Docket: 2016-1515(GST)I

BETWEEN:

THE LATE ARUN SUD,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

Appeal heard on March 21, 2017, at Hamilton, Ontario.

Written submissions by both parties received in May 2017.

Before: The Honourable Justice Johanne D'Auray

Appearances:

Agent for the Appellant:	Raman Ayyar
Counsel for the Respondent:	Meaghan Mahadeo

JUDGMENT

The appeal from the assessment made under Part IX of the *Excise Tax Act*, notice of which is dated August 1, 2014, for the periods from January 1, 2003 to December 31, 2005, is dismissed without costs.

Signed at Ottawa, Canada, this 8th day of June 2017.

"Johanne D'Auray"

D'Auray J.

Citation: 2017 TCC 106
Date: 20170608
Docket: 2016-1515(GST)I

BETWEEN:

THE LATE ARUN SUD,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

REASONS FOR JUDGMENT

D'Auray J.

I. OVERVIEW

[1] Arun Sud (the "appellant") was the sole director and shareholder of 1186271 Ontario Inc. (the "Corporation").

[2] The Minister of National Revenue (the "Minister") assessed Arun Sud as a director of the Corporation on August 1, 2014 pursuant to section 323 of the *Excise Tax Act*[1] (the "*ETA*"). The appellant was assessed for an amount of $17,298.32 in respect of tax unremitted by the Corporation. The assessment covered the Corporation's unremitted tax from January 1, 2003 to December 31, 2005.

[3] Under subsection 323(1) of the *ETA*, if a corporation fails to remit an amount of tax, namely GST/HST, the directors of a corporation may be jointly and severally liable with the corporation to pay the amount owed.

[4] The appellant submits that the Minister did not assess him within the time limit prescribed by subsection 323(5) of the *ETA*. Subsection 323(5) of the *ETA* states that an assessment for an amount payable by a director of a corporation shall not be made more than two years after the person ceased to be a director.

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1 *Excise Tax Act*, RSC 1985 c E-15 at s 323 [*ETA*].

[5] The appellant submits that he had ceased to be a director of the Corporation when the Minister assessed him in 2014.

[6] The respondent submits that at the time of the assessment the appellant was still a director of the Corporation. Therefore, in assessing the appellant, the Minister was within the time limit prescribed by subsection 323(5) of the *ETA*.

[7] I was apprised by the appellant's representative, Mr. Ayyar, that Mr. Sud passed away at the end of May 2017 and that he did not have an estate.

II. REQUEST FOR AN AMENDMENT

[8] At trial, the respondent requested that the assumptions in the Reply to the Notice of Appeal be amended, as follows:

> Reply:
>
> > g) The company ceased operations in August 2005;
> >
> > h) The company's corporate status was cancelled on February 24, 2007
> >
> > j) The Appellant made an assignment in bankruptcy on October 24, 2002
> >
> > k) The Appellant was discharged from bankruptcy on March 11, 2005
> >
> > m) Prior to the corporation status being cancelled, the Appellant used his personal finances, including cash and credit cards, to keep the company running
>
> Amended Reply:
>
> > g) The company ceased business operations in August 2005;
> >
> > h) At all relevant times, the company's corporate status remained active with the Ontario Ministry of Government Services
> >
> > j) The Appellant filed a proposal on October 24, 2002
> >
> > k) The Appellant fully performed the proposal as of March 11, 2005 and a Certificate of Full Performance of Proposal was issued by the Trustee on March 18, 2005

> m) Prior to the company ceasing its business activities, the Appellant used his personal finances, including cash and credit cards, to keep the company running

[9] The request for this amendment was made orally at trial. Even though this appeal is proceeding under the informal procedure, amendments that are not only clerical changes should be made in advance, to give an opportunity for the appellant to contest them. In any event, the respondent cannot amend the assumptions of fact which were relied upon by the Minister to assess the appellant. The facts that the Minister had taken into account to assess the appellant maybe incorrect, but unless it is clear that the Minister did not assume these facts at the time of the assessment, I do not see how these assumptions can be amended without any evidence submitted at trial to this effect.

