Docket: 2010-1632(GST)G

BETWEEN:

ALLAN A. CHELL,

appellant,

and

HER MAJESTY THE QUEEN,

respondent.

Appeal heard on common evidence with the appeals of Allan A. Chell (2010-1633(IT)G and 2010-1634(IT)G) on October 9 and 10, 2012, at Calgary, Alberta.

Before: The Honourable Justice Robert J. Hogan

Appearances:

Counsel for the appellant:	Lori G. Bokenfohr
Counsel for the respondent:	Margaret M. McCabe

JUDGMENT

The appeal from the assessment made against the appellant under subsection 323(1) of the *Excise Tax Act*, the notice of which is dated May 5, 2008 and bears number 677649, is dismissed, with costs, in accordance with the attached reasons for judgment.

Signed at Ottawa, Canada, this 28th day of January 2013.

"Robert J. Hogan"

Hogan J.

Docket: 2010-1633(IT)G

BETWEEN:

ALLAN A. CHELL,

appellant,

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Appeal heard on common evidence with the appeals of
Allan A. Chell (2010-1632(GST)G and 2010-1634(IT)G)
on October 9 and 10, 2012, at Calgary, Alberta.

Before: The Honourable Justice Robert J. Hogan

Appearances:

Counsel for the appellant:	Lori G. Bokenfohr
Counsel for the respondent:	Margaret M. McCabe

JUDGMENT

The appeal from the assessments made against the appellant under section 227.1 and subsection 227(10) of the *Income Tax Act* for the 2003, 2004 and 2005 taxation years, with respect to the liability of cDemo Inc. for federal income tax deducted at source from cDemo's employees' wages and salaries, is dismissed, with costs, in accordance with the attached reasons for judgment.

Signed at Ottawa, Canada, this 28th day of January 2013.

"Robert J. Hogan"

Hogan J.

Docket: 2010-1634(IT)G

BETWEEN:

ALLAN A. CHELL,

appellant,

and

HER MAJESTY THE QUEEN,

respondent.

Appeal heard on common evidence with the appeals of
Allan A. Chell (2010-1632(GST)G and 2010-1633(IT)G)
on October 9 and 10, 2012, at Calgary, Alberta.

Before: The Honourable Justice Robert J. Hogan

Appearances:

Counsel for the appellant:	Lori G. Bokenfohr
Counsel for the respondent:	Margaret M. McCabe

JUDGMENT

The appeal from the assessments made against the appellant under section 227.1 and subsection 227(10) of the *Income Tax Act* for the 2004 and 2005 taxation years, with respect to the liability of Global Autolink Corp. for federal income tax deducted at source from Global Autolink's employees' wages and salaries, is dismissed, with costs, in accordance with the attached reasons for judgment.

Signed at Ottawa, Canada, this 28th day of January 2013.

"Robert J. Hogan"

Hogan J.

Citation: 2013 TCC 29
Date: 20130128
Dockets: 2010-1632(GST)G
2010-1633(IT)G
2010-1634(IT)G

BETWEEN:

ALLAN A. CHELL,

appellant,

and

HER MAJESTY THE QUEEN,

respondent.

REASONS FOR JUDGMENT

Hogan J.

[1] The appellant, Allan A. Chell, is appealing three director's liability assessments issued against him on May 5, 2008. One assessment pertains to the failure of cDemo Inc.'s ("cDemo") to remit payroll source deductions ("source deductions") for its 2003, 2004 and 2005 taxation years. The assessed amount is $53,768.95. Another assessment relates to cDemo's failure to remit goods and services tax ("GST") amounts in 2005. The assessed amount is $3,289.39. The third assessment pertains to the failure of Global Autolink Corp. ("Global") to remit payroll source deductions. The assessed amount is $239,838.42. These appeals were heard on common evidence.

Background

[2] The appellant is a consultant in the automobile industry. In 2001, he became a director of cDemo, a software development company which he helped to found. That company developed technology to facilitate inspections of automobiles through smart phone applications.

[3] In 2000, the appellant became a director of Global, a company of which he was a founder. Originally, the company was in the business of purchasing

automobiles in Canada for resale internationally. In approximately 2003, as a result of a strengthening Canadian dollar, Global changed its business model, focusing instead on providing technological solutions to clients wishing to sell automobiles online. It did so by licensing technology from cDemo. Generally speaking, Global's clients included automobile manufacturers, fleet-leasing and rental companies, and automobile auction companies.

[4] The appellant was responsible for business development at both companies.

