

Federal Court of Appeal



Cour d'appel fédérale

Date: 20200325

Docket: A-2-19

Citation: 2020 FCA 65

**CORAM: WEBB J.A.
RENNIE J.A.
MACTAVISH J.A.**

BETWEEN:

ALAOWDDIN AHMAR

Appellant

and

HER MAJESTY THE QUEEN

Respondent

Heard at Toronto, on March 2, 2020.

Judgment delivered at Ottawa, Ontario, on March 25, 2020.

REASONS FOR JUDGMENT BY:

MACTAVISH J.A.

CONCURRED IN BY:

**WEBB J.A.
RENNIE J.A.**

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REASONS FOR JUDGMENT

MACTAVISH J.A.

[1] Alaowddin Ahmar appeals from a decision of the Tax Court rendered orally on December 5, 2018, in Court File No. 2016-4994 (GST) G that found him personally liable for the HST tax debt of a company called Strong Forming Inc. In finding him personally liable, the Tax Court held that Mr. Ahmar had failed to exercise the degree of care, diligence and skill required

to prevent the failure to remit that would be exercised by a reasonably prudent person in comparable circumstances.

[2] For the reasons that follow, Mr. Ahmar has not persuaded me that the Tax Court erred in concluding that he was not entitled to claim the benefit of the due diligence defence provided for in subsection 323(3) of the *Excise Tax Act*, R.S.C., 1985, c. E-15. Consequently, I would dismiss the appeal.

1. Background

[3] Mr. Ahmar started Strong Forming Inc. (Strong Forming) in the mid-1990s. The company was engaged in the concrete forming business. Other than in the company's first year of operations, Mr. Ahmar was at all times the sole shareholder, director, officer and operator of the company.

[4] The Tax Court found that for many years, Mr. Ahmar did everything right. He worked hard at his business, which developed a reputation for quality work. Mr. Ahmar paid Strong Forming's bills, including its tax bills, and from time to time, he would inject some of his own monies into the company to make sure that it could honour its obligations.

[5] Things changed, however, in 2013, when Strong Forming subcontracted to a company called Rossclair to provide concrete work for the construction of the Eglinton and Tahoe subway stations in Toronto. A wall built by Strong Forming at the Tahoe construction site turned

out to be out of plumb, and repairs to the wall were not satisfactory. This mistake on the part of Strong Forming led to a six-month construction delay.

[6] Mr. Ahmar testified that Rossclair was Strong Forming's only customer at the time, and that there was little for Strong Forming's employees to do during this period. Strong Forming was, however, required to keep six key employees and equipment on the job site and to pay its suppliers. As a result, the company began to run out of money. Rossclair then agreed to assist Strong Forming by paying the expenses associated with keeping Strong Forming's employees at the job site. In accordance with this agreement, Strong Forming began invoicing Rossclair for its payroll expenses, which invoices included amounts for HST. While Rossclair covered Strong Forming's payroll during the construction delay period, it did not pay any amount to Strong Forming for HST.

[7] Mr. Ahmar did what he could to keep Strong Forming afloat for as long as he could. He had the company make small payments to suppliers in an effort to keep them happy, and he ensured that union dues and Workplace Safety and Insurance Board premiums were paid so that Strong Forming's employees would remain on the job site. Mr. Ahmar injected more of his own money into the company in an attempt to keep things going, maxing out his lines of credit in the process. He also had Strong Forming file HST returns, reporting net tax owing of \$183,180.75 for the period between September 1, 2013 and November 30, 2014. However, as Mr. Ahmar explained to the Tax Court, Strong Forming did not remit any of the HST owing because it had not received payment for HST from Rossclair.

[8] Mr. Ahmar further testified before the Tax Court that he was trying to keep his business going in the hope that he would be able to turn things around, thus enabling him to satisfy the company's obligations, including its HST debt. Around February of 2014, Strong Forming began work on the Eglinton subway station, but by September of 2014, the company's insurance had been terminated and the Canada Revenue Agency had garnished the company's bank account leaving it unable to pay any of its operating expenses. As a result, the company had to cease operations.

