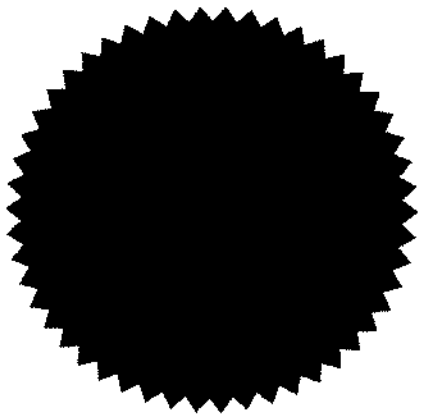

Citation: 2004TCC733
Date: 20041110
Docket: 2001-2050(GST)G
2001-2052(IT)G

SANTINO FACCHINI,

Appellant,

And

HER MAJESTY THE QUEEN,

Respondent.

Counsel for the Appellant: Howard J. Alpert
Counsel for the Respondent: David W Chodikoff

REASONS FOR JUDGMENT

(Delivered orally from the Bench on October 6, 2004, at Toronto, Ontario)

McArthur J.

[1] These appeals were heard on common evidence with respect to the assessments under subsections 227.1(1) of the *Income Tax Act* (*ITA*) and 323(1) of the *Excise Tax Act* (*ETA*). The Minister of National Revenue assessed the Appellant as a director of All Trades Estimating Ltd. (the Corporation) for his alleged failure to remit employee source deductions and goods and services tax. The Appellant's only position or defence is that he used the necessary skill and due diligence expected of him, considering all the circumstances, and he relies on subsections 227.1(3) of the *ITA* and 323(3) of the *ETA*. These corresponding sections are identical for our purposes. The alternative positions pleaded in the Notices of Appeal were abandoned by counsel for the Appellant at the outset of the hearing.

[2] The position of the Respondent is that the Appellant did not exercise the degree of care, diligence and skill to prevent the failure of the Corporation to remit $38,000 in GST and $92,000 in income tax that a reasonably prudent person would have exercised in comparable circumstances.

[3] The named corporate directors were Marcellinus (Marcy) MacNeil, Rocco Dipede and the Appellant. The Appellant was born in Rome, Italy, in 1938 and came to Canada with his family at the age of 13. His education is limited to grade 3 in Italy and eight months in Canada. His reading and writing skills in both those languages are very limited. For practical purposes, he is illiterate. He spent most of his working life as a carpenter. His skills were learned from the school of hard knocks. The Appellant and Maureen Panchuk, the Corporation's former bookkeeper, accountant and secretary to Marcy MacNeil, were the only witnesses.

[4] While the Appellant's memory was selective to fit what he believed were his present-day needs, I did not find him dishonest. It is not unusual that the remembered past does not always coincide with the historical past, but for the most part, I accept the Appellant's evidence, much of which was corroborated by Maureen Panchuk, whose evidence I accept in its entirety.

[5] The Appellant had an adequate command of the English language. The facts for our purposes include, as stated, the Appellant arrived in Canada as a 13-year old in 1951 and has been working in the construction field almost since that time. Over the years, he became a carpenter and in mid-1986, a shareholder in the Corporation which was incorporated in August 1985 by Marcy MacNeil and his wife. Marcy was an able project estimator and convinced Rocco Dipede and the Appellant to join him as equal shareholders and directors around mid-1986. There are corporate minutes which reflect that the Appellant and Rocco were elected directors in November 1985. This type of inconsistency is not uncommon. Those preparing corporation's minute books and who are completely detached from the corporation often take arbitrary dates when the precise information is not available. In this instance, nothing falls on it. The minutes later refer to the wives of the three directors being elected as directors. I believe this is fictitious.

[6] The individual skills of the three directors complemented each other. Marcy was an experienced, able estimator; Rocco and the Appellant were on-site construction workers. The Appellant looked to Marcy for the financial administration of the Corporation with complete confidence that he operate the office and secure work through his estimates. Marcy retained the services of

Maureen Panchuk, whom as mentioned was the only witness other than for the Appellant. Rocco was responsible for the on-site management of Toronto construction projects and some office duties. In fact, together with Marcy, in about 1987, he interviewed Ms. Panchuk for her job. She had been there ten years.

