

SUPERIOR COURT
(Commercial Division)

CANADA
PROVINCE OF QUÉBEC
DISTRICT OF MONTRÉAL
N°: 500-11-042345-120

DATE : APRIL 3, 2012

PRESIDING : THE HONOURABLE MARK SCHRAGER, J.S.C.

IN THE MATTER OF THE PROPOSED PLAN OF COMPROMISE AND
ARRANGEMENT OF :

AVEOS FLEET PERFORMANCE INC./
AVEOS PERFORMANCE AÉRONAUTIQUE INC.

and

AERO TECHNICAL US, INC.

Insolvent Debtors/Petitioners

and

FTI CONSULTING CANADA INC.

Monitor

REASONS FOR JUDGMENT DELIVERED ORALLY
ON MARCH 30, 2012

JS 1319

[1] Should a debtor company under the Company Creditors Arrangement Act¹ (« CCAA ») be obliged to remit sales taxes collected with regard to periods prior to the date of the filing of the motion seeking an initial order under the CCAA ?

[2] The Aveos Fleet Performance Inc./Aveos Performance Aéronautique Inc., (the « Debtor ») has filed a motion seeking an amendment to the initial order issued by the undersigned on March 19, 2012 that would relieve it of such obligation. The initial order included an order requiring such a payment.

¹ R.S.C., 1985, c. C-36.

FACTS

[3] Pursuant to the motion as filed by the co-Petitioners, the initial order issued by the undersigned under the CCAA included paragraph 18b) which reads as follows :

« ORDERS that the Petitioners shall remit, in accordance with legal requirements, or pay :

b) all goods and services or other applicable sales taxes (collectively, « Sales Taxes ») required to be remitted by the Petitioners in connection with the sale of goods and services by the Petitioners, but only where such Sales Taxes are accrued or collected after the date of this Order or where such Sales Taxes were accrued or collected prior to the date of this Order but not required to be remitted until on or after the date of this Order. »

[emphasis added]

[4] The Debtor now seeks to amend this paragraph by striking the words underlined by the Court.

[5] The terms of the order were requested by the Debtor. Counsel explains that when the initial order was filed, the Debtor intended to continue its operations, at least in part.

[6] However, in the hours following the issuance of the initial order, the Debtor has stated that it was unable to obtain the accommodations sought from its principal customer, Air Canada. Given this situation, and the fact that the expenses of continuing operations were calculated to be \$500,000 per day, the board of directors of the Debtor decided to completely shut down its remaining operations and lay-off all remaining employees but for those required to assist in the liquidation of the Debtor's assets.

[7] Also, given the foregoing situation, all directors resigned but for one. The remaining director signed the affidavit in support of the Debtor's motion for the appointment of a chief restructuring officer (« CRO »), The appointment of a CRO was sought because of the directors' resignations and « to conduct in an orderly fashion the liquidation of the assets of Aveos while being in a position to eventually consider any other proposal that may be made to the company in connection with a potential restructuring of the latter » (para. 16 Motion for appointment of a CRO dated March 20, 2012).

[8] The motion for the appointment of a CRO was granted by the undersigned on March 20, 2012 and Mr. Jonathon Solorsh of the firm Ril Group Inc. was appointed CRO of the Debtor.

[9] The undersigned is informed that the remaining director of the Debtor subsequently resigned.

[10] The Court was informed by counsel that there is approximately \$2 million of sales taxes to be remitted on March 30, 2012 and another \$1 million in the week following.

[11] The Debtor submits the following in support of the motion :

1. the wording inserted in paragraph 18b) of the initial order by the Debtor was so inserted given the view that the operations would continue and that sales tax would continue to be remitted to the government in the ordinary course of business;
2. the amount of sales taxes collected are in respect of the period prior to the filing. In point of fact the amounts in question are due in respect of the period ending February 29, 2012;
3. as a matter of law, the amounts are not subject to any deemed trust;
4. the attorneys of both the Canada Revenue Agency and the Ministère du Revenu du Québec, duly served with the present motion have confirmed by letters filed with the Court that they do not contest the motion;
5. no other party on the service list contests the motion.

DISCUSSION

[12] The Supreme Court of Canada has confirmed that section 37 (formerly section 18.3) of the CCAA takes precedence over the deemed trust provisions of the Excise Tax Act² and any similar provincial legislation such that as the Debtor's attorney contends, the amounts of sales taxes at issue are not subject to any statutory deemed trust in favour of a government³.

² R.S.C., 1985 E-15.

³ *Century Services Inc. v. Canada (A.G.)*, 2010 3 S.C.R. 379.

[13] Moreover any claim by the taxing authorities for such amounts would be unsecured⁴.

[14] If the Debtor were to eventually become a bankrupt under The Bankruptcy and Insolvency Act « (BIA) »⁵ the date of such bankruptcy would be March 19, 2012 – ie the date of the initial order. In such regard reference is made to the definitions of « claim provable » under the CCAA and the BIA and the definition, in the BIA of the « date of initial bankruptcy event »⁶. Thus, the amount of sales taxes collected prior to the bankruptcy in respect of periods prior to the bankruptcy but not remitted on the date of the initial bankruptcy event and not subject to a non-statutory trust would be unsecured claims in such a bankruptcy⁷. These amounts should be treated as such and be payable under the terms of an eventual arrangement filed by the debtor, if any, or in a bankruptcy according to the rank established under the BIA.

[15] Given the legal status of such a claim and the Debtor's inability to continue its operations which was not known to the Debtor at the initial filing, it is understandable that the Debtor does not wish to make the payment and seeks an amendment to the initial order. The Court is mindful of the cash position of the Debtor which is extremely tight. Accordingly the payment not strictly required by law or by business exigencies should not be made. This Court will exercise its discretion under section 11 of the CCAA to make the appropriate order or, in this instance, to amend the initial order.

[16] The other factor motivating the Court grant the motion is the situation of the employees. They have not been paid wages for the period immediately preceding the shutdown of the Debtor's operations nor have they received other amounts which would become due following a layoff or a termination of employment. Easing the strain on the Debtor's cash flow can only help bring about a favourable outcome for the employees in this regard. The Court has made it known to the Debtor, the monitor and the lead secured creditor that it sees a payment of amounts due to employees in the short or medium term as a priority.

[17] **FOR ALL OF THE FOREGOING REASONS, THE COURT :**

[18] **GRANTED** the Motion for an amended and restated initial order without costs and **PERMITTED** the amendment of the initial order by the striking of the following words from section 18 b).

⁴ Section 38 CCAA; see also Section 86(1) BIA.

⁵ R.S.S. 1985 c. B-3.

⁶ See Section 2 CCAA and Sections 2 and 121 BIA.

⁷ *Deputy Minister of Revenue of Quebec v. Caisse populaire Desjardins de Montmagny*, [2009] 3 S.C.R. 286.

« or where such Sales Taxes were accrued or collected prior to the date of this Order but not required to be remitted until on or after the date of this Order ».

[19] For purposes of clarity section 18b) of the initial order, now reads as follows :

« 18. ORDERS that the Petitioners shall remit, in accordance, with legal requirements to pay, or pay :

b) all goods and services or other applicable sales taxes (collectively, « Sales Taxes ») required to be remitted by the Petitioners in connection with the sale of goods and services by the Petitioners, but only where such Sales Taxes are accrued or collected after the date of this Order; »


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