Docket: 2002-250(GST)I

BETWEEN:

GÉRALD MARTIN,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

[OFFICIAL ENGLISH TRANSLATION]

Appeal heard in part on February 27, 2003 at, Québec City, Quebec

Before: The Honourable Judge P. R. Dussault

Appearances:

Counsel for the Appellant: Jean-Paul Boily

Counsel for the Respondent: Philippe Morin

JUDGMENT

This appeal of an assessment under subsection 323 of the *Excise Act* (Part IX) regarding the tax on goods and services for the periods ending October 31, 1993; October 31, 1994; October 31, 1995; October 31, 1996 and April 19, 1997 notice of which is dated March 29, 2000, number PQ-2000-948, is dismissed in accordance with the attached Reasons for Judgment.

Signed at Ottawa, Canada this 23rd day of June 2003.

"P. R. Dussault"

J.T.C.C.

Translation certified true
on this 23nd day of March 2004.

Sharon Moren, Translator

Citation: 2003TCC414
Date: 20030623
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REASONS FOR JUDGMENT

Dussault, J.T.C.C

[1] This is an appeal from an assessment based on subsection 323 of the *Excise Act* (the "Act") (Part IX), notice of which is dated March 29, 2000, number PQ-2000-4948. As director of the company Gérald Martin Animat Inc. (the "company" or "corporation"), the Appellant was assessed for goods and services tax not remitted by the corporation, as well as for interest and penalties, totalling $284,265.83$ for the periods ending on October 31, 1993, October 31, 1994, October 31, 1995, October 31, 1996 and April 19, 1997.

[2] In assessing the Appellant, the Minister of National Revenu (the "Minister") relied on the findings and assumptions of fact at paragraphs (a) to (n) of subsection 20 of the Reply to the Notice of Appeal. These paragraphs read:

> [TRANSLATION]
>
> (a) Over the course of the years 1993, 1994, 1995, 1996 and 1997, the Appellant, was one of the directors of Gérald Martin Animat inc. (the "corporation");
>
> (b) over the course of the above-mentioned years, the corporation was a registrant for GST purposes;

(c) on March 26, 1997, the Minister assessed the corporation a total amount of $196,564.28 for unremitted GST for the periods ending October 31, 1993; October 31, 1994; October 31, 1995 and October 31, 1996 including interest and penalties;

(d) on October 17, 1997, the Minister assessed the corporation an amount of $17,109.08 for unremitted GST for the period ending April 17, 1997;

(e) on June 19, 1997, the corporation filed a notice of objection against the March 26, 1997 assessment;

(f) in a ruling on the opposition on July 7, 1998, the Minister upheld the March 26, 1997 assessment;

(g) the corporation filed no appeal before the Tax Court of Canada regarding this decision;

(h) on August 20, 1998, and in accordance with section 316 of Part IX of the *Excise Act* (R.S.C. 1985, c. E-15) the Minister produced a certificate to the Federal Court verifying taxes, penalties and interest due and payable by the corporation in the amount of $241,240.21;

(i) the Minister's certificate was duly registered at the Federal Court and the corporation was ordered to pay the amount of $241,240.21;

(j) on July 14, 1999, a writ of seizure and sale was delivered by the Federal Court to deduct the amount of $241,240.21 with interest, penalties and expenses from the corporation's moveable property;

(k) the writ of seizure and sale could not be executed because the corporation had no seizeable property; such that the execution was returned unsatisfied in whole for the amount stated in the certificate;

(l) the Appellant was director of the company in the periods during which it was required to remit the net amount of the tax to the Respondent;

(m) as the corporation's director, the Appellant did not act with a degree of care, diligence and skill to prevent the breach that a reasonable, prudent individual would have shown in similar circumstances;

(n) in particular, the Appellant took no concrete and positive steps to prevent the corporation from these breaches.

[3] As such, the amount of the assessment is not contested. However, counsel for the Appellant maintains that the assessment should be cancelled on the one hand because it is limited under the terms of subsection 323(5) of the Act, and, on the other because the Appellant acted with due diligence for the exemption under subsection 323(3) of the Act.

[4] I will first of all deal with the limitations issue.