[5] In the mid-2000s, both cDemo and Global became insolvent. At that time, both companies were behind on their remittances to the Canada Revenue Agency ("CRA").

[6] Following the resignation of all of the other directors, the appellant found himself as the sole director of both cDemo and Global. The evidence shows that, in January 2006, the appellant posted a letter at the offices of cDemo and Global, indicating his intention to resign as a director and officer of each of those companies. Four to six weeks later, the appellant delivered a copy of the letter to the lawyer who had been acting for the two companies. Apparently, because cDemo and Global had unpaid bills with the lawyer, the latter took no action in respect of the letter. No changes were made to the Alberta Corporate Registry to indicate that the appellant was no longer a director of either company.

[7] Despite his resignation letter, the appellant remained actively involved in both cDemo and Global. He continued to meet with the CRA to discuss, *inter alia*, cDemo's and Golbal's outstanding liabilities for source deductions and GST. These meetings occurred approximately every few weeks throughout 2006 and into 2007.

[8] In February 2007, the appellant informed the CRA that a former employee of cDemo might be interested in purchasing assets of cDemo. Days later, the appellant told the CRA that an agreement had been reached whereby that employee would purchase certain tools owned by cDemo. The appellant subsequently turned over the proceeds of the sale to the CRA along with the corresponding bill of sale, which was signed by the appellant. In February, April and May of 2007, the appellant spoke to the CRA of the possibility of a group of investors purchasing other assets of cDemo. Such a sale did not materialize.

[9] The appellant also effected a change on the Alberta Corporate Registry with respect to cDemo's directors. Following a request from Gord Roberts, who was a

director of cDemo, the appellant signed in June 2006, a statutory declaration removing Roberts as a director from the Alberta Corporate Registry.

[10] During the 2006 and 2007 time period, the appellant continued to pursue business development activities for Global. In 2006, Global was pursuing a pilot project in the U.S. The purpose of that project was to showcase Global's online technology for potential U.S.-based users.

[11] Between June and September 2006, the appellant indicated to the CRA that he was in regular contact with the U.S. client to discuss the results of the pilot project, as well as the potential implementation of the technology and the pricing of Global's services. On July 11, 2006, the appellant indicated to the CRA that he was hopeful that the U.S. client would enter into a contract with Global which would provide sufficient revenue to allow Global to satisfy its outstanding remittances.

[12] In September 2006, the appellant provided documentation to the CRA outlining the approximate amount of revenue that Global would generate if the U.S. client were to purchase services from Global. In that document, he identified himself as the president and CEO of Global.

[13] Despite these efforts, in October 2006, the appellant informed the CRA that the pilot project had been cancelled because the U.S. client did not wish to commit to a long-term arrangement with Global.

[14] The appellant acknowledged that he never indicated to the CRA that he was no longer a director of either cDemo or Global. According to the appellant, the CRA did not raise the matter with him and he was under no obligation to advise the CRA thereof.

Issues

[15] There are two issues in these appeals:

1. First, was the appellant either a *de jure* or *de facto* director of cDemo or Global within the two years preceding the assessments?
2. If so, can the appellant rely on the so-called due diligence defence under subsections 227.1(3) and 323(3) of the *Income Tax Act* ("*ITA*") and *Excise Tax Act* ("*ETA*") respectively?

Positions of the Parties

[16] The appellant argues that he ceased to be a director of cDemo and Global on January 11, 2006, the date on which he posted his letter of resignation at the offices of the two corporations. The appellant submits that, consequently he is not liable for the unremitted source deductions and GST because his resignation occurred more than two years before the assessments. According to the appellant, his continued involvement with cDemo and Global was solely in the capacity of creditor and shareholder, and not as a director. Finally, in the event of a finding to the contrary, the appellant claims that he exercised due diligence to prevent cDemo and Global from failing to remit the source deductions and GST.

[17] In response, the Minister submits that the appellant did not cease to be a director of cDemo or Global more than two years before the assessments. Further, the Minister contends that the appellant did not exercise due diligence to prevent cDemo and Global from failing to remit the source deductions and GST. Therefore, he is liable for their payment.

Analysis

[18] Under both the *ITA* and *ETA*, a director may be liable for a corporation's failure to remit certain amounts collected on behalf of the Crown. Subsection 227.1(1) of the *ITA* provides:

> **227.1**(1) Where a corporation has failed to deduct or withhold an amount as required by subsection 135(3) or 135.1(7) or section 153 or 215, has failed to remit such an amount or has failed to pay an amount of tax for a taxation year as required under Part VII or VIII, the directors of the corporation at the time the corporation was required to deduct, withhold, remit or pay the amount are jointly and severally, or solidarily, liable, together with the corporation, to pay that amount and any interest or penalties relating to it.

