

GST & Commodity Tax

©2008 THOMSON CANADA LIMITED

ALL RIGHTS RESERVED. NO PART OF THIS PUBLICATION MAY BE REPRODUCED, STORED IN A RETRIEVAL SYSTEM, OR TRANSMITTED, IN ANY FORM OR BY ANY MEANS, ELECTRONIC, MECHANICAL, PHOTOCOPYING, RECORDING, OR OTHERWISE, WITHOUT THE PRIOR WRITTEN PERMISSION OF THE PUBLISHER.

THIS PUBLICATION IS DESIGNED TO PROVIDE ACCURATE AND AUTHORITATIVE INFORMATION. IT IS SOLD WITH THE UNDERSTANDING THAT (1) THE AUTHORS, EDITORS AND PUBLISHER ARE NOT RESPONSIBLE FOR THE RESULTS OF ANY ACTIONS TAKEN ON THE BASIS OF INFORMATION IN THIS WORK, NOR FOR ANY ERRORS OR OMISSIONS; AND (2) THE PUBLISHER IS NOT ENGAGED IN RENDERING LEGAL, ACCOUNTING OR OTHER PROFESSIONAL SERVICES. IF LEGAL ADVICE OR OTHER EXPERT ASSISTANCE IS REQUIRED, THE SERVICES OF A COMPETENT PROFESSIONAL SHOULD BE SOUGHT.

WE ACKNOWLEDGE THE FINANCIAL SUPPORT OF THE GOVERNMENT OF CANADA, THROUGH THE PUBLICATIONS ASSISTANCE PROGRAM (PAP), TOWARD OUR MAILING COSTS.

PAP REGISTRATION #8919

PUBLICATIONS MAIL AGREEMENT #1410180

EDITORS:

JONATHAN SPENCER, C.A.
THORSTEINSSONS LLP
EMAIL: jspencer@thor.ca

CONTENT EDITOR: CHRISTY PENTLAND

SUBSCRIPTION RATE: \$310 PER YEAR
PLUS SHIPPING, HANDLING AND GST
10 ISSUES PER YEAR

ISSN 0847-3528

THOMSON

CARSWELL

ADDRESS ALL SUBSCRIPTION INQUIRIES TO
ONE CORPORATE PLAZA, 2075 KENNEDY ROAD
TORONTO, ONTARIO M1T 3V4
TELEPHONE (416) 609-3800 FROM TORONTO
1-800-387-5184 FROM ELSEWHERE IN CANADA
FAX (416) 298-5094
www.carswell.com
Email: carswell.orders@thomson.com

ways to raise taxes. Toronto tested its new taxation powers in 2007 and produced two new taxes, one of which is the land transfer tax. Practitioners involved in Toronto transactions will need to be aware of the new tax.

GST/HST CASES

THE AUJLA DECISION: ARE DIRECTORS LIABLE WHEN A CORPORATION IS REVIVED?

Jamie Wilks

McMillan Binch (Toronto)

jamie.wilks@mcmbm.com

In *Aujla*¹, the Tax Court of Canada considered whether a revived company's directors (or at least former directors) could be derivatively liable for GST liabilities under section 323 of the *Excise Tax Act* (the "ETA").

In particular, does the revival of a dissolved company resuscitate the Minister of Revenue's rights to assess individuals in their capacity as directors of the company?

¹ (2007), [2007] G.S.T.C. 187, 2007 TCC 764, 2007 CarswellNat 4456 (T.C.C.) At the date of writing, the Crown has appealed the decision to the Federal Court of Appeal.

The Facts

Amarjit and Harjinder Aujla (the "Purported Directors") were directors of Aujla Construction Ltd. (the "Company"). The British Columbia ("BC") Registrar of Companies (the "Registrar") struck the Company from the Register of Companies (the "Register") and dissolved the Company pursuant to section 257 of the *BC Company Act*, for failure to file annual returns.

On February 20, 2003, the Attorney General of Canada, on behalf of the federal Crown, applied to the BC Supreme Court for an order restoring the Company to the Register; the BC Supreme Court allowed the application and so ordered (the "Revival Order"). On March 6, 2003 the Registrar restored the Company on the Register for the two-year period ending March 5, 2005 pursuant to the *Company Act*.

The Crown had revived the Company to pursue collection action against the Company. The Company's omission in its application to any reference to pursuing collection action against the Purported Directors would prove important in the ultimate resolution of this case. Prior to the Company's dissolution on March 5, 1999, Revenue Canada assessed the Company on March 20, 1998 for failure to remit close to \$200,000 of net tax for reporting periods between January 1, 1993 and December 31, 1995.

On June 17, 2003, during the Company's two-year revival period, the Federal Court certified the amount payable by the Company pursuant to section 316 of the ETA and execution for this amount was returned unsatisfied. Having met the conditions in paragraph 323(2)(a) of the ETA to assess directors, Revenue Canada proceeded to assess the Purported Directors by Notices of Assessment dated September 4, 2003.

The Relevant Provincial Corporate Law

As is so often the case in director's liability cases, the relevant provincial corporate law plays a vital role in determining the outcome. Pursuant to subsection 262(2) of the *BC Company Act*, when the court orders a company restored to the Register, "the company is deemed to have continued in existence, . . . and proceedings may be taken as might have been taken if the company had not been cancelled." In crafting its order under section 262, a court has the authority under section 263 of the *Company Act* to "give directions and make provisions it considers appropriate for placing the company. . . and every other person in the same position, as nearly as may be, as if the company had not been dissolved. . . , but, unless the court otherwise orders, the order is without prejudice to the rights of parties acquired before the date on which the company. . . is restored to the register." The Revival Order contained a similar "without prejudice" clause.