[5] The corporation is governed by the *Canada Business Corporations Act* R.S.C. (1985), c. C-44. Since the beginning of the 1980s, it has primarily operated in the area of animation and organization of casinos for agricultural expositions, festivals and special events. The casinos were organized and managed by the company after the non-profit organizations that held the casinos obtained a permit from the Régie des courses et des lotteries (the "Régie"). The Appellant signed all contracts on behalf of the corporation. Under the terms of all the contracts, the corporation supplied all the materials and services necessary for holding the casinos. Regarding staff, such as croupiers and floor managers, the corporation used its own employees or, according to the Appellant's testimony, contracted with self-employed workers as the client's agent and on the client's behalf. In a number of cases, the company did not make deductions at source and did not bill the taxes to the clients, including GST for the services rendered by the croupiers and floor managers.

[6] Subsequent to an audit by Revenu Québec regarding the deductions at source and later on, upon remittance of the applicable taxes, it was found that the services of the croupiers and floor managers had been rendered by employees of the corporation and not self-employed workers. The corporation was therefore assessed for taxes not deducted as well as for unremitted taxes and, in light of the corporation's failure to pay its tax liabilities, the assessments pertaining to this decision under review were established against the Appellant.

[7] The corporation ceased operations in April or May 1997. However, it did not declare bankruptcy and has not been dissolved. It is still in existence even if this existence is described as artificial by counsel for the Appellant since, according to him, its only purpose is to make absolute a suit for damages for professional liability against the accounting firm Raymond, Chabot, Martin, Paré. Since the corporation is no longer able to carry out the activities for which it was formed,

counsel for the Appellant maintains that it would be fair and equitable that it be dissolved and that it would have been had it not been for the lawsuit against the accounting firm from which the ministère du Revenu du Québec (the "Ministry") could potentially benefit following an agreement with the solicitors for the corporation. According to him, in circumstances such as these, it [TRANSLATION] "*would be unfair and illogical to convict the Appellant on the pretext that he is still director of the company while it has lost every "substratum", that is, that it is impossible for it to pursue the objectives for which it was in operation, or its reason for existence, and that it would be fair and equitable for it to be liquidated, if it weren't for the prosecution laid against Raymond Chabot for the sole benefit of the ministère du Revenu*"

[8] With regard to the limitation of an assessment against a director, under subsection 323(5) of the Act:

> 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.

[9] In *The Queen v. Kalef*, [1996] 2 C.T.C. 1, 96 DTC 6132, [1996] F.C.J. No. 269 (Q.L.), the Federal Court of Appeals noted at subsection 10 that the *Income Tax Act* does not define the term "director" and establishes no criteria for determining when a person ceases to fill this position. Taking this silence into account, the Court considered that "*it only makes sense to look to the company's incorporating legislation for guidance*". I deem that the same approach should take precedence with respect to the GST since the Act is also silent in this regard.

[10] Sections 102 and beyond in the *Canada Business Corporations Act* establish the rules applicable to directors. For the purposes of this decision under review, it is proper to recall certain provisions regarding the length and end of directors' terms. Firstly, under subsections 106(2) to (6) on the length of the term:

> 106. (1) . . .
>
> (2) **[Term of Office]** Each director named in the notice referred to in subsection (1) holds office from the issue of the certificate of incorporation until the first meeting of share holders.

(3) **[Election of directors]** Subject to paragraph 107(*b*), shareholders of a corporation shall, by ordinary resolution at the first meeting of shareholders and at each succeeding annual meeting at which an election of directors is required, elect directors to hold office for a term expiring not later than the close of the third annual meeting of shareholders following the election.

(4) **[Staggered terms]** It is not necessary that all directors elected at a meeting of shareholders hold office for the same term.

(5) **[No stated terms]** A director not elected for an expressly stated term ceases to hold office at the close of the first annual meeting of shareholders following the director's election.

(6) **[Incumbent directors]** Notwithstanding subsections (2), (3) and (5), if directors are not elected at a meeting of shareholders the incumbent directors continue in office until their successors are elected.

(7) . . .

[11] The exception in subsection 102(6) is especially important to note since it provides for extension of the directors' terms until election of their successors.

[12] Moreover, subsection 108 deals with the end of the term:

108. (1) **[Ceasing to hold office]** A director of a corporation ceases to hold office when the director

(*a*) dies or resigns;

(*b*) is removed in accordance with section 109; or

(*c*) becomes disqualified under subsection 105(1).

(2) **[Effective date of resignation]** 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.

[13] The corporation is still in existence. There is no evidence that the Appellant has resigned, that he was removed or became disqualified. To the contrary, the Appellant has acknowledged that he was always the only director of the corporation. He has stated that he furthermore is still producing financial statements and annual reports. Subsection 323(5) should only be interpreted in light of this legal situation. Under these circumstances, it is obvious that there can be no limitation since the Appellant has never legally ceased to be the corporation's director.