[9] In November of 2015, the Minister of National Revenue assessed Mr. Ahmar as a director of Strong Forming pursuant to subsection 323(3) of the *Excise Tax Act* for the company's failure to remit HST in the amount of \$196,551.91, inclusive of interest, for the period between September 1, 2013 and November 30, 2014. Mr. Ahmar then appealed this assessment to the Tax Court.

2. The Tax Court's Decision

[10] The Tax Court was clearly impressed by Mr. Ahmar as a witness, finding him to be honest, forthright and frank in his description of the events that led to the demise of Strong Forming.

[11] The Tax Court considered Mr. Ahmar's explanation for the company's failure to comply with its HST obligations. While accepting that the company had been subject to an unfortunate set of circumstances that the Court described as a "perfect storm", it nevertheless found that Mr.

Ahmar had been aware of Strong Forming's tax obligations and that he had failed to act "in a positive and affirmative way" to ensure that the company's tax obligations were satisfied. Rather than using funds that were otherwise available to satisfy Strong Forming's tax debt, Mr. Ahmar chose instead to use these funds to try to keep the company going.

[12] After reviewing the relevant jurisprudence, the Tax Court found that while Mr. Ahmar's conduct may have been understandable, he had nevertheless diverted funds that would otherwise have been available to satisfy Strong Forming's obligations under the *Excise Tax Act* to pay other creditors. The Court thus found that Mr. Ahmar had failed to demonstrate that he had exercised the degree of care, diligence and skill necessary to prevent Strong Forming's failure to comply with its obligations under the *Excise Tax Act*. Consequently, the Tax Court concluded that Mr. Ahmar was not entitled to the benefit of the due diligence defence provided for in subsection 323(3) of the Act, and he was found to be personally liable for the company's unremitted HST.

3. The Issues and Standard of Review

[13] Before this Court, Mr. Ahmar asserts that the Tax Court erred in law in the standard that it used in determining whether he was entitled to the benefit of the due diligence defence, effectively imposing on him a standard of absolute liability. The Tax Court further erred, Mr. Ahmar says, in failing to consider his actions during each of the remittance periods between September of 2013 and November of 2014 separately in assessing whether his conduct was that of a reasonably prudent person in comparable circumstances. Finally, Mr. Ahmar says that the

Tax Court erred by failing to have regard to certain factual considerations in finding that he had failed to be sufficiently diligent in ensuring that Strong Forming satisfied its obligations under the *Excise Tax Act*.

[14] The legal test applied by the Tax Court in evaluating Mr. Ahmar's conduct is a question of law that is reviewable on the correctness standard. In contrast, the Court's consideration and weighing of the evidence in determining whether a corporate director has exercised due diligence is subject to review on the palpable and overriding error standard: *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235; *Balthazard v. Canada*, 2011 FCA 331, 428 N.R. 329 at paras. 22-24; *Helgesen v. Canada*, 2017 FCA 21, 2017 D.T.C. 5018 at para. 4.

4. Analysis

[15] In accordance with subsection 323(1) of the *Excise Tax Act*, corporate directors are jointly and severally liable with the company for any net taxes, penalties or interest that the company fails to remit. Directors are not, however, absolutely liable for a company's tax debts: *Canada v. Buckingham*, 2011 FCA 142, 417 N.R. 178 at paras. 47 and 52; *Balthazard*, above at para. 30. Nor do directors have to take every conceivable step possible to avoid companies defaulting on their tax obligations: *Moriyama v. Canada*, 2005 FCA 207, 337 N.R. 243 at para. 19, leave to appeal to SCC refused, 31069 (15 December 2005); *Balthazard*, above at para. 32(d). A director will be able to avoid personal liability if the individual can establish that he or she exercised the degree of care, diligence and skill to prevent the failure to remit that would be

exercised by a reasonably prudent person in comparable circumstances: see subsection 323(3) of the *Excise Tax Act* and *Buckingham*, above at para. 33.

