Docket: 2008-2496(GST)I

BETWEEN:

RALPH DONCASTER,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

Appeal heard on June 12 and December 10, 2009,
at Halifax, Nova Scotia,

Before: The Honourable Justice T.E. Margeson

Appearances:

For the Appellant:	The Appellant himself
Counsel for the Respondent:	Toks C. Omisade

JUDGMENT

The appeal from the third party assessment made under the *Excise Tax Act*, for the period from January 1, 1999 to June 6, 2005, notice of which is dated September 12, 2006 and bears number 71492, is dismissed.

Signed at Ottawa, Canada, this 8th day of April 2010.

"T.E. Margeson"

Margeson J.

Citation: 2010 TCC 190
Date: 20100408
Docket: 2008-2496(GST)I

BETWEEN:

RALPH DONCASTER,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

REASONS FOR JUDGMENT

Margeson J.

[1] This appeal is from the Minister of National Revenue's assessment of the Appellant for the period January 1, 1999 to June 6, 2005 under section 323 of the *Excise Tax Act*, Part IX, (the "*Act*"), for the failure of Doncaster Consulting Inc. (the "Company") to remit to the Receiver General of Canada the amount of net G.S.T. as required by subsection 228(2) of the *Act*, with penalties and interest thereon.

Evidence

[2] The Appellant testified that towards the end of 2003 he sent a copy of his resignation letter from the Company to the Minister. A copy of this letter was referred to in Exhibit R-1, Tab 8, at page 2.

[3] He also said that he gave a box of documents to the Minister which has not been returned to him. The documents would have shown that G.S.T. input tax credits were not credited to him. These amounts could have affected the amount owed. These documents consisted of invoices from Bell Canada to the Company for internet-related services.

[4] He explained that to Mr. Chartrand from Canada Revenue Agency ("CRA") and he said that he would examine them, but they did not take them into account then

or at the objection stage. He asked for copies of the documents but was told that the documents were no longer in the Minister's possession.

[5] The Minister prepared the returns as seen at Tab 12 of Exhibit R-1, but the Appellant was not given any chance to review them. The certificate was registered against him on October 16, 2006 but he was not assessed until January of 2007, or at least after the certificate was issued.

[6] He could not object to the assessment issued on September 16, 2006 because he did not receive a copy of it until one year later.

[7] According to the Appellant, the material at Tab 13 of Exhibit R-1 shows that he was sent a copy of the Notice of Assessment in Ontario although he had moved to Nova Scotia. They did not wait for 90 days to enter judgment against him.

[8] From about October 1998 until almost 1999, he was not ordinarily resident in Canada but in the United States. He may have ceased to be a director under Part 4 of the *Ontario Business Corporations Act.* He had a driver's license in the United States and resided at that address in North Carolina.

[9] In cross-examination he was referred to the Reply at paragraph 10(h) and said that there was no net tax due. He denied the allegations found in paragraphs 10(h) to (o) inclusive.

[10] He never notified CRA that his address had changed, even though he moved on July 4, 2006. He did not know when he received the pre-assessment letter found at Tab 4 of Exhibit R-1.

[11] He did not contact the Minister at any time to locate the records.

[12] Regarding his educational background, he was a high school graduate in 1988, had a Bachelor of Computer Science degree from Acadia University and had completed a one-week computer course in Ottawa for which he received a certificate. He worked in the IT industry and was a senior software architect by times.

[13] He was a business owner for a number of different businesses as a proprietor and as a shareholder, director and officer of 6042147 Canada Inc. He was also the President.

[14] He was the sole shareholder of the Company up to January 1, 2003. It was incorporated on December 30, 1992. After January 1, 2003, the sole shareholder of the Company was 6042147 Canada Inc. but he remained as President.

[15] Between 1987 and 1988 he was the sole proprietor of Computers Plus which sold disks and computer accessories. This business ceased in April of 1992. He was also a shareholder with his brother in a family trust.

[16] At various times his wife had been involved in the Company as a Vice President.

[17] He resigned as a director of the Company in December 2002, and was last involved with 6042147 Canada Inc. as President in September of 2005.

[18] He was also President and director of another company where all of the shares were held by a family trust until sometime in 2006.

[19] He confirmed the information found at Tab 1 of Exhibit R-1. In 1988 he had a visitor's visa to the United States. He was married in September of 1998. He had a bank account in Canada and a credit card. He went back and forth to the United States. He received mail in both places. His wife visited the United States and he visited Canada. He did not have a job in Canada.

[20] He admitted that he had sworn the affidavit seen at Tab 9 of Exhibit R-1 on May 31, 2005. This document indicated that he was the controlling mind of the Company. He identified the proposal in bankruptcy as seen at Tab 2 of Exhibit R-1, which was rejected by the auditors. He also identified the certificate in bankruptcy at Tab 3 of Exhibit R-1.

