Docket:2016-3167(IT)G
2016-3168(IT)G

BETWEEN:

CAROLINE COLITTO,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

Appeals heard on May 18, 2017, at Ottawa, Ontario

By: The Honourable Justice Henry A. Visser

Appearances:

Counsel for the Appellant:	Kristen Duerhammer
	Adam Gotfried
Counsel for the Respondent:	Amy Kendell

JUDGMENT

The Appeals from the assessments dated January 13, 2016, made under section 160 of the *Income Tax Act* are allowed and the assessments are vacated.

Signed at Ottawa, Canada, this 26th day of April, 2019.

"Henry A. Visser"

Visser J.

Citation:2019 TCC 88
Date:20190426
Docket: 2016-3167(IT)G
2016-3168(IT)G

BETWEEN:

CAROLINE COLITTO,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

REASONS FOR JUDGMENT

Visser J.

INTRODUCTION

[1] In specified circumstances, sections 160 and 227.1 of the *Income Tax Act*[1] (the "*Act*") allow the Minister of National Revenue (the "Minister") to collect amounts owed by one taxpayer under the *Act* from another person. While these anti-avoidance provisions are intended to protect the collection of taxes by the Minister, they have been described as harsh or draconian in some circumstances. These Appeals deal with the cascading application of both of these provisions in relation to the failure by a corporation to remit source deductions in 2008 and the transfer of an interest in real property by a director of the corporation to his spouse in 2008 in circumstances where the Minister did not crystalize the director's liability under subsection 227.1(2) of the *Act* until 2011.

[2] In this case, the Minister assessed the Appellant, Caroline Colitto, pursuant to section 160 of the *Act* by notices dated January 13, 2016, bearing reference numbers 3587483 and 3492852 (the "Assessments") in the amounts of $187,498 and $41,248, respectively. The Assessments relate to the transfer of a 50% interest in two properties to Ms. Colitto by her spouse, Domenic Colitto, on May 2, 2008, for nominal consideration (collectively, the "Transfers"). Mr. Colitto's tax liability,

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

in turn, relates to the failure by Core Precision Technologies Ltd. ("Precision") to remit source deductions in 2008 to the Minister. At that time, Mr. Colitto was a director of Precision. Following the filing of Notices of Objection dated April 12, 2016, in respect of each of the Assessments, Ms. Colitto appealed the Assessments to this Court pursuant to paragraph 169(1)(b) of the *Act* (the "Appeals").

ISSUES

[3] The sole issue in these Appeals is whether Ms. Colitto is liable to pay the amounts of $187,498 and $41,248 pursuant to section 160 of the *Act* in respect of the transfer to her of a 50% interest in two properties by her spouse on May 2, 2008. In this respect, the issue relates to the interaction of sections 160 and 227.1 of the *Act*, and whether Ms. Colitto was jointly and severally liable with Mr. Colitto pursuant to section 227.1 and paragraph 160(1)(e) of the *Act* for Precision's failure to remit source deductions to the Minister in 2008. In particular, the issue relates to the timing of Mr. Colitto's liability under section 227.1 of the *Act* for Precisions' failure to remit source deductions in 2008 and how that timing relates to Ms. Colitto's liability under section 160 of the *Act* in respect of the May 2, 2008, transfers of property by Mr. Colitto to Ms. Colitto.

[4] For the reasons that follow, it is my view that Ms. Colitto is not liable pursuant to section 160 of the *Act* in the circumstances of this case, and that therefore her Appeals should be allowed and the Assessments should be vacated.

BACKGROUND FACTS

[5] The facts in this case are not in dispute. In this respect, the parties submitted a Statement of Agreed Facts (the "SAF") which is set out in full at Appendix "A" hereto. The SAF includes three schedules which set out copies of the two Assessments[2] under appeal as well as the Minister's March 28, 2011, Notice of Assessment (the "Director's Liability Assessment") in the amount of $733,812.98 issued to Mr. Colitto pursuant to section 227.1 of the *Act*.[3] The parties did not call any witnesses and did not submit any other evidence in these Appeals.

---

[2] See SAF Schedules A and B.

[3] See SAF Schedule C.

[6] I will briefly summarize the relevant facts in these Appeals, focusing in particular on the dates which are relevant to the outcome of these Appeals. On May 2, 2008, Domenic Colitto transferred a 50% interest in two real properties (the "Properties") to his spouse, Caroline Colitto, in consideration of $2.00 for each property interest (for total consideration of $4.00). The fair market value of the resulting benefit received by Ms. Colitto was $41,248 in respect of the property located at 30 Aida Court, Bolton Ontario (the "Aida Court Property") and $187,498 in respect of the property located at 15000 12th Concession RR1, Bolton Ontario (the "15000 12th Concession Property"), for a total benefit of $228,746.

[7] At all relevant times, Mr. Colitto was a director and shareholder of Precision, a manufacturer of moulds, tools for injections, tools for extrusions, and vinyl extrusions. Precision's year end for the purposes of the *Act* was July 31. Between February and August 2008, Precision failed to remit source deductions to the Minister of National Revenue, and as a result the Minister issued a Notice of Assessment to Precision for unremitted source deductions, interest and penalties totalling $631,554.23 on October 10, 2008. On August 6, 2009, a certificate for Precision's tax debt in the amount of $794,286.98 was registered in the Federal Court under section 223 of the *Act*. On November 23, 2010, direction to enforce the writ registered with the Federal Court was made to the Sheriff for the amount of $776,380.32, which reflected payments made to reduce the assessed debt between August 6, 2009 and November 23, 2010. Precision's tax debt was executed and returned unsatisfied on January 4, 2011.

[8] As previously noted, the Minister issued a Notice of Assessment to Mr. Colitto on March 28, 2011, in the amount of $733,812.98 and issued the Assessments under appeal herein to Ms. Colitto on January 13, 2016, in the aggregate amount of $228,746. Neither Mr. Colitto nor Precision filed a notice of objection with respect to the respective assessments issued to them by the Minister.

[9] In summary, the following dates and timeline are relevant to the issues raised in these Appeals:

(a) February 2008 to August 2008 – Precision fails to remit source deductions;

(b) May 2, 2008 – Mr. Colitto transfers an interest in the Properties to Ms. Colitto for nominal consideration;

(c) October 10, 2008 – assessment issued to Precision;

(d) August 6, 2009 – Precision's debt registered in Federal Court;

(e) November 23, 2010 – direction to enforce writ;

(f) January 4, 2011 – Precision's debt executed and returned unsatisfied;

(g) March 28, 2011 – s. 227.1 assessment issued to Mr. Colitto; and

(h) January 13, 2016 – s. 160 Assessments issued to Ms. Colitto.

[10] As discussed further below, the two dates that are the most critical to the issues raised in these Appeals are May 2, 2008, and January 4, 2011, being the date that the Transfers were effected and the date that Precision's debt was executed and returned unsatisfied in compliance with paragraph 227.1(2)(a) of the *Act*, respectively.

LAW AND ANALYSIS

Applicable Legislation

[11] These Appeals raise a narrow technical issue regarding the scope and interaction of sections 160 and 227.1 of the *Act*.[4] In this respect, I note that the Assessments were issued by the Minister to Ms. Colitto pursuant to subsection 160(1) of the *Act*, which provided as follows:[5]

> **160 (1) Tax liability re property transferred not at arm's length —** Where a person has, on or after May 1, 1951, transferred property, either directly or indirectly, by means of a trust or by any other means whatever, to
>
> (a) the person's spouse or common-law partner or a person who has since become the person's spouse or common- law partner,
>
> (b) a person who was under 18 years of age, or
>
> (c) a person with whom the person was not dealing at arm's length,

---

[4] The counterpart provisions for GST/HST purposes are sections 323 and 325 of the *Excise Tax Act*, R.S.C., 1985, c. E-15 (the "*ETA*").

[5] Additional parts of Section 160 of the *Act* are set out in Appendix "B" hereto.