[16] Mr. Ahmar was the sole director and directing mind of Strong Forming throughout the relevant period. The question for the Tax Court was thus whether his conduct was that of a reasonably prudent person in comparable circumstances. A review of the Tax Court's reasons reveals that it clearly understood the test to be applied in determining whether a corporate director was entitled to the benefit of the due diligence defence in subsection 323(3) of the Act, and that it did not hold Mr. Ahmar to a standard of absolute liability. This is made clear through the Court's discussion of the legal test articulated by this Court in *Buckingham* and *Balthazard*, above.

[17] The focus of many of Mr. Ahmar's submissions to this Court was on the circumstances in which Strong Forming found itself in 2013-2014. He contends that one of the principal causes of the company's default was Rossclair's failure to pay the HST component of the amounts invoiced by Strong Forming during the period of the construction delay, submitting that he could not have remitted HST that was not in Strong Forming's possession or control. Mr. Ahmar also argues that he could not have used funds received from Rossclair to satisfy Strong Forming's HST debt because he had a contractual and statutory obligation to use those funds to pay his employees: *Business Corporations Act*, R.S.O. 1990, c. B.16, s. 131(1). Finally, Mr. Ahmar submits that it was reasonable for him to try to keep Strong Forming going for a period of time in an attempt to get the company back on its feet, and that the Tax Court erred in failing to consider

each of the remittance periods separately in assessing whether his conduct was that of a reasonably prudent person in comparable circumstances.

[18] Insofar as this latter submission is concerned, this Court held in *Buckingham* that a director's conduct should be evaluated as of the time that he or she became aware that the company was entering a period of financial difficulties: above at para. 46. Moreover, the focus of the due diligence defence is "to prevent the failure to remit, not to cure failures to do so" *Buckingham*, above at paras. 31, 33 and 53. In *Balthazard*, this Court found that "it is important for directors to quickly make the necessary decisions if they wish to successfully mount a due diligence defence": above at para. 50. The Court further observed that quick decisions are important because the farther a business falls behind in its taxes, the more difficult it becomes to argue that the business is not using Crown remittances to operate: *Balthazard*, above at para. 50.

[19] In this case, Mr. Ahmar was aware of Strong Forming's financial difficulties by September of 2013, and he nevertheless made a conscious decision not to remit the amounts owing by the company on account of its HST obligations. In light of this, I am not persuaded that the Tax Court's failure to address each remittance period separately had any impact on the result of Mr. Ahmar's appeal.

[20] The Tax Court's reasons also disclose that it was fully aware of the circumstances giving rise to the construction delay and the difficulties that this presented for Strong Forming's ability to meet its financial obligations. The Tax Court reviewed Mr. Ahmar's personal circumstances in some detail, along with his description of events and his explanation for why Strong Forming fell

behind on its tax remittances, including the fact that Rossclair had failed to pay the HST components of Strong Forming's invoices.

[21] While the Tax Court was clearly sympathetic to the circumstances in which Strong Forming and Mr. Ahmar found themselves, it also observed that the company had received \$1,660,478.00 from Rossclair out of the total contract price of \$1,705,775.00, at least some of which could have been applied to reduce or discharge the company's tax debt. Strong Forming also received a payment of \$250,000 from another customer, which related to an earlier construction project with respect to the Toronto subway extension. In addition, there was evidence before the Tax Court that Mr. Ahmar had periodically injected funds into the company in an attempt to keep things going, although it is unclear precisely when these cash injections were made or in what amount.

[22] Moreover, as counsel for Mr. Ahmar conceded before us, it is unclear from the evidence that was before the Tax Court how much of the monies taken in by Strong Forming were actually paid to the company's employees, and how much were used to pay suppliers and other company expenses. What is clear is that none of these funds were applied towards Strong Forming's HST debt.