[7] The Corporation carried on business from substantial office premises on Renfrew Drive in Markham, Ontario. Marcy and Rocco had private offices. The office included a boardroom and a large open area where Ms. Panchuk worked and managed. She did the office bookkeeping-accounting, including accounts payable, receivable, payroll, T4 summaries, all under Marcy's supervision. The Corporation retained an outside accountant and lawyer for the financial statements, corporate minutes, mortgages and other matters.

[8] The Appellant was responsible for construction projects outside the Toronto area including Niagara Falls, Windsor, Peterborough, London, Newcastle, and Hamilton. The Corporation was a subcontractor for primary building contractors. The Appellant was the foreman for his crew of five or six men and not the supervisor of the entire project. His men were hired at his request, either directly through the relevant union or by calling the corporate office and having it attended to through the office. He rarely attended the Renfrew Drive office but did so once or twice a month, usually to deliver timesheets and pick up pay cheques for the employees. The cheques required two signatures. Marcy always signed first and usually Rocco second, but occasionally, in Rocco's absence, the Appellant signed cheques. There is no doubt he trusted Marcy explicitly to operate the office and manage financial matters.

[9] At the outset, the business prospered to a point where, upon a decision made by all three directors, dividends or bonuses, as the Appellant referred to them, were paid, one in excess of $300,000 in May 1990, to each of the directors. Lesser amounts were paid in previous years. In addition, each shareholder drew a salary of $1,000 to $1,500 weekly.

[10] The Corporation suffered like most other businesses during the recession and real estate collapse of the 1990s. To insert needed funds into the Corporation, the Appellant and his wife granted a $300,000 mortgage to the Bank of Nova Scotia on their home in 1990 which was paid off by the Corporation within a year or two. Subsequently, the Appellant and his spouse granted a $200,000 mortgage to London Trust and Savings Corporation in January 1994 to bolster the Corporation's cash flow. This was not paid off by the Corporation. In January 1997, the weekly

salary to the three directors ceased, and in February, at a directors' meeting, Marcy advised the Appellant that the Corporation was shutting down and that he had spoken to a Trustee in Bankruptcy.

[11] Although the Appellant stated he was shocked, I find that difficult to believe. Surely there were many warning signs of financial difficulties, such as the 1994 mortgage which was not paid off, and the weekly draws being cut in January 1997. Be that as it may, he trusted in Marcy to do the right thing. Occasionally, upon his questioning Marcy, he was told that the Corporation was doing well. Ms. Panchuk corroborated the Appellant's evidence that he worked outside of Toronto; rarely came into the office; had no office of his own; that Marcy and Ms. Panchuk dealt with Revenue Canada exclusive of the Appellant; and that the Appellant was not involved in the office operation, financial or banking affairs. Upon the bankruptcy of the Corporation in 1997, the Appellant and his wife were left to pay the mortgage on their home and he went back to his carpentry trade, earning approximately $800 weekly as an employee.

[12] Counsel for the Respondent questioned the Appellant's pretension of naiveté. Counsel stated that the Appellant ran the job site with respect to the subcontracts; he was foreman at the site; he had control over his workers; he picked them up in the Toronto area and drove them home at the end of the day; he had control to hire and fire; he resolved problems as foreman; he signed numerous documents, which are contained in the Respondent's book of documents as Exhibits R-2 and R-3; he brought timecards back to the office; he signed cheques; he was elected the Secretary-Treasurer of the Corporation; he was a shareholder of 100 shares; he was responsible equally for the affairs of the Corporation equally with the two other shareholders; he received bonuses together with his two other shareholders; and he participated in inserting cash into the Corporation by signing two mortgages.

