Tax Court of Canada  Cour canadienne de l'impôt

2000-2487(IT)I

BETWEEN:

JACOB KRAHN,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

Appeal heard on November 23, 2000 at Vancouver, British Columbia by

the Honourable Judge D. W. Beaubier

Appearances

For the Appellant:	The Appellant himself
Counsel for the Respondent:	Johanna Russell

JUDGMENT

The appeal from the assessment made under the *Income Tax Act*, notice of which is dated February 9, 1999 and bears Assessment No. 13782 is dismissed.

Signed at Ottawa, Canada, this 28th day of November, 2000.

"D. W. Beaubier"

J.T.C.C.

Tax Court of Canada  Cour canadienne de l'impôt

2000-2486(IT)I

BETWEEN:

CORNELIA KRAHN,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

AND BETWEEN:

[redacted]

JACOB KRAHN,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

REASONS FOR JUDGMENT
(delivered orally from the Bench at
Vancouver, British Columbia on November 23, 2000)

Beaubier, J.T.C.C.

[1] These appeals pursuant to the Informal Procedure were heard together on common evidence at Vancouver, British Columbia on November 23rd, 2000. Mr. Krahn testified and the Appellants called the Revenue Canada auditor on their files, James Mise, who also testified.

[2] The Appellants have appealed assessments for director's liability pursuant

to Section 227.1 of the *Income Tax Act*. Paragraphs 2 to 5 inclusive of the Reply respecting Cornelia Krahn read:

2. By Notice of Assessment No. 13783 dated February 9, 1999, the Minister of National Revenue (the 'Minister') assessed the Appellant for federal income tax deducted at source but not remitted by Super Save Glass and Car Care Ltd. (the 'Corporation') and for penalties and interest relating thereto as follows:

Date	Tax	Federal Penalty	Federal Interest
July 10, 1995 (for 1993 and 1994)	$ 831.40	nil	$1,185.76
July 11, 1995 (for January to May 1995)	$1,491.24	$47.41	$2,126.66
June 17, 1996 (for December 1995 January to March 1996)	$1,532.18	$16.80	$2,184.96
Total	$3,854.82	$64.21	$5,497.38

3. In so assessing the Appellant, the Minister relied on the following assumptions of fact:

a) the Corporation was incorporated in the province of British Columbia on June 21, 1991;

b) the Appellant was, at all material times, a director of the Corporation;

c) the Corporation failed to remit to the Receiver General federal income tax withheld from wages paid to its employees as follows:

For periods:	Unremitted Federal income tax
1994 to 1995	$ 831.40
January to May 1995	$1,491.24
December 1995 and January to March 1996	$1,532.18

d) the Corporation failed to pay penalties and interest relating to the unremitted federal tax in the amounts of $64.21 and $5,497.38, respectively;

e) on May 12, 1998, the liability of the Corporation was certified in the Federal Court of Canada, in the amount of $8,855.72;

f) in June 1998, the Collections Department forwarded the Writ of Fieri Facias to Accurate Court Bailiff Services Ltd., for execution against all assets of the Corporation;

g) on October 7, 1998, the Writ of Fieri Facias was returned nulla bona, advising that they were unable to locate assets of the Corporation;

h) the Corporation was assessed in June of 1992 for payroll deductions not remitted for the 1991 and 1992 taxation years; and

i) the Appellant did not exercise the degree of care, diligence and skill to prevent the failure to remit the amount by the Corporation that a reasonably prudent person would have exercised in comparable circumstances.

B. ISSUES TO BE DECIDED

4. The issue is whether the Appellant is liable for the failure by the Corporation to remit to the Receiver General an amount of federal income tax, with penalties and interest thereon.

C. STATUTORY PROVISIONS RELIED ON

5. He relies on sections 153, 227 and 227.1 of the *Income Tax Act*, R.S.C. 1985, c. 1 (5th Supp.), as amended (the 'Act')."

[3] The only assumption which was not confirmed directly by the evidence is assumption 3(i). Respecting 3(i), Mr. Krahn testified that Mrs. Krahn had nothing to do with the Corporation. But the evidence is clear that she was a shareholder, a director and an officer of the Corporation from its beginning until long after the defalcations in question. She also had separate signing power over its cheques, signed some cheques and along with Mr. Krahn, she lent in excess of

$90,000 to the Corporation.