The Purported Directors' Arguments

The Purported Directors argued that the Company's restoration was "without prejudice" to their rights to immunity from assessment that existed immediately prior to the restoration. Upon the Company's dissolution on March 5, 1999, the

Purported Directors ceased to be the Company's directors. Once a Company is no longer in existence, it cannot have directors. Since Revenue Canada issued its assessments more than two years after the Purported Directors ceased to be directors, the assessments issued against the Purported Directors under subsection 323(4) of the ETA were beyond the statutory limitation period (i.e., beyond the allowed time-period for issuing the assessments) and invalid under subsection 323(5) of the ETA.

The Crown's Arguments

The Crown countered as follows. Upon the Company's restoration to the Register, it is deemed to have continued in existence as if the Company never ceased to exist. By corollary, the Purported Directors never ceased to be directors, so the assessments against the Purported Directors are validly issued, as the two-year limitation period under subsection 323(5) had not begun to run at the time the assessments were issued. The Crown also argued that the "without prejudice" provision under section 263 of the *Company Act* and in the Revival Order only applies to rights as between the Company and other parties, and not as between Revenue Canada and the Purported Directors. According to the Crown, section 130 of the *Company Act* provided all the ways in which a director may cease to be a director. Involuntary dissolution of the Company was not listed in the section 130.

The Tax Court's Findings

The Tax Court found that section 130 of the *Company Act* did not provide an exhaustive list of all the ways a director may cease to be director. The court found it significant that the Revival Order did not say. Although section 263 of the *Company Act* authorized the BC court making the Revival Order under section 262 "to place the directors in the same position as if the company had not been dissolved," it did not do so. Instead, the Revival Order stated that the Company "is restored. . .for the purpose of enabling the Minister of National Revenue to facilitate the assessment and collection of the Goods and Services Tax debt owing by" the Company to the federal Crown. The Tax Court found it "significant. . .that this statement of purpose of the order does not include facilitating the assessment and collection of debt owing by each of the two appellants, but only that owing by the company." Further, if the Purported Directors were to be affected by the Revival Order, then it would be expected, as a procedural necessity, they should have received notice of application for the order (which apparently they did not).

For all the above reasons, the Tax Court found that the Purported Directors ceased to be directors when the Registrar struck the Company from the Register and dissolved it on March 5, 1999. Since they were assessed more than two years after ceasing to be directors, the assessments were beyond the two-year statutory limitation period under subsection 323(5) of the ETA.

Accordingly, the Purported Directors' appeals were allowed, with costs, and the assessments against the Purported Directors were vacated.

Other Jurisprudence

In the decision in *Leger v. R.*,² released earlier in 2007 than *Aujla*, the Tax Court confronted a similar issue, but reached the opposite conclusion. Revenue Canada assessed Dr. Gabriel Leger as a director of Richard Security Limited ("RSL") for failure to remit payroll source deductions pursuant to section 153 of the *Income Tax Act* (the "ITA") and net tax for GST/HST reporting periods pursuant to subsection 228(2) of the ETA.

The Tax Court ruled against Dr. Leger on the issue of whether he had ceased to be a director as the result of RSL's dissolution on March 9, 1998 under the New Brunswick ("NB") *Business Corporations Act* for failing to file its annual returns. As RSL's revival on September 18, 1998 was retroactive to the date of its dissolution on March 9, 1998, Dr. Leger did not cease to be a director on RSL's dissolution. According to the court's interpretation of subsection 136(5) of the NB *Business Corporations Act*, as supported by the case law, RSL's revival was meant to restore it to the same state that it would have had if the dissolution had never occurred. Subject to certain limitations, subsection 136(5) specifically provides a "corporation . . . has all the rights and privileges and is liable for the obligations that it would have had if it had not been dissolved." Accordingly, Dr. Leger could not rely on the two-year statutory limitation period for assessments against directors in subsection 227.1(4) of the ITA and subsection 323(5) of the ETA.

This ITA provision, like subsection 323(5) of the ETA, restricts the Minister of Revenue from assessing a person more than two years after ceasing to be a director.

Conclusion

Currently, there is conflicting jurisprudence on whether a corporate revival has retroactive curative effect insofar as restoring individuals to their status as directors of the company as of the date of dissolution. It may be an issue that needs to be resolved by a higher court. It may also depend on the particular facts and underlying provincial law in the particular case. For example, in *Aujla*, the Revival Order's express purpose was to facilitate assessment and collection by the Minister of a GST debt owing by the Company (not the directors). On the other hand, the Crown could argue that the purpose of the derivative GST assessments against the Purported Directors was to facilitate assessment and collection of the GST debt owing by the Company.

It is not only the Crown that might wish to revive a company and reinstate its directors to pursue GST debt collection. A part of its collection strategy, a supplier seeking to recover GST from a dissolved corporate customer might resort to an application to revive the company and reinstate its directors and officers. Corporate revival might, therefore, enhance collection prospects in private disputes. On the other hand, it might be easier to enforce private collection against the former principals of a company where there is no corporate shell behind which to hide.

² 2007 CarswellNat 1960, [2007] G.S.T.C. 82, [2007] 5 C.T.C. 2246, 2007 D.T.C. 1121 (Eng.), 2007 TCC 322.