[13] With respect to credibility, counsel for the Respondent added that the Appellant tailored his answers to meet his needs and he understood each question put to him without the need of repetition. Counsel stated that the Appellant's absolute trust position with Marcy was inconsistent with his questioning Marcy from time to time on how things were going, and the mortgages are inconsistent with his stating that he thought all was well financially with the Corporation until February 1997.

Analysis

[14] Like most of the due diligence defences, this case is fact-driven. There are mountains of case law on the due diligence defence going both ways. Generally, a director must have taken active steps to ensure that the corporation made its source deduction remittances. An outside director will not be held to the same standard as an inside director, but a director's background and experience in business will be given great weight in determining whether the director has met due diligence.[1]

[15] The Appellant virtually took no active steps to ensure the Corporation would make its required remittances. Simply put, he maintains he was a carpenter-turned-foreman, functionally illiterate, and he relied on the experience of Marcy absolutely to remit what had to be remitted because he did not have the experience, ability or know-how to do anything else.

[16] Counsel for the Respondent counters this with a formidable list which I will deal with briefly. Counsel advances that the Appellant was the boss of a crew and responsible for the completion of subcontracts for substantial construction projects, such as a university addition in Windsor. This assertion is accurate. The Appellant did have a responsible position with the Corporation, and I would go further and say that, within the analysis of *Soper*, he was an inside director, but knowing the hands-on building trade has little to do with the Corporation's financial obligations. Mr. MacNeil brought the Appellant into his Corporation because the Appellant knew framing, foundations and dealing with construction tradesmen. He had had a wealth of hands-on experience in the construction business. The Appellant's skills complemented those of Mr. MacNeil, who had the office management skills but obviously lacked construction skills.

[17] In dealing with the Appellant's actual involvement in the Corporation's corporate affairs, it is true that the Appellant signed at least fifty corporate minutes. However, I accept the Appellant's position that he was doing as he was told. He had very little idea what he was signing. He did not know a company by-law or board resolution from a GST or income tax remittance form. I am satisfied that he did not simply ignore the paper end of the Corporation; he was incapable of grasping its significance.

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1 These thoughts are taken from Justice Robertson of the Federal Court of Appeal in *Soper v. The Queen*, 97 DTC 5407.

[18] Yet, in contrast, I have no doubt that he was a talented carpenter and probably a brilliant foreman or construction crew boss, and the Corporation had some very successful years, which does not happen by itself. He knew he held an equal number of shares with Messrs. MacNeil and Dipede, making him what he described as an equal partner. He knew his strengths as a field construction man and his weaknesses in an office environment. He had no office. He must have known there were financial problems when he and his wife granted financial institutions substantial mortgages on their home, but I believe he was entitled to rely on Mr. MacNeil's expertise in the office, as Mr. MacNeil relied on the Appellant's expertise in the field.

[19] The ceasing of his weekly advance in January 1997 must have caught his attention and I have difficulty believing that he remained silent, but at this point, there was nothing he could do. He already had a $200,000 mortgage on his home, the proceeds of which went to the Corporation. Even if he had had the wherewithal to hire a replacement for Mr. MacNeil, it was too late; the Corporation ceased operations a month later.

[20] I have the decision of my colleague, Justice Margeson, dismissing the appeal of the Appellant's fellow shareholder, Mr. Dipede, with respect to the same question I am faced with. The Respondent's counsel suggests this case was at all fours with that of Mr. Dipede. I disagree. Both cases depend on their individual facts. Both common shareholders had the burden of proving, or at least making a *prima facie* case, that they exercised the degree of care, diligence and skill to prevent the failure of the Corporation to remit that a reasonably prudent person would have exercised in comparable circumstances. Margeson J. found that Mr. Dipede did not meet that criteria. I have no doubt that Mr. Dipede was more involved in the financial administration of the Corporation. He worked in Toronto and had his own office. Margeson J. relied on the evidence of Mr. MacNeil, who did not testify at this hearing. Margeson J. found that the evidence of Mr. Courtney, a representative of CRA, and Mr. MacNeil was "... more likely to represent the true factual situation than is the scenario described by the Appellant ...". I did not have the evidence of either Mr. Courtney or Mr. MacNeil.

