, 2018

APPEARANCES:

Agent for the Appellant: Ray Barnes  
Counsel for the Respondent: Jamie Hansen  
Patrick Cashman

COUNSEL OF RECORD:

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