

BETWEEN:

BASIL JAIRAM PUNIT,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

Appeal heard on October 25, 26 and 28, 2010, at Toronto, Ontario

Before: The Honourable Justice T.E. Margeson

Appearances:

Counsel for the Appellant: Marvin J. Huberman

Counsel for the Respondent: Thang Trieu

JUDGMENT

The appeal from an assessment made under subsection 227.1(1) of the *Income Tax Act*, notice of which is dated October 11, 2007, and bears number 46126, is dismissed, and the Minister's assessment is confirmed.

Costs are awarded to the Respondent.

Signed at New Glasgow, Nova Scotia, this 11th day of February 2011.

“T.E. Margeson”

Margeson J.

Citation: 2011 TCC 88
Date: 20110211
Docket: 2008-3635(IT)G

BETWEEN:

BASIL JAIRAM PUNIT,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

REASONS FOR JUDGMENT

Margeson J.

[1] The Minister of National Revenue (the “Minister”) assessed the Appellant in the amount of \$216,717.06 for federal income tax source deductions that HTS - Horizon Teleservices Inc. (the “Company”) failed to remit with penalties and interest thereon, pursuant to section 227.1 of the *Income Tax Act*, R.S.C. 1985, c. 1 (5th Supp.), as amended (the “Act”), and issued a notice of assessment dated October 11, 2007.

[2] The Minister confirmed the assessment and issued a notice of confirmation dated July 25, 2008. From this assessment, the Appellant has appealed to this Court.

[3] Basil Jairam Punit testified that he came to Canada in 1988 from New York. He holds the following designations: C.A. (Canada), C.P.A. (United States), and a C.M.A. (Canada). He holds a Bachelor of Commerce degree from Concordia University. He said that the Company teleservices was an incorporated body operating in the teleservices business and operating an “outbound call centre”.

[4] Exhibit A-1, Tab 3, of the Appellant's Book of Documents was introduced by agreement. It was the Articles of Incorporation dated May 16, 2002. He incorporated this Company at the request of Dr. Frederick Ballantyne, an investor, medical doctor and a director of this Company. He was busy at the time of the trial and could not be here, according to this witness. Dr. Ballantyne is presently the Governor General of St. Vincent and the Grenadines.

[5] Exhibit A-1, Tab 5 was admitted into evidence. It was the Certificate of Incorporation for HTS - Horizon Management Inc. It was incorporated by the Appellant to provide consulting services. It was inactive until 2005. It is still active. There is no relationship between this entity and the Company.

[6] According to Exhibit A-1, Tab 7, the Appellant had a "Share Trust" agreement with respect to the shares in "teleservices" until his capital investment was repaid.

[7] The letter at Exhibit A-1, Tab 12 was the subject matter of an objection and was admitted only for the purposes of showing that it was delivered to Canada Revenue Agency (CRA). He indicated that Dr. Ballantyne had an investment of \$275,000 in the Company.

[8] The Company had experience in operating a call centre.

[9] Exhibit A-1, Tab 2 was an Offer to Lease on a Net Basis for the call centre in Sudbury, Ontario. It was signed by the Appellant and by Dr. Ballantyne as "Indemnifier". The Appellant referred to himself as the Chief Financial Officer (CFO) and outside accountant.

[10] Exhibit A-1, Tab 4 was a so-called "Engagement letter" from the Appellant which indicated that he would advise the Company in making management decisions but that he would not make such decisions or perform any such functions. This letter was from the Appellant to Dr. Ballantyne and was dated May 22, 2002. He said that he had no duties with regard to the operations in making decisions. He referred to himself as the "functional officer" and the "outside accountant". He held the shares in the Company in Trust for Dr. Ballantyne in accordance with the Declaration of Trust found in Exhibit R-1, Tab C. Dr. Ballantyne was a non-resident of Canada. The Appellant held the shares as a matter of convenience. He was likewise, a director.

[11] Exhibit A-1, Tab 7 was the Minutes of the first meeting of the Company and set out the names of the shareholders. Basil Punit held 10% of the shares.