[4] Mrs. Krahn was in the Courtroom throughout the hearing. She authorized Mr. Krahn to act for her in the hearing and spoke to the Court briefly more than once. She is a competent, mature, sensible woman. She and Mr. Krahn chose that she should not testify. Mr. Krahn testified. Except for Mr. Krahn's testimony that Mrs. Krahn had "nothing to do with it," there is no evidence to refute assumptions 3(i). That statement by Mr. Krahn is not sufficient to refute assumption 3(i) respecting Mrs. Krahn.

[5] Paragraphs 2 to 5 inclusive of the Reply to Mr. Krahn's appeal read:

2. By Notice of Assessment No. 13782 dated February 9, 1999, the Minister of National Revenue (the 'Minister') assessed the Appellant for federal income tax deducted at source but not remitted by Super Save Glass and Car Care Ltd. (the 'Corporation') and for penalties and interest relating thereto as follows:

Date	Federal Tax	Federal Penalty	Interest
July 10, 1995 (for 1993 and 1994)	$ 831.40	nil	$1,185.76
July 11, 1995 (for January to May 1995)	$1,491.24	$47.41	$2,126.66
June 17, 1996 (for December 1995 and January to March 1996)	$1,532.18	$16.80	$2,184.96
Total	$3,854.82	$64.21	$5,497.38

3. In so assessing the Appellant, the Minister relied on the following assumptions of fact:

a) the Corporation was incorporated in the province of British Columbia on June 21, 1991;

b) the Appellant was, at all material times, a director of the Corporation;

c) the Corporation failed to remit to the Receiver General federal income tax withheld from wages paid to its employees as follows:

For periods:	**Unremitted Federal income tax**
1993 and to 1994	$ 831.40
January to May 1995	$1,491.24
December 1995 and January to March 1996	$1,532.18

d) the Corporation failed to pay penalties and interest relating to the unremitted federal tax in the amounts of $64.21 and $5,497.38, respectively;

e) on May 12, 1998, the liability of the Corporation was certified in the Federal Court of Canada, in the amount of $8,855.72;

f) in June 1998, the Collections Department forwarded the Writ of Fieri Facias to Accurate Court Bailiff Services Ltd., for execution against all assets of the Corporation;

g) on October 7, 1998, the Writ of Fieri Facias was returned nulla bona, advising that they were unable to locate assets of the Corporation;

h) the Corporation was assessed in June 1992 for payroll deductions not remitted for the 1991 and 1992 taxation years; and

i) the Appellant did not exercise the degree of care, diligence and skill to prevent the failure to remit the amount by the Corporation that a reasonably prudent person would have exercised in comparable circumstances.

B. ISSUES TO BE DECIDED

4. The issue is whether the Appellant is liable for failure by the Corporation to remit to the Receiver General an amount of federal income tax, with penalties and interest thereon.

C. STATUTORY PROVISIONS RELIED ON

5. He relies on sections 153, 227 and 227.1 of the *Income Tax Act*, R.S.C. 1985, c. 1 (5th Supp.), as amended (the 'Act')."

[6] Assumptions 7(a) to (h) were confirmed by the evidence. The evidence concerning assumption 7(i) was extensive. Mr. Krahn testified and was cross-examined at length. He appears to be about 60 years old. He graduated with a Bachelor of Commerce from the University of British Columbia, and from 1961 until 1981 or 1982, he was employed by LaFarge International in Europe and the United States. At times he was president of some of their subsidiaries.

[7] In 1985, he was active in real estate and logging business in Prince George, British Columbia, when one corporate partner went bankrupt, as a result of which the entire operation was wiped out and Mr. Krahn went into "receivership". Mr. Krahn suffered an "anxiety attack" after this and saw a psychiatrist for a period.

[8] From 1985 until 1990, Mr. Krahn sold life insurance and formed a corporation "J. Krahn Financial Services" that managed group benefit insurance plans for small employers. That corporation remained in business throughout the periods in question. Mr. and Mrs. Krahn are shareholders, directors and officers of it. Mr. Krahn devoted 35 to 40 hours per week to its operations during the periods in question.

[9] In late 1989, the Appellants became involved in building a sound studio in Vancouver through their corporation "Jan West Management Services". It was completed by December 1991 and is at 440 Brooksbank Avenue ("440") in North Vancouver. To get the full mortgage draw, it had to be fully leased. Part of the premises had been leased to "Rex Regal Auto Glass", which went into receivership in mid-1991. As a result the Appellants formed the corporation which they intended to be a mere shell tenant with which to draw down the mortgage money on 440 and was to be taken over by a gas station operator across the street from 440. When this arrangement failed to develop, the Appellants began to operate the corporation as a vehicle glass repairer with an Insurance Corporation of British Columbia permit.