The corresponding provision in the *ETA* is subsection 323(1), which provides:

> **323**(1) If a corporation fails to remit an amount of net tax as required under subsection 228(2) or (2.3) or to pay an amount as required under section 230.1 that was paid to, or was applied to the liability of, the corporation as a net tax refund, the directors of the corporation at the time the corporation was required to remit or pay, as the case may be, the amount are jointly and severally, or solidarily, liable, together with the corporation, to pay the amount and any interest on, or penalties relating to, the amount.

[19] Notwithstanding these provisions, if an individual resigns as a director of a corporation that has failed to remit the amounts referred to, the Minister may not assess that individual for director's liability more than two years after that individual's resignation. Subsection 227.1(4) of the *ITA* provides:

> **227.1**(4) No action or proceedings to recover any amount payable by a director of a corporation under subsection 227.1(1) shall be commenced more than two years after the director last ceased to be a director of that corporation.

The corresponding provision in the *ETA* is subsection 323(5), which provides:

> **323**(5) An assessment under subsection (4) of any amount payable by a person who is a director of a corporation shall not be made more than two years after the person last ceased to be a director of the corporation.

[20] In the present appeals, it is therefore necessary to determine whether the appellant was a director within the two years preceding the assessments for director's liability.

[21] Neither the *ITA* nor the *ETA* defines when an individual ceases to be a director for the purpose of the director's liability provisions. Rather, the corporate law of the relevant jurisdiction is determinative: *Aujla v.* Canada, 2008 FCA 304, [2009] 3 F.C.R. 93, at paragraphs 23 to 25.

[22] A director may be a *de jure* director or a *de facto* director for the purpose of director's liability under the *ITA* and *ETA*: see *Mosier v. R.*, [2001] G.S.T.C. 124 (TCC), at paragraph 23. A *de jure* director is an individual who has been appointed as such pursuant to the corporate law of the jurisdiction in which the corporation was created or continued, as the case may be. A *de facto* director can exist in two forms. As Bowman A.C.J., as he then was, observed in *Mosier*, at paragraph 23, "*de facto* directors can be those who are ostensibly duly elected but who may lack some qualification under the relevant company law, and those who simply assume the role of director without any pretence of legal qualification". Either *de jure* or *de facto* directorship can give rise to director's liability.

[23] If the appellant was a *de jure* or *de facto* director within the two years preceding the assessments for director's liability, then he is liable for the unremitted source deductions and GST. This is so unless he can rely on the due diligence defence available under both the *ITA* and *ETA*.

[24] As stated above, the date of each of the three assessments under appeal is May 5, 2008. Therefore, it is first necessary to determine whether the appellant was a *de jure* or *de facto* director on or after May 5, 2006, being two years before the assessments.

Was the appellant a *de jure* director on or after May 5, 2006?

[25] An individual becomes and ceases to be a *de jure* director according to the corporate law of the jurisdiction in which the corporation was created or subsequently continued. The cDemo company was incorporated in Delaware. Global was incorporated in Alberta.

[26] Directors may resign in a similar fashion under both the *Delaware Code* and Alberta's *Business Corporations Act* (the "*ABCA*"). Title 8, Chapter 1, Subchapter IV, § 141(b) of the *Delaware Code* provides:

> . . . Any director may resign at any time upon notice given in writing or by electronic transmission to the corporation. A resignation is effective when the resignation is delivered unless the resignation specifies a later effective date or an effective date determined upon the happening of an event or events. . . .

Similarly, section 108 of the *ABCA* provides:

> (1) A director of a corporation ceases to hold office when
> (a) the director dies or resigns,
> (b) the director is removed in accordance with section 109, or
> (c) the director becomes disqualified under section 105(1).
>
> (2) A resignation of a director becomes effective at the time a written resignation is sent to the corporation, or at the time specified in the resignation, whichever is later.

Under each provision, a director may resign by providing to the corporation notice of his or her intention to resign.

[27] By posting his letter of resignation at the offices of cDemo and Global on January 11, 2006, the appellant provided to the corporation's proper notice of resign action under both Delaware and Alberta corporate law. Since he ceased to be a *de jure* director more than two years before the assessments, it is necessary to determine whether the appellant was a *de facto* director of cDemo and Global despite his legal resignation.