[12] The Appellant resigned as a director after the meeting on July 20, 2002 and a change of directors was prepared and filed. He thought that the other directors were appointed on July 20, 2002. This was indicated by the document found at Exhibit A-1 at Tab 6. He believed that he had resigned at that time. He signed the document. It was given to the Secretary of the Company and he believed that it was to be mailed to the Federal Government office. It was a Federal Government form that was used. Everyone believed that he had resigned as a Director and from this point on, he was only an outside accountant. He never exercised any control after that point. He informed the other directors about payroll deductions.

[13] In the fall of 2002, another meeting of directors was held and the Appellant told the directors the same thing and that the amount of arrears was building up. This is confirmed in Exhibit A-1, Tab 7. He was asked to apply for a line of credit and he did so. This application was refused by CIBC. He applied to the TD Bank and this was refused as well.

[14] He was told by Dr. Ballantyne that the monies to pay the statutory deductions would always be in the account.

[15] The equipment was faulty and it was two to three months before new equipment was brought in. There was a "dealer" problem. Sales were not being recorded; there was no money to pay the bills. All deposits were controlled by the other directors. The Appellant had no control. Fraud was committed against the Company by Andre Albarus and Chevon Blackwood. Monies were not going into the account. They were diverted away from the Company account.

[16] The Appellant was still authorized to sign cheques for the Company but he had to get approval from the other directors. He tried to get the bills paid.

[17] He arranged to have post-dated cheques issued to CRA in the spring of 2003 and delivered them to CRA. He assumed that the money would be there when the cheques were presented for payment. He issued twelve cheques for \$10,000 each from June of 2003. The first three or four cleared and then there was no money in the account. When the first cheques were dishonoured by the bank, the Appellant told CRA that he was going to stop payment on the cheques. He was assured that the money would be there.

[18] The other directors set up a new bank account with CIBC in Sudbury and diverted the company funds there. He realized this in the fall of 2003.

[19] He hired a former RCMP officer to investigate the loss of \$80,000 and this was confirmed. Dr. Ballantyne agreed to wait and give the other directors another chance to turn the Company around. The Appellant could do nothing else.

[20] In October of 2004, they walked away from the Company. They abandoned the premises and were running a parallel business. They took their staff and equipment to the other business.

[21] The Appellant tried to assist CRA in the collection of the outstanding amounts but no assets were found.

[22] In cross-examination, the Appellant said that he knew that the Company was incorporated under Ontario laws. He admitted that he was a “first” director. His address was the same as that of the Company. The Company was active from 2002 to 2004 apart from some technical difficulties. The Company had no revenue until August of 2002. There was a change in directors in 2002. When he filed the objections to the assessment in question, he still believed that the federal form was required for changing the list of directors. The Articles of Incorporation were the last documents filed in the Minister’s office.

[23] He incorporated HTS-Horizon Management Inc. shortly after the Company was incorporated. It was incorporated under Ontario laws. He was the sole shareholder, director and manager of HTS-Horizon Management Inc.

[24] In 2005, the Appellant was a financial advisor to the Government of Guyana in the building of a new hotel in Guyana. It was never completed. The notice indicating that he was an investor was wrong. He was only the advisor to the investor. He was not an executive in this project even though the information contained in Exhibit R-4 indicated that he was. He admitted to being involved in other companies as well. He was the co-owner of a private company in Guyana by the name of Lintel. This was a telemarketing company. It suddenly closed at the end of 2006.

[25] He was the President of one Guyana-Canada Chamber of Commerce. The purpose was to promote Guyana-Canada business.

[26] He signed the offer to lease on behalf of the Company before it was incorporated. It was also signed by Dr. Ballantyne as a guarantor. The Appellant was indicated to be the CFO but this was a “functional” title only.

[27] In the fall of 2002, he was aware that there was a C and A Solutions Company.

[28] He indicated that he resigned as a director of the Company on July 20, 2002. He signed the Changes Regarding Directors form at Tab 6 of Exhibit A-1. He said that he gave it to the Secretary, Chevon Blackwood, to file. He would give it to his secretary to file.

[29] He identified CIBC bank statements of the Company marked as Exhibits R-8, R-9 and R-10 showing his address as that of the Company. He would send these documents to Sudbury after he received them. His notations were on these statements. The Company's records were kept in Sudbury.

[30] He had authority to sign cheques as did Dr. Ballantyne but the Appellant had to receive permission from the directors before signing any cheque. He could also transfer funds between the Canadian and American accounts. He would check the accounts weekly between 2002 and 2004.

