Docket: 2012-4927(GST)I

BETWEEN:

SPIROS FENGOS,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

[OFFICIAL ENGLISH TRANSLATION]

EDITED VERSION OF TRANSCRIPT
OF REASONS FOR JUDGMENT

Let the attached edited transcript of the Reasons for Judgment delivered from the Bench at Montréal, Quebec, on July 17, 2014, be filed.

Let a copy of the original version of the transcript also be sent to the parties.

Signed at Ottawa, Ontario, this 14th day of August 2014.

"Gaston Jorré"

Jorré J.

Translation certified true
On this 28th day of November 2014
Margarita Gorbounova, Translator

Citation: 2014 TCC 253
Date: 20140814
Docket: 2012-4927(GST)I

BETWEEN:

SPIROS FENGOS,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

[OFFICIAL ENGLISH TRANSLATION]

EDITED VERSION OF TRANSCRIPT OF REASONS FOR JUDGMENT[1]
(delivered from the bench on July 17, 2014, at Montréal, Quebec)

APPEARANCES:

Counsel for the appellant:	Billy Katelanos
Counsel for the respondent:	Huseyin Akyol
Court registrar:	Pierre Limoges

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— Hearing started on July 17, 2014 at 9:55 a.m.

[1] Mr. Limoges: Reading of the judgment in docket 2012-4927(GST)I between Spiros Fengos and Her Majesty the Queen. Present this morning are Billy Katelanos, for the appellant, and Huseyin Akyol, for the respondent.

[1] This version is edited by the judge, who has made changes to improve style and clarity, corrected minor errors and added citations to the names of cases already appearing in the reasons. There are no corrections on the merits.

Jorré J.

[2] Good morning. I will now deliver my reasons in the appeal of Spiros Fengos. The appellant is appealing from an assessment dated January 12, 2012, which was issued under section 323 of the *Excise Tax Act*. Section 323 imposes solidary liability on a director of a corporation for that corporation's failure to remit an amount of net tax. The amount of the assessment including tax and penalties is less than $3,000.

[3] It is not disputed that the corporation Levisted inc. defaulted on remitting net tax amounts for the period from January 1 to December 31, 2006. The amounts in question were due on April 2, 2007. It is not disputed that the appellant was a director of Levisted inc., a corporation incorporated under the Quebec *Companies Act*.

[4] The only issue is whether the appellant can avail himself of the defence set out at subsection 323(3). That subsection reads as follows:

> 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.

[5] I also note that the first paragraph of article 322 of the *Civil Code of Québec* imposes the following obligation on directors: "A director shall act with prudence and diligence".

[6] The appellant is a pharmacist by trade; he obtained his bachelor's degree in biology in 1985 and bachelor's degree in pharmacy in 1989. He also obtained a diploma in administration in 1989. As soon as he was registered with the Ordre des pharmaciens, he became the owner of a pharmacy. Later, he acquired other pharmacies, and at one point he owned 19 pharmacies.

[7] The period between 2005 and 2007 was very difficult for the appellant. Both his parents were very ill, his marriage was failing, and he eventually got divorced. During that time, he was also very active in his community.

[8] Evidently, he had all his responsibilities with the pharmacies, and several of the pharmacies were having financial problems. Although other pharmacies were doing well, overall the pharmacies had serious problems, because at the time a pharmacist could not incorporate his or her pharmacy, and those 19 pharmacies (there may have been less than 19 pharmacies in June 2006) were not incorporated.

[9] Following these problems, on June 21, 2006, the appellant filed a notice of intent to file a proposal in bankruptcy. An intermediary receiver was appointed the same day. The proposal dated October 18, 2006, mandated the intermediary receiver to sell off all of the appellant's assets including his shares in Levisted inc. The proposal was accepted and its execution was completed in July 2008.

[10] According to the appellant, the trustee told him that he could no longer manage his property after he had given the notice of intent.

[11] The fact that the appellant's shares in Levisted were part of the proposal has no legal effect on the fact that the appellant held the office of director of Levisted.

[12] The appellant testified that he became a shareholder and director of Levisted as a favour to Gérald Lévis. In the past, the appellant had purchased non-pharmaceutical products from a company that at the time belonged to Mr. Lévis. Mr. Lévis's former company had gone bankrupt, and Mr. Lévis wanted to start a new company in which he would work with his two sons.

[13] The appellant helped Mr. Lévis in two ways. On the one hand, he became a shareholder by buying treasury shares of the new company for $25,000 at the end of 2002. On the other hand, he guaranteed a $50,000 line of credit just over a year later. He was hoping to eventually make a little money from his investment; he also became a director of Levisted at the time.

[14] The appellant's testimony was very clear that he was inactive as a director. He had never attended a board of directors' meeting. He had never asked to see financial statements or reports. He did not ask questions. He did not receive reports or statements of account from the bank with regard to the line of credit or to anything else. He received a financial report from the company, if I understood the evidence correctly, for the company's first fiscal year. There is no evidence that he asked what was happening with GST remittances.

[15] Mr. Lévis came to see the appellant every two or three months, but Mr. Lévis's visits were as a supplier for the appellant's pharmacies. When the appellant saw Mr. Lévis, their conversations were very general and informal, and he concluded that everything was going well with the company.

[16] After June 21, 2006, and before 2009, the appellant's involvement as a director of Levisted did not increase; he received no communications regarding the company until the bank asked him to honour his guarantee.

Analysis

[17] In these circumstances, did the appellant exercise the degree of care, diligence and skill to prevent a failure to remit the net tax that a reasonably prudent person would have exercised in comparable circumstances?