> the following rules apply:
>
> (d) the transferee and transferor are jointly and severally, or solidarily, liable to pay a part of the transferor's tax under this Part for each taxation year equal to the amount by which the tax for the year is greater than it would have been if it were not for the operation of sections 74.1 to 75.1 of this Act and section 74 of the Income Tax Act, chapter 148 of the Revised Statutes of Canada, 1952, in respect of any income from, or gain from the disposition of, the property so transferred or property substituted for it, and
>
> (e) the transferee and transferor are jointly and severally, or solidarily, liable to pay under this Act an amount equal to the lesser of
>
> (i) the amount, if any, by which the fair market value of the property at the time it was transferred exceeds the fair market value at that time of the consideration given for the property, and
>
> (ii) the total of all amounts each of which is an amount that the transferor is liable to pay under this Act (including, for greater certainty, an amount that the transferor is liable to pay under this section, regardless of whether the Minister has made an assessment under subsection (2) for that amount) in or in respect of the taxation year in which the property was transferred or any preceding taxation year,
>
> but nothing in this subsection limits the liability of the transferor under any other provision of this Act or of the transferee for the interest that the transferee is liable to pay under this Act on an assessment in respect of the amount that the transferee is liable to pay because of this subsection.
>
> [emphasis added]

[12] With respect to the application of subsection 160(1) of the *Act* in these Appeals, the parties agree that Mr. Colitto transferred the Properties to his spouse, Ms. Colitto, on May 2, 2008, for nominal consideration of $4.00, and that the fair market value of the resulting benefit was $228,746 in aggregate. Ms. Colitto is therefore not challenging the amount of the benefit determined for the purpose of subparagraph 160(1)(e)(i) of the *Act*. Ms. Colitto is also not challenging the amount of the underlying assessments issued by the Minister to Mr. Colitto and Precision. As a result, the only issue with respect to the application of subsection 160(1) of the *Act* in these Appeals relates to the application of subparagraph 160(1)(e)(ii) of the *Act* to the facts in this case, and in particular whether Mr. Colitto's liability pursuant to section 227.1 of the *Act* was "in or in respect of the

taxation year in which the property was transferred or any preceding taxation year".[6]

[13] Section 227.1 of the *Act* allows the Minister to collect amounts owing by a corporation, such as unremitted source deductions, by assessing the corporation's directors in prescribed circumstances. The text of section 227.1 is set out in Appendix "B" hereto.

[14] In this case, the parties agreed that Mr. Colitto was a director of Precision at all relevant times, and that he did not exercise due diligence as a director of Precision to prevent its failure to remit the required source deductions. As such, the parties agree that the due diligence defence and limitation period set out in subsections 227.1(3) and (4) of the *Act* do not apply in the circumstances of these Appeals. Subsection 227.1(1) and paragraph 227.1(2)(a) are, however, relevant and provided as follows:

> **227.1 (1) Liability of directors for failure to deduct** — 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.
>
> **(2) Limitations on liability -** 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 under section 223 and execution for that amount has been returned unsatisfied in whole or in part;
>
> [emphasis added]

The Parties Positions

---

[6] Subparagraph 160(1)(e)(ii) of the *Act.*

[15] While the parties agree on all of the relevant facts and much of the applicable law, they do not agree on how the law should be interpreted and applied to the circumstances of these Appeals.

[16] The Appellant argues that the Transfers of the Properties to the Appellant by her spouse should not be subject to section 160 of the *Act* in the circumstances of this case. In summary, the Appellant argues that:

(a) the Federal Court of Appeal in *Livingston v Canada*[7] unequivocally set out the requirements for section 160 to apply in a four part test which is binding on this Court;

(b) one of the criteria set down in *Livingston* is that "[the] transferor must be liable to pay tax under the Act at the time of transfer";[8]

(c) liability pursuant to section 227.1 of the *Act* does not arise until the pre-conditions set out in subsection 227.1(2) of the *Act* have been met, and such liability, once crystalized, is not retroactive;

(d) Mr. Colitto was not liable for Precision's unremitted source deductions pursuant to section 227.1 of the *Act* until January 4, 2011, when the last of the pre-conditions set out in paragraph 227.1(2)(a) of the *Act* were met, and, as a result, Mr. Colitto was not liable for Precision's unremitted source deductions pursuant to section 227.1 of the *Act* at the time of the Transfers on May 2, 2008; and

(e) because Mr. Colitto was not liable for Precision's unremitted source deductions pursuant to section 227.1 of the *Act* at the time of the Transfers on May 2, 2008, the conditions set out in *Livingston* have not been met in these Appeals and Ms. Colitto is therefore not liable pursuant to section 160 of the *Act*.

[17] With respect to the application of section 227.1 of the *Act* in the context of a section 160 assessment, the Appellant also argues that there is no language in subsection 160(1) or section 227.1 of the *Act* that provides that, once the

---

7 2008 FCA 89.

8 *Ibid*, at paragraph 17.

preconditions in paragraph 227.1(2)(a) of the *Act* are satisfied, a director's liability arising under section 227.1 of the *Act* has retroactive effect to the time when the relevant corporation failed to remit the required source deductions. The Appellant further argues that any ambiguity in the legislation should be resolved in favour of the Appellant.

[18] While the Respondent acknowledges that *Livingston* is binding on this Court, the Respondent nonetheless argues that the principles set out by the Federal Court of Appeal in *Livingston* must be considered in light of the applicable legislation and the relevant facts in this case. In summary, the Respondent argues that:

(a) the criterion set down by the Federal Court of Appeal in *Livingston* that "[the] transferor must be liable to pay tax under the Act at the time of transfer"[9]:

(i) does not override cases rendered by this Court when considering the application of section 160 of the *Act* and an underlying director's liability assessment;

(ii) oversimplifies the requirements set out in subparagraph 160(1)(e)(ii) of the *Act*; and

(iii) must be interpreted in light of the wording of subparagraph 160(1)(e)(ii) of the *Act* which references a transferor's liability "in or in respect of the taxation year in which the property was transferred or any preceding taxation year";

(b) *Livingston* is distinguishable from the case at bar because:

(i) the Federal Court of Appeal in *Livingston* did not consider the application of subsection 160(1) in conjunction with section 227.1 of the *Act*; and

---

9 *Ibid*, at paragraph 17.

(ii) the Federal Court of Appeal in *Livingston* was not required to consider the issue of the time at which the transferor's liability arose as the only issue in that case was whether there was a transfer of property for the purposes of subsection 160(1) of the *Act*;

(c) once the pre-conditions set out in subsection 227.1(2) of the *Act* have been satisfied, a director's liability pursuant to subsection 227.1 of the *Act* applies retroactively as of the date that the corporate taxpayer failed to remit source deductions;

(d) in this case, once the pre-conditions set out in subsection 227.1(2) of the *Act* were satisfied on January 4, 2011, Mr. Colitto's liability for Precision's failure to remit source deductions applied retroactively to the times that Precision failed to remit source deductions in 2008; and

(e) Mr. Colitto's liability for Precision's failure to remit source deductions was in or in respect of his 2008 taxation year and Ms. Colitto was therefore subject to the application of subsection 160(1) of the *Act* in respect of the Transfers of the Properties in 2008.

