Docket: 2004-4287(GST)G

BETWEEN:

PAUL LECUYER,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

Appeal heard on June 28, 2007 at Thunder Bay, Ontario

Before: The Honourable Justice L.M. Little

Appearances:

Counsel for the Appellant:	Brian R. MacIvor
Counsel for the Respondent:	Penny L. Piper

JUDGMENT

The appeal from the assessment made under Part IX of the *Excise Tax Act*, notice of which is dated June 20, 2003 and bears number 60724 is allowed, with costs, in accordance with the attached Reasons for Judgment.

Signed at Vancouver, British Columbia, this 24th day of August 2007.

"L.M. Little"

Little J.

Citation: 2007TCC476
Date: 20070824
Docket: 2004-4287(GST)G

BETWEEN:

PAUL LECUYER,

Appellant,

And

HER MAJESTY THE QUEEN,

Respondent.

REASONS FOR JUDGMENT

Little J.

[1] 864333 Ontario Limited (the "Corporation") was a company incorporated under the Laws of the Province of Ontario. The Corporation carried on business as Superior Chipping. The Corporation was involved in the production and sale of wood chips. The wood chips were sold to its only customer, Avenor Pulp and Paper Ltd ("Avenor").

[2] During the period in question the Appellant was the President of the Corporation. The Appellant and his spouse were the Directors of the Corporation. On June 12, 1998, the Appellant's spouse resigned as a Director of the Corporation leaving the Appellant as the sole Director.

[3] On December 13, 1995 West Bay Developments (Thunder Bay) Limited ("West Bay") became the sole shareholder of the Corporation. The Appellant owned the shares of West Bay.

[4] The Appellant owned the majority of the shares in Gravel and Lake Services Ltd.

[5] Commencing with the reporting period ending June 30, 1996, the Corporation failed to file Goods and Services Tax ("GST") returns as they became due.

[6] In November and December 1997, the Corporation filed GST returns for the six consecutive quarters commencing June 30, 1996 and ending September 30, 1997.

[7] The net tax due was not remitted on the filing of the GST returns referred to in the preceding paragraph.

[8] The GST return for the period ending December 31, 1997 was late filed in February 1998, and was a credit return. The credit was applied to the Corporation's outstanding tax liability.

[9] The GST return for the period ending March 31, 1998 was late filed in June 1998 and the net tax due for that amount was not remitted.

[10] The GST return for the period ending June 30, 1998 was late filed in September 1998 and was a credit return. The credit was applied to the Corporation's outstanding tax liability.

[11] Nil GST returns were filed for the period September 1998 to June 1999.

[12] No GST returns have been filed after the return filed for the period ending June 30, 1999.

[13] The records of the Canada Revenue Agency (the "CRA") indicate that by March 6, 2003, the Corporation owed GST, penalty and interest totalling $209,559.04.

[14] On April 22, 1999 the Corporation's debt was certified by officials of the CRA in the Federal Court Trial Division (See Exhibit R-1, Tab 4).

[15] On June 4, 2003 a writ of execution in respect of the GST assessed against the Corporation was returned unsatisfied in whole.

[16] On June 20, 2003 the Corporation's debt was $211,821.51.

[17] On June 20, 2003 the Minister of National Revenue (the "Minister") issued a Notice of Assessment against the Appellant. The amount assessed against the Appellant was $211,821.51. The amount of $211,821.51 was the amount originally assessed against the Corporation.

B. ISSUES

[18] The issue before the Court is whether the Appellant exercised the degree of care, diligence and skill to prevent the failure of the Corporation to remit GST that a reasonably prudent person would have exercised in comparable circumstances.

C. ANALYSIS AND DECISION

[19] Section 323 of the *Excise Tax Act* (the "*Act*") reads as follows:

> **(1) Liability of directors** -- 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.
>
> **(2) Limitations** -- 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.
>
> **(3) Diligence** -- 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.

> **(4) Assessment** -- The Minister may assess any person for any amount payable by the person under this section and, where the Minister sends a notice of assessment, sections 296 to 311 apply, with such modifications as the circumstances require.
>
> **(5) Time limit** -- 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.
>
> **(6) Amount recoverable** -- Where execution referred to in paragraph (2)(a) has issued, the amount recoverable from a director is the amount remaining unsatisfied after execution.
>
> **(7) Preference** -- Where a director of a corporation pays an amount in respect of a corporation's liability referred to in subsection (1) that is proved in liquidation, dissolution or bankruptcy proceedings, the director is entitled to any preference that Her Majesty in right of Canada would have been entitled to had the amount not been so paid and, where a certificate that relates to the amount has been registered, the director is entitled to an assignment of the certificate to the extent of the director's payment, which assignment the Minister is empowered to make.
>
> **(8) Contribution** -- A director who satisfies a claim under this section is entitled to contribution from the other directors who were liable for the claim.