[14] The second ground of attack involves the question of reasonable diligence. In this regard, subsection 323(3) of the Act specifies:

> 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.

[15] In *Soper v. Canada*, [1998] 1 F.C. 124, The Federal Court of Appeal extensively reviewed subsection 227.1(3) of the *Income Tax Act* providing a similar exemption. Robertson, J. clearly established the principle that the standard of prudence contains objective components and subjective components. The objective components pertain to the care, diligence and competence which a "*reasonably prudent person"* would demonstrate while the subjective components, translated by the expression "*in respect of same*" refer to the director's own knowledge, experience and situation.

[16] The circumstances in which a director finds himself, particularly the fact that he is an outside director rather than an inside director constitutes, then, according to Robertson J. in *Soper* (*supra*), the starting point for the analysis of a director's liability. At subsection 44, he moreover states with regard to the distinction:

> At the outset, I wish to emphasize that in adopting this analytical approach I am not suggesting that liability is dependent simply upon whether a person is classified as an inside as opposed to an outside director. Rather, that characterization is simply the starting point of my analysis. At the same time, however, it is difficult to deny that inside directors, meaning those involved in the day-to-day management of the company and who influence the conduct of its business affairs, will have the most difficulty in establishing the due diligence defence. For such individuals, it will be a challenge to argue convincingly that, despite their daily role in corporate management, they lacked business acumen to the extent that that

> factor should overtake the assumption that they did know, or ought to have known, of both remittance requirements and any problem in this regard. In short, inside directors will face a significant hurdle when arguing that the subjective element of the standard of care should predominate over its objective aspect.

[17] In this case, counsel for the Appellant claims that the Appellant was only an outside director and maintains that the approach pertaining to this type of director (see especially, *Cadrin v. Canada*, 99 DTC 5079 (F.C.A.)) should be adopted. However, it is known that the Appellant was the only director of the corporation, the one who signed particularly all the contracts and all the financial statements, and the one who took care of the day-to-day management of the corporation of which he was also the only shareholder.

[18] Moreover, I also feel it is important to set a second point straight with regard, this time, to the burden of proof. Contrary to what counsel for the Appellant seems to put forward in his written argument, the burden of proof is on him to establish, according to the balance of probabilities, that he acted with due care and diligence. It is not up to "the Ministry" or the Respondent to prove the opposite.

[19] According to Yves Ouellete, auditor at Revenu Québec, who made the assessment of the unremitted GST, most of the assessment against the corporation and subsequently against the Appellant, pertains to the tax applicable to the croupiers' services rendered by the corporation's employees during certain casinos over the course of the years at issue. However, Mr. Ouellette also stated that there was as well a portion of the taxes due imputable to other components. Thus, he also spoke of the taxes recorded in the corporation's books and that had not been remitted as well as certain adjustments to the input tax credits ("ITC") (see Exhibit I-10).

[20] During his testimony, the Appellant stressed a number of times that holding casinos is highly monitored by both the Régie and the Sûreté du Québec. According to him, the agencies, agricultural companies and others who obtained casino permits from the Régie also found it necessary to retain the services of an accounting firm that was independent and separate from the corporation's. These agencies' books were also being monitored. A certain Gil Comptois was in charge of accounting for a number of agencies and prepared audited financial statements for them.

[21] The corporation's headquarters was located at the Appellant's home and a secretary worked there. Bookkeeping was done by a certain Renée Côté, who it seems had a contract with the corporation through a management company. Moreover, the accounting firm Raymond, Chabot, Martin, Paré had been retained to prepare the corporation's financial statements. However, this firm had no mandate for an audit or audit examination, contrary to what the Appellant stated during his testimony (see Exhibit I-6, Note to Reader).

[22] With regard to the question of the legal relationship between the corporation and the individuals whom it contracted with for croupier and other services when casinos were held, that is, knowing whether they were employees of the corporation or self-employed workers, the Appellant indicated that the corporation had previously been audited by Revenu Québec in 1991. He stated that at that time, he had asked for an opinion to find out if his method of operation, contracting with self-employed workers rather than with employees, was correct. He was told that it was and that he would receive some recommendations. No records were submitted as evidence pertaining to this supposed audit done in 1991, the request for advice or the recommendations made.

[23] In May 1995, at the request of the Festival d'été de Québec, as it would appear, the corporation asked for the accounting firm's opinion regarding its relationship with self-employed workers when casinos were held and so that the staff required in the future be provided and paid by the client-agencies themselves. This way, it would no longer be necessary for the corporation to collect taxes, including the GST, with regard to these workers' services.

