Citation: 2009TCC164
Docket: 2008-1530(GST)I

BETWEEN:

THOMAS RALPH JARROLD,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

REASONS FOR JUDGMENT
(Delivered orally from the Bench at Vancouver, British Columbia
on March 3, 2009)

Margeson J.

[1] The question before the Court at this time is whether or not the Appellant, as a director of the Company, Jarrold and Associates, was responsible for unremitted net taxes owing by the Company to the Minister for the years in question and for the amount as referred to by the Minister in the assessment.

[2] The Minister of National Revenue's position is that the Appellant is liable as a Director of Jarrold and Associates for the unremitted net taxes of $8,027.21 together with the related penalties and interest for the periods in issue.

[3] The Appellant's position is, of course, that he is not responsible for those and he makes a number of arguments. The Court will try to deal with them individually.

[4] Counsel for the Respondent has argued that the first issue, as set out in the Reply, was whether or not there was unreported – unremitted – net taxes for which the Appellant here – individual Appellant – could be responsible. The Court is satisfied that the evidence is quite clear: that there was unremitted net taxes in the amount as set out in the Reply on the basis of sections 225 and 228 of the *Excise Tax Act*, and that those amounts are correct. The Court is not satisfied there is any

evidence before it whatsoever, that would rebut the Minister's presumption and evidence that these were the amounts of net taxes which were unremitted on behalf of the Company.

[5] Counsel referred to the case of *Zaborniak v. Canada*, [2004] G.S.T.C. 110 (T.C.C.) at Tab 18. This has to do with the issue as to whether or not a director can successfully attack the underlying assessment. This case was decided by Justice Bowie and as counsel noted there is some issue as to whether or not the underlying assessment can be attacked.

[6] This Court decided in a number of cases that the underlying assessment cannot be attacked. Justice Bowman decided that it can be and he said that it depends on the type of case. The case before Justice Bowman was under section 160 of the *Income Tax Act* where a property was transferred by one person to another who owed taxes. That is an entirely different type of case, according to him.

[7] Justice Bowie, in his decision, said:

> To find that the Appellants in this case have a right to dispute the quantum of the judgment debt would require that I add to subsection 323(1), by implication, the words "or such lesser amount as the corporation might have been found liable to remit following a successful appeal of its assessment". I simply have no mandate to do that. I am in agreement with the conclusions reached by Garon C.J. and Tardif J. I note that these decisions have been criticized and described as "not … good law". I disagree. The policy is certainly a legitimate subject for criticism, but that criticism should be directed to Parliament, for it is there and not in the Court that policy is formulated:

[8] There may be good reasons why one should not be allowed to attack the underlying assessment and, on the basis of what Justice Bowman said, there might be good reasons why one should be allowed to attack the underlying assessment.

[9] This Court's decision is that you cannot attack the underlying assessment no matter what the reason is. In this particular case, the Court is satisfied that it can distinguish the facts here from the facts that Justice Bowman considered in his case. Here, certainly, there would not be any basis for the Appellant arguing that he could not attack the original assessment when it was made, because he was not prohibited from looking at the books and he was not prohibited from finding out that the money was owing, or that the taxes were not being paid, because all that subject matter was within his personal knowledge. As a matter of fact he, as a sole

director had complete control over them so nobody would have been in a better position that he would be to know what was going on. The Court is satisfied on the basis of his evidence that he certainly was in a position to know.

[10] On that issue then, the Court decides that the underlying assessment cannot be attacked here. There is no reasonable basis for attacking the assessment here even if as a general principal of law it was open to be attacked.

[11] Counsel, in her argument, referred to *Scavuzzo v. Canada*, [2005] T.C.J. No. 620 (T.C.C.), in that respect as well. But again, as indicated, that was a section 160 assessment and Justice Bowman found as he did. The Court has declined to accept that argument. It prefers to take Justice Bowie's, Justice Tardif's, Justice Garon's and this Court's earlier decisions that the underlying assessment cannot be attacked.

[12] Counsel for the Respondent said here that the Appellant should not be allowed to attack or question the assessment because he had all the ability to question it, he had charge of the records at the time of the assessment, he is an accountant, he was aware of the circumstances, and he did not attack the assessment. Further, he has not rebutted the amounts that are referred to under section 221, subsection 225(1) and subsections 228(1) and (2). This Court is satisfied on the basis of the evidence that those assessments were properly made. The amounts were either collected and not remitted, or not collected. The problem remains the same.