[10] By mid-1992, the Appellant became involved in several pieces of litigation in which he acted for himself or his corporations. They included foreclosure proceedings on 440 by the Royal Bank; inter-shareholder litigation by the owners of the corporation that owned 440 and suits begun by Mr. Krahn.

[11] In 1992, Mr. Krahn and his son operated the Corporation and it fell into arrears in its withholdings. Mr. Krahn has no memory of the 1992 arrears. However, in 1992, Mr. Krahn had J. Krahn Financial Services' financial officer Mr. Tom Avendano, a recent graduate from BCIT, begin to handle the Corporation's payroll. Mr. Avendano deducted the withholdings from employees' paycheques. The Corporation also entered into a contract with Mr. McRae to operate the actual glass installations, but the Corporation retained the ICBC permit and continued to operate the business premises and to employ staff. Mr. Krahn was there virtually every day, sometimes at 4:00 a.m., attending to the Corporation's interests. Essentially, he admits that he was doing crisis management of the Corporation, but that he had excellent knowledge of its activities.

[12] At the end of 1994, Mr. Lum from Revenue Canada began a second withholding audit which resulted in an assessment of arrears. Mr. Krahn testified that either just before this or at this time, he discussed the withholdings with Mr. Avendano, and that Mr. Avendano told him that he had withheld, but he didn't know that the withholdings had to be remitted, so he didn't remit. This testimony is not accepted without corresponding testimony from Mr. Avendano. Any employee who sees such withholdings from a cheque knows that the employer must remit them. Mr. Avendano was a BCIT graduate and should have known this. Moreover, Mr. Krahn and Mrs. Krahn signed all the cheques and they would have known that the remittances weren't being made, especially after their now-forgotten 1992 arrears problem.

[13] The Court finds that at all times after the arrears of withholdings incident of 1992, the Appellants should have been alert and prevented any failures to remit by such a small corporation such as this, especially when it appears to have had only about two employees from time to time and it is clear from the evidence that the Corporation was always short of cash with which to meet cheques. The Court finds on the whole of the evidence that both Appellants were fully aware of the failures to remit withholdings that are in dispute. Moreover, in the circumstances of this case, they knew of it before it occurred and apparently determined to use the withholdings for other purposes. The Corporation had no line of credit and the cheques paid to Revenue Canada were failing to clear at various times.

[14] The entire matter came to a head when ICBC cancelled its permit to the Corporation in March of 1996 as a result of fraud allegations against Mr. McRae.

Thereupon, the Corporation closed its doors in March.

[15] Later in 1996, Mr. Krahn suffered another anxiety attack and was hospitalized.

[16] Mr. and Mrs. Krahn have failed to appreciate that wages are the employees' property. Payment is made to the employees of what is in their paycheques. The rest is still the property of the employees and the employer holds it in trust for the employees and remits it to Revenue Canada and to other public authorities. The withholdings do not belong to the employer for its financing purposes. Under the Krahns' direction, the Corporation was putting out fires with other peoples' money and the Krahns knew that they were doing it with the withholdings. The operation was so small and had so little cash, that anyone signing cheques had to know that because there was so little cash, that there was a question as to any cheque clearing at any time.

[17] For these reasons, the Court finds that both Appellants failed to exercise the degree of care, diligence and skill to prevent the failure to remit that a reasonably prudent person would have exercised in comparable circumstances.

[18] The appeals are dismissed.

Signed at Ottawa, Canada, this 30th day of January, 2001.

"D. W. Beaubier"

J.T.C.C.

COURT FILE NO.:	2000-2486(IT)I and 2000-2487(IT)I
STYLE OF CAUSE:	Cornelia Krahn v. The Queen and Jacob Krahn v. The Queen
PLACE OF HEARING:	Vancouver, British Columbia
DATE OF HEARING:	November 23, 2000
REASONS FOR JUDGMENT BY:	The Honourable Judge D. W. Beaubier
DATE OF JUDGMENT:	November 23, 2000

APPEARANCES:

For the Appellants:	J. Krahn
Counsel for the Respondent:	J. Russell

COUNSEL OF RECORD:

For the Appellant:

Name:

Firm:

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