Citation: 2011 TCC 91
Date: 20110303
Docket: 2007-3055(IT)G

BETWEEN:

741290 ONTARIO INC.,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

AMENDED REASONS FOR JUDGMENT

Bowie J.

[1] These appeals were begun under the informal procedure of this Court, to challenge the correctness of some 94 unspecified assessments made under the provisions of the *Income Tax Act* (the *Act*),[1] the *Employment Insurance Act*[2] and the *Canada Pension Plan*[3] in respect of amounts required by those statutes to be withheld from wages paid to employees of the appellant between April 1992 and July 1999.

[2] By the Order of Rossiter J., as he then was, made on October 23, 2007, the appeals were quashed insofar as they related to assessments under the *Employment Insurance Act* and the *Canada Pension Plan*. On June 19, 2008, at the request of the appellant, McArthur J. ordered that the remaining appeals proceed pursuant to the general procedure.

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1 R.S. 1985 c.1 (5th supp.), as amended.

2 R.S. 1996, c.23, as amended.

3 R.S. 1985, c. C-8, as amended.

[3] The appeals from the assessments under the *Income Tax Act* came on for hearing before me on December 9, 2009, and it quickly became apparent that the only issue that the appellant sought to pursue was not revealed by the Notice of Appeal. I granted leave to the appellant to file a Fresh As Amended Notice of Appeal, and that was done.

[4] By the amended pleading the appellant has limited the issue to the validity of the penalties assessed under subsection 227(9) of the *Income Tax Act.* Specifically, it is asserted that those penalties are subject to a defence of due diligence, and that the question of due diligence has been resolved in the appellant's favour by a judgment of O'Connor, J of this Court. By that judgment O'Connor, J. allowed the appeals of Stella Pinnock and Stainton Pinnock from assessments made against them as the directors of 741290 Ontario Inc. under section 227.1 of the *Income Tax Act* in respect of amounts that should have been, but were not, remitted as withholdings from the wages paid by it to its employees.[4] The relevant part of paragraph 153(1)(*a*) and sections 227 and 227.1 are attached as Appendix "A".

[5] Stella Pinnock and her husband, Stainton Pinnock, have been the directors of the appellant since its inception in 1987. From then until November 1998 the appellant operated Van Del Manor Nursing Home in Toronto under a license granted by the province of Ontario under the *Nursing Homes Act*. In November 1998 the Ontario Ministry of Health determined that the building could no longer be operated as a nursing home. After that Ms. Pinnock operated it as a retirement home for a brief period. Since September 1999, the premises have been leased to the City of Toronto, which operates it as a seniors' home. The nursing home license was sold by the appellant's bank.

[6] Mrs. Pinnock gave evidence for the appellant. From the outset the Pinnock's had difficulty meeting their payroll. Mrs. Pinnock blamed this on a number of factors. The payroll was substantially higher than they had expected, based on the financial statements that they had seen prior to buying the business. The Ministry of Health required them to make substantial repairs, renovations and upgrades to the building, at considerable cost, in order to continue to use it as a nursing home. They also were required to increase the number of staff employed beyond the level that

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[4] As the notices of assessment were not put into evidence by either party, it is not possible for me to be certain that the assessments under section 227.1 included precisely the same withholdings as gave rise to these assessments. However, for purposes of these appeals, I shall assume that they did.

they had expected and that the income would support. The appellant was paid on a per patient basis by the Ministry of Health, and according to Ms. Pinnock's evidence the payments were always made after the month end, when the money was required to pay current expenses. In short, the expenses of operating the business were higher than the Pinnock's had foreseen, and there was an acute shortage of working capital from the outset.