[13] Counsel referred to the case of *Tatarnic v. Canada*, [1997] G.S.T.C. 54 (T.C.C.), which is authority for the proposition that the onus is on the Appellant to establish on the balance of probabilities that the reassessment, as it relates to a liability under the *Excise Tax Act*, is in error. This Court is satisfied on the basis of the evidence given here that no such evidence has been forthcoming. It is satisfied that if the assessment is to be attacked, there has to be evidence which goes to the root of that assessment to show that it was incorrect. Such evidence does not exist in the present case. The court is satisfied that the Appellant has not shown that the assessment was incorrect.

[14] Further, at Tab 16, which is the case of *Vacation Villas of Collingwood Inc. v. Canada*, [1996] G.S.T.C 13 (F.C.A.), counsel puts that forward in support of the proposition that once the Minister makes the presumptions in the Reply, as the Court outlined to the Appellant before he started, it is the Appellant's job to rebut

those presumptions. The onus is on him of establishing on the balance of probabilities that the assessment is incorrect.

[15] As decided in that particular case, this Court is satisfied that the Applicant, or the Appellant, has failed to place before the Court any satisfactory evidence which would have demolished the Minister's assumptions in the Reply and consequently, then, those assumptions must stand.

[16] The net tax that was owing by the corporation was a net tax which was calculated by the Minister and, interestingly enough, those calculations were based upon the very information supplied by the taxpayer itself. The taxpayer is the one that filed the returns and based upon the information provided, the Minister accepted that information and made the assessment as he did.

[17] The Appellant has not brought in any documents to refute the Minister's assessment. Indeed, the Court believes that he has heard some evidence here today which probably helped explain to him a little better what the real situation was.

[18] In any event, the Court is satisfied that no evidence was given by way of *viva voce* evidence or by way of documentation which would have rebutted the presumptions that the Minster made, that the assessment made by him was not correct.

[19] With respect to the interest and penalties, counsel directed her attention to that issue. It did not appear to be a real issue as far as the Appellant was concerned. That is, whether or not the Minister was entitled to levy the penalties and interest. That entitlement is borne of the statute itself. Once the monies are not paid on time, then the clock starts to run, so to speak, and the interest and penalties are accrued on the basis of the unpaid amount. There is not much the taxpayer can do about that.

[20] But to the extent that it is an issue, it can only be an issue raised by the Appellant to the extent that he asks the Minister to give him relief from the application of section 280 with respect to penalties. This Court is satisfied that it has no jurisdiction to reduce the amount of interest and penalties. That is up to the Minister. The Minister has refused an application, apparently, already on the basis of the fairness package – which, again, this Court does not have any jurisdiction over – on the basis that it was out of time and this Court cannot see anything wrong with the Minister's decision there.

[21] Even if it did, the Court is satisfied that it would not have any jurisdiction to deal with that in any event. So, to the extent that the interest and penalties are questioned by the Appellant, the Court is satisfied that it cannot give any credence to his argument.

[22] Is the Appellant liable for the taxes that were levied and as indicated on the basis of paragraph 322(3)(a) of the *Excise Tax Act*? The Court is satisfied that he was a director. He was a director throughout. He remained a director until the end of the day, maybe even today, but certainly at all relevant times to this appeal, he was a director.

[23] The Court is satisfied that the Minister has met and given evidence with respect to the conditions, the pre-conditions or pre-requisites to assessing the Appellant. The Court is satisfied that the debt was owing. The Court is satisfied the Appellant was a director. The Court is satisfied that the Minister took all the steps that he was required to do on the basis of the appropriate provisions of the statute. He made the assessment on the Company. He obtained a certificate from the Federal Court. He filed the certificate in the Federal Court. He gave notice to the Appellant on several occasions that the amount was due and owing. He made efforts to collect the amount and the amount was not collected. The writ of *fieri facias* was returned *nulla bono*, so to speak, and so he was unable to collect the amount. All of those requisites have been met and the Court can find nothing wrong with the Minister's actions in that regard.