The Test for Section 160

[19] In *Livingston*, Sexton J.A., writing for a unanimous Federal Court of Appeal, set out the test for the application of subsection 160(1) of the *Act* as follows (the "*Livingston* test"):

> 17 In light of the clear meaning of the words of subsection 160(1), the criteria to apply when considering subsection 160(1) are self-evident:
>
> 1) The transferor must be liable to pay tax under the Act at the time of transfer;
>
> 2) There must be a transfer of property, either directly or indirectly, by means of a trust or by any other means whatever;
>
> 3) The transferee must either be:
>
> i. The transferor's spouse or common-law partner at the time of transfer or a person who has since become the person's spouse or common-law partner;
>
> ii. A person who was under 18 years of age at the time of transfer; or

> iii. A person with whom the transferor was not dealing at arm's length.
>
> 4) The fair market value of the property transferred must exceed the fair market value of the consideration given by the transferee.[10]
>
> [emphasis added]

[20] It is clear, and not disputed by either party, that decisions of the Federal Court of Appeal are generally binding on this Court.[11] In this respect, I note that *Livingston* has been widely followed by this Court.[12] It is also clear, and the parties agree, that the only issue in these Appeals relates to the timing and amount of Mr. Colitto's liability pursuant to subparagraph 160(1)(e)(ii) of the *Act*, which corresponds approximately with the first *Livingston* criterion, namely whether the transferor (Mr. Colitto) was liable to pay tax under the *Act* at the time of transfer. The question remains, however, whether the test set out in *Livingston* applies in the circumstances of this case, and if so, how it should be interpreted.

[21] Based on *stare decisis*, the Appellant submits that the *Livingston* test is binding on this Court and therefore that in order for subsection 160(1) of the *Act* to apply to the Transfers, Mr. Colitto, the transferor, must have been liable to pay tax under the *Act* at the time of the Transfers. As previously noted, while the Respondent agrees that this Court cannot overturn *Livingston*, the Respondent disagrees with the Appellant's interpretation and application of the first criterion in the *Livingston* test in the circumstances of these Appeals for the following reasons:

(a) the test was formulated in a factual context where the timing of the transferor's liability (criterion #1) was not in dispute; and

(b) the test must be interpreted in light of the actual wording of subsection 160(1) of the *Act*.

---

10 *Ibid*, at para 17.

11 The principle of *stare decisis* requires that this Court follow decisions of the Federal Court of Appeal and the Supreme Court of Canada - see *Canada v Craig*, 2012 SCC 43, at paras 20-21, and *Brent Kern Family Trust v R*, 2013 TCC 327, at para 28.

12 See, for example, *Woodland v R*, 2009 TCC 434 at para 24; *Campbell v R*, 2009 TCC 431 at para 18; *Pickard v R*, 2010 TCC 535; *Lapierre v R*, 2012 TCC 299 at para 18; *Kiperchuk v R*, 2013 TCC 60, at para 13, *Copeland v. R.*, 2016 TCC 124, at para 10, *Klundert v. R*, 2016 TCC 130, at para 21, *Parihar v. R*, 2015 TCC 52, at para 26.

[22] In essence, the Respondent argues that the first criterion set down by the Federal Court of Appeal in *Livingston* was obiter and oversimplifies the legislative test set down by Parliament, and that therefore *Livingston* should be distinguished in the circumstances of this case. I agree with the Respondent for the following reasons.

[23] First, *Livingston* is distinguishable from the case at bar. The main issue in *Livingston* was whether there was a "transfer" within the meaning of subsection 160(1) of the *Act*. It did not consider the issue of cascading assessments under the combined operation of sections 160 and 227.1 of the *Act*, where the timing of the transferor's liability – the first criterion in the *Livingston* test – is in dispute.

[24] Second, while the Federal Court of Appeal in *Livingston* summarized the test under subsection 160(1) of the *Act*, because the first criterion therein (dealing with the timing of the transferor's liability) was not in issue in that case, the Federal Court of Appeal's summary of the first criterion is, in my view, obiter and was not meant to be a complete codification of all of the statutory requirements under that provision. In this respect, I note that once subsection 160(1) of the *Act* is engaged as a result of a transfer of property by a person to a transferee described in any of paragraphs 160(1)(a), (b) or (c) of the *Act*, the transferee may become liable as specified in paragraphs 160(1)(d) or (e) of the *Act*. The first criterion set out in the *Livingston* test does not distinguish between these two different liability provisions, or fully set out the specified criteria for determining the amount of the liability under each such provision. Rather, the first criterion in the *Livingston* test merely referenced a part of paragraph 160(1)(e) of the *Act* which was not in dispute in that case.

[25] My view is further supported by comparing the wording of subsection 160(1) of the *Act* with the wording of the *Livingston* test. For example, the first criterion in the *Livingston* test provides that "[the] transferor must be liable to pay tax under the Act at the time of transfer" [emphasis added]. In contrast, the relevant provision corresponding to the first *Livingston* criterion is subparagraph 160(1)(e)(ii) of the *Act*, which provides as follows:

> (ii) the total of all amounts each of which is an amount that the transferor is liable to pay under this Act (including, for greater certainty, an amount that the transferor is liable to pay under this section, regardless of whether the Minister has made an assessment under subsection (2) for that amount) in or in respect of

> the taxation year in which the property was transferred or any preceding taxation year,
>
> [emphasis added]

[26] The wording of subparagraph 160(1)(e)(ii) of the *Act* is broader than the first *Livingston* criterion in two key respects. First, *Livingston* references a liability "to pay tax under the Act", whereas subparagraph 160(1)(e)(ii) of the *Act* references "the total of all amounts each of which is an amount that the transferor is liable to pay under this Act". Subparagraph 160(1)(e)(ii) of the *Act* therefore includes all amounts payable under the *Act*, not just "tax". Second, *Livingston* provides that the transferor's liability to pay tax under the *Act* is to be measured "at the time of transfer", whereas subparagraph 160(1)(e)(ii) of the *Act* provides that the transferor's liability is to be measured "in or in respect of the taxation year in which the property was transferred or any preceding taxation year". Subparagraph 160(1)(e)(ii) of the *Act* therefore includes all of the amounts payable under the *Act* in or in respect of the taxation year of transfer, not just amounts payable up to the time of the transfer. As a result, for the purposes of subparagraph 160(1)(e)(ii) of the *Act*, the transferor's liability under the *Act* can arise after the exact point-in-time of the transfer, provided that it is "in or in respect of the taxation year" of the transfer (or any preceding taxation year).

[27] My view is also supported by the legislative history of amendments to subsection 160(1) of the *Act*, which was the subject of a legislative amendment, 1980-81-82-83, c 140, s. 107, applicable for transfers of property occurring after November 12, 1981. Prior to the amendment, there was no paragraph 160(1)(e) of the *Act*, and the relevant provisions of subsection 160(1) of the *Act* read as follows:

> […]
>
> (d) the transferee and the transferor are jointly and severally liable to pay the lesser of
>
> (i) any amount that the transferor was liable to pay under this Act on the day of the transfer, and
>
> (ii) a part of any amount that the transferor was so liable to pay equal to the value of the property so transferred;
>
> […]
>
> [emphasis added]

[28] The 1982 Technical Notes accompanying the amendment stated as follows with respect to the changes:

> The existing provisions in paragraph 160(1)(d) that make the transferor and transferee jointly and severally liable to pay an amount in respect of the transferor's tax liability on the day of the transfer have been amended in new paragraph 160(1)(e) to extend the liability to include amounts payable by the transferor under the Act for the year in which the property was transferred.
>
> [emphasis added]

[29] The Appellant's interpretation of the *Livingston* test appears more in line with this previous version of the legislation. In my view, however, it is clear that Parliament explicitly amended subsection 160(1) of the *Act* to include all amounts payable under the *Act* by the transferor in or in respect of the entire taxation year in which the transfer occurred.

[30] My view is also supported by case law. In *Raphael v Canada*,[13] Sexton J.A., before he rendered the judgment in *Livingston*, cited the following four-part test that was used by the trial judge in *Raphael* (the "*Raphael* test"):[14]

> 1) There must be a transfer of property;
>
> 2) The transferor and transferee are not dealing at arm's length
>
> 3) There must be no consideration or inadequate consideration flowing from the transferee to the transferor; and
>
> 4) The transferor must be liable to pay an amount under the Act in or in respect of the year when the property was transferred or any preceding year.[15]
>
> [emphasis added]

[31] This iteration of the test as set out in *Raphael* was not discussed or overruled in *Livingston*. I also note that the wording of the fourth condition in *Raphael* is more consistent with the statutory language of subparagraph 160(1)(e)(ii) of the *Act*, in comparison to the first condition set out in the *Livingston* test.