[31] He identified Minutes of the Company and said that they accurately reflected what went on. These were all directors' meetings but he was there in his capacity as outside accountant. These were not all of the Company minutes. They were approved and circulated. Exhibit R-2 at Tab 7 indicates that he resigned as a director and was appointed as the accountant of the Company.

[32] On October 19, 2002, he was aware that the June, July, August and September deductions had not been paid. The decision was made to pay the employees and defer the payments to CRA.

[33] He had some evidence of fraud against the Company. Most of the receivables came from the United States (U.S.) and would go into the U.S. account. He admitted being involved in the Primus account in March of 2003 but said it was only about the under-billing of \$150,000 and he did not make management decisions. He dealt with the Primus account only about billings.

[34] He was involved in the terms and conditions of the lease.

[35] In April of 2003, money was still going into the U.S. account. He was always aware of the shortfall of payments to CRA and always made the directors aware of it.

[36] He identified the proposal sent to CRA, Exhibit R-11, dated November 26, 2003. It was his proposal as CFO.

[37] He telephoned CRA to advise that the cheques would not be honoured. He did not know who he told. It was by telephone. The cheques were still not being honoured.

[38] The letter he sent to CRA on August 24, 2004 was sent in his position as CFO.

[39] Very few funds were being sent to CRA as the directors had deferred their payments. He signed the Corporation's T2 Corporation Income Tax Return for the 2002 taxation year and the 2003 taxation year, as well as the GST Returns dated August 24, 2004. The sales were all for non-registrants.

[40] On or about October 8, 2004, he received a collection letter as a director for \$307,737.34. That correspondence that indicated that Marcus Ballantyne was not a director is not true, but he has no documentation that Marcus was a director.

[41] He did not subpoena Marcus Ballantyne because he did not think that it was necessary. He talked to his partner and asked him to come but he could not come because of his duties in St. Vincent.

[42] Exhibit R-18 was a letter he wrote to CRA on March 2, 2005, about loans he had made to the Company and cheques that were issued to him for these loans amounting to \$22,000.

[43] He would not agree that he transferred his property over to his wife, as shown in Exhibit R-19, because he believed that he was liable as a director for the debt in question here. It was for personal reasons. As of today, they are joint tenants.

[44] Exhibit R-21 were minutes sent to CRA by the Appellant in 2005. It was suggested that these minutes were different from those earlier submitted by the Appellant. He could not say why the set of Minutes said August 8, 20003, and another said June 18, 2003. These were copies that he received.

[45] It was pointed out to the Appellant that his name was not listed as a director in Exhibit A-1 at Tab 7 dated April 27, 2002, but it was included in Exhibit R-21 at page 63, the Minutes supplied by Mr. Punit to the Minister. It was suggested to him that he gave the Minister a different set of Minutes that left his name out as a director so that he would not be held liable as a director. He did not agree. He said that because he read the Minutes that did not mean that he was the Secretary. His position as CFO was not indicative of him being the Secretary-Treasurer of Horizon.

[46] The information that he set out in his letter to CRA under date of July 5, 2007, was incorrect. He believed that the fraud was in 2003 and not 2004. It was further incorrect when it indicated that he had filed Form 6 with Industry Canada in July of 2002.

[47] He was referred to the taxpayer relief request that he made which was entered as Exhibit R-23. It was suggested to him that there was no fraud perpetrated against the Company and that he was merely grasping at straws.

[48] He agreed that he had completed Form 6 where Dr. Frederick Ballantyne's name does not contain an "e". It was suggested to him that all such documents were actually prepared by him. He disagreed. It was suggested to him that Form 6 was prepared after 2002. He disagreed even though the form number at the lower left-hand corner was IC3103 (2004/11).

[49] It was suggested to him that he signed this form in 2005 in an attempt to get out of the situation. He was referred to Exhibit R-21 at page 63 where Basil Punit was referred to as Secretary-Treasurer in the Minutes of July 20, 2002.

[50] It was pointed out that the Minutes of January 18, 2003 contained in Exhibit A-1 at Tab 7 and the Minutes of August 8, 2003 contained in Exhibit R-21 are very similar. He said that the Minutes in Exhibit A-1 came from the Company after the meeting in Sudbury on July 20, 2002. He requested them from the Secretary. The Minutes as contained in Exhibit A-1 were also in his files. He had not just received them before he gave them to CRA.