[24] Now we come to the question of due diligence and we come to the case of *Soper v. R.*, [1997] 3 C.T.C. 242 (F.C.A.), which is found at Tab 14 of the Respondent's Book of Authorities. As the Court indicated before, this is a case where the Court spent a considerable amount of time setting out the standard of care in a case like the present one. Justice Robertson, at that time was considering subsection 227.1(3) of the *Income Tax Act* but the definition is the same. The history of the section is parallel with subsection 227.1(3) of the *Act*. Justice Robertson said:

> The standard of care set out in subsection 227.1(3) of the Act is, therefore, not purely objective.

Now he said it was subjective objective and that has been subsequently rejected. The Supreme Court of Canada has said that it is actually completely objective, *People's Department Stores Inc. (Trustee of) v. Wise*, [2004] S.C.J. No. 64 (S.C.C.). Looking at it from an objective point of view, then, the Court must decide

whether or not the Appellant has satisfied the burden of showing that he acted as a reasonable and prudent director would under all of the circumstances.

[25] The Court is bound by that decision and the Court must look at the standard of care based upon the test being completely objective. The *Soper* case also dealt with inside/outside directors and that case set out a difference between the responsibility of an inside director and an outside director and basically found that if you are an inside director you have much more responsibility. You have a much higher hill to climb to show that you acted as a reasonable and prudent director would. This Court accepts that argument.

[26] The Court is satisfied herein, as the Appellant himself said, that he was an inside director. He had inside information. He was the sole director. He knew about the accounts. He had accounting training. He was completing other taxpayer's income tax returns, so one has to conclude that he was in a position that demands the highest standard of care for a director.

[27] In *Kanavarous v. R.*, [2008] G.S.T.C 115 (T.C.C.), which was a decision of this Court and which was quite similar to the case before the Court here, at least the theory applied in that particular case is applicable here. I remember that case well.

[28] This particular director pointed out that he had some difficulties. He had financial difficulties, personal difficulties and he had trouble making ends meet. He was running around trying to make agreements, trying to make payments and the Court does not fault him in any way for his efforts. But his efforts were too little too late.

[29] As in *Kanavarous, supra,* the Appellant taxpayer was interested in trying to make sure that all of the workers were paid, trying to keep the business running, gave a little money here, a little money there to the Minister, but the Court found, as I do here, that it was up to the Appellant to remit those monies, to collect those monies and to remit them to the Minister. In that case, as here, although there has not been much evidence here about what the Appellant did with the monies, obviously the monies were collected and those monies went somewhere else, they did not go to the Minister.

[30] It was the Appellant's responsibility, and the Company's responsibility, over all, apart from keeping the business running in the hopes that things would get better, apart from paying out the salaries to the workers and so on, it was the

Company's job and the Appellant director's job here to make sure that the payments were made to the Minister when they were supposed to be made, within the reporting period set out by the statute.

[31] The actions of the Appellant here, and the actions of the appellant in the *Kanavarous*, *supra*, case, do not satisfy the duty imposed upon them by this section of the statute. They do not meet the requirements of the test. They duty, as far as this Court is concerned, is to prevent the failure to make remittances, and not to cure the problem after the fact.

[32] The Court is satisfied, as set out in *Soper, supra*, and *Kanavarous, supra* that it is the duty of the director to take positive action by setting up controls to account for remittances, by asking for regular reports from the Company's financial officers or bookkeepers. He had the duty to put in place ongoing controls and tests and balances to confirm at regular intervals that withholding tax has been taken as required by the *Act*.

[33] All of these actions, in this case, were under the control and power of the Appellant because he was the sole shareholder and sole director and had complete control over the business.

[34] As the Court earlier indicated he was an inside director. There was a very high standard of care required of him. He was required to take the steps to prevent the defalcation and not to try to step in to do something about it afterwards. His actions in trying to get the bill paid were laudable, but at the same time they were too little, too late.

[35] With respect to the question about whether or not the Minister acted reasonably and responsibly in waiting for 10 years before making this assessment, the Court has no control over that. The Minister was within his rights to wait as he did, but apart from that, certainly there was substantial evidence before me as to why there was the delay that there was. Part of it had to do with the Appellant himself in not filing returns. The returns were filed late. The Minister attempted to get him to file documentation, to send in information so that he could conclude whether the offer that he was making to settle the matter was reasonable or not. All of those things accounted for some of the delay. So overall, the Court is satisfied that the delay has been explained.