[24] The opinion was obtained from a certain Normand Gervais, tax specialist from another firm who was contacted by Pierre Lapointe, the person in charge of the corporation's account at Raymond, Chabot, Martin, Paré. Mr. Gervais' opinion was stated as follows: (Exhibit A-6)

> [TRANSLATION]
>
> . . .
>
> Gérald Martin Animat inc. provides services for organizing casinos for non-profit organizations. The organizations obtain a casino permit from the Régie des loteries et courses and then outsource the management to companies like Gérald Martin Animat inc.

According to the current agreements, Gérald Martin Animat inc. is acting as a casino operator and agrees to provide, among other things, all of the staff required and necessary for holding the event. This staff is made up of, among other, self-employed workers.

Gérald Martin Animat inc. intends to modify his future agreements so that that the staff (self-employed workers) required and necessary for the duration of the event are provided by Gérald Martin Animat inc.'s clients and constitute a direct expenditure for his clients.

Subject to the general anti-avoidance rule discussed below, we understand that in the future, the self-employed workers would have a service contract with the clients. Accordingly, the self-employed workers will apply GST and QST, if applicable, when billing the clients and the latter will recover allowable amounts.

A self-employed worker is not required to collect GST and QST if his gross income for the four previous quarters does not exceed $30,000 (small supplier) and he is not registered.

A client can normally recover all the GST and QST for commercial activities. There are exceptions for, among others, non-profit organizations. In fact, running a game of chance is normally an exempt supply, which limits recovery of the GST and QST. This type of agency may nonetheless recover 50% of the GST and QST if it is at least 40% publicly funded.

Moreover, you tell us that Gérald Martin Animat inc. could act as its clients' agent for finding and paying self-employed workers.

Our experience with taxation authorities proves to us that the concept of agent must be unequivocally established in both the agreements and facts. Thus, the self-employed workers must bill the clients. Gérald Martin Animat inc. could receive the bills and make the payments for and on behalf of the clients. In a context in which all the legal relationships between the principal (client) and the agent (Gérald Martin Animat inc.) are clearly established, these payments are considered as made by the clients. Accordingly, there would be no record of these invoices in Gérald Martin Animat inc.'s books.

[25] Mr. Gervais then suggests certain modifications that should be made to the contract:

> [TRANSLATION]
>
> Bearing in mind the modifications discussed above, future agreements should be modified accordingly, the following text serving only as an example:
>
> (a) Gérald Martin Animat inc. should be designated as the contracting authority for holding the casino rather than the operator (preamble and section 2);
>
> (b) Subsections 3.1 (c), (d) and (j) should be removed;
>
> (c) The following subsection should be added to section 4.1:
>
> (a) All staff required and necessary for holding the casino should be supplied by _(client)_ and is his/her responsibility. _(client)_ will obtain the services of individuals qualified for this type of event.
>
> (d) If agency is required for finding and paying staff, a subsection to this effect should be added.
>
> "_(client)_ directs Gérald Martin Animat inc. to find and pay for, on _(client's)_ behalf, the staff required and necessary for holding the casino.
>
> _(client)_ agrees to remit to Gérald Martin Animat inc. the amounts advanced for _(client)_ upon presentation of proof of payments made for and on behalf of _(client)_."

[26] Mr. Gervais then discusses the general anti-avoidance rule:

> [TRANSLATION]
>
> Legislation regarding the GST and QST includes a general anti-avoidance rule. In broad terms, this rule is applied when a taxpayer obtains a tax advantage and it is reasonable to consider that there is abuse in application of the Act, unless there is a true commercial objective other than a tax advantage. Tax advantage

> means among other, the reduction, carry-over or avoidance of the tax.
>
> Even if we consider that structuring one's business in order to decrease the tax burden is not in itself avoidance, the taxation authorities could take a different position with regard to the components discussed above.

[27] Mr. Gervais completes his opinion with the following limitation clause:

> [TRANSLATION]
>
> . . .
>
> We stress to you that this memorandum regarding planned transactions is not necessarily the opinion of Revenue Canada or the ministère du Revenu du Québec, who are free to protest through legal channels any position you may take.
>
> . . .

[28] In his testimony, the Appellant states that he had followed these recommendations starting in May 1995, but that he allowed the agencies to choose how to proceed regarding the hiring of the required staff.

