Docket: 2018-2482(IT)G

BETWEEN:

UGIS JEKABS ZVILNA,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

Appeal heard on October 26, 2021, at Hamilton, Ontario.

Before: The Honourable Justice Gaston Jorré, Deputy Judge

Appearances:

For the Appellant:	The Appellant himself
Counsel for the Respondent:	Acinkoj Magok

JUDGMENT

In accordance with the attached Reasons for Judgment the appeals from assessments numbered 3441994 and 3441797, both dated 30 September 2015, are allowed and the assessments are vacated.

There will be no order for costs.

Signed at Ottawa, Canada, this 20th day of May 2022.

"G. Jorré"

Jorré D.J.

Citation:2022TCC50
Date:20220520
Docket: 2018-2482(IT)G

BETWEEN:

UGIS JEKABS ZVILNA,

Appellant,

and

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Respondent.

REASONS FOR JUDGMENT

Jorré D.J.

Introduction

[1] The Appellant appeals from two director's liability assessments made on 30 September 2015 pursuant to section 227.1 of the *Income Tax Act* in respect of amounts owing by TASAC Ltd. The assessments related to the company's 2009 taxation year.

[2] There are no issue as to quantum and there are no issues regarding the preconditions set out in subsection 227.1(2) of the *Act*. It was not suggested that the Appellant was a *de facto* director.

[3] Subsection 227.1(4) of the *Income Tax Act* provides for a limitation period for assessments under section 227.1; it states that:

> No action or proceedings to recover any amount payable by a director of a corporation under subsection (1) shall be commenced more than two years after the director last ceased to be a director of that corporation.

[4] The key question here is a factual one: Did the Appellant ceased to be a director more than two years before 30 September 2015.

[5] One of the difficulties in this matter is that key events took place in the period 2004 to 2006, long before the assessments.

[6] The Appellant made three alternative submissions in support of his appeal. Two of them may be disposed of rapidly and I shall deal with them first.

The Appellant withdrew from the Business and thereby ceased to be a Director

[7] The Appellant says that by late 2004/2005 he had completely withdrawn from the company, had absolutely no involvement with the company and that the only other shareholder and director, his wife was fully aware that he was no longer a director.[1]

[8] I accept the Appellant's evidence in this regard. Absolutely nothing in the evidence suggests the contrary.

[9] Based on that, the Appellant relies on the decision of this Court in *Perricelli v. R.*[2] He submits that his situation should be treated like that of *Perricelli*, who was found not to be a director notwithstanding that there was no written resignation.

[10] While I agree that the situation is has some similarities insofar as no copy of a written resignation has been produced in this mater[3], a purely verbal resignation by a director of an Ontario corporation cannot have any effect. This is the result of subsection 121(2) of the Ontario *Business Corporations Act* which states[4]:

> A resignation of a director becomes effective at the time a written resignation is received by the corporation or at the time specified in the resignation, whichever is later.

[11] Subsection 121(2) of the Ontario *Business Corporations Act* was applied by the federal Court of Appeal in *Chriss v. R.*[5]

[12] Accordingly, the Appellant did not cease to be a director by reason of his withdrawal from the company.

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[1] There is a great deal of confusion over whether the Appellant left the family residence at Thanksgiving of 2004 or Thanksgiving of 2005. For the purposes of this appeal it does not really matter in which of those two years that occurred.

[2] *Vito Perricelli v. HMQ*, 2002 CanLii 953.

[3] I note that the appellant's testified that there was a written resignation although there was much confusion in his testimony between the written resignation and the filing of the notice of the resignation for the purpose of the Ontario *Corporations Information Act*.

[4] I would note that in analysing this case I have not been unmindful of the rebuttable presumption in subsection 262 (3) of the Ontario *Business Corporations Act.*

[5] 2016 FCA 236 at paragraphs 9 to 15.The reasons for judgement in *Chriss* also apply to the appeal of *Gariepy v. R.*

The written separation agreement of 7 April 2011 contained the Appellant's written resignation[6]

[13] After much delay the Appellant and his wife signed their separation agreement on 7 April 2011. The Appellant takes the position that subsection 8.04(c) constitutes a written resignation from his position as a director of the company.