[36] The Court is satisfied the Minister acted reasonably in any event. It accepts counsel for the Respondent's position that the Minister had the right to decide as to

how he was going to collect this debt. It is satisfied that the Minster waited part of the time because one of the agents on the file did not think they would be successful in processing the claim because there were no assets to attach. But subsequently, another officer had come in and, through her research, found that there may have been assets there which were capable of satisfying the account. It was reasonable, then, for the Minister to make the assessment that he did.

[37] This Court has no jurisdiction to question the Minister's decision to proceed as he did. This Court is satisfied the Minister had the option to proceed as he did and there was nothing wrong with proceeding the way he did. The Minister had the right to assess the penalties that he did and to assess the interest that he did. There was nothing wrong in the manner in which he acted.

[38] With respect to the Appellant's argument, referable to subsection 281.1(1) that the Court has some jurisdiction to overturn the Minister's decision that he could not grant the relief that the Appellant was seeking because of the time limit, this Court has no jurisdiction to deal with that. It indicated that position to him when he was making the argument. If the Minister had the right to bridge the ten year argument, it was his decision to make and not this Court's. This Court has not been given any jurisdiction to deal with that. The Federal Court has been given some jurisdiction to deal with the fairness package. This Court has not.

[39] The Appellant himself said that he was an inside director, but he felt that he was acting reasonably, he did all that he could. The Court is not satisfied that he did all that he could. He did all he could later on when times were really, really difficult. But he did not do anything at the beginning when the trouble started to arise when he should have known that the monies were not being remitted to the Minster.

[40] As a matter of fact, the Court draws the conclusion from what the Appellant himself said today – and it may have come about because of the fact that he did not review the file at all or sufficiently to appraise himself of all the facts – but the Court is satisfied in what he said that he really did not even know that the debt was owing, that the returns were filed, who was filing the returns and who was responsible for filing the returns. The bookkeeper, at some point in time, certainly had some responsibility, but the impression the Court received from him was that he was not sure that the money was owing. Nobody told him that he owed any money – that the Company owed any money. That was not a reasonable conclusion to draw.

[41] He opined that he would have done something if the Minister had called him up and said, “I’m coming down to look at your records, then I’ll show you what I’ve got”. The Appellant himself told the Minister that he could not afford the effort and the time required to send any more material or to photocopy two years of work and send it to the Minister. For some reason the Appellant concluded that the Minister told him he was going to come down and look at the records.

[42] That is not the Minister’s duty. The Minister’s duty or the Minister’s right is to ask the taxpayer to provide the documentation that is needed and there is no way that the documentation was provided in this particular case. It was not reasonable for the Appellant to wait on the Minister to come down to look at the documents, and when he did not come down, not to do anything about it, not to make any payments and not to pay the debt.

[43] What the Appellant should have done, if the Minister did not come down, was to send whatever information he could to the Minister, or to send a proposal to the Minister to say “I’m going to pay X number of dollars, or continue to make the payments” and then wait to see what the Minister did. But even at that point in time, it was past the period of defalcation anyway. It was almost too late at that particular time unless the Minister agreed to accept the payment plan that would be proposed. It was too late to remedy the situation because the damage had already been done. The requisite taxes had not been collected and remitted.

[44] The Court is satisfied that, under all the circumstances the Appellant did not comply with the statute. He has not met the burden of establishing on the balance of probabilities that he acted as a reasonable and prudent director would under all the circumstances.

[45] The Court accepts his position and agrees with him when he said, “I kept at it over the years. I’m still working at it,” or maybe he is still working at it. He did all that he could, he said. But the Court’s position is that he did not do anything when he should have done it, that is before the defalcation took place. That is the burden on a director. Unfortunately for the Appellant, he waited too long and tried to remedy the situation after the horse got out of the barn.

[46] The Court is aware of the fact he had personal problems, he had financial problems and all these have to be taken into account. But they still do not eliminate the need of a director to act as a reasonable and prudent director would under all of the circumstances and to take the steps that the Court outlined before, which were adequate to ensure that remittances were deducted and remitted in a timely manner.

[47] Unfortunately then for the Appellant, the Court will have to dismiss the appeal and confirm the Minister's assessment.

Signed at New Glasgow, Nova Scotia, this 7th day of April 2009.

"T. E. Margeson"

Margeson J.

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