[7] The appellant's major income source was the monthly payments made to it by the Ontario Ministry of Health. These, Ms. Pinnock said, were amounts paid for specific purposes or activities such as patient care or nutrition, and they had to be applied to those purposes. The appellant's employees were paid every second Thursday. For reasons that Ms. Pinnock attributed to delays by the Ministry of Health in making its payments, the appellant was frequently in the position of being unable to meet its gross payroll, which is to say the payroll including the statutory deductions that an employer is required to make for income tax, employment insurance premiums and Canada Pension Plan contributions. Frequently it did have sufficient funds, however, to meet the net payroll only, and on these occasions it did so by paying the employees their net pay for the period, but it did not remit the income tax and other deductions to the Receiver General within the time fixed by section 108 of the *Income Tax Regulations*[5] (the *Regulations*) for doing so.

[8] In January 2000, the Minister assessed Stainton Pinnock and Stella Pinnock pursuant to subsection 227.1(1) of the *Act* for the unremitted withholdings, interest and penalties. They appealed from those assessments to this Court, relying on the saving provision found in subsection 227.1(3), which reads:

> 227.1(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.

[9] Those appeals were heard by O'Connor J on September 29, 2004, and he gave judgment orally at the conclusion of the hearing allowing the appeals. His Reasons for Judgment are brief. He refers to the extent to which decisions made by the Ministry of Health affected the appellant's profitability by imposing requirements to spend money on the maintenance of the building and by limiting the number of patients that could be accommodated, and to the financial problems caused by union demands. He found Mr. and Mrs. Pinnock to be credible witnesses, and to have

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5 C.R.C., c. 945.

attempted in good faith to resolve their financial difficulties by negotiating with the Revenue Agency officials, and by liquidating their personal savings to invest in the business.

[10] Schedule B to the Reply to the Notice of Appeal filed by the respondent lists some 93 assessments issued by the Minister between April 13, 1992 and July 14, 1999 in respect of withholdings either not remitted at all, or remitted late. By the time of the hearing the appellant no longer disputed the particulars of any of these assessments, either as to its failure to remit withholdings or as to the computation of the interest and penalties under the *Act*. It contested only the penalties for late remittance of the withholdings, on the basis that Stainton and Stella Pinnock were, at the material times, the *alter ego* of the appellant as they were the only directors, and so theirs were the controlling minds of the corporation. The appellant argues that if they, the only directors, exercised the degree of care, diligence and skill that a reasonably prudent person would, in comparable circumstances, have exercised to prevent the failure to remit on time, then it must follow that the corporation exercised sufficient diligence to be exculpated from the penal provisions of subsection 227(9). This submission, of course, necessarily depends upon the proposition that failure to remit the statutorily required withholdings is a strict liability offence rather than an absolute liability offence, and that the degree of diligence required of directors by subsection 227.1(3) is at least as great as that required to exculpate the company under subsection 227(9).

[11] The appellant argues that it would be incongruent and lacking in consistency for Parliament to have provided a defence of due diligence for directors from their potential vicarious liability under section 227.1 for the failure of a corporation to remit amounts withheld under section 153, and yet not provide a similar defence for the corporation from its potential liability to a penalty under subsection 227(9). The argument is that since the directors are the directing mind of the corporation the legislation must be presumed to require the same standard of conduct from the corporation itself as is required from the directors.

[12] In my view the matter is not so simple as that. The reasons of the majority of the Supreme Court of Canada in *Toronto (City) v. C.U.P.E. Local 79*[6] were written by Arbour J. At paragraph 23 she notes that there are three conditions that must be met for issue estoppel to apply:

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6 2003 SCC 63; [2003] 3 S.C.R. 77.

(i) the issue to be decided must be the same as that which was decided in the prior case;
(ii) the earlier decision must have been a final one; and
(iii) the parties to both proceedings must be the same, or their privies.

While abuse of process by litigation is a more flexible doctrine than issue estoppel, it is clear from Arbour J.'s discussion of it at paragraphs 35 to 54 that the requirement of identity of issue in the two proceedings is as necessary to abuse of process as it is to issue estoppel.

[13] The rationale underlying both doctrines includes avoiding unnecessary expense to the parties to relitigate a matter that has already been decided, conserving judicial resources, avoiding the possibility of collateral attack on a prior judgment that would otherwise be final, and protecting the integrity of the judicial system from the harm to public confidence in it that would be occasioned by inconsistent judgments in respect of the identical issue. None of these concerns arise if the issues in the first and second proceedings are not identical.