[29] However, as can be observed, the opinion is based on the hypothesis that the corporation contracted with self-employed workers and not that it hired individuals who had the status of employees for holding casinos.

[30] The Appellant stated that over the course of the years at issue, the corporation had hired employees, but that it also contracted with self-employed workers. On cross-examination, he acknowledged that the same person could be either, at one time or another. However, he never explained on what basis and according to what criteria these relationships were established and it seems that that is the crux of the problem. In fact, the assessments made against the corporation were initially subsequent to an audit concerning the at source deductions that the corporation had not made with regard to individuals who were considered employees by the auditor. As I mentioned above, it is subsequent to this first audit that there was a second in order to establish the taxes, including GST, that should have been billed and remitted for the amounts charged to the clients for the services of individuals who were considered employees of the corporation by the first auditor.

[31] It is not enough to claim contracting with self-employed workers to avoid making deductions at source or collecting applicable taxes for services rendered. One must be able to prove that there were reasonable motives to believe in the nature of this relationship and that there was no attempt to present individuals, about whom there is no doubt that they are really employees, as self-employed workers.

[32] Therefore, the GST assessment against the corporation was established primarily on the basis that the services had been rendered by the corporation's employees and that the corporation had not billed the relevant tax. This assessment has not been appealed.

[33] In the case under review, the Appellant has in no way established how, as director, he was reasonably justified in not invoicing and collecting the GST for holding certain casinos while he did so for others. Claiming to have followed the opinion given by Mr. Gervais regarding the self-employed workers certainly does not constitute an adequate explanation under the circumstances, the more so because the Appellant stated to have left the decision on how to proceed up to the agencies. As director of the corporation and as the individual signing the contracts, the Appellant should have been able to provide clearer and more complete explanations in this regard.

[34] As for the question of the corporation's bookkeeping and accounting, testimony of the auditor, Mr. Ouellette, is sufficiently eloquent and shows significant gaps to the degree that he instead had to rely on the individual agencies' accounting to perform his audit and to be able to make the assessments.

[35] First of all, Mr. Ouellette observed a flagrant lack of accounting and other records, including invoices, that would enable him to do a reconciliation. He also noted that there was no banking reconciliation. Mr. Ouellette then obtained, either from the corporation itself or from the agencies, all the contracts signed since 1993 regarding the casino activities. He met with the agencies' main accountant, Gil Comptois, as well as with other accountants, for the purpose of determining the actual disbursements the agencies made to the corporation for holding these casinos. During his audit, Mr. Ouellette noticed that the contracts with the agencies were different in that the croupiers' services were invoiced in some cases and not in others and that the practice could even be different from one year to the next for the same agency (see Exhibit I-7). However, with regard to some agencies,

especially those in the Quebec region, the tax was always billed for the croupiers' services.

[36] Mr. Ouellette thus attempted to reconcile the corporation's income and the expenses paid by the agencies since the corporation had no record of [TRANSLATION] "cash-receipts" and did not do banking reconciliation. Thus, by way of example regarding a casino held for the La Chaudière agricultural exposition from July 21 to 30, 1995, he determined that two invoices had been issued by the corporation to the agency, one in the amount of $158.50 and the other in the amount of $85,741.30 for a total of $85,899.80. Although a deposit for this amount appears on the bank statement, the amount cannot be traced, nor the invoice numbers in the reconciliation prepared by Renée Côté for the months from July to October 1995. Mr. Ouellette, moreover, observed the deposit of significant amounts, whose origin he could not verify lacking the relevant information. Similarly, according to him, a credit note for $107,000 was not supported by any record and the remittance of $50,000 to a croupier has remained unexplained (see Exhibits I-8 and I-9).

[37] In his testimony, Mr. Ouellette stated that, in addition to the errors traced by Ms. Côté regarding this period from July to October 1995 for which she had attempted at his request, a reconciliation, certain transactions were not supported by any record nor could any explanation be provided. Moreover, the same exercise by Ms. Côté for 1996, according to her, revealed $100,000 more in income and $7,000 in unpaid taxes. Mr. Ouellette also mentioned a loss of $89,542 that was recorded in the financial statements regarding an investment plan in a casino outside Quebec, which was not supported by any record.

[38] Mr. Ouellette stated that from the beginning of his audit, he asked the Appellant certain questions and requested records from the Appellant, who referred him to either the accountant Lapointe or Ms. Côté, who was in charge of keeping the books. During his audit, Mr. Ouellette had a number of telephone conversations with Ms. Côté. Moreover, a certain Ms. Belleau, who worked as a secretary, turned over certain records to him. Mr. Ouellette also requested the missing records during the preparation of the draft assessment and gave the Appellant an extension to provide them.