Was the appellant a *de facto* director on or after May 5, 2006?

[28] Following his legal resignation as a director of cDemo, the appellant continued to be actively involved with that company. As discussed above, the appellant negotiated the sale of certain assets of cDemo, signing his name on the corresponding bill of sale. Only a director of cDemo could have authorized the sale of cDemo's assets. Although this sale occurred May 16, 2007, *de facto* directorship "must be considered to endure at least as long as [the] person manages or supervises the management of the business and affairs of the corporation in question": see *Bremner v.* The Queen, 2009 FCA 146, at paragraph 8.

[29] The appellant continued to act as a *de facto* director of cDemo until at least June 2006. As noted above, the appellant signed in that month a statutory declaration removing a fellow director from the Alberta Corporate Registry. Such a declaration is effective only if signed by a director. Although the appellant claimed at trial that he was unaware that he was signing in the capacity of director, it is difficult to accept that he thought he could have made that change in the capacity of creditor or shareholder. This evidence suggests that the appellant was a *de facto* director of cDemo until at least June 2006.

[30] The appellant also continued to be actively involved with Global's following his legal resignation. He met with a prospective client of Global is in the hope of entering into a long-term contract for Global's services. In this regard, the appellant appeared to be acting as a director of Global. The evidence shows that he discussed pricing and the implementation of Global's technology with this prospective client. The appellant also provided documentation to the CRA indicating approximately how much revenue Global could generate if it entered into a long-term agreement with this client. Such actions are not, contrary to the appellant's contention, consistent with the role of creditor and shareholder. Rather, these actions would suggest to a third party that the appellant was still a director of Global.

[31] The fact that the appellant's functions with Global never changed following his legal resignation also suggests that the appellant continued to act as a director of Global. Despite his legal resignation, he continued to attempt to fulfil those functions by meeting with clients. Because the appellant's behaviour remained the same following his legal resignation, a third party would not suspect that his status had changed.

[32] By continuing to act on behalf of Global, the appellant created the impression that he was still a director of the corporation. In my view, the evidence demonstrates

that the appellant was a *de facto* director of Global until at least October 2006, at which time he ceased attempting to conclude a long-term contract with a prospective client of Global's.

[33] The appellant's behaviour towards the CRA following his legal resignation reinforces my view that he continued to act as a *de facto* director until at least October 2006. When he first met with the CRA to discuss the unremitted source deductions and GST owed by cDemo and Global, the appellant had not yet resigned as a director of either corporation. Following his legal resignation, he continued to meet with the CRA to discuss these liabilities. In no way did the appellant's behaviour towards the CRA change following his legal resignation. Further, from January 2006 to approximately August 2007, the appellant never indicated to the CRA that he was no longer a director of either corporation. The appellant resigned occultly, yet he continued to cooperate with the CRA as if his status had not changed. In my view, the appellant's actions created the impression that he was still an active director of both corporations.

[34] On the basis of the foregoing reasons, I conclude that the appellant was a *de facto* director of both cDemo and Global on or after May 5, 2006, which is within the two years preceding the three assessments under appeal. Accordingly, the appellant is prima facie liable unless he can establish that he acted diligently to prevent the failures to remit.

Did the appellant exercise due diligence to prevent the failures?

[35] Subsection 227.1(3) of the *ITA* provides for a due diligence defence to director's liability, as follows:

> (3) A director is not liable for a failure under subsection 227.1(1) where the director exercised the degree of care, diligence and skill to prevent the failure that a reasonably prudent person would have exercised in comparable circumstances.

Subsection 323(3) of the *ETA* provides for a similar due diligence defence:

> (3) A director of a corporation is not liable for a failure under subsection (1) where the director exercised the degree of care, diligence and skill to prevent the failure that a reasonably prudent person would have exercised in comparable circumstances.

[36] In The Queen *v. Buckingham*, 2011 FCA 142, the Federal Court of Appeal confirmed that an objective standard must be used to determine whether a director

has satisfied the conditions of the due diligence defence under subsections 227.1(3) of the *ITA* and 323(3) of the *ETA*. Mainville J.A. stated:

> 37 . . . I conclude that the standard of care, skill and diligence required under subsection 227.1(3) of the *Income Tax Act* and subsection 323(3) of the *Excise Tax Act* is an objective standard . . . .
>
> 38 . . . Consequently, a person who is appointed as a director must carry out the duties of that function on an active basis and will not be allowed to defend a claim for malfeasance in the discharge of his or her duties by relying on his or her own inaction . . . .
>
> 39 An objective standard does not however entail that the particular circumstances of a director are to be ignored. These circumstances must be taken into account, but must be considered against an objective "reasonably prudent person" standard. . . .
>
> [Emphasis added.]