[14] The appellant's argument in this case assumes that if failure to remit amounts deducted is not an absolute offence, admitting of no defence whatsoever, then the degree of care that a corporation must show in order to establish a defence for purposes of the penalty imposed by subsection 227(9) of the *Act* must be identical to the degree of care that a director must show in order to avoid vicarious liability for the default of the corporation under subsection 227.1(3). I understand this proposition to be founded on the basis that subsection 227.1(3) uses the expression "due diligence" and that phrase has been used from time to time to describe the defence available to those charged with a strict liability offence.[7]

[15] I know of only one case in which the question whether the failure to remit as and when required is an absolute or a strict liability offence has arisen. That is *Weisz, Rocchi & Scholes v The Queen,*[8] a decision of Bowman, A.C.J., as he then was. His conclusion was that the offence of late remitting had not been established by the evidence, and so there was no need to decide whether, if it had been established, the appellant would have been entitled to avoid liability for the penalty by proof of due

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7 See: *R. v. Sault Ste. Marie, [1978] 2 S.C.R. 1299; Canada v. Consolidated Canadian Contractors Inc.* [1999] 1 F.C. 209; *Pillar Oilfield Project Ltd. v. The Queen,* [1993] GSTC 49.

8 2001 TCC 821; [2001] 2 C.T.C. 2520.

diligence. He did, however, add in *obiter* that although the question was one for another day, if he had been required to decide it he would have found that a due diligence defence was available.

[16] For purposes of this appeal, I am prepared to assume that a "due diligence" defence is available. Nevertheless, for the reasons that follow, I conclude that neither *res judicata* nor abuse of process by relitigation based on the judgment of O'Connor J. is available to the appellant, and that the defence of due diligence, assuming it is available at all, has not been established.

[17] Assuming that failure to remit as and when required is not an absolute but a strict liability offence, it nevertheless requires a greater degree of "due diligence" than does subsection 227.1(3). The words of that subsection are precisely the same as those found in paragraph 122(1)(*b*) of the *Canada Business Corporations Act*,[9] and were considered by the Supreme Court of Canada in *Peoples Department Stores Inc. v. Wise*.[10] That Court's conclusion as to the standard of conduct that these words mandate is found in paragraph 67 of the unanimous judgment:

> 67 Directors and officers will not be held to be in breach of the duty of care under s. 122(1)(*b*) of the CBCA if they *Act* prudently and on a reasonably informed basis. The decisions they make must be **reasonable business decisions** in light of all the circumstances about which the directors or officers knew or ought to have known. In determining whether directors have acted in a manner that breached the duty of care, it is worth repeating that perfection is not demanded. Courts are ill-suited and should be reluctant to second-guess the application of business expertise to the considerations that are involved in corporate decision making, but they are capable, on the facts of any case, of determining whether an appropriate degree of prudence and diligence was brought to bear in reaching what is claimed to be a **reasonable business decision** at the time it was made. (emphasis added)

Can this be said to be the same standard that applies to the obligation of an employer to remit to the Receiver General the amounts that it has withheld from its employees' earnings for their income tax liability as required under section 153? I think not.

[18] There is a marked contrast between the standard of conduct required by the "reasonable business decision" test under subsection 227.1(3) on the one hand and

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9 R.S.C. 1985, c. C-44.

10 2004 SCC 68; [2004] 3 S.C.R. 461.

what is required by section 227 on the other. Subsection 227(4) creates a trust in favour of the Crown, whereby the employer holds the amounts deducted for income tax from payments of remuneration "… in trust for Her Majesty and for payment to Her Majesty in the manner and at the time provided under this *Act*."