[39] In his testimony, Mr. Ouellette also stated that the corporation had not been audited in 1991, contrary to what the Appellant had stated. According to him, there is no evidence either that advice had been requested or recommendations made by Revenu Québec at that time regarding tax applicable to the services of the

croupiers working for the corporation or regarding the use of self-employed workers.

[40] As rebuttal evidence, the Appellant, who seems to have placed himself entirely in the hands of Ms. Côté and the accountant Lapointe regarding the corporation's bookkeeping and accounting, provided or attempted to provide certain explanations regarding items raised by Mr. Ouellette. Thus, he explained that significant deposits to the corporation's bank accounts came from payments made by Visa or Mastercard pertaining to withdrawals made by clients of the casinos on their credit cards. Because the agencies for which the casinos had been organized could not obtain merchant numbers from Visa or Mastercard, the corporation had a permanent number and accordingly provided this service to the agencies.

[41] The $107,000 credit note was never explained by the Appellant. As for the payment of the amount of $50,000 to a croupier, according to him, this was used as working capital for one of the casinos organized by the corporation that used its own cash for this purpose.

[42] Regarding the $89,000 loss, the Appellant explained that he had gone into partnership with another individual to invest in a casino abroad and the amount of $89,000 represented the amount of his share in this project, the equivalent of $U.S.74,000. After the hearing and with agreement of Counsel for the Respondent, Counsel for the Appellant produced some records in this regard. According to the records submitted, a bank transfer of $89,542 ($U.S.75,000) was made by the Société de Gestion B. & G. Inc., which held guaranteed investments at Trust Prêt et Revenu, to the National Bank of Canada on June 26, 1992. This transfer was then forwarded through the Dresdner Bank U.S. of New York to the Dresdner Bank Schweiz A.G. in Switzerland to the account of a certain Mr. Dessureau. The transfer was made at the request of the Appellant, one of the directors of the Société de Gestion B. & G. Inc. All that can be ascertained is that neither the explanations provided by the Appellant during the hearing, nor the records submitted afterwards, connect this transfer in any way to the corporation.

[43] I have already dealt with the Appellant's responsibility regarding the collection and remittance of the GST in connection with the croupiers' services. The tax, in this regard, is the greatest portion of the assessment.

[44] However, according to Mr. Ouellette, certain other amounts have been assessed and the ITCs have been adjusted following the audit. As I have already

said, the Appellant seems to have placed himself totally in the hands of Ms. Côté for keeping the books and of Mr. Lapointe of Raymond, Chabot, Martin, Paré for the preparation of the financial statements. I also believe that I understand the arguments of Counsel for the Appellant (page 4, paragraphs 14 and 15 of the Appellant's argument) that the Appellant was in no way responsible for the bookkeeping and accounting deficiencies, which could only be blamed on these individuals. In this regard, it is important to recall that a bookkeeper and an accountant are essentially agents and a corporation's director, the more so if he is a sole director managing the corporation's daily affairs, cannot clear himself of all responsibility by invoking these individuals' failure to fulfill their obligations. On this point, in his decision in *Roberts (K.) v. Canada,* [1997] G.S.T.C. 58, [1997] T.C.J. NO. 771 (Q.L.), Bowman J. discussed this question regarding the defence of due diligence concerning the penalty set in paragraph 280(1)(*a*) of the Act in these terms at paragraph 9:

> . . . The accountants are after all the appellant's agents and the appellant is responsible of what they did or failed to do. In the same way as the exercise of due diligence on the part of a taxpayer's accountants or bookkeepers would be attributed to the taxpayer and would justify the removal of a penalty, so too does the absence of due diligence on the part of the taxpayer's accountants or bookkeepers disentitle him or her to the relief envisaged by the Pillar Oilfield case.

[45] I deem that the principle is equally applicable when an appellant, the director of a corporation, wants to avail himself of the exemption under subsection 323(3) of the Act. It is not enough to simply place the responsibility on others. The director of a corporation, especially if he is the sole director, must also be able to discuss in concrete and exact terms what he has done to prevent this failure. I feel that proof has not been given of this.

[46] Consequently, the appeal is dismissed.

Signed at Ottawa, Canada, this 23rd day of June 2003

"P. R. Dussault"
J.T.C.C.

Translation certified true
on this 23nd day of March 2004.

Sharon Moren, Translator