[21] After January 6, 2005, the date of the certificate in bankruptcy, his position was adverse to that of the Trustee in bankruptcy. He reiterated that after January 1, 2003, all of the shares in the Company were held by the numbered company.

[22] He resigned in December of 2002 but did not have a copy of his resignation. He gave the letter of resignation to his wife. She is not here. He did not know who he sent it to in 2003 but it was the woman that he spoke to on the telephone. He did not bring his wife to testify because he did not want to "expose her to the system".

[23] He could not remember speaking to Greg Bright about the contents of the examiner's comments as found at Tab 7 of Exhibit R-1.

[24] Some of the nineteen returns that were not filed were due to a clerical error and some were not filed due to there being no taxes owing.

[25] The information was contained in the box that he gave to Mr. Chartrand who said that he gave it to the Trustee.

[26] He did not list CRA as a creditor because he did not know that any amount was owed to them even though CRA had issued a "requirement to pay" against the Company. He thought that CRA would make any claim against the Trustee.

[27] The Respondent called Greg Scott Wright who has been a trust examiner for twelve years and before that was a collections officer for seven years. He attempted to do an examination of the business of the Company without success. The Appellant would not meet with him.

[28] A computer-generated notional assessment was recommended. The file was then sent to collections. In cross-examination he said that when notional assessments are done no input tax credits are given as it is up to the taxpayer to prove them. He was responsible for the spreadsheet.

[29] Gilles Jules Chartrand was a trust account examiner with Canada Revenue Agency. He had twenty-five years experience. He did the bankruptcy examination for the Company here. This can be seen at Tab 8 of Exhibit R-1.

[30] There were nineteen outstanding returns for G.S.T. by the Company from January 6, 1985 to January 1, 1999. He received five of the returns from the Trustee. The remainder were "nil returns".

[31] He went to the Trustee's office and then to the Appellant's residence. He received one box of supposed records. These were mostly invoices dealing with cost of goods sold to the Company and had nothing to do with the Company's G.S.T. collected on sales. He gave these documents to the Trustee in September of 2005. He picked up five returns and gave the information to the Trustee to prepare the returns as seen in Tab 12 of Exhibit R-1. They processed the fourteen remaining returns as zero. Collections filed a Proof of Claim with the Trustee on the basis of his results.

[32] In cross-examination he said that he examined the bank statements provided by the Trustee. The sales were based upon the bank deposits. There was no other information provided.

[33] Paul James Lynch was formerly employed by Canada Revenue Agency as a collections officer. He was assigned the file in this case. He identified the document at Tab 4 of Exhibit R-1. This was a pre-assessment letter that he sent out. He did not know if he received any response to it.

[34] He signed the Proof of Claim at Tab 5 of Exhibit R-1 which was filed in the bankruptcy of the Company. He also signed the amended Proof of Claim at Tab 6 of Exhibit R-1 which was completed after the trust examination was completed. The claim was for $93,550.67. None of the claim was rejected. He issued the Notice of Assessment, Third Party, at Tab 10 of Exhibit R-1. This amount was the same as in the Amended Proof of Claim.

[35] He did not recall receiving a letter of resignation as a director from the Appellant.

[36] In cross-examination he said that he saw the information in Tab 7 of Exhibit R-1. It was in their system. He saw Mr. Chartrand's examination results and following that he filed the Amended Proof of Claim.

[37] W.D. Morrison was an appeals officer in this matter and had twenty-five years experience in such matters. He identified his report on the objection as can be seen in Exhibit R-1 at Tab 13. The issues raised in the objection were that the amount of the assessment was incorrect and that the sum of $10,000 was more reasonable. Further, he was told that the Trustee should have paid the amount. Further, the Appellant said that he had resigned as a director of the Company.

[38] He determined that the amount of the assessment was correct and there were no documents that showed it to be incorrect. There were no documents presented to show that the $10,000 figure was correct.

[39] No dividend was paid from the Estate of the bankrupt. He was shown no documents to confirm the resignation of the Appellant.

[40] He identified the pre-assessment letter that was sent to the Appellant. There was no response to it.

[41] The Appellant was the director and controlling mind of the Company and when it filed a proposal it was completed by the Appellant. The document at Tab 9 of Exhibit R-1 shows that the Appellant was the controlling mind of the Company.

[42] Tab 12 of Exhibit R-1 was a letter he sent to the Appellant in which he responded to every issue raised by the Appellant. There was no evidence offered in proof of any of his allegations.

[43] Canada Revenue Agency was not on the list of preferred creditors.