[19] It is certainly reasonable that an employer should not be penalized under subsection 227(9) where the failure to remit in time is caused by an event beyond the employer's control, such as a failure of the post office to deliver a remittance mailed in time, or an error made by a bank clerk in transferring funds. However, subsection 227(4) does not permit the employer, in any circumstances, to make a business decision to use the funds for some purpose of its own, no matter how dire its financial plight may be or how brief the period for which it intends to use the funds. The funds belong to the employees, not to the employer. In my view, any failure to remit withholdings when they are due that results from a deliberate decision of the employer, whether that decision is made by a director or by an employee, would necessarily be culpable. Consequently, the issues that arise under subsection 227.1(3) and subsection 227(9) are different. Neither issue estoppel nor abuse of process by relitigation can apply in this case.

[20] Was the failure of the appellant to remit its withholdings as and when prescribed under the *Act* the result of an event beyond the control of the corporation, or did it result from a deliberate decision? Mrs. Pinnock certainly tried by her evidence to paint a picture of a corporation that was in default only because of unforeseeable problems caused by the actions of others. The expenses were greater than she and her husband had anticipated because they were not properly revealed to them before they purchased the business, and because the Department of Health made too many demands on them to spend money on upgrades and repairs. Labour costs were inflated by staffing requirements that were imposed on the appellant by the Department of Health, and by the demands of unionized workers. The payments from the Department of Health always came after the month end, when the money was required before that in order to meet the payroll and the accounts payable. Their attempts to raise additional capital were thwarted by the banks that would not extend additional credit to the appellant after its line of credit was exhausted, and by the refusal of the Department of Health to approve a prospective investor.

[21] It is clear from the evidence of both Mrs. Pinnock and Ms. Ebanks, a CRA Collections Officer, as well as from the Amended Notice of Appeal, that the appellant habitually failed to remit the payroll withholdings as and when required under the *Act*, and that its failure to do so was caused entirely by the fact that it did not have the necessary funds to meet the gross payroll, and so elected to pay the net

payroll to the employees and not pay the withholdings. This practice was the subject of adverse comment by the Supreme Court of Canada in *Royal Bank of Canada v. Sparrow Electric Corp.*:[11]

> (B) *The Nature of Section 227(4) and (5) Statutory Trusts*
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> 25 Section 153(1)(*a*) *ITA* places an affirmative duty upon employers to deduct and withhold amounts from their employees' pay cheques, and remit those withholdings to the Receiver General on account of the employees' tax payable. By virtue of s. 153(3) *ITA*, these withholdings are deemed to become the property of the employee:
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> > 153 ...
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> > (3) When an amount has been deducted or withheld under subsection (1), it shall, for all the purposes of this Act, be deemed to have been received at that time by the person to whom the remuneration, benefit, payment, fees, commissions or other amounts were paid.
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> In a perfect world, these deductions would be made, a cash fund would be set aside by the employer, and the withheld amounts would be promptly remitted to the Receiver General when due. The deducted amounts, lawfully the property of the employee, would in this way be transferred to Her Majesty to be set against his overall tax payable.
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> 26 As a practical reality, however, these deductions are often not remitted as required under the *ITA*. Instead, the withholdings are commonly made solely as a book entry, and therefore the deduction of taxes from wages becomes merely a notional transaction; no cash is actually set aside for remittance and, often, the deductions are not transferred to the Receiver General: see, e.g., *Re Deslauriers Construction Products Ltd.*, [1970] 3 O.R. 599 (C.A.), at p. 601. It is at this point which a business becomes indebted to Her Majesty for the amount of moneys only fictionally deducted. I hasten to add, however, that while it can be said Her Majesty at this point becomes *de facto*, if not *de jure*, a creditor of the non-remitting employer, the arrangement is dissimilar to an ordinary debtor-creditor situation in two fundamental respects. First, in contrast to usual negotiated credit arrangements, this transaction is of manifestly a non-consensual nature. Second, by virtue of s. 153(3), the debtor can in law be considered to be utilizing an asset which is the property of its employees. In this sense, it is not inaccurate to characterize the non-remittance of payroll deductions as a "misappropriation" of the property of another. Indeed, the authorities, correctly in my view, commonly refer to the conduct of the tax debtor in this manner: *Roynat, supra*, at p. 646,