---

13 2002 FCA 23, aff'g 2000 DTC 2434 (TCC). [*Raphael*]

14 The origin of this test was another Tax Court decision in *Williams v Canada*, 2000 DTC 2340 (TCC). For ease of reference, it will be referred to as the *Raphael* test.

15 *Raphael*, at para 4.

[32] Post-*Livingston*, Justice Boyle of this Court in *Gambino v The Queen*[16] also cited and applied the *Raphael* test. He was of the view that the four requirements in the *Livingston* test were really "[the] same four requirements [as the Raphael test] albeit in different order and words".[17] The *Raphael* test was also cited and used by this Court in a number of cases both before and after *Livingston*.[18]

[33] In *Kuchta v The Queen*,[19] Justice Graham of this Court found that the phrase "at the time of transfer" in the third condition of the *Livingston* test was "*obiter*" for the purposes of determining whether the transferor and the transferee were spouses, notwithstanding that the Court ultimately still reached the conclusion that the relationship should be determined at the time of transfer:

> The Respondent submits that I should not rely on Livingston to conclude that the relationship between a transferor and transferee must be determined at the time the transfer occurs. The Respondent points out that the phrase "at the time of transfer" that appears in the third test set out by the Federal Court of Appeal in Livingston does not actually appear in subsection 160(1). Since the time at which the determination of the relationship between the transferor and the transferee was not at issue in Livingston, the Respondent argues that the inclusion of the phrase "at the time of transfer" in the third test is obiter. I agree that the inclusion of the phrase in the third test is obiter. As a result, I have not treated Livingston as binding in reaching my conclusion that the time at which the relationship is to be determined is the time of transfer.[20]
>
> [emphasis added]

[34] The language in *Livingston* can also be contrasted with a more recent pronouncement from the Federal Court of Appeal. In *Heroux v Her Majesty The Queen*,[21] Justice Webb, writing for the majority, noted the following at paragraph 8 in summarizing the test applicable to section 160 of the *Act*:

---

16 2008 TCC 601 (Informal Procedure). [*Gambino*]

17 *Ibid* at para 20.

18 See *Warren v R*, 2008 TCC 674, at para 14; *Yates v R*, 2007 TCC 498 at para 12 and fn 2, aff'd by 2009 FCA 50; *Pearson v R*, 2009 TCC 338 at para 11; *MacLeod v R*, 2012 TCC 379, at para 14.

19 2015 TCC 289.

20 *Ibid* at para 15.

21 2015 FCA 240.

> In essence, section 160 of the Act is the section that allows the Minister of National Revenue to assess one person (the transferee) for all or a portion of the tax liability of another person (the transferor) if:
>
> a) the transferor is the spouse or common law partner or otherwise does not deal at arm's length with the transferee;
>
> b) the transferor transfers property to the transferee for consideration that is less than the fair market value of such property; and
>
> c) the transferor owes an amount under the Act in respect of the taxation year in which the property is transferred or a preceding year.
>
> [emphasis added]

[35] While each of the cases discussed above has provided a synopsis of the test in section 160, it is my view that the Courts in those cases did not intend the synopsis to be a substitute or narrowed interpretation of test set down by Parliament in section 160 of the *Act*. In conclusion, it is my view that the phrase "at the time of transfer" in the first condition of the *Livingston* test must be given more precise meaning in light of the wording of subsection 160(1) of the *Act*. The real question then becomes whether, pursuant to the wording of subparagraph 160(1)(e)(ii) of the *Act*, Mr. Colitto, the transferor, was liable to pay an amount under this *Act* in or in respect of the "taxation year" in which the Properties were transferred or any preceding taxation year. If so, then the Transfers to the Appellant would be caught by subsection 160(1) of the *Act*.

Whose Taxation Year for the purposes of subparagraph 160(1)(e)(ii)

[36] There is no question that Mr. Colitto's liability under subsection 227.1(1) of the *Act* is "an amount" for which he is "liable … under this Act" for the purposes of subparagraph 160(1)(e)(ii) of the *Act*. The total amount of the liability as of the date of the Director's Liability Assessment was $733,812.98, which is equal to the remaining balance of the uncollected tax debt (plus interest and penalties) owing by Precision in respect of its failure to remit source deductions for the period from February to August 2008.

[37] The key issue that remains to be answered is the timing of that liability. To determine whether Mr. Colitto was liable to pay an amount under this *Act* in or in respect of the "taxation year" in which the Properties were transferred or any preceding taxation year, we must turn to section 227.1 of the *Act*. Before doing so,

however, the Court must first determine whose taxation year subparagraph 160(1)(e)(ii) is referring to in this factual context.

[38] The Respondent submitted at trial that the phrase "taxation year in which the property was transferred" refers either to the "period of collection" or Precision's taxation year ending on July 31, 2008, which encompasses the assessment period for Precision from February to August 2008. In my view, neither of those interpretations is correct.

[39] A "taxation year" cannot be a "period of collection" without reference to a specific taxpayer. Pursuant to subsection 249(1) of the *Act*, a taxation year is defined with reference to particular types of taxpayers, whether they are individuals, corporations, partnerships or other.[22] This can be contrasted with the use of the phrase "calendar year", which is not specific to any particular taxpayer and is simply defined, pursuant to paragraph 37(1)(a) of the *Interpretation Act*,[23] as a "period of twelve consecutive months commencing on January 1."

[40] Based on the wording of subparagraph 160(1)(e)(ii) of the *Act*, the "taxation year in which the property was transferred" cannot be any of Precision's taxation years, because section 160 of the *Act* contemplates a transferor and a transferee. Where there are cascading assessments under section 160 of the *Act* against multiple taxpayers, there are multiple transferors and transferees. However, Precision, whose tax liability is grafted onto Mr. Colitto by virtue of section 227.1 of the *Act*, is neither a transferor nor a transferee of any property under section 160 of the *Act*.

[41] When the wording of subparagraph 160(1)(e)(ii) of the *Act* is scrutinized closely – *i.e.* "the transferee and the transferor are jointly and severally, or solidarily, liable to pay … an amount that the transferor is liable to pay under this Act … in or in respect of the taxation year in which the property was transferred or any preceding taxation year" – the only possible interpretation, in my view, is that the "taxation year" refers to the transferor's taxation year during which the property was transferred. In the context of this case, Mr. Colitto was the transferor

---

22 The text of subsections 249(1), (1.1) and (2) is set out in Appendix "B" to these Reasons For Judgement.

23 RSC 1985, c. I-21.

and the taxation year in which the Properties were transferred was his 2008 taxation year.

[42] Based on the foregoing, the question then becomes whether Mr. Colitto's liability (pursuant to section 227.1 of the *Act*) was an amount that he was liable to pay under the *Act* in or in respect of his 2008 taxation year, being the taxation year in which the Properties were transferred. This determination must be made by considering the application of section 227.1 of the *Act* in the circumstances of these Appeals, and in particular by determining when Mr. Colitto's liability arose pursuant to section 227.1 of the *Act* in the circumstances of these Appeals.

The Test for Section 227.1

[43] As previously noted, subsection 227.1(1) of the *Act*[24] imposes joint and several liability on "the directors of [a] corporation at the time the corporation was required to deduct, withhold remit or pay" certain specified amounts as required under the *Act* but failed to do so. In my view, subsection 227.1(1) is silent as to when this liability arises, which is the issue at the heart of these Appeals.

[44] Subsections 227.1(2), (3), (4) and (5) of the *Act* set out a number of pre-conditions and other limitations on the liability established pursuant to subsection 227.1(1). In this respect, subsection 227.1(2) sets out a crucial pre-condition that must be satisfied in order for liability to arise under section 227.1 of the *Act*. While the limitations and defences set out in subsections 227.1(3), (4) and (5) are not directly at issue in these Appeals, they are nonetheless relevant for the purpose of interpreting subsections 227.1(1) and (2) of the *Act* in the circumstances of these Appeals.