[51] He was authorized by Dr. Ballantyne to pay the employees. Dr. Ballantyne was still very involved in the Company although he was not supposed to be. He was referred to Exhibit A-1, Tab 12 which was purportedly signed by Dr. Frederick Ballantyne, which contained no "e" in the name Frederick. He said that he did not know who signed it but he basically told him what to say. He did not know why Marcus Ballantyne was not listed as a director. He was not aware that there was something going on at the Call Centre until October of 2004.

[52] He knew that Ms. Deirdre Rhora was a Collections Officer with CRA but could not say if he told her that there were four directors living in Sudbury. She advised him in June of 2004 that he was the sole director according to the provincial records but there were now three new directors including himself. He would not agree with respect to himself.

[53] He would have told her that he resigned as an incorporating director and could not remember telling her about filing Form 6. He would have responded to him not being a director either orally or in writing. He also met with the payroll auditor, and gave him shareholder information about the Company.

[54] He was a 10% beneficial owner of the shares in the Company. He did not remember telling the payroll auditor/trust examiner that he was a Vice-President but did say that Dr. Ballantyne was the President. If he did tell him that he was a director then that was a “slip”, he was an incorporating director.

[55] He agreed that he provided Exhibit R-25 to the payroll auditor which contained his name as a director. He could not remember what date they were talking about.

[56] He was never in charge of the deposits and was limited to the amount of money in the accounts. He said that there were controls put in at the beginning and there were operational controls over the bank account.

[57] He received a copy of the Notice of Assessment, Exhibit R-1, Tab B around October 11, 2007. He talked to a Mr. Corney at CRA. He told him that he could not pay and that he would likely file for bankruptcy.

[58] He never held himself out as a director after he filed Form 6. He would not agree that he was “less than honest” in his evidence. He was looking for administrative relief for the Company.

[59] In re-direct, he said that the Company could not meet the \$10,000 payments that it promised.

[60] He reiterated that approximately \$80,000 was missing from Horizon’s account. This would have covered the unpaid remittances to CRA and made the account current.

[61] He said that the house was transferred back to him and his wife or at least that he instructed his lawyer to do so.

[62] Arthur John Reynolds Mastin was a lawyer who practiced in corporate and commercial law. He identified the letter in Exhibit A-1 at Tab 13 as his letter written to CRA on July 21, 2008 regarding this Appellant. Most of the information contained in the letter was hearsay evidence but he did say that the Appellant asked him to

prepare this letter five years after the events referred to therein had taken place. He was not paid to write the letter.

[63] He could not say why the Appellant would have told him that he was a “bare trustee” and he could not say if he had told him that he would be a director.

[64] The Appellant gave him no instructions to file a claim with respect to the alleged missing money. He thought that the Appellant had resigned on the record from what he told him.

[65] The Respondent called Deirdre Rhora, who was a CRA collections officer. She worked on this file in June and July of 2005 and again in October of 2007. The Appellant told her he was an incorporating director but never told her that he had resigned as a director.

[66] She sent a warning letter to all directors including the Appellant. She received no response to this letter from the Appellant. If he had told her that he was not a director, she would have asked for the Minutes and his resignation.

[67] On November 18, 2004, she spoke to the Appellant who said that collection actions were still being taken against the Company and asked to have the collection documents against the Company removed. He said that he was an incorporating director and at a meeting in August of 2002 three other directors were appointed. He did not say that he was not a regular director. She never received any information from him about his resignation as a director.

[68] The reference in the minutes of June, 2005 about his resignation was the first time she heard about his resignation.

Argument on Behalf of the Appellant

[69] The Company was started in 2002 and ceased operations on March 31, 2005. That is the period in issue.

[70] The Appellant is a very educated person and his evidence should be given respect. He said that he was the outside accountant, CFO, Secretary-Treasurer, Vice-President, but not a director. He was the incorporating director. Exhibit R-2 shows him as a director on the record in 2005.

[71] The Appellant said that he resigned as a director at the first meeting and others were appointed in his place. He ceased to be a director "*de jure*". He believed that he was no longer a director. He referred to himself as an incorporating director.