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[11] [1997] 1 S.C.R. 411 @ paras. 25-28. This passage from the dissenting judgment of Gonthier J is part of the background that is agreed with by the majority of the Court at paragraph 91.

per Twaddle J.A.; and *Pembina on the Red Development Corp. Ltd. v. Triman Industries Ltd.* (1991), 85 D.L.R. (4th) 29 (Man. C.A.), at p. 48, *per* Lyon J.A. dissenting.

27 The economic reality of this sort of misappropriation of statutory deductions is artificially to increase the working capital of the tax debtor. By foregoing a cash payment to Her Majesty in the amount of the payroll deductions, the tax debtor is able to utilize the freed resources elsewhere in its business. The effect of non-remittance was summarized by Lyon J.A. in his dissenting reasons in *Pembina on the Red Development*, *supra*, at p. 48:

> ... either the tax debtor used the misappropriated deductions for its own purposes or the pool of moneys available for distribution to the tax debtor's creditors ... has been increased by the amount which the tax debtor failed to remit to the Receiver-General.

28 It is against the backdrop of this unfortunate factual scenario that the provisions of s. 227(4) and (5) can be seen to have been enacted. While it can be said that at the point of withholding the employer becomes the trustee of a fund which is in law the property of its employee, s. 227(4) has the effect of making Her Majesty the beneficiary under that trust. I agree with the observation of the mechanics of s. 227(4) made by Twaddle J.A. in *Roynat*, *supra*, at p. 646, where he states:

> Although [s. 227(4)] calls the trust created by it a deemed one, the trust is in truth a real one. The employer is required to deduct from his employees' wages the amounts due by the employees under the statute. This money does not belong to the employer anymore. It belongs to the employees. The employer holds it in a statutory trust to satisfy their obligations.

The conceptual difficulty arises, of course, when the tax debtor fails to set aside moneys which are to be remitted. At this point, the subject of Her Majesty's beneficial interest becomes intermingled with the general assets of the tax debtor. As Twaddle J.A. rightly observed in *Roynat*, *supra*, at p. 646, "Her Majesty's claim ... then be[comes] that of a beneficiary under a non-existent trust". In short, the misappropriation of statutory deductions conceptually problematizes the legal vehicle -- the concept of the trust -- which Parliament has invoked in order to regain the moneys lawfully owed to Her Majesty.

[22] Faced with a chronic insufficiency of working capital, and unable to meet its gross payroll in full from time to time, the appellant chose to solve the problem by appropriating the withholdings rather than by resorting to the mechanisms available under the statutes designed to deal with the problems of insolvent corporations. This misappropriation is surely conduct beyond the threshold of culpability under subsection 227(9) of the *Act*, no matter whether the offence be considered "strict

liability" or something else. For this reason, like Bowman C.J., I need not decide whether the offence is one of absolute liability or not. Certainly, the appellant in this case has no basis on which to claim that it used all reasonable means, or even its best efforts, to avoid the failure to remit on time.

[23] The appeals are dismissed, with costs to the respondent.

Signed at Ottawa, Canada, this **3rd day of March, 2011.**

"E.A. Bowie"

Bowie J.

APPENDIX 'A'

153(1) Every person paying at any time in a taxation year

(a) salary, wages or other remuneration,

…

shall deduct or withhold therefrom such amounts as determined in accordance with prescribed rules and shall, at such time as is prescribed, remit that amount to the Receiver General on account of the payee's tax for the year under this Part or Part XI.3 as the case may be,

227(1) No action lies against any person for withholding or deducting any sum of money in compliance or intended compliance with this *Act*.

(2) Where a person (in this subsection referred to as the "payor") is required by regulations made under subsection 153(1) to deduct or withhold from a payment to another person an amount on account of that other person's tax for the year, that other person shall, from time to time as prescribed, file a return with the payor in prescribed form.