[45] While subsection 227.1(1) of the *Act* is silent as to the time at which a director's liability arises thereunder, subsection 227.1(2) of the *Act* provides that:

> (2) A director is not liable under subsection 227.1(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 under section 223 and execution for that amount has been returned unsatisfied in whole or in part;

---

[24] The full text of section 227.1 of the *Act* is set out in Appendix "B" to these Reasons For Judgement.

[emphasis added]

[46] In this case, Precision failed to remit source deductions in 2008. However, Precision's debt was not executed and returned unsatisfied in compliance with paragraph 227.1(2)(a) of the *Act* by the Minister until January 4, 2011. These facts are undisputed. What is disputed, however, is whether, as a result, Mr. Colitto's liability pursuant to section 227.1 of the *Act* arose in his 2008 or 2011 taxation years. If the liability arose in Mr. Colitto's 2011 taxation year, a further question is whether the liability was nonetheless "in respect of" Mr. Colitto's 2008 taxation year. As discussed below, it is my view that Mr. Colitto's liability arose pursuant to section 227.1 of the *Act* in his 2011 taxation year and was not in respect of his 2008 taxation year. As Ms. Colitto is only liable pursuant to subparagraph 160(1)(e)(ii) of the *Act* if Mr. Colitto's liability under section 227.1 of the *Act* was "in or in respect" of his 2008 taxation year, it is my view that Ms. Colitto is not liable pursuant to section 160 of the *Act* in respect of the Assessments.

[47] The principles of statutory interpretation applicable in this case are well established and were summarized by the Supreme Court of Canada in *Canada Trustco Mortgage Co. v. Canada*,[25] at paragraph 10 as follows:

> 10 It has been long established as a matter of statutory interpretation that "the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament": see *65302 British Columbia Ltd. v. R.*, [1999] 3 S.C.R. 804 (S.C.C.), at para. 50. The interpretation of a statutory provision must be made according to a textual, contextual and purposive analysis to find a meaning that is harmonious with the Act as a whole. When the words of a provision are precise and unequivocal, the ordinary meaning of the words play a dominant role in the interpretive process. On the other hand, where the words can support more than one reasonable meaning, the ordinary meaning of the words plays a lesser role. The relative effects of ordinary meaning, context and purpose on the interpretive process may vary, but in all cases the court must seek to read the provisions of an Act as a harmonious whole.

[48] Subsection 227.1(2) of the *Act* provides that a "director is not liable under subsection (1), unless" the preconditions set out in subsection 227.1(2) have been satisfied. In my view, the text of subsection 227.1(2) is very clear and unambiguous, and strongly suggests that a director's liability for unremitted source deductions and other amounts specified under subsection 227.1(1) of the *Act* does

---

[25] 2005 SCC 54.

not arise until the relevant preconditions set out in subsection 227.1(2) of the *Act* are met. In this case, those preconditions were met on January 4, 2011.

[49] In *Worrell v Canada*,[26] the Federal Court of Appeal adopted such an interpretation. In that case, the three co-directors of a company were assessed director's liability for unremitted source deductions under subsection 227.1(1) of the *Act* and for unremitted GST under subsection 323(1) of the *ETA*. While the central issue was whether the taxpayers exercised the requisite degree of due diligence to prevent the failures to remit under subsection 227.1(3) of the *Act*, the Court stated the following general principle regarding the nature of a director's liability assessment under subsection 227.1(1) of the *Act*:

> Fifth, directors incur no personal liability under subsection 227.1(1), and therefore do not need to invoke subsection 227.1(3), if at any time the company's debt to Revenue Canada, including interest and late payment penalties, is discharged. This is because subsection 227.1(2) qualifies subsection 227.1(1) by providing, in effect, that a director is liable to pay to the Crown the amounts not remitted by the company only after all efforts to collect have been exhausted.[27]
>
> [emphasis added]

[50] The Court further stated the following in respect of the preconditions set out under subsection 227.1(2) of the *Act*:

> Whether directors have exercised due diligence to prevent such failures from occurring has both a legal and a factual aspect. As a matter of law, the liability of a director for unremitted source deductions and G.S.T. does not crystallise until the conditions prescribed in subsection 227.1(2) have been satisfied. Moreover, if the remittances are made in full, albeit late, the directors will not be liable for the company's previous failure to remit.[28]
>
> [emphasis added]

[51] The Federal Court of Appeal has also described these conditions as "conditions precedent"[29] or "statutory preconditions".[30] The statutory provision

---

26 2000 D.T.C. 6593, [2001] 1 C.T.C. 79 (FCA). [*Worrell*]

27 *Ibid*, at para. 35.

28 *Ibid*, at para. 74.

29 *Kyte v Canada* (1996), 97 D.T.C. 5022, [1996] F.C.J. No 1615 at para 2 (FCA). The *Black's Law Dictionary*, 10 ed. defines "condition precedent" in the context of contract law as "[a]n act or event, other than a lapse of time, that must exist or occur before a duty

"shields a director from liability"[31] and is "intended to ensure that a director is not held liable for a tax debt of the corporation unless the Crown has taken specified steps on a timely basis to satisfy the debt from the assets of the corporation."[32] In *Kern v Canada*,[33] Justice Campbell Miller of this Court stated in more explicit terms that subsection 323(2) of the *ETA*, the parallel provision to subsection 227.1(2) of the *Act*, operates essentially as a "timing provision"[34]:

> The director's liability only arises after a company has demonstrated it cannot pay. Prior to that time the directors are not liable, and obviously there can be no assessment against them […][35]
>
> [emphasis added]

[52] The importance of fulfilling the preconditions under subsection 227.1(2) of the *Act* and for the Minister to produce such evidence in court was further highlighted in *Walsh v Canada*,[36] in which Justice Sheridan of this Court followed the above guidance in *Worrell*. In *Walsh*, a Sheriff's letter showing that the writ of seizure was returned unsatisfied was excluded by the Court as the document was not included in the Respondent's list of documents. As such, the Court found that the Minister's failure to produce evidence that the execution of the writ was returned unsatisfied, a precondition under paragraph 227.1(2)(a) of the *Act*, was fatal to the Minister's assessment of joint and several liability on the director. In reaching this conclusion, the Court cited the above passage from *Worrell*[37] and further stated as follows in respect of the purpose of the preconditions:

---

to perform something promised arises. If the condition does not occur and is not excused, the promised performance need not be rendered." [emphasis added]

30 *Smith v Canada*, 2001 FCA 84 at para 8. [*Smith*]

31 *Madison v Canada*, 2012 FCA 80 at para 17.

32 *Ibid*, at para 18.

33 2005 TCC 314 [Informal Procedure], aff'd 2006 FCA 257.

34 *Ibid* at para 23.

35 *Ibid* at para 21.

36 2009 TCC 557, 2009 D.T.C. 1372, at para. 26. [*Walsh*]

37 *Ibid*, at para 26.