[72] On June 15, 2005, he faxed the minutes to CRA showing that he had resigned as a director. This is shown in Exhibit R-21 at page 63.

[73] A Form 6 was downloaded and he left it with the Company's Secretary to file. He continued to serve as the accountant. There was nothing to show that he was a director after that.

[74] From July of 2002, he told the Company's directors about their obligations. He relied upon the others to operate the business.

[75] He applied to the CIBC and the TD Bank for lines of credit but they refused. Dr. Ballantyne refused to sign a personal guarantee. It was the fraud of Chevon Blackwood and Andre Albarus that caused all of the problems. This fraud was discovered in February of 2003. He could not sign any cheques without the authority of Andre Albarus and Chevon Blackwood. He tried to arrange payment.

[76] On November 26, 2003, he asked to have the \$10,000 per month payments to CRA reduced to \$5,000 and put it on notice that there were real problems. He informed CRA of the \$80,000 of diverted funds which could have been used to pay all of the outstanding debt to CRA. The investors walked away from the Company in 2004 and the Appellant found out about it in 2005.

[77] In October and November of 2004, CRA started sending notices to the directors. After that, the Appellant was very co-operative and helpful to them.

[78] The question is whether the Appellant was a director when the Company was required to make the payments. He referred to the case of *Kalef v. Canada*, [1996] 2 C.T.C. 1 (FCA), and pointed out that a person ceases to be a director when he resigns. He referred to the appropriate provisions of the *Business Corporations Act*, R.S.O. 1990, c. B.16 as amended with respect to the position of directors. A person ceases to be a director when he resigns. The Appellant said that he resigned. Even if the written resignation was not filed, the Appellant had resigned (see *Netupsky v. Canada*, [2003] G.S.T.C. 15, [2003] T.C.J. No. 30 (QL)).

[79] The role that the Appellant played was constrained and subject to the will of others. The due diligence test is reasonableness on the part of the directors. The Appellant thought that he was doing the right thing at all times.

[80] Dr. Ballantyne told him that there would be money in the account at all times to pay CRA. The Appellant's belief was reasonable, subjectively and objectively. He should be exonerated because the money was stolen out from under him.

[81] The Appellant did not have the freedom of choice. He delivered the post-dated cheques and the others committed the fraud. He could do nothing.

[82] The Appellant resigned or he mistakenly believed that he had resigned and he has shown due diligence. If there is any liability, it should only be up to the date of the fraud.

Argument on behalf of the Respondent

[83] Counsel said that there are two issues here:

- (i) Was he a director at the relevant times?
- (ii) Did he meet the due diligence test?

[84] He opined that he was a director at all relevant times and that he did not meet the due diligence test.

[85] Insofar as the evidence of the Appellant is concerned, there is “a lot to be reconciled and a lot to be considered on the questions of the credibility of the Appellant”.

[86] None of the presumptions in the Reply have been demolished. The Appellant has been discredited as a witness.

[87] He held himself out as a director verbally and in writing. According to him, his title of CFO was in a functional capacity only. It was much more than that.

[88] In Exhibit R-21, he held himself as the Secretary-Treasurer as of July 20, 2002.

[89] The Appellant confirmed that the Minutes in Exhibit A-1 at Tab 7 were accurate but they were different from the Minutes found in Exhibit R-21.

[90] It was suggested to him that he changed the Minutes to show that he was just an accountant and that he had resigned when he did not. He said that he had filed Form 6 when he did not. His own Notice of Appeal impeaches his credibility. The Form 6 has been shown to be a form that was not in use until 2003. The 2001 Form 6 was different. He said that he filed the Form 6 in 2002, but this form did not appear until November, 2004 and was current until May 4, 2005. It was impossible for him to have filed the Form 6 that he referred to when he said that he did.

[91] He was hatching up a plan by saying that it was filed in the wrong office so that he would be safe. The down side is that he down-loaded the form that he used, after the fact. He fabricated his evidence so that he would not have to pay. He indicated that he had transferred his property back to himself and his wife but this transfer, if it did take place, was after he received the warning letter from CRA. He

was sent the warning letter by CRA on November 19, 2004 and did not say that he remembered denying that he was a director. The witness from CRA said he did not know that the Appellant was denying that he was a director until she received Exhibit R-21.