[20] Section 323(3) of the *Act* refers to the degree of care, diligence and skill that a reasonably prudent person would exercise in comparable circumstances. It therefore follows that the question is whether the Appellant acted in a reasonable and prudent manner.

[21] The nature of the failure of the Corporation was the unforeseen circumstances associated with its only customer, Avenor. Avenor was a large multi-national enterprise, and it had unilaterally indicated to the Corporation in December 1996, that it had overpaid or over advanced amounts to the Corporation totalling $383,000.00 (see Exhibit A-1, Tab 10).

[22] The Appellant, Mr. Lecuyer, was of the view that Avenor had short changed the Corporation by a significant amount ($1.6 million). The combination of those two circumstances led to the ultimate failure of the Corporation to remit the GST that is now sought from Mr. Lecuyer directly under section 323, of the *Act*.

[23] Mr. Lecuyer testified. I found him to be a credible, direct and forthright witness. The evidence indicates that at the time West Bay purchased the shares of

the Corporation, he was cognizant of the financial difficulties because the Corporation owed Gravel & Lake Services Ltd. some money. However, the Appellant did not know the extent to which there was a serious financial problem.

[24] Tab 3 of the Appellant's Exhibit A-1 indicates that these over advanced amounts, of which Avenor was complaining, related to a period in 1994 at a time when Mr. Lecuyer was not the director, not an officer and not a shareholder of the Corporation.

[25] As noted above, when West Bay purchased the shares of the Corporation in December 1995, Mr. Lecuyer was aware of the financial difficulties facing the Corporation. However, he did not appreciate that Avenor was not only short changing the company but indicated in December 1996 that it had advanced too many dollars to the Corporation.

[26] Ms. Hansen, an official of the CRA, stated that the first payment that was actually missed by the Corporation relates to a period subsequent to the December 1996 time period.

[27] The payment of the $45,000.00 in GST that was due on January 31, 1997 is a period subsequent to when Avenor said to the Corporation "I am sorry, you owe us $383,000.00".

[28] Mr. Lecuyer, through his other company, (Gravel & Lake Services Ltd.), did make payments to the CRA on behalf of the Corporation. Mr. Symington, the Corporation's accountant, testified that Gravel and Lake Services Ltd. had paid in excess of $150,000.00 of GST to the CRA. In other words efforts were made by the Appellant to direct payments on behalf of this deficient balance.

[29] Exhibit R-1, Tab 9 is a copy of a letter from Mr. Lecuyer to the CRA. In this letter Mr. Lecuyer makes the following comments:

> This is in response to your letter of June 9, 2002.
>
> Please note that I am the sole Director of the company and have been since the change in ownership on or about December 15, 1995.
>
> I have and will continue to use Due Diligence in matters concerning the above noted company. (i.e. the Corporation) I have made every attempt to meet the financial obligations and reporting requirements of the company since I became

> the Owner & Director. Not only with the Levels of Government but with Financial Institutes, Trade Payables and the employees of the Company.
>
> I have not taken any salaries personally out of this company since I acquired it to this date.
>
> I have made every effort to turn the company around since I took over and turn it into a viable operation. The company was in a deficit equity position of $88,000.00 unknown to me at the time of take over.
>
> In 1998 additional financial pressure came when the Bank withdrew its operating facilities and we had to pay down all its long term debt which was fully secured.
>
> In early 1999 the chipping plant became totally disabled and beyond repair and the loss was not covered by insurance. I had lost the ability to generate revenue completely from this company.
>
> We then had to satisfy our creditors from our other operations namely Gravel and Lake Services Ltd which has put a severe handicap on this operation where we employ 15 – 20 people.
>
> Note: From Gravel and Lake we have managed to pay in excess of $160,000.00 towards the debt owed to the Federal Government by 864333 Ont Ltd in 2000 & 2001.

[30] In *McKinnon v. The Queen*, 2003 TCC 884, Associate Chief Justice Bowman (as he then was) indicated at paragraph 18:

> Another argument that is frequently made in these cases and which I regard as fallacious runs somewhat as follows: "You were stealing from money held in trust for the Crown to run your business and pay your employees". This is, I think, an inaccurate and unfair characterization. It implies that there is a separate account (or cookie jar if you will) into which the payroll deductions are put and then withdrawn to pay the company's expenses. The fact is there is no cookie jar, real or notional, and no money to put into it even if there were. The net amount paid to the employees is all there is to go around. The employees, suppliers and other creditors are paid because if they are not the business will be closed down. Where, as here, unforeseen supervening events make it impossible for the payroll deductions to be paid to the government, I do not think there is anything the appellant could reasonably have done to ensure the payment.