> 25 […] Paragraph 227.1(2)(a) requires nothing of the taxpayer; its focus is the action that must be taken by the Minister to trigger the taxpayer's liability under subsection 227.1(1) and, in turn, his power to assess. […]
>
> […]
>
> 27 The purpose of paragraph 227.1(2)(*a*) is to require the Minister to exhaust his remedies of recovery against the corporate taxpayer before permitting him the extraordinary remedy of assessing a third party, its director, for the company's unremitted source deductions. While subsection 227(10) provides that the Minister "... may at any time assess any amount payable under ... section 227.1", that otherwise broad power to assess is contingent upon the fulfillment of the conditions set out in paragraph 227.1(2)(*a*). […]
>
> 28 […] Absent proof that the Minister has satisfied the requirements of paragraph 227.1(2)(a), no liability attaches under subsection 227.1(1) and the assessment upon which it was based cannot stand.[38]
>
> [emphasis added]

[53] In considering the context and purpose of subsection 227.1(2), it is also necessary consider all of section 227.1 as well as the *Act* as a whole. The scheme of the *Act* is premised on legal relationships established in private corporate and commercial law. One of the cornerstones of corporate law is that a corporation is a separate legal person, and therefore separate from the various stakeholders in the corporation, whether they are directors, officers, shareholders or employees. Subsection 227.1(1) of the *Act* effectively allows the Minister to pierce the "corporate veil" and attribute corporate liability to directors. In this respect, subsection 227.1(1) is a tax collection provision and effectively penalizes directors personally if they do not ensure that a corporation of which they are a director deducts and remits specified amounts to the Minister. Parliament did not, however, intend liability under subsection 227.1(1) to be absolute, and therefore prescribed limits to that power in passing subsections 227.1(2) – (5). Subsection 227.1(2) of the *Act* effectively provides that a director of a corporation is "not liable unless" the Minister has exhausted all collection remedies against the corporation. Subsection 227.1(3) of the *Act* provides that a director is "not liable" if he or she exercised the requisite degree of due diligence. Subsection 227.1(4) of the *Act* prevents the Minister from commencing proceedings to collect from a person who has ceased to be a director for more than two years. Subsection 227.1(5) of the *Act* provides that when a director becomes liable following execution referred to in

---

[38] *Ibid*, at paras 25, 27-28.

paragraph 227.1(2)(a), "the amount recoverable from [the] director is the amount remaining [by the corporation which is] unsatisfied after execution." As such, a director is only liable to the extent of the remaining balance of the corporations' debt, not the amount that the corporation was originally liable for under the corporation's assessment.

[54] Furthermore, contextually, when comparing the language of subsection 227.1(2) and 227.1(4) of the *Act*, the interpretation that subsection 227.1(2) is a timing provision is confirmed. Subsection 227.1(2) of the *Act* states that "[a] director is not liable under subsection (1), unless", whereas subsection 227.1(4) of the *Act* states that "[n]o 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."[emphasis added] In my view, it is clear that subsection 227.1(4) is a statutory limitation period, pursuant to which an otherwise valid liability established pursuant to section 227.1 can no longer be recovered from a director if more than two years has passed since the director last ceased to be a director. In my view, however, subsection 227.1(2) is not a limitation period, but rather a pre-condition to establishing liability under section 227.1. Should Parliament have wanted subsection 227.1(2) of the *Act* to mean that a liability of a director could not be recovered before the conditions were met, it could have used the same language as it did in subsection 227.1(4) of the *Act*. However, Parliament chose to use the words "not liable … unless" in subsection 227.1(2) instead of wording similar to what it used in subsection 227.1(4).

[55] The interplay of these provisions demonstrates that Parliament never intended that a director's liability under section 227.1 of the *Act* for a corporation's failure should be viewed as absolute the moment that the corporation failed to meet its remittance obligations. In my view, to be able to trace a corporation's liability to its director under section 227.1 and then ultimately to the director's spouse under section 160 is an extraordinary remedy, and one that should only be applied if expressly permitted by law.

[56] While none of the above authorities specifically considered the interaction between a derivative assessment under section 227.1 followed by a derivative assessment under section 160 of the *Act*, they speak directly and unequivocally to the timing of a director's liability under section 227.1 of the *Act*, and conclude that liability arises at the time that the preconditions in subsection 227.1(2) have been satisfied.

[57] As noted by the parties in their submissions, there are a number of cases in which this Court specifically considered the joint operation of a section 160 assessment (or section 325 of the *ETA*) with a section 227.1 director's liability assessment (or section 323 of the *ETA*): *White v Canada* ("*White No.1*"),[39] *Filippazzo v R*,[40] and *Pliskow v R*.[41]

[58] In each of those cases, the Court determined that the liability of a director arose or was crystallized at the time that the corporation failed to remit the required source deductions or GST, which happened to coincide with the taxation year in which the properties were transferred by the directors to the non-arm's length transferees. As a consequence, the section 160 assessments (or the equivalent under the *ETA*) were upheld as the transferees became jointly and severally liable for the transferor's liability up to and including the year of transfer.

[59] In *White No.1*, a case predating the above jurisprudence regarding section 227.1 of the *Act*, Justice Mogan of this Court found that the appellant's spouse, who was a director of the corporation at the time when the corporation incurred a significant Part VIII tax liability in 1984, had a "matching liability"[42] in that same year and consequently the appellant transferee was liable under section 160 of the *Act* in respect of the property transferred from the appellant's spouse in 1984.

[60] In *Filippazzo*, the Court considered exactly the same argument as was raised in the case at bar,[43] and found without much explanation that:

---

39 95 DTC 877, [1994] TCJ No 1042. [*White No.1*] The Respondent also presented another case, *White v R* (1994), [1995] 2 CTC 2973 (TCC) [Informal Procedure] [*White No.2*]. With respect, *White No.2* did not consider the application of section 160 to a transfer between one spouse to another. In *White No.2*, Justice Lamarre (as she then was) of this Court dealt solely with the issue of the appellant's directors' liability under section 227.1 of the *Act*.

40 [2000] TCJ No 402, 2000 DTC 2326 (TCC); Respondent's Written Submissions, at para 35.

41 2013 TCC 283 [Informal Procedure]. Also see *Taylor v Canada*, [1997] GSTC 33 [Informal Procedure] (TCC); *Jones v Canada*, 2004 TCC 251 [Informal Procedure] (TCC).

42 *White No.1*, at para 18.

43 *Filippazzo*, at para 8.

> The time the liability of Carlogero Filippazzo arose [was] on the date of the failure to remit source deductions as required by the Act in 1987 and 1988 and not the date the certificate was registered in the Federal Court. I also conclude, section 160 of the Act is intended to include the liability for failure to remit source deductions in the taxation year in which the property was transferred or any preceding taxation years.[44]
>
> [emphasis added]

[61] It that case, the Court relied in part on the commentary from Stikeman Canada Tax Service.[45]

[62] In *Pliskow*, a GST appeal under the informal procedure, the Court followed *Filippazzo* and stated that "[i]t is also clear that such liability arises at the time of the failure to remit, not the time the certificate for the amount of the corporation's liability has been registered in Federal Court as confirmed in *Filippazzo v R*, 2000 DTC 2326."[46]

[63] More recently, in *Sheck v The Queen*[47], a GST appeal under the informal procedure, the Court followed *Filippazzo* and *Pliskow* and held that the director's liability arose when the corporation failed to remit.

[64] *Pliskow* and *Sheck* are informal procedure appeals in the context of the *ETA* and are not binding on this Court. In addition, while *White No.1* and *Filippazzo* are not binding on this Court, judicial comity suggests that I should follow them unless unless I am convinced they are wrong.

[65] With respect, I will not follow the decisions of this Court in *Pliskow*, *Sheck*, *White No.1* and *Filippazzo*. It is not apparent that these cases engaged in a textual, contextual and purposive interpretation of how sections 160 and 227.1 of the *Act* should interact with each another. In this respect, I prefer the previously discussed Federal Court of Appeal and Tax Court decisions[48] which found that liability pursuant to section 227.1(1) arises when the preconditions in subsection 227.1(2) have been met.

---

44 *Ibid*, at para 14.

45 *Ibid*, at para 13.

46 *Pliskow*, at para 14.

47 2018 TCC 125.

48 See *Worrell*, *Kern* and *Walsh*.

[66] In my view, in drafting section 227.1, Parliament sought to achieve a balance between its objective of (i) protecting tax collection of corporate remittances (by imposing liability through subsection 227.1(1) on directors for corporate failures to remit) and (ii) providing limits on such director's liability (through subsections 227.1(2) to (5)). This includes subsection 227.1(2) which effectively requires the Minister to pursue collection remedies against the corporation first before any such director liability arises. In the context of provisions which have been described as unjust or draconian in certain circumstances, it is my view that this Court cannot interfere in the balance struck by Parliament.