[92] He admitted to CRA that the other two persons in Sudbury would not act as directors so he continued on.

[93] After the alleged fraud, he acquiesced in whatever the Company did. The amounts owing were fast piling up. He continued to write cheques. He checked the accounts weekly and received the records at his home. The Company continued to fund the operation and paid suppliers to keep the business afloat.

[94] Prior to the assessment, he told CRA that the problems were due to start-up costs, but in Court he said that this was the fraud period.

[95] There was no evidence presented that the Appellant was prevented from acting as a director. His evidence was inconsistent about whether he had to get authority to disburse funds.

[96] Even as a “bare trustee”, he did not have to take instructions about how to run the Company, as opposed to how he would handle the shares. He held himself out as a director orally and in writing. In Exhibit R-25, he is listed as a Vice-President, CFO and Director. He was untruthful from the beginning.

[97] He was a “*de jure*” director. He was listed on the provincial records as such. There was no evidence supporting his statement that he had resigned as such. There was no resolution to that effect and no such indication in the Company books. The minutes that he did present were unreliable. The Form 6 is worthless.

[98] He was also a “*de facto*” director. He held himself out as a director. He did not deny that he was a director when first confronted with this allegation, as Marcus Ballantyne did.

[99] He acted in the capacity as a director. He had control of the funds. He applied for lines of credit. He was overseeing the operation of the Company. He took over discussions with Primus. He contacted an insurance broker in 2003. He was the one who met with Mr. Mastin about the \$25,000 amount. He was the one who dealt with the lease. He was the one trying to arrange the payments to CRA. He advised CRA about the financial difficulties of the Company.

[100] Why did he let the cheques be dishonoured? He dealt with CRA during 2004 and 2005.

[101] Reasonable care is about the failure to prevent the failure. At no time did he do so. He was compliant in the failure to remit. He was an inside director and there is a higher standard for them.

[102] He was always aware of Horizon's financial difficulties.

[103] He argues that the fraud by others in the Company is a defence to his liability. However, the fraud was not directed against him. The alleged fraud did not prevent him from making the payments. The business continued for one year after the alleged fraud. In any event, there was no real evidence of fraud.

[104] The Appellant was aware of the failure to remit since 2002. At first, he claimed the reason was start-up costs, then cash flow. The fact is that the Company decided to defer the payments to CRA.

[105] No controls were put in place to see that CRA was paid. There was a conscious decision to divert the cash in order to keep the business going rather than paying CRA. It is not an excuse to say that he had been directed by Dr. Ballantyne.

[106] The Appellant made the decisions and had only himself to blame. The appeal should be dismissed with costs.

Reply

[107] In Reply, counsel said that there is no evidence of forgery. It is only speculation on behalf of the Minister to argue that some of the signatures and documents may have been forged. He does agree that there are some inconsistencies in the evidence of the Appellant in the documentation and in the Minutes.

[108] He is shown to be a director in Exhibit R-25. However, this may have been created before the difficulties were manifest and may have been given to the Minister in a pile of documents. All records were lost in Sudbury when the Company was put out of the premises.

[109] The demeanour of the Appellant in Court was fine. His evidence was consistent with the documents and with the evidence of Ms. Rhora. There was an

explanation as to why Dr. Ballantyne was not here. Why did CRA not subpoena Marcus Ballantyne? There was enough evidence to go to the reasonable care defence. Exhibit R-21 is evidence of fraud.

[110] Exhibit R-22 was only a letter from Mr. Punit, but it is consistent with the presence of fraud.

Analysis and Decision

[111] As both counsel have basically agreed, the two issues in this appeal are:

- (i) Was the Appellant a director during any of the relevant period of time?
- (ii) If the Appellant was a director during any of the relevant period of time, did he exercise the degree of care, diligence and skill that a reasonably prudent person would have exercised in comparable circumstances to prevent the Company's failure to remit the federal income tax source deductions, as indicated.

[112] It is trite to say that an Appellant in such a case as this has the burden of establishing, on a balance of probabilities, that the Minister was incorrect in making the assessments that he did.

[113] This requires the Appellant to demolish a sufficient number of the relevant presumptions of the Minister in order for the Court to find that the assessment was incorrect.

[114] In order to demolish those presumptions, as set out in the Reply, the Appellant must provide sufficient and credible evidence. Evidence which is not credible does not meet the burden of proof.