[18] The appellant claims that he is an outside director and that he only became liable when he knew that the business was having difficulties. According to the appellant, because he was not informed of the company's difficulties, the consequence is that he had no obligation to act and that he is not liable as a director.

[19] The appellant was not involved day to day in the company's operations, and I agree that he was an outside director. However, I have carefully read the case law on which the appellant is relying, and I cannot use the interpretation proposed by the appellant. In this case, not only was the appellant not informed, but he also made no effort to be informed. That does not constitute due diligence.

[20] One of the excerpts the appellant cited is from paragraph 5 of the Federal Court of Appeal decision in *Borduas v. Canada*, 2010 FCA 102. I quote:

> . . . As an outside director, the appellant would only be liable if he knew or should have known that the corporation was having difficulty remitting its taxes; hence his interest in being characterized as such.

[21] I emphasize that the words "or should have known" were included in this excerpt.

[22] Although the appellant was not aware of the company's financial problems, it is clear that a person cannot claim the exemption set out at subsection 323(3) if that person does nothing as a director. It is also clear that the onus is on the appellant to show that he fulfilled the requirements of the exemption.

[23] But I come back to the obligation to do something, and not simply do nothing. This is evident first from the wording itself of subsection 323(3). The subsection states that the person must exercise the degree of care, diligence and skill that a reasonably prudent person would have exercised in comparable circumstances. A reasonably prudent person is not a person who does not ask questions and who never tries to find out what is happening with regard to remitting net tax. Therefore, he or she must do something because, if one is uniformed, it is impossible to prevent a failure.

[24] This can also be seen in the case law, and I will cite some excerpts from the Federal Court of Appeal decision in *Canada v. Buckingham*, 2011 FCA 142. Although that decision concerns an inside director, it is clear that the decision written by Justice Mainville states principles that apply generally to all directors, particularly, at the end of paragraph 33:

> . . . The directors must thus establish that they exercised the degree of care, diligence and skill required "to prevent the failure". The focus of these provisions is clearly on the prevention of failures to remit.

[25] Then, at the end of paragraph 38:

> . . . 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: . . .

[26] In addition, at the end of paragraph 40, the following is stated:

> . . . In order to rely on these defences, a director must thus establish that he turned his attention to the required remittances and that he exercised his duty of care, diligence and skill with a view to preventing a failure by the corporation to remit the concerned amounts.

[27] This can also be seen further down in the decision at paragraph 52. The Court of Appeal stated that liability is not absolute, but, it says, and I quote from part of the paragraph:

> . . . What is required is that the directors establish that they were specifically concerned with the tax remittances and that they exercised their duty of care, diligence and skill with a view to preventing a failure by the corporation to remit the concerned amounts.

[28] I acknowledge that at paragraph 39 of the judgment, the Court of Appeal states the following:

> 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. . . .

[29] Further down in the same paragraph, the Court of Appeal cites an excerpt from a Supreme Court of Canada decision in *Peoples Department Stores Inc.(Trustee of) v. Wise*, 2004 SCC 68.

[30] But what does it mean that "circumstances must be taken into account"? It is true that an outside director is in a different situation from the inside director, and we must take that into account. But this is not to say that the outside director can make no effort to stay informed. Because, as I just read, those circumstances "must be considered against an objective "reasonably prudent person" standard".

[31] And a reasonably prudent person who wants to avoid a failure to remit is not completely uninterested in operations.

[32] What does this mean in practice? This might mean, for example, that there may be circumstances where the liability of an external director would be incurred at a later date than that of an internal director.

[33] For instance, an internal director who is the company's president, who is there every day, might learn that there are problems that may potentially lead to the company's being unable to pay its remittances earlier than an external director would. And it may be understandable that, while still being diligent, an external director would learn of this later and would act later. Therefore, the external director's liability would begin on a date that is later than that on which the internal director's liability began. And this might have consequences for the amount for which he or she might be liable. That is what it means to take circumstances into account.

[34] There is a sentence in a decision of the Quebec Court of Appeal, which I believe reflects this. That decision is in a rather different context; it is *Wightman c. Widdrington (Succession de Widdrington)*, 2013 QCCA 1187, a decision of the Quebec Court of Appeal. In that decision, the Court of Appeal examines the law with respect to the duties of directors at paragraphs 392 to 407 of the decision.

[35] Just after reviewing *Buckingham*, the Court of Appeal says several things at paragraphs 400 to 402; I will not read them all, but paragraph 400 reflects what I just explained well:

> [TRANSLATION]
> Thus, an inside director must be compared to a reasonably prudent inside director, while an outside director must be compared to a reasonably prudent outside director

[36] And in both cases, the director must do something.

[37] Thus, based on these facts, no efforts were made by a reasonably prudent person who is an outside director to follow Levisted's remittances, and I do not see how I could find that there was due diligence. The result is that I must dismiss the appeal.

— The hearing was adjourned at 9:52 a.m.

Translation certified true
On this 28th day of November 2014
Margarita Gorbounova, Translator

CITATION:	2014 TCC 253
COURT FILE NO.:	2012-4927(GST)I
STYLE OF CAUSE:	SPIROS FENGOS v. THE QUEEN
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DATE OF JUDGMENT:	July 18, 2014
DATE OF THE TRANSCRIPT OF REASONS FOR JUDGMENT EDITED BY THE JUDGE:	August 14, 2014

APPEARANCES:

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Counsel for the respondent:	Huseyin Akyol

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