[44] He identified the Proof of Loss at Tab 5 of Exhibit R-1 as the initial Proof of Claim filed two months after the bankruptcy and the Amended Proof of Claim for $93,550.67 filed six months after the bankruptcy.

[45] In cross-examination he said that the Proof of Claim was not rejected.

[46] The Appellant always had the option of filing amended returns to claim G.S.T. credits.

Argument on Behalf of the Respondent

[47] Counsel for the Respondent argued that there is only one issue: is the Appellant liable as a director for the Company's failure to remit the requisite Goods and Services Tax for the relevant reporting periods between January 1, 1999 and June 6, 2005?

(1) In particular, has the Minister met the technical requirements of the *Act*?

(2) Has the Appellant successfully challenged the assessment, notice of which was dated September 12, 2006?

(3) Was the Appellant a director during the appropriate periods?

(4) If he was a director, has he shown "due diligence"?

[48] The six-month requirement has been met as can be seen from the documents at Tab 5 of Exhibit R-1 which show that the claim was made within six months of the assignment. Further, the amended claim was filed on March 22, 2006 and since the original claim was filed within six months, this amended claim is valid (see *Moriyama v. Her Majesty the Queen*, 2005 FCA 207).

[49] Therefore, the technical requirements of the *Act* have been met.

[50] The claim cannot be made against him if it was made more than two years after he ceased to be a director. The evidence indicates that he was a director on June 6, 2006, the date of bankruptcy.

[51] Exhibit R-1, Tab 11, shows that the certificate was returned unsatisfied. The evidence is clear that the Appellant was assessed. There is no question about the correctness of the assessment. The Company failed to file a return for nineteen different periods as required by the *Act* (see Exhibit R-1, Tab 8). Fourteen notional assessments were created.

[52] The Appellant has not produced any evidence to substantiate his position. *Jarrold v. R.*, 2009 TCC 164, is applicable here. As there, the Appellant failed to back up his claim. His position amounts to nothing more than an assertion without proof. *Scragg v. R.*, 2008 D.T.C. 4511, is also applicable.

[53] The assessment should stand.

[54] On the issue of whether or not he was a director, he was at all relevant times. If he was not, he was a *de facto* director.

[55] He said that he resigned in December of 2002, giving a letter of resignation to his wife but he did not bring her to testify. The only evidence is his own.

[56] The Company was incorporated in Ontario so one must look to the Ontario legislation. Under Part IX, subsection 4, he is deemed to be a director because he was still managing the Company. He signed the document at Tab 1 of Exhibit R-1 on May 13, 2005. He also completed the affidavit found at Tab 9 of Exhibit R-1 on May 31, 2005. If he did resign, then he was still a *de facto* director at the appropriate times.

[57] The two-year limitation period as required by subsection 323(5) does not apply here.

[58] On the question of due diligence, it is obvious that the Appellant had a considerable amount of experience. He was educated. He was intelligent and yet he did nothing to prevent the default. The evidence shows that the Appellant did nothing to file the missing returns and notional returns had to be filed.

[59] As early as May 6, 2003, the Appellant knew that the Company had not filed its returns (see Exhibit R-1, Tab 7, page 2). He took no positive steps to see that the returns were filed according to the evidence. Any reasonably prudent person would have taken steps to file the returns. He merely blames the Trustee but the Trustee had nothing to do with this. It was not his responsibility to file the returns and ensure that the tax was remitted.

[60] The assessment was completed up to the time of the bankruptcy. The Minister has met all of the technical requirements of the *Act*. The Appellant has not successfully challenged the assessments and has not shown that he was not a director at all material times.

[61] Further, the Appellant has not met the "due diligence test".

[62] The appeal should be dismissed and the Minister's assessment confirmed.

Argument on Behalf of the Appellant

[63] The Appellant argued that the Respondent has not refuted the reliability of his evidence that he resigned in December of 2002. The only matter left is whether he was a *de facto* director. He argued that he was involved with the Company but it was controlled by 6042147 Canada Inc. and not him. It owned all of the shares and controlled it from January 1, 2003.

[64] On the question of due diligence, he considered in his own mind that since the input tax credits from Bell Canada to the numbered company would offset the tax bill, there would be no Goods and Services Taxes owing. The documents that he gave to Mr. Chartrand were relevant to this issue.

[65] He was prepared to admit that perhaps $10,000 was owing up to January 1, 2003.

[66] Mr. Chartrand in his evidence indicated that he would not take into account any input tax credits unless they were calculated. If there was a *de facto* director it was the numbered company.

[67] After the bankruptcy, he had no power over the Trustee, had no further input and could not correct the assessments. He took the position that the Minister did not

show that the claim was proven within six months after the bankruptcy. Further, he argued that he was not assessed before collection proceedings commenced.