[115] In this case, unfortunately the Court has real concern about the quality of the evidence, both *viva voce* evidence and documentary evidence.

[116] The Court also has considerable concern about the absence of any evidence from other persons involved in the Company, who have not been called to testify by the Appellant.

[117] It is no answer to this concern to argue that the Minister has not called such witnesses. Further, it is no answer to say that the Appellant did not believe that such

evidence was necessary. The Court is not satisfied that the absence of such evidence has been adequately explained.

[118] There were inconsistencies in the Appellant's testimony and in some instances it was contradictory to the evidence of other witnesses and the documentary evidence. The Court paid strict attention to the Appellant when he testified and noted his demeanour on the stand. He repeated over and over again that he was acting always as an outside accountant in spite of the fact that the evidence showed clearly that he was much more than that.

[119] The documentary evidence indicates that he was described at various times as Director, Vice President, Secretary-Treasurer, and by his own admission was the Chief Financial Officer of the Company.

[120] As counsel for the Respondent argued, there were inconsistencies in what the Minutes purported to report. These Minutes were provided by the Appellant himself but no explanation was offered as to why there were such inconsistencies. One could only conclude that some of these Minutes were not really a recitation of what went on but merely a compilation of what was alleged to have occurred, but compiled after the fact.

[121] The Appellant described himself as the "Chief Financial Officer acting in a functional capacity". He was obviously much more than that throughout.

[122] The evidence that gave the Court the greatest concern was Form 6 which the Appellant indicated in the written documentation that he had filed it himself. In *viva voce* evidence, he said that he gave it to the Company secretary to file and it was filed in the wrong office. There was no other corroborating evidence that either scenario had occurred.

[123] In any event, Form 6 could not have been filed when the Appellant said that it was. That form was not then available in 2002 when the Appellant said that it was filed. The Appellant said that it was filed in the Federal office but there is no record to indicate that any such document was filed in any Government office, let alone this document was not available in such form at that time.

[124] The Court is satisfied that the Form 6 referred to by the Appellant could not have been completed and signed until 2004.

[125] This evidence has the effect of tainting all other evidence given by the Appellant in support of his contention that he resigned as a Director and filed the form on July 20, 2002.

[126] In any event, the Appellant was confronted with the Minister's position that he was a Director when he received the warning letter from CRA. Unlike Marcus Ballantyne, he did not deny that this was the case. This would have been the time when one could reasonably have expected him to take this position. He did not deny this allegation until later. The Court is satisfied that the Appellant was a "*de jure*" director at all times material to this assessment.

[127] The Court is further satisfied that the Appellant was a "*de facto*" director at all material times to this assessment. He held himself out as a director. He acted as a director. He had control of the funds; he was the only signing authority on the Company's bank account. He took over discussions with Primus. He applied for lines of credit. He was overseeing the operation as suggested by counsel for the Respondent. He met with Mr. Mastin about the alleged fraud. He dealt with the lease; he was the one who was trying to arrange a payment schedule with CRA. He advised CRA about the financial difficulties of the Company.

[128] In regard to the defence of due diligence, the Appellant has failed to satisfy the Court that he acted as a truly prudent director would have done. The Appellant was not prevented from acting prudently by any person or any factor beyond his control.

[129] The Appellant took no steps to prevent the failure and one could only conclude that he was compliant with the decision to withhold payments from CRA, to pay other creditors and to continue withholding the remittances to CRA so that the Company could continue carrying on business. Any alleged fraud on the Company by others did not cause the failure to remit source deductions to CRA. It may have made it more difficult for the Company to come up with the necessary funds to do so,

but it is obvious that the Company came up with the resources to pay creditors and to pay wages to such an extent that the Company continued in business.

[130] The Court is satisfied that the Appellant did nothing to put into place any form of controls to ensure payment to CRA in spite of the fact that he was aware of such deficiencies since 2002.

[131] The Appellant has failed to establish the “reasonable care” defence.

[132] The appeal is dismissed, with costs, and the Minister’s decision is confirmed.

Signed at New Glasgow, Nova Scotia, this 11th day of February 2011.

“T.E. Margeson”

Margeson J.

CITATION: 2011 TCC 88
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DATE OF JUDGMENT: February 11, 2011

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