(3) Every person who fails to file a return as required by subsection (2) is liable to have the deduction or withholding under section 153 on account of his tax made as though he were an unmarried person with dependants.

(4) Every person who deducts or withholds any amount under this *Act* shall be deemed to hold the amount so deducted or withheld in trust for Her Majesty.

(5) Notwithstanding any provision of the *Bankruptcy Act*, in the event of any liquidation, assignment, receivership or bankruptcy of or by a person, an amount equal to any amount

(*a*) deemed by subsection (4) to be held in trust for Her Majesty, or

(*b*) deducted or withheld under an *Act* of a province with which the Minister of Finance has entered into an agreement for the collection of taxes payable to the province under that *Act* that is deemed under that *Act* to be held in trust for Her Majesty in right of the province

shall be deemed to be separate from and form no part of the estate in liquidation, assignment, receivership or bankruptcy, whether or not that amount has in fact been kept separate and apart from the person's own moneys or from the assets of the estate.

(6) Where a person on whose behalf an amount has been paid to the Receiver General after having been deducted or withheld under Part XIII was not liable to pay any tax under that Part or where the amount so paid to the Receiver General on his behalf is in excess of the tax that he was liable to pay, the Minister shall, upon application in writing made within two years from the end of the calendar year in which the amount was pad, pay to him the amount so paid or such part thereof as he was not liable to pay, unless he is otherwise liable or about to become liable to make a payment under this *Act*, in which case the Minister may apply the amount otherwise payable under this subsection to that payment and notify him of that fact.

(7) Where, upon application by or on behalf of a person to the Minister pursuant to subsection (6) in respect of an amount paid to the Receiver General that was deducted or withheld under Part XIII, the Minister is not satisfied

(*a*) that the person was not liable to pay any tax under that Part, or

(*b*) that the amount paid to the Receiver General was in excess of the tax that the person was liable to pay

the Minister shall assess that person for any amount payable by him under Part XIII and send a notice of assessment to that person, whereupon sections 150 to 167 (except subsections 164(1.1) to (1.3)) and Division J of Part I are applicable with such modifications as the circumstances require.

(8) Subject to subsection (8.5), every person who in a calendar year has failed to deduct or withhold any amount as required by subsection 153(1) or section 215 is liable to a penalty of

(*a*) 10% of the amount that should have been deducted or withheld; or

(*b*) where the person had at the time of the failure been assessed a penalty under this subsection in respect of an amount that should have been deducted or withheld during the year, 20% of the amount that should have been deducted or withheld.

(8.1) Where a particular person has failed to deduct or withhold an amount as required under subsection 153(1) or section 215 in respect of an amount that has been paid to a non-resident person, the non-resident person is jointly and severally liable with the particular person to pay any interest payable by the particular person pursuant to subsection (8.3) in respect thereof.

(8.2) Where a person has failed to deduct or withhold any amount as required under subsection 153(1) in respect of a contribution under a retirement compensation arrangement, that person is liable to pay to Her Majesty an amount equal to the amount of the contribution, and each payment on account of that amount is deemed to be, in the year in which the payment is made,

(*a*) for the purposes of paragraph 20(1)(*r*), a contribution by the person to the arrangement; and

(*b*) an amount on account of tax payable by the custodian under Part XI.3.

(8.3) A person who has failed to deduct or withhold any amount as required by subsection 135(3) or 153(1) or section 215 shall pay to the Receiver General interest on the amount at the prescribed rate, computed

(*a*) in the case of an amount required by subsection 153(1) to be deducted or withheld from a payment to another person, from the fifteenth day of the month immediately following the month in which the amount was required to be deducted or withheld, or from such earlier day as may be prescribed for the purposes of subsection 153(1), to,

(i) where that other person is not resident in Canada, the day of payment of the amount to the Receiver General, and

(ii) where that other person is resident in Canada, the earlier of the day of payment of the amount to the Receiver General and April 30 of the year immediately following the year in which the amount was required to be deducted or withheld; and

(*b*) in the case of an amount required by subsection 135(3) or section 215 to be deducted or withheld, from the day on which the amount was required to be deducted or withheld to the day of repayment of the amount to the Receiver General.