Clearly, subsections 227.1(3) of the *ITA* and 323(3) of the *ETA* entail a modified objective analysis which involves considering what a reasonable person would have done in the circumstances of the individual under assessment.

[37] To establish the defence, the director or former director must show that he or she took positive actions to prevent the corporation's failure to remit the amounts in question. In *Buckingham*, the Federal Court of Appeal compared the aforementioned provisions with paragraph 122(1)(*b*) of the *Canada Business Corporations Act*, which requires directors and officers to "exercise the care, diligence and skill that a reasonably prudent person would exercise in comparable circumstances". Mainville J.A. wrote:

> 40 The focus of the inquiry under subsections 227.1(3) of the *Income Tax Act* and 323(3) of the *Excise Tax Act* will however be different than that under 122(1)(*b*) of the CBCA, since the former require that the director's duty of care, diligence and skill be exercised to prevent failures to remit. In order to rely on these defences, a director must thus establish that he turned his attention to the required remittances and that he exercised his duty of care, diligence and skill with a view to preventing a failure by the corporation to remit the concerned amounts.
>
> [Emphasis added.]

[38] At trial, the appellant agreed that he was an inside director who was very familiar with the businesses of both cDemo and Global. The appellant also described his function with the two corporations as being to find new clients in order to develop

new business. A reasonably prudent director with that level of familiarity with the businesses of cDemo and Global would have been aware of the significant financial difficulties facing the two corporations. The evidence shows that the appellant did not take any positive steps to ensure that the corporations continued to meet their remittance obligations. Instead, the source deductions and GST were diverted to fund the corporations' failing businesses.

[39] Parliament has mandated that a director of a corporation must take reasonable steps to prevent the corporation from failing to fulfil its remittance obligations under the *ITA* and *ETA*. According to the appellant, he never reviewed the books of cDemo or Global, and was unaware of the remittance patterns of the companies. The appellant asserted that he had delegated cDemo's and Global's tax function to key employees who were responsible for managing the remittance obligations of the two corporations. The appellant cannot discharge his statutory obligation by delegating the remittance function to an employee without any oversight on his part.

[40] The evidence shows that the appellant did not exercise "the degree of care, diligence and skill to prevent the failure that a reasonably prudent person would have exercised in comparable circumstances". A reasonable person in the appellant's circumstances would have anticipated that the corporations' financial difficulties could affect the remittance obligations of the two corporations and would have taken steps to prevent failures to remit. The appellant's lack of oversight and his inaction cannot serve as the foundation of a due diligence defence.

[41] At trial, I reserved judgment on the admissibility of the following three items: (i) the appellant's entry in his personal journal, being Exhibit A-2, (ii) Global's T4 statements, being Exhibits R-4 and R-5, and (iii) cDemo's T4 statement.

[42] None of these documents influenced my disposition of these appeals. Therefore, the question of their admissibility is moot. The appellant provided oral testimony, which I accepted, that he resigned as a *de jure* director by posting a letter of resignation at the offices of the two corporations. The notes in his personal journal (Exhibit A-2) add nothing to this finding.

[43] The other documents show that the corporations had not met their remittance obligations. That fact is not in dispute in these appeals. The appellant acknowledged that he was unaware of the tax reporting and remittance actions of either corporation. He admitted that he had delegated that function to other employees and that he exercised no oversight. The above-mentioned exhibits add nothing to this finding.

[44] For all these reasons, the appeals are dismissed, with one set of costs to the respondent.

Signed at Ottawa, Canada, this 28th day of January 2013.

"Robert J. Hogan"

Hogan J.

CITATION:	2013 TCC 29
COURT FILE NOS.:	2010-1632(GST)G 2010-1633(IT)G 2010-1634(IT)G
STYLE OF CAUSE:	ALLAN A. CHELL v. HER MAJESTY THE QUEEN
PLACE OF HEARING:	Calgary, Alberta
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REASONS FOR JUDGMENT BY:	The Honourable Justice Robert J. Hogan
DATE OF JUDGMENT:	January 28, 2013

APPEARANCES:

Counsel for the appellant:	Lori G. Bokenfohr
Counsel for the respondent:	Margaret M. McCabe

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