[21] The Appellant worked outside of Toronto, rarely went into the office, and had no private office, as did Mr. Dipede. The Appellant was illiterate, and although an able construction foreman, he had no other choice than to rely on the expertise of Mr. MacNeil. Both parties have referred me to approximately twenty cases, ten

of which support the Respondent and, not surprisingly, ten supporting the Appellant's position. Again, the case is to be decided on its facts and I accept the direction that counsel for the Appellant has taken. I find as a fact that the Appellant meets the due diligence criteria in both *Acts* and feel it does not serve a useful purpose to review in any detail the case law provided, yet it is worth mentioning a few of the Appellant's authorities which I find of assistance.

[22] In the case of *A.G. Can v. Dilorenzo*,[2] the Federal Court of Appeal stated, in effect:

> It was appropriate for the Court to take into account the level of skill, experience and qualifications of the taxpayer. In this case the tax court judge made no error in his findings of fact, or in law, in noting that the taxpayer lacked formal education, having started in the construction industry after immigrating to Canada from Italy at the age of sixteen. Furthermore, the tax court did not find it unreasonable for the taxpayer to rely on the expertise of the Corporation's accountant.

Also, in the case of *Hevenor v. The Queen*,[3] the taxpayer was a farmer with a grade 10 education with no accounting or business experience. Rip J. of this Court found that the Appellant had nothing to do with the corporation's business, having left all of the decision-making to his son. He had not been told on an ongoing basis of the precarious situation, and he had been placed in a situation for which he had no experience and skill. Rip J. determined that the Appellant was not held personally liable as assessed.

[23] Also, in *Kenny v. The Queen*,[4] Justice Bell found that the taxpayer was absorbed in his own business activity and lacked acumen insofar as financial aspects of that business were concerned. And he stated:

> ... where a person is assured, upon inquiry, that GST obligations are being met ... the due diligence test under subsection 323(3) of the *Excise Tax Act* has been met.

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2 2003 GTC 1538.

3 99 GTC 3070.

4 [2001] T.C.J. No. 58.

And lastly in *Luciano v. The Queen*,[5] a further decision of Justice Bell, he stated:

> The Appellant exercised precisely the degree of care, diligence and skill ... that a reasonably prudent person would have exercised in comparable circumstances – namely, none.

The headnote for this case provides as follows:

> The taxpayer's appeal was allowed. The taxpayer was uneducated, unsophisticated, honest construction labourer who was always at the bottom of the hierarchical structure. ... He did not appreciate that he was a director of [the corporation], and he was totally ignorant of his director status and duties. ...

[24] In both these appeals, I find that the Appellant exercised the degree of care, diligence and skill to prevent the failure that a reasonably prudent person would have exercised in comparable circumstances. He managed the out-of-town construction operations. He could no more remit deductions than most of us could split the atom. The appeals are allowed with costs.

Signed at Ottawa, Canada, this 10th day of November, 2004.

"C.H. McArthur"

McArthur J.

CITATION:	2004TCC733
COURT FILE NO.:	2001-2050(GST)G and 2001-2052(IT)G
STYLE OF CAUSE:	Santino Facchini and Her Majesty the Queen
PLACE OF HEARING:	Toronto, Ontario
DATE OF HEARING:	October 4, 5, 6, 2004
REASONS FOR JUDGMENT BY:	The Honourable Justice C.H. McArthur
DATE OF JUDGMENT:	October 8, 2004

APPEARANCES:

Counsel for the Appellant:	Howard J. Alpert
Counsel for the Respondent:	David W. Chodikoff

COUNSEL OF RECORD:

For the Appellant:

Name:	Howard J. Alpert
Firm:	Alpert Law Firm
For the Respondent:	Morris Rosenberg Deputy Attorney General of Canada Ottawa, Canada