[67] In this respect, I note that liability under section 227.1 is not dependent on knowledge of the underlying corporate liability or intent to defeat the Minister's collection thereof. As such, liability may be imposed on a director pursuant to section 227.1 even if the director has no knowledge of the underlying corporate failure.[49] In addition, a director may rely on the two year limitation period in subsection 227.1(4) whether or not the director resigns with intent to defeat the Minister's collection attempts pursuant to section 227.1. As such, it is also my view that intent (acknowledged or inferred), or the lack thereof, to defeat collection under subsection 227.1 by transferring assets should not be a factor in interpreting the meaning of section 227.1.

[68] Based on all of the foregoing, when undertaking a textual, contextual and purposive analysis of section 227.1 to find a meaning that is harmonious with the *Act* as a whole, it is my view that a director's liability does not arise under subsection 227.1(1) unless and until the relevant preconditions in subsection 227.1(2) are satisfied, the onus of proof of which lies on the Minister.[50]

[69] As such, in the circumstances of this case, it is my view that Mr. Colitto's liability as a director of Precision (at the time Precision failed to remit the required source deductions in 2008) pursuant to subsection 227.1(1) of the *Act* arose on January 4, 2011 (when the preconditions in subsection 227.1(2) were met), and not in 2008 when Precision failed to remit.

---

49 Assuming, of course, that the director cannot otherwise rely on any of subsections 227.1(2) to (5) to avoid any such liability.

50 *Walsh v Canada*, 2009 TCC 557, at para 28.

[70] Notwithstanding the foregoing, the Respondent argued, based on authority,[51] that a taxpayer's liability under the *Act* arises not from an assessment, but from the application of the *Act* to the income that is earned at any particular moment. As such, the Respondent argues that Mr. Colitto's liability as a director did not arise at the time the Director's Liability Assessment was issued against him in March 2011. While this position is correct, it misses the point of subsection 227.1(2) of the *Act*, which provides that the director's liability arises when the relevant preconditions under subsection 227.1(2) of the *Act* are satisfied. This occurred on January 4, 2011, when the execution of Precision's debt was returned unsatisfied. As such, Mr. Colitto's liability arose on January 4, 2011, not March 2011 when the Director's Liability Assessment was issued.

[71] In my view, the wording of subsection 227.1(2) clearly provides that a director's liability under subsection 227.1(1) arises when the preconditions in subsection 227.1(2) have been met, and there is no language in section 227.1 which provides that the liability should be applied retroactively once it arises. As noted in *Gustavson Drilling (1964) Limited v. M.N.R.*,[52] at page 279:

> … the general rule is that statutes are not to be construed as having retrospective operation unless such a construction is expressly or by necessary implication required by the language of the Act.

[72] Based on the foregoing, it is my view that Mr. Colitto's liability pursuant to section 227.1 did not arise in 2008 when Precision failed to remit source deductions, but rather arose on January 4, 2011 when the preconditions of paragraph 227.1(2)(a) were satisfied.

[73] The Respondent argued that the term "in respect of" must be interpreted broadly for the purposes of subparagraph 160(1)(e)(ii). There is no question that the scope of the connecting phrase "in respect of" is extremely broad. In this respect, I note that the Supreme Court of Canada has explicitly stated that the words "in respect of" are:

> … words of the widest possible scope. They import such meanings as 'in relation to', 'with reference to' or 'in connection with'. The phrase 'in respect of' is

---

51 *Jurak v Canada*, 2001 CanLII 62 (TCC), aff'd 2003 FCA 58; *The Queen v Simard-Beaudry* (1971), 71 DTC 5511 (FCTD).

52 [1977] 1 S.C.R. 271.

> probably the widest of any expression intended to convey some connection between two related subject matters.[53]

[74] This definition was applied to provide retroactive liability in the context of a section 160 assessment in *Mario Côté Inc. v. Canada*[54] ("MCI"). In that case, the Court concluded that the Minister's overpayment of a dividend tax refund to the transferor corporation (the payor of a dividend to MCI) in a subsequent taxation year was an amount that the transferor was liable to pay "in respect of" the previous taxation year in which the property (the dividend) was transferred or paid to MCI. As such, MCI was found to be jointly and severally liable for the remaining balance on that amount under subsection 160(1) of the *Act*.

[75] In *Mario Côté Inc.*, the transferor erroneously[55] reported in its tax return for the previous taxation year a large positive balance of refundable dividend tax on hand ("RDTOH") when the correct balance should have been nil. The inflated RDTOH balance was used to determine the dividend tax refund as well as the tax liability of the transferor for that previous taxation year, notwithstanding that the refund was ultimately issued to the transferor in the following taxation year.

[76] There is, however, a fundamental difference between the case at bar and *Mario Côté Inc.* In the latter, the transferor corporation was liable to pay an amount under the *Act* because of an overpayment of RDTOH (the dividend tax refund) that was in respect of the transferor's previous taxation year in which the dividend was paid and in which it erroneously reported an RDTOH balance for the purpose of calculating the transferor's tax liability in that previous taxation year. The liability arose in one of the transferor's taxation years but was in respect of or related back to an earlier taxation year of that same taxpayer. Subparagraph 160(1)(e)(ii) of the *Act* applied in such instance.

[77] In these Appeals, Mr. Colitto's liability pursuant to section 227.1 of the *Act* arose on January 4, 2011. Mr. Colitto's liability, however, relates to the failure of Precision to remit source deductions in 2008. In my view, while Precision's failure (to remit source deductions from February to August 2008) clearly relates to

---

53 *Nowegijick v Canada*, [1983] 1 SCR 29 at 39.

54 2011 TCC 105.

55 *Ibid.* The error stemmed from the tax reporting of one of the predecessors to the transferor corporation, and flowed through to the transferor on their merger.

Precision's taxation year ending on July 31, 2008 (and perhaps to its taxation year ending on July 31, 2009 to the extent Precision failed to remit source deductions in August 2008), Precision's failure to remit source deductions in 2008 does not in any way relate to Mr. Colitto's 2008 taxation year. The mere fact that Precision's failure occurred within the 2008 calendar year which coincides with Mr. Colitto's 2008 taxation year does not mean the failure was "in respect of" Mr. Colitto's 2008 taxation year. There is no evidence in these Appeals that there is any nexus between Precision's failure to remit source deductions in 2008 and the computation of Mr. Colitto's income or the amount of tax payable by him under the *Act* in his 2008 taxation year.

[78] Overall, it is my view that Mr. Colitto's liability pursuant to section 227.1 of the *Act* was not "in or in respect of" his 2008 taxation year. As a result, it is my view that the Transfers of the Properties by Mr. Colitto to Ms. Colitto in 2008 were not caught by section 160 of the *Act*.

CONCLUSION

[79] Based on all of the foregoing, Ms. Colitto's Appeals are allowed and the Assessments are vacated.

COSTS

[80] Costs are awarded to the Appellant. The parties shall have 30 days from the date hereof to reach an agreement on costs, failing which the Appellant shall have a further 30 days to file written submissions on costs and the Respondent shall have yet a further 30 days to file a written response. Any such submissions shall not exceed 10 pages in length. If the parties do not advise the Court that they have reached an agreement and no submissions are received, costs shall be awarded to the Appellant as set out in the Tariff.

Signed at Ottawa, Canada, this 26th day of April 2019.

"Henry A. Visser"
Visser J.

Appendix "A"
Statement of Agreed Facts[1]

[1] The Statement of Agreed Facts attached hereto excludes copies of Schedules A, B and C thereto.