(8.4) A person who has failed to deduct or withhold any amount as required under

(*a*) subsection 135(3) in respect of a payment made to another person, or

(*b*) subsection 153(1) in respect of an amount paid to another person who is non-resident or who is resident in Canada by reason only of paragraph 250(1)(*a*)

is liable to pay as tax under this *Act* on behalf of the other person the whole of the amount that should have been so deducted or withheld and is entitled to deduct or withhold from any amount paid or credited by the person to the other person or otherwise to recover from the other person any amount paid by the person as tax under this Part on behalf of the other person.

(8.5) Where a person has failed to deduct or withhold any amount in respect of a payment described in paragraph 153(1)(*a*), subsection (8) shall be read as follows:

"(8) Every person who in a calendar year has failed to deduct or withhold a particular amount as required by paragraph 153(1)(*a*) in respect of a payment made by the person is liable to a penalty of

(*a*) 10 % of the particular amount that should have been deducted or withheld; or

(*b*) where the person had at the time of the failure been assessed a penalty under this subsection for failing to deduct or withhold during the year another amount so required to be deducted or withheld in respect of a payment made by the person from the same establishment of the person, 20% of the particular amount that should have been deducted or withheld."

(9) Subject to subsection (9.5), every person who in a calendar year has failed to remit or pay as and when required by this *Act* or a regulation an amount deducted or withheld as required by this *Act* or a regulation or an amount of tax that he is, by section 116 or by a regulation made under subsection 215(4), required to pay is liable to a penalty of

(*a*) 10% of that amount; or

(*b*) 20% of that amount, where the person had at the time of the failure been assessed a penalty under this subsection in respect of a previous failure during the year.

(9.1) Notwithstanding any other provision of this *Act*, any other enactment of Canada, any other enactment of a province or any law, the penalty for failure to remit an amount required to be remitted by a person or before a prescribed date under subsection 153(1), subsection 22(1) of the *Canada Pension Plan* and subsection 68(1) of the *Unemployment Insurance Act, 1971* shall, unless the person required to remit the amount has wilfully delayed in remitting the amount or wilfully remitted an amount less than the amount required, apply only to the amount by which the aggregate of all amounts each of which is an amount so required to be remitted on or before that date exceeds $500.

(9.2) Where a person has failed to remit as and when required by this *Act* or a regulation an amount deducted or withheld as required by this *Act* or a regulation, he shall pay t the Receiver General interest on the amount at the prescribed rate computed from the day on which he was so required to remit the amount to the day of remittance of the amount to the Receiver General.

(9.3) Where a person has failed to pay an amount of tax that he is, by section 116 or a regulation made under subsection 215(4), required to pay, as and when he was so required to pay it, he shall pay to the Receiver General interest on the amount at the prescribed rate computed from the day on or before which the amount was required t be paid to the day of payment of the amount to the Receiver General.

(9.4) A person who has failed to remit as and when required by this *Act* or a regulation an amount deducted or withheld from a payment to another person as required by this *Act* or a regulation is liable to pay as tax under this *Act* on behalf of the other person the amount so deducted or withheld.

(9.5) Where a person has failed to remit or pay an amount deducted or withheld in respect of a payment described in paragraph 153(1)(*a*), subsection (9) shall be read as follows:

"(9) Every person who in a calendar year has failed to remit or pay as and when required by this *Act* or a regulation a particular amount deducted or withheld as required by paragraph 153(1)(*a*) in respect of a payment made by the person from an establishment of the person is liable to a penalty of

(*a*) 10% of the particular amount that should have been remitted or paid; or

(*b*) where the person had at the time of the failure been assessed a penalty under this subsection for failure to remit or pay during the year another amount so required to be remitted or paid in respect of an amount so deducted or withheld by the person in respect of a payment made by the person from the same establishment of the person, 20% of the amount that should have been remitted or paid."