[31] In this situation the Appellant, Mr. Lecuyer, was not even doing that, i.e. he was not taking funds from the Corporation. Mr. Symington, his accountant, testified that, Gravel & Lake Services Ltd. was making the payroll of the Corporation and

covering the expenses for the Corporation. In other word the Corporation was not taking amounts that were held in trust for GST.

[32] Mr. Lecuyer also indicated that he was not receiving any remuneration from the Corporation. As noted above, in paragraph 29, no salary or wages were received by him. I refer again to Justice Bowman's comments in *McKinnon*:

> "Where, as here, unforeseen supervening events make it impossible for the payroll deductions to be paid to the government, I do not think there is anything the appellant could reasonably have done to ensure the payment."

[33] I would also note that if we were to change the phrase "payroll deductions" to "remittances" that is just as applicable in this situation as it is in the *McKinnon* case. In this case, we have unforeseen circumstances. Avenor decides it is owed money by Superior Chipping and, at the same time, Avenor is not prepared to recognize the $1.6 million that Mr. McVittie had calculated that it owed to the Corporation. (Note: Mr. McVittie was the former accountant of Avenor).

[34] Another comment made by Associate Chief Justice Bowman in *McKinnon* (*supra*) is applicable to this case. At paragraph 14 of *McKinnon*, Bowman A.C.J. said:

> A passage which I find particularly helpful is that found in *Smith v. The Queen*, 2001 D.T.C. 5226 (Fed. C.A.) at p. 5231, paragraphs [31] and [32], where Sharlow J.A. said:
>
> > [31] The Tax Court Judge appears to have recognized the efforts made by Mr. Smith in an after June of 1995, but he noted, at paragraph 138:
> >
> > > The actions that he took did not have the effect of ensuring that Revenue Canada received any of the monies here.
> >
> > And, at paragraph 142:
> >
> > > The Court is satisfied that the actions taken by the Appellant did nothing to prevent the failure.
> >
> > [32] It appears to me that these comments reveal another error in the Tax Court Judge's application of the due diligence defence. A director is required only to act reasonably in the circumstances. The fact that his efforts are unsuccessful does not establish that he has failed to act reasonably. (Emphasis added)

[35] I also refer to *Kraeker v. The Queen*, 2007 TCC 31. In that case, my colleague, Justice Campbell Miller referred to the *McKinnon* decision (*supra*) and said:

> "Turning then to the facts before me, what did Messrs. Kraeker and Johnson do to prevent the failure that a reasonable prudent person in comparable circumstances would have done? Did they make reasonable business decisions? Or, more pointedly, as put by Chief Justice Bowman in *McKinnon* – due to unforeseen events, was there anything more they could have done?"

[36] In this situation, I am convinced that there was not much more that Mr. Lecuyer could have done with respect to the Corporation's dealings with Avenor. Avenor was the Corporation's only customer. Mr. Lecuyer thought they had shorted the Corporation financially to the extent of $1.6 million. Nonetheless, in December 1996 Avenor viewed themselves to have been shorted $383,000.00 by the Corporation. The financial position with Avenor put the Corporation in an unfortunate position and it subsequently failed.

[37] I have reviewed the evidence very carefully and I have concluded that the Appellant exercised the degree of care, diligence and skill to prevent the failure of the Corporation to remit the GST that a reasonably prudent person would have exercised in comparable circumstances. I have therefore concluded that the due diligence test contained in subsection 323(3) has been satisfied and that the Appellant is not obliged to pay the GST assessed against the Corporation.

[38] The appeal from the assessment made under the *Act* is allowed with costs and the assessment made under section 323 of the *Act* is vacated.

Signed at Vancouver, British Columbia, this 24th day of August 2007.

"L.M. Little"

Little J.

CITATION:	2007TCC476
COURT FILE NO.:	2004-4287(GST)G
STYLE OF CAUSE:	Paul Lecuyer and Her Majesty the Queen
PLACE OF HEARING:	Thunder Bay, Ontario
DATE OF HEARING:	June 28, 2007
REASONS FOR JUDGMENT BY:	The Honourable Justice L.M. Little
DATE OF JUDGMENT:	August 24, 2007

APPEARANCES:

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Counsel for the Respondent:	Penny L. Piper

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