2016-3167(IT)G
2016-3168(IT)G

TAX COURT OF CANADA

BETWEEN:

CAROLINE COLITTO

Appellant

– and –

HER MAJESTY THE QUEEN

Respondent

STATEMENT OF AGREED FACTS

The parties admit, for the purposes of the above appeals only, the truth of the following facts and the authenticity of the attached documents:

1. The Minister of National Revenue (the "**Minister**") assessed the appellant, Caroline Colitto ("**Caroline**") pursuant to section 160 of the *Income Tax Act* (the "**Act**") by notices dated January 13, 2016 bearing reference numbers 3587483 and 3492852 (the "**Assessments**").[1]

2. At all material times, Caroline's spouse is Domenic Colitto ("**Domenic**").

---

[1] Copies of the notices of assessment are attached as Schedules A & B.

I. THE TRANSFERS

Aida Court

3. Prior to May 2, 2008, Domenic was the sole owner of the property at 30 Aida Court, Bolton, Ontario ("**Aida Court**").

4. On May 2, 2008, Domenic transferred 50% of his interest in Aida Court to Caroline (the "**Aida Court Transfer**").

5. At the time of the Aida Court Transfer:

   (a) the fair market value of Aida Court was $315,000.00;

   (b) all mortgages and other encumbrances on Aida Court were $232,500.00;

   (c) the fair market value of the equity in Aida Court was $82,500.00;

   (d) the fair market value of the 50% interest in Aida Court transferred to Caroline was $41,250.00;

   (e) the fair market value of the consideration given by Caroline to Domenic for the 50% interest in Aida Court was $2.00; and

   (f) the fair market value of the benefit received by Caroline for the Aida Court Transfer was $41,248.00.

15000 12th Concession

6. Prior to January 2, 2007, Domenic was the sole shareholder of the property at 15000 12th Concession Rr1, Bolton, Ontario (**"15000 12th Concession"**).

7. On January 2, 2007, Domenic added the Appellant as a co-owner of 15000 12th Concession.

8. The Appellant paid Domenic consideration of $2.00 to be added as co-owner of 15000 12th Concession.

9. On May 2, 2008, Domenic transferred his remaining 50% interest in 15000 12th Concession to Caroline (the "**12th Concession Transfer**").

10. At the time of the 12th Concession Transfer:

    (a) the fair market value of 15000 12th Concession was $1,875,000.00;

    (b) all mortgages and other encumbrances on 15000 12th Concession were $1,500,000.00;

    (c) the fair market value of the equity in 15000 12th Concession was $375,000.00;

    (d) the fair market value of the 50% interest in 15000 12th Concession transferred to Caroline was $187,500.00;

    (e) the fair market value of the consideration given by Caroline to Domenic for the 50% interest in 15000 12th Concession was $2.00; and

    (f) the fair market value of the benefit received by Caroline for the 12th Concession Transfer was $187,498.00.

II. DOMENIC'S ASSESSMENT

11. Domenic was a director and shareholder of Core Precision Technologies Ltd. ("**Precision**").

12. Precision was a manufacturer of moulds, tools for injections, tools for extrusions, and vinyl extrusions.

13. Precision's taxation year-end was July 31.

14. Between February and August, 2008, Precision failed to remit source deductions to the Minister of National Revenue.

15. As a director of Precision, Domenic did not exercise due diligence to prevent Precision's failure to remit the required source deductions.

16. On October 10, 2008, the Minister issued a notice of assessment to Precision for unremitted source deductions, interest and penalties totaling $631,554.23. Precision did not file a notice of objection to the assessment.

17. On August 6, 2009, a certificate for Precision's tax debt in the amount of $794,286.98, was registered in the Federal Court under section 223 of the Act.

18. On November 23, 2010, direction to enforce the writ registered with the Federal Court was made to the Sheriff for the amount of $776,380.32, which reflected payments made to reduce the assessed debt between August 6, 2009 and November 23, 2010.

19. Precision's tax debt was executed and returned unsatisfied on January 4, 2011.

20. The Minister issued notice of assessment number 1368027, dated March 28, 2011, ("**Notice of Assessment number 1368027**") to Domenic for the amount of $733,812.98.[2]

21. Domenic did not file a notice of objection with the Minister with respect to notice of assessment number 1368027.

---

[2] A copy of the notice of assessment is attached as Schedule "C".

Dated at Halifax, in the Province of Nova Scotia, on March 17, 2017.

Amy Kendell
Counsel, Tax Law Services

Attorney General of Canada
Department of Justice Canada
Atlantic Regional Office
Suite 1400, Duke Tower
5251 Duke Street
Halifax, NS B3J 1P3
Phone: (709) 772-7404
Facsimile: (902) 426-8802

Dated at the City of Toronto, in the Province of Ontario, on March 15, 2017.

KPMG Law LLP
Counsel for the appellant

Adam Gotfried
Kristen Duerhammer

KPMG Law LLP
Barristers & Solicitors
Bay Adelaide Centre
333 Bay Street, Suite 4600
Toronto, ON
M5H 2S5

t. 416.777.8813 / 416.777.3568
f. 416.861.0624

e. agotfried@kpmg.ca /
kduerhammer@kpmg.ca

Appendix "B"

Legislation

The statutory references in this schedule are to provisions of the *Income Tax Act* in force at the time that the Assessments were issued on January 13, 2016.

> **160 (1) Tax liability re property transferred not at arm's length —** Where a person has, on or after May 1, 1951, transferred property, either directly or indirectly, by means of a trust or by any other means whatever, to
>
> > (a) the person's spouse or common-law partner or a person who has since become the person's spouse or common- law partner,
> >
> > (b) a person who was under 18 years of age, or
> >
> > (c) a person with whom the person was not dealing at arm's length,
>
> the following rules apply:
>
> > (d) the transferee and transferor are jointly and severally, or solidarily, liable to pay a part of the transferor's tax under this Part for each taxation year equal to the amount by which the tax for the year is greater than it would have been if it were not for the operation of sections 74.1 to 75.1 of this Act and section 74 of the *Income Tax Act*, chapter 148 of the Revised Statutes of Canada, 1952, in respect of any income from, or gain from the disposition of, the property so transferred or property substituted for it, and
> >
> > (e) the transferee and transferor are jointly and severally, or solidarily, liable to pay under this Act an amount equal to the lesser of
> >
> > > (i) the amount, if any, by which the fair market value of the property at the time it was transferred exceeds the fair market value at that time of the consideration given for the property, and

> (ii) the total of all amounts each of which is an amount that the transferor is liable to pay under this Act (including, for greater certainty, an amount that the transferor is liable to pay under this section, regardless of whether the Minister has made an assessment under subsection (2) for that amount) in or in respect of the taxation year in which the property was transferred or any preceding taxation year,

but nothing in this subsection limits the liability of the transferor under any other provision of this Act or of the transferee for the interest that the transferee is liable to pay under this Act on an assessment in respect of the amount that the transferee is liable to pay because of this subsection.

[…]

(2) Assessment — The Minister may at any time assess a taxpayer in respect of any amount payable because of this section, and the provisions of this Division (including, for greater certainty, the provisions in respect of interest payable) apply, with any modifications that the circumstances require, in respect of an assessment made under this section as though it had been made under section 152 in respect of taxes payable under this Part.

227.1 (1) Liability of directors for failure to deduct — 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.

(2) Limitations on liability — 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 under section 223 and execution for that amount has been returned unsatisfied in whole 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 bankruptcy order has been made against it under the *Bankruptcy and Insolvency 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 bankruptcy order.

(3) Idem [due diligence defence] — A director 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.

(4) Limitation period — 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 the director last ceased to be a director of that corporation.

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

(6) Preference — 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, the director is entitled to any preference that Her Majesty in right of Canada would have been entitled to had that amount not been so paid and, where a certificate that relates to that amount has been registered, the director is entitled to an assignment of the certificate to the extent of the director's payment, which assignment the Minister is hereby empowered to make.

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

249. (1) Definition of "taxation year" — In this Act, except as expressly otherwise provided, a ***taxation year*** is