(10) The Minister may assess

(*a*) any person for any amount payable by that person under subsection (8), (8.1), (8.2), (8.3), (8.4) or 224(4) or (4.1) or section 227.1 or 235, and

(*b*) any person resident in Canada for any amount payable by that person under Part XIII,

and, where he sends a notice of assessment to that person, Divisions I and J of Part I are applicable with such modifications as the circumstances require.

(10.1) The Minister may assess

(a) any person for any amount payable by that person under subsection (9), (9.2), (9,3) or (9.4), and

(b) any non-resident person for any amount payable by that person under Part XIII,

and, where he sends a notice of assessment to that person, sections 150 to 167 (except subsections 164(1.1) to (1.3)) and Division J of Part I are applicable with such modifications as the circumstances require.

(11) Provisions of this *Act* requiring a person to deduct or withhold an amount in respect of taxes from amounts payable to a taxpayer are applicable to Her Majesty in right of Canada or a province.

(12) Where this *Act* requires an amount to be deducted or withheld, an agreement by the person on whom that obligation is imposed not to deduct or withhold is void.

(13) The receipt of the Minister for an amount withheld or deducted by any person as required by or under this *Act* is a good and sufficient discharge of the liability of any debtor to his creditor with respect thereto to the extent of the amount referred to in the receipt.

(14) Parts IV, IV.1, VI and VI.1 are not applicable to any corporation for any period throughout which it is exempt from tax under section 149.

(15) In this section a reference to "person" with respect to any amount or any tax deducted or withheld from an amount under Part XIII shall be deemed to include a partnership that is with respect to that amount deemed for the purposes of that Part to be a person resident in Canada or a non-resident person.

(16) A corporation that at any time during the taxation year would be a corporation described in paragraph 149(1)(*d*) but for a provision of an *Appropriation Act* shall be deemed not to be a private corporation for the purposes of Part IV.

227.1(1) Where a corporation has failed to deduct or withhold an amount as required by subsection 135(3) 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 liable, together with the corporation, to pay that amount and any interest or penalties relating thereto.

(2) A director is not liable under subsection (1), unless

(*a*) a certificate for the amount of the corporation's liability referred to in that subsection has been registered in the Federal Court of Canada under section 223 and execution for such amount has been returned unsatisfied in while or in part;

(*b*) the corporation has commenced liquidation or dissolution proceedings or has been dissolved and a claim for the amount of the corporation's liability referred to in that subsection has been proved within six months after the earlier of the date of commencement of the proceedings and the date of dissolution; or

(*c*) the corporation has made an assignment or a receiving order has been made against it under the *Bankruptcy Act*

and a claim for the amount of the corporation's liability referred to in that subsection has been proved within six months after the date of the assignment or receiving order.

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

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

(5) Where execution referred to in paragraph (2)(*a*) has issued, the amount recoverable from a director is the amount remaining unsatisfied after execution.

(6) Where a director pays an amount in respect of a corporation's liability referred to in subsection (1) that is proved in liquidation, dissolution or bankruptcy proceedings, he is entitled to any preference that Her Majesty in right of Canada would have been entitled to had such amount not been so paid and, where a certificate that relates to such amount has been registered, he is entitled to an assignment of the certificate to the extent of his payment, which assignment the Minister is hereby empowered to make.

(7) A director who has satisfied a claim under this section is entitled to contribution from the other directors who were liable for the claim.

CITATION:	2011 TCC 91
COURT FILE NO.:	2007-3055(IT)G
STYLE OF CAUSE:	741290 ONTARIO INC. and HER MAJESTY THE QUEEN
PLACE OF HEARING:	Toronto, Ontario
DATE OF HEARING:	December 10, 2009
REASONS FOR JUDGMENT BY:	The Honourable Justice E.A. Bowie
DATE OF JUDGMENT: DATE OF AMENDED REASONS:	February 14, 2011 March 3, 2011

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