[68] In rebuttal, counsel for the Respondent said that the Appellant controlled the numbered company and therefore he controlled the Company (Doncaster) at the relevant times. See *Wheeliker v. Canada*, [1998] 1 C.T.C. 2021.

[69] The Appellant acted as a *de facto* director. This term means all kinds of directors.

Analysis and Decision

[70] The Court must first comment on the Appellant's apparent belief that once he has given testimony that it is up to the Minister to disprove what he has said. To that end, he apparently concluded that because he stated in testimony that he had resigned in December of 2002 that the Minister must show that this was not correct or that other evidence that he gave has to be proven to be wrong.

[71] The rule, of course, is that any evidence given can be accepted or rejected either in whole or in part by the Court. The weight to be given to any evidence is for the trial judge after weighing and considering all of the evidence, the conduct and demeanour of any witness, and any evidence that corroborates or conflicts with such evidence.

[72] In this case, the Minister has pleaded certain facts which he is entitled to rely upon until such time as these presumptions have been destroyed. This was pointed out to the Appellant at the time of the trial.

[73] In this case, the Minister does have the burden of proving that the technical requirements of the *Excise Tax Act* have been met. Apart from the Minister's presumptions contained in the Reply, the Court is satisfied on the basis of credible evidence, given by competent and informed witnesses, that all of the technical requirements of the *Act* have been met.

[74] The Appellant merely stated that these requirements have not been met, but such inferences are incapable of overturning the evidence that showed otherwise.

[75] The second issue is whether the Appellant has successfully challenged the assessments. The only evidence given on this issue by the Appellant was that there should have been no tax owing because there were enough input tax credits available

to the Company which, if properly credited to the account, would have been sufficient to reduce the amount to zero.

[76] However, the Court must also consider the Appellant's own admission that there probably was at least $10,000 in taxes still lowing. There was no credible evidence given as to how this figure was arrived at, no documents tendered to show that the amount claimed was wrong, and no other attempt made to discredit the assessments.

[77] Sufficient acceptable evidence was given to verify the assessments and they must stand.

[78] Another issue that must be addressed is whether or not the Appellant was a director at all relevant times.

[79] The Appellant stated in evidence that he resigned as a director in December of 2002. He said that he gave the resignation letter to his wife but he did not call his wife to testify to that fact.

[80] He said that he did not want to subject his wife to the Court process. It may very well be more likely that he did not want to subject her to the rigours of cross-examination. But in any event she was not called and the Court does not accept the Appellant's explanation as to why she did not testify. It is more likely that the evidence that she would have given on this very important point would not have confirmed his own position in that regard. The Court draws an unfavourable inference against the Appellant as a result of the wife's failure to appear.

[81] Further, it would appear to be very unlikely that if the Appellant had resigned as a director that he would have continued to be the controlling mind of the Company as he indicated that he was, even up to the date of the bankruptcy, as he made a proposal that was rejected. Further, he signed an affidavit on May 31, 2005 that indicated anything but his position that he had resigned as a director.

[82] His evidence that he was acting on behalf of the numbered company, who was the sole shareholder of the Company when he signed the affidavit, is not borne out by the contents of the affidavit and this proposition would appear to be more of an afterthought rather than reflecting the real situation at that time.

[83] Even if the Court were to accept the Appellant's position that he had resigned as a director when he said he did, it would accept the Respondent's argument that

under the Ontario legislation he was still a *de facto* director up to the date of the bankruptcy.

[84] On the question of "due diligence", there is no evidence whatsoever that he did anything to prevent the failure that a reasonable and prudent director would have done.

[85] Any such action was prevented by his erroneous belief that there was no tax owing and his position that he had already resigned as a director.

[86] He erroneously believed that the documents that he gave to Mr. Chartrand were sufficient to support his position. On the clear evidence of Mr. Chartrand, he had no such documents.

[87] The Court is satisfied that the Appellant has failed to show that the Minister's assessment as made was invalid as against him.

[88] The appeal is dismissed and the Minister's assessment is confirmed.

Signed at Ottawa, Canada, this 8th day of April 2010.

"T.E. Margeson"

Margeson J.

CITATION:	2010 TCC 190
COURT FILE NO.:	2008-2496(GST)I
STYLE OF CAUSE:	RALPH DONCASTER and HER MAJESTY THE QUEEN
PLACE OF HEARING:	Halifax, Nova Scotia
DATE OF HEARING:	June 12 and December 10, 2009
REASONS FOR JUDGMENT BY:	The Honourable Justice T.E. Margeson
DATE OF JUDGMENT:	April 8, 2010

APPEARANCES:

For the Appellant:	The Appellant himself
Counsel for the Respondent:	Toks C. Omisade

COUNSEL OF RECORD:

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Firm:	
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