[14] Subsection (c) reads as follows:

> … Upon this agreement becoming effective,
> (a)…
> …
> (c)The Husband **shall** resign as officer, director and employee of TASAC Ltd., effective as of the date of this agreement
> …
>
> (My emphasis)

[15] Subsection (a) provide that upon the agreement becoming effective the minute books and corporate documents shall be brought up to date. Subsection (b) provides that the usual corporate formalities shall be completed so as to transfer the Appellant's shares to the wife as of the date of the agreement - including recording the transfer in the corporate records. Last, subsection (d) provided that the Appellant waived any present or future claims with respect to the company and the wife's shares and interest in the company.

[16] It is clear that subsection 8.04(c) is an undertaking to resign once the separation agreement has been signed. It is not in itself a resignation. This is abundantly clear when one considers that subsections (a) and (b) also require actions to be taken once the separation agreement is signed and when one contrasts this with subclause 8.04(d) which reads:

> The Husband **hereby releases** all present and future claims with respect to TASAC Ltd and the wife's shares and interest in TASAC Ltd.
>
> (My emphasis)

[17] Unlike the other subsections in section 8.04, subsection 8.04(d) requires no further action.

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[6] The agreement is at tab 12 of exhibit R-1.

[18] As a consequence the separation agreement does not constitute a written resignation as required by subsection 121(2) of the Ontario *Business Corporations Act*.[7]

The main question: Did the Appellant resign in writing and give the resignation to his wife, the other Director of the corporation?

[19] The difficulties in this matter arise from the fact that the Appellant has not produced a written resignation.

[20] The Appellant and Lorin Flaum Zvlina were married in July 1997.

[21] During the marriage the Appellant and his wife had a number of small companies. Some were entirely owned by the Appellant. One was entirely owned by the wife. There were two companies where the Appellant and his wife each owned 50% of the shares; one of those two companies was TASAC Ltd., the only company relevant to the assessments under appeal.

[22] TASAC Ltd. was incorporated in early 1993, the Appellant became a director at the same time and his wife became a director in July 1997.[8]

[23] In the next few paragraphs I am going to refer to certain dates in 2004. Considering the evidence as a whole I believe that these events took place in 2004. However, the evidence is very confusing as to whether these events occurred in 2004 or 2005 but for the purposes of this appeal it really does not matter whether these events were in 2004 or 2005.

[24] At the beginning of 2004 the Appellant informed his wife that he wanted to leave their common businesses and start his own company. TASAC would become solely the wife's company.[9]

[25] In April 2004 he incorporated a new business and operated from premises at Aberfoyle Crescent. From that point on he ceased to be involved with TASAC Ltd.[10]

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[7] Given that the Appellant's wife was the only other director of the company it might well have been a different matter had the wording been that " … the husband hereby resigns as an officer, director … "
[8] See pages 1, 2 and 5 of the corporate profile report at tab 7 of exhibit R-1.
[9] See pages 26 and 27 of the transcript.
[10] See pages 26 and 36 of the transcript.

[26] At Thanksgiving of 2004 the Appellant left the matrimonial home. The Appellant found the separation very stressful. It was not friendly insofar as once he left the home he was not to return ever. On the day he left he took some clothes with him and he never did return to the matrimonial home.

[27] While the evidence was confusing, I am satisfied that the Appellant was trying as best he could to answer truthfully as to what happened many years ago during what would have to have been a very stressful period.

[28] The separation agreement was substantially ready to sign six years before the actual signing 2011. The Appellant testified that it was negotiated quickly and easily.

[29] There were difficulties actually getting the separation agreement signed.[11]

[30] Sometime after the Appellant left the family home at Thanksgiving and prior to 2006 the Appellant and his wife met.

