

THERE'S NO HIDING FROM THE AUDITING POWER OF COLLECTING SOCIETIES

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PRECIS: The Federal Court has demonstrated that certain circumstances allow for the application of a doctrine with which courts can short circuit abusive behaviour, such as the avoidance of audits for blank media levies. As well as recognizing the applicability of this doctrine, this case displays a shortcut that may pave the way for an easier solution to such problems.

In *Canadian Private Copying Collective v Fuzion Technology Corp* 2006 FC 1284 the Federal Court of Canada has demonstrated that certain circumstances allow for the application of a doctrine with which courts can short circuit abusive behaviour, such as the avoidance of audits for blank media levies. As well as recognizing the applicability of this doctrine, this case displays a shortcut that may pave the way for an easier solution to such problems in the future.

Pursuant to Section 9 of the Private Copying Tariff, 2003-2004 the Canadian Private Copying Collective (CPCC) is the responsible body for the collection and redistribution of levies. Section 9 also requires importers and manufacturers to keep records from which the CPCC can readily ascertain the amounts payable.

In the present case, the CPCC's attempt to audit Fuzion, an importer of blank media, ended bluntly. Before the CPCC could seek legal remedies to pursue its action, Fuzion had transferred its stock, employees, rights under its lease, phone numbers, website and logo to another company, FTC Computers, in an effort "to allow for a seamless transition for customers and supplies". When the CPCC attempted to continue the audit by auditing FTC's books, its efforts

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reached a similar outcome: FTC claimed that it was an independent entity that neither imported nor manufactured blank media.

The CPCC then petitioned the Federal Court of Canada for a blanket auditing order against Fuzion, FTC and Yeung (FTC's sole shareholder, officer and director). Fuzion was not represented and the order was summarily granted.

As for the other respondents, the court turned to the doctrine of the lifting of the corporate veil to issue an identical order. Recognizing that the law on this subject follows no consistent principle, the court retained it had a duty to look behind a corporate structure to see it in law as it is in fact: a puppet structure should be ignored if it is used as a vehicle for fraud or improper purposes.

The court ordered FTC to open its books, stating that although there may have been legitimate business reasons to realize a "seamless transition for customers and supplies", and that there was no evidence that this transition was created to defraud creditors, the deliberate efforts to blur the line between Fuzion and FTC amounted to an improper purpose. Also relevant to this issue was the fact that there was no evidence of payment for FTC's acquisition of Fuzion's goodwill, stock and use of its premises for three months and that Yeung, as well as being a former director of both corporations for a period of time, continued to sign Fuzion's levy reports even after the business transition.

As for the order against Yeung, the court concluded that as sole shareholder, officer and director of FTC he had the best knowledge of the record's handling in both entities, was the principal actor involved in the transition and should be targeted by the order to ensure his cooperation.

Further, having gained control over the stock by way of an agreement that put FTC in charge of selling it for Fuzion, FTC never acquired property rights over it and the act's provision on selling or otherwise disposing of blank media did not put FTC in its ambit. Interestingly, the court considered this to constitute sufficient grounds to order an audit against FTC, because gaining control and selling must entail book keeping.

Finally, the court considered the order for payment of eventual outstanding levies premature, should the CPCC's audit confirm any. Unlike some laws dealing with taxes and duties, the act does not provide for provisional payments.

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