[10] That being said, the respondent is not bound by the assumptions of the Minister, she is entitled to prove otherwise, and she can provide evidence to prove that some of the facts upon which the Minister relied were incorrect.[2] This is what happened in this appeal, the respondent proved that appellant had not resigned as a director and that at the time of assessment in 2014, the Corporation had not yet been dissolved.

III. FACTS

[11] Prior to incorporating, the appellant was providing courier services as an employee of Dynamex Inc. Dynamex advised the appellant that it would be advantageous tax wise to operate his courier business as a corporation instead of as a proprietorship.

[12] Accordingly, the appellant incorporated 1186271 Ontario Inc. under the laws of Ontario on June 21, 1996 for the purpose of operating his courier and messenger business.

[13] However, it was clear from the appellant's testimony, that he did not fully understand the obligations that come with incorporating a corporation. The appellant had minimal knowledge with respect to tax matters.

[14] At all relevant times, the appellant was the sole director and shareholder of the Corporation.

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[2] *Continental Bank Leasing Corporation and Continental Bank of Canada v. The Queen*, [1993] 93 DTC 298 at para 27.

[15] Due to personal financial problems, the appellant filed a Proposal with his creditors on October 24th, 2002. The creditors accepted the Proposal on December 18th, 2002. Subsequently, the Court approved the proposal on February 24th, 2003.

[16] The Proposal was fully performed by the appellant by March 11, 2005 and a certificate of full performance was signed on March 18, 2005.[3]

[17] The Corporation's debt stems from its failure to remit tax. The Corporation failed to remit tax for the period, from January 1, 2003 to December 31, 2005.[4]

[18] The Corporation ceased business operations in August 2005. The last income tax return filed by the Corporation was for the 2007 taxation year and it was filed on July 19, 2008.[5]

[19] On November 2, 2006, the Minister assessed the Corporation for unremitted GST/HST. Following this assessment, the Corporation filed an appeal with this Court.

[20] On February 5, 2010, the Corporation and the Minister filed with this Court a Consent to Judgment. As a result of the Consent to Judgment, the Corporation was reassessed and owed an amount of $36,363.28 for unremitted GST/HST.[6] The Corporation did not repay this debt.

[21] On August 1, 2014, the Minister reassessed the appellant pursuant to subsection 323 of the *ETA* for an amount of $17,298.32 in respect of the Corporation's unpaid debt.

[22] The appellant never resigned as a director of the Corporation. The Corporation was eventually dissolved by the Ministry of Finance of Ontario by Notice of Dissolution effective October 24, 2016,[7] for failure to file its annual return and EFF declaration.

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3 Exhibit A-5, Certificate of full performance.

4 The Corporation failed to remit tax beginning in 2000, but the appellant was only assessed for the Corporation's failure to remit beginning in 2003.

5 Appellant's additional submissions, Corporate tax returns.

6 Exhibit A-10, Consent to judgment; Respondent's affidavit Tab D.

7 Exhibit R-4, Notice of dissolution.

[23] Accordingly, pursuant to subsection 241(4) of the *Ontario Business Corporations Act*[8] (the "*OBCA*") the Certificate of Incorporation was cancelled.[9]

IV. ISSUES

[24] Whether the Minister correctly assessed the appellant pursuant to subsection 323(1) of the *ETA* for part of the debt owed by the Corporation.

[25] Was the two-year time limitation period prescribed by subsection 323(5) of the *ETA* expired at the time of the assessment in 2014?

V. POSITION OF THE PARTIES

A. Appellant's position

[26] The appellant's representative submitted that the Corporation ceased its business operations in August 2005. As a result, the appellant did not act as a director of the Corporation after August 2005. Accordingly, the Minister's assessment in 2014 was out of time pursuant to the limits prescribed in subsection 323(5) of the *ETA*.