[31] At that meeting many documents were signed including the appellant's resignation as a director and the documents transferring the appellant's interest and shares in TASCAN so that it would become solely the business of the wife. I infer that at that time all the requirements of subsections 8.04(b) and (c) of the separation agreement were carried out, long before the signature of the separation agreement. The appellant left the documents with his wife.[12]

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[11] Apart from modifying the date on the agreement, it appears that there were later changes to section 3 regarding child support. These changes appear to have been to reflect what had happened up to late 2009.

[12] Because the evidence is confusing I have reviewed the transcript a number of times. The key question here is did the appellant resign in writing and give it to the other director, his wife, resulting in receipt of the resignation by the corporation? Considering the evidence as a whole, I am satisfied that:

- When the Appellant says that he said "I never thought of that" to his accountant in 2015 or 2016 and his accountant said to him that he would get the appellant off the books and submit the resignation this had to be a reference to the obligations under the *Corporations Information Act* of Ontario - see lines 1 to 8, p. 29 of the transcript. It was not a reference to the written resignation.
- However, what the appellant learned from the account at that meeting appears to have been very much on his mind when the Appellant testified and
- the Appellant was often referring to the failure to send notice of the resignation (as required under the *Corporations Information Act* of Ontario) when being asked whether he gave a written resignation.
- He was also saying that he signed a resignation document.

See, for example, l. 25, p. 37 to l. 9, p. 40; l. 28, p. 46 to l.1, p. 48; p. 56, l. 6 to l.14 of the transcript.

I recognize that the Appellant in his testimony states that he does not have a specific recollection of signing specific documents but he does recall that they signed the documents necessary to turn it into solely his wife's business and he testifies that his wife was very keen to have complete control of that business. I am satisfied that she kept the resignation.

[32] At the same time the wife signed the documents necessary to resign as a director of and transfer her interest in another company which they had owned jointly, Southwest Television Advertising Corporation, so that it would become solely the Appellant's company.[13]

[33] As a result, by the time the separation agreement was signed in 2011 the requirements in subparagraphs 8.04(b) and (c), including his resignation as a director and giving it to the corporation by handing it to his wife, had already been fulfilled.

Conclusion

[34] Having concluded that the Appellant resigned in writing and left the resignation with his wife, the other director, prior to 2006, it follows that the Appellant validly resigned as a director more than two years before the assessments in issue.[14]

[35] Accordingly, the appeals are allowed and the two assessments in issue will be vacated. There will be no order for costs.[15]

Signed at Ottawa, Canada, this 20th day of May 2022.

"G. Jorré"

Jorré D.J.

This is consistent not only with his wife wanting sole control of TASCAN but also with her running the business from 2004/2005 on. It is also consistent with the separation agreement.

[13] The Southwest Television Advertising Corporation is referred to in section 8.03 of the separation agreement.

[14] Given my finding, is unnecessary for me to deal with any question of due diligence. However, given that he had completely ceased to have any involvement with TASCAN prior to 2006, had he been a director, no due diligence defence could have existed.

[15] This matter proceeded as a general procedure matter up to and including the beginning of the trial. In the course of the trial an application was made to move the matter to the informal procedure and I made an order during the hearing transferring this appeal to the informal procedure.

CITATION:	2022 TCC 50
COURT FILE NO.:	2018-2482(IT)G;
STYLE OF CAUSE:	UGIS JEKABS ZVILNA AND HER MAJESTY THE QUEEN
PLACE OF HEARING:	Hamilton, Ontario
DATE OF HEARING:	October 26, 2021
TRANSCRIPT RECEIVED BY THE COURT ON:	November 18, 2021
REASONS FOR JUDGMENT BY:	The Honourable Justice Gaston Jorré, Deputy Judge
DATE OF JUDGMENT:	May 20, 2022

APPEARANCES:

For the Appellant:	The Appellant Himself
Counsel for the Respondent:	Acinkoj Magok

COUNSEL OF RECORD:

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Firm:	
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