[23] The Tax Court further found that Mr. Ahmar was clearly aware of Strong Forming's tax obligations, its financial difficulties and his potential personal liability for the company's tax debts. Instead of using some of the company's revenues to satisfy its tax obligations, however, the Court found that Mr. Ahmar made the conscious decision to have Strong Forming defer

payment of its HST debt, and to use these revenues to satisfy other obligations in the hopes of turning the company's financial position around. As the Tax Court observed, this was precisely the situation that confronted this Court in *Buckingham*, above.

[24] As this Court observed in *Buckingham*, where a company is facing financial difficulties “it may be tempting to divert these Crown remittances in order to pay other creditors and thus ensure the continuation of the operations of the corporation”. The Court held, however, that this was precisely the mischief that section 323 of the *Excise Tax Act* sought to avoid. This Court went on in *Buckingham* to state that the defence under section 323 “should not be used to encourage such failures by allowing a due diligence defence for directors who finance the activities of their corporation with Crown monies on the expectation that the failures to remit could eventually be cured”: both quotes from para. 49.

[25] As noted in paragraph 6 of these reasons, Mr. Ahmar testified that Rossclair failed to pay the HST component of the invoices rendered by Strong Forming for keeping employees on the job site. Because Rossclair never paid Strong Forming for the HST amounts invoiced, Mr. Ahmar submits that he did not use Crown monies to fund Strong Forming's operations and the Tax Court erred by failing to distinguish between HST that was collectible and HST that had been collected. This implies that the only goods and services that were provided by Strong Forming during the period between September 1, 2013 and November 30, 2014 were the services provided to Rossclair related to the six employees who were being kept at the jobsite, and that the monies received from Rossclair for these services were thus the only monies that were available to Strong Forming to discharge its HST debt.

[26] There is, however, no dispute that the net tax during the reporting periods in issue was \$183,180.75. There is no indication of the amount of input tax credits of Strong Forming for the relevant reporting periods. Since the rate of HST in Ontario was 13% at the relevant time, in order to generate this amount of net tax the taxable supplies made by Strong Forming during these reporting periods must have been at least \$1,409,083 (which would be the amount assuming no input tax credits). This would suggest that there were probably taxable supplies that were made by Strong Forming during this time, apart from the supply of services for which Strong Forming was invoicing Rossclair an amount equal to the payroll amount of these six employees plus HST.

[27] The Tax Court was, moreover, clearly alive to Mr. Ahmar's personal circumstances and those of Strong Forming, including the fact that Rossclair had failed to pay the HST component of Strong Forming's invoices. The Court evaluated Mr. Ahmar's explanation for the company's failure to pay its taxes in light of the governing jurisprudence, finding that he had been focused on curing the failure to remit, rather than on preventing that failure in the first place. The Tax Court thus concluded that Mr. Ahmar had not demonstrated that he had exercised the degree of care, diligence and skill necessary to prevent the failure to remit that would be exercised by a reasonably prudent person in comparable circumstances. Having applied the appropriate test, the Tax Court did not err in law in this regard.

[28] At the end of the day, Mr. Ahmar is really asking this Court to reweigh the evidence that was before the Tax Court and to come to a different conclusion with respect to his personal liability for the tax debt of Strong Forming. That is not the role of this Court on an appeal such as

this. The Tax Court's finding that Mr. Ahmar had failed to demonstrate that he was entitled to use the due diligence defence was one that was open to the Court in light of the record before it, the requirements of subsection 323(3) of the *Excise Tax Act* and the governing jurisprudence. Mr. Ahmar has not established that the finding was tainted by either an error of law or a palpable and overriding error.

5. Conclusion

[29] For the above reasons I would dismiss Mr. Ahmar's appeal. If the parties are unable to come to an agreement with respect to the issue of costs within two weeks of the receipt of this decision, they may provide the Court with submissions in writing, not to exceed three pages in length.

"Anne L. Mactavish"

J.A.

"I agree.

Wyman W. Webb J.A."

"I agree.

Donald J. Rennie J.A."

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

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RENNIE J.A.

DATED: MARCH 25, 2020

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