[27] Further, the appellant's representative stated that since the Corporation had stopped filing its annual return and EFF with the Ministry of Finance of Ontario in 2008, he was under the impression that the Corporation would automatically be dissolved within two years.

[28] Overall, the appellant's position is that he is not liable for the tax debt of the Corporation, since at the time of the assessment in 2014 the time limit to assess the appellant as a director had expired by virtue of subsection 323(5) of the *ETA*.

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8 Ontario *Business Corporations Act*, RSO 1990, c B 16 [*OBCA*].

9 Exhibit R-5, Notice of default.

B. Respondent's position

[29] The respondent submitted that at that time of the assessment in 2014, the appellant was still a director of the Corporation, even though the Corporation was not active. In addition, the appellant never resigned as director of the Corporation.

[30] The evidence established that the Corporation was not dissolved before 2016. Therefore, at the time of the assessment in 2014, the appellant was a director of the Corporation and the two-year time limit to assess the appellant under subsection 323(5) had not even begun. As a result, the appellant as a director was liable for the debt owed by the Corporation.

VI. LEGAL ANALYSIS

[31] The applicable provisions in this appeal are subsections 323(1) and 323(5) of the *ETA*. Subsection 323(1) of the *ETA* imposes liability on directors of a corporation, when the corporation fails to remit an amount of net tax. Subsection 323(1) reads as follows:

> 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.

[32] Subsection 323(5) of the *ETA* outlines the time limit for the Minister to assess under subsection 323(1). Subsection 323(5) reads as follows:

> Time limit
>
> (5) An assessment under subsection (4) of any amount payable by a person who is a director of a corporation shall not be made more than two years after the person last ceased to be a director of the corporation.

[33] The question to resolve in this appeal is whether the appellant ceased to be a director prior to the dissolution of the Corporation in 2016.

[34] There is a due diligence defense to liability under section 323, however, at trial this defense was not argued by the appellant and it was clear based on the evidence that a due diligence defense was not available.

A. Did the appellant cease to be a director?

[35] As addressed above, the Corporation was not dissolved until 2016. Therefore, the only way that the appellant will not be liable for the Corporation's debt is if it is found that the appellant ceased to be a director two years prior to the Minister's assessment in 2014. If the appellant ceased to be a director two years before the Minister's assessment in 2014, then the Minister would have been out of time when assessing in accordance with the limits prescribed by subsection 323(5).

[36] In order to determine if the appellant ceased to be a director of the Corporation, it is necessary to examine the rules applicable to directors in the *OBCA*.

[37] According to section 121 of the *OBCA*, a director ceases to hold office in the following situations:[10]

> 121 (1) A director of a corporation ceases to hold office when he or she,
>
> (a) dies or, subject to subsection 119 (2), resigns;
>
> (b) is removed in accordance with section 122; or
>
> (c) becomes disqualified under subsection 118 (1).
>
> (2) A resignation of a director becomes effective at the time a written resignation is received by the corporation or at the time specified in the resignation, whichever is later.

[38] In this appeal, the appellant was not disqualified under subsection 118(1) or removed in accordance with section 122 of the *OBCA*.

[39] As a result, the only manner in which the appellant could have ceased to hold office is if it is found that he resigned.

[40] Subsection 121(2) of the *OBCA* sets out the effective time of resignation. This provision has been interpreted to require resignation to be in writing and to be

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10 *OBCA*, *supra* note 8 at s 121.

received by the corporation. The Federal Court of Appeal emphasized the need for written resignation in *Chriss v R*.[11]

[41] The Court in *Chriss* held that the resignation date of directors requires certainty, and that merely a subjective intention to resign would not be sufficient. The Court stated:[12]

> It is thus self-evident that the status of directors must be capable of objective verification. Reliance on the subjective intention or say-so of a director alone would allow a director to plant the seeds of retroactive resignation, only to rely on it at some later date should a director-linked liability emerge. The facts of this case illustrate why subsection 121(2) of the *OBCA* has been drafted the way it is: the dangers associated with allowing anything less than delivery of an executed and dated written resignation are unacceptable.

[42] The Federal Court of Appeal went on to overturn the Tax Court's decision that allowed the resignation of the directors, since there was no written resignation.

[43] The decision in *Chriss* focuses on the need for written resignation that can be objectively verified. As a result, the subjective intention or thought process of a director cannot be used as evidence of resignation:[13]

> A director's belief that they have resigned has no correspondence or connection to the underlying purposes of subsection 121(2) of the *OBCA* and its emphasis on an objectively verifiable communication of a resignation to the corporation. To allow a subjective intention to suddenly spring to life, when, in the affairs of the corporation, or in the interests of the director, it is convenient to do so, would significantly undermine corporate governance.

[44] In this case, the appellant testified at the hearing that he did not ever formally resign from being a director. Even if the appellant had a subjective belief that he was no longer a director, this would not be sufficient to meet the requirements in section 121 of the *OBCA*.

[45] Further, the appellant was still involved with matters of the Corporation after operations ceased, including the Consent to Judgement on February 5, 2010.

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11 *Chriss v R*, 2016 FCA 236.
12 *Ibid* at para 14.
13 *Ibid* at para 19.

[46] In addition, the appellant cannot argue that he was no longer a director once the Corporation ceased operations. This Court has addressed this issue and held that it is not relevant to the determination of director's liability. In *Bremner v R*, the Court stated:[14]

> The fact that Excel ceased to carry on business in August is not really relevant. Directors of corporations have duties that survive the cessation of the business previously carried on.

[47] The facts in this appeal are consistent with the point stated in *Bremner*, as the appellant continued to manage the affairs of the Corporation well after business operations had ceased.

[48] Further, even if a corporation had ceased operations and gone into bankruptcy, this would not affect the status of an individual as a director.[15]

[49] The *OBCA* and the relevant jurisprudence have outlined strict requirements for the resignation of directors. In this case, the appellant never resigned as a director, and therefore would still be considered a director until the Corporation was dissolved in 2016.

B. Appellant's resignation as a director

[50] Even if it was found that the appellant did resign as a director, it is not clear that this resignation would even be valid.

[51] The appellant was the only director of the Corporation. Paragraph 115(2)(a) of the *OBCA* requires a non-offering corporation to have at least one director:[16]

> Board of directors
>
> (2) A corporation shall have a board of directors which shall consist of,
>
> > (a) in the case of a corporation that is not an offering corporation, at least one individual; and

[52] Since, no other director was elected, it is not clear that the appellant's resignation would even be effective.

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14 *Bremmer v R*, 2007 TCC 509 at para 28.
15 *Kalef v R*, [1996] 2 CTC 1.
16 *OBCA*, *supra* note 8 at s 115(2)(a).

VII. CONCLUSION

[53] The Corporation was dissolved by Notice of Dissolution effective October 24, 2016.

[54] The appellant was the sole director of the Corporation at all relevant times and never resigned as a director.

[55] To effectively resign, a director must provide written resignation to the corporation. Absent written resignation, a person would continue to be a director even if the corporation ceased business operations.

[56] In conclusion, since the appellant never resigned as a director, he remained a director of the Corporation until the Notice of Dissolution became effective on October 24, 2016. Therefore, the Minister correctly assessed the appellant as a director for the Corporation's debt.

[57] The appeal is therefore dismissed.

Signed at Ottawa, Canada, this 8th day of June 2017.

"Johanne D'Auray"

D'Auray J.

CITATION:	2017 TCC 106
COURT FILE NO.:	2016-1515(GST)I
STYLE OF CAUSE:	THE LATE ARUN SUD v HER MAJESTY THE QUEEN
PLACE OF HEARING:	Hamilton, Ontario
DATE OF HEARING:	March 21, 2017
REASONS FOR JUDGMENT BY:	The Honourable Justice Johanne D'Auray
DATE OF JUDGMENT:	June 8, 2017

APPEARANCES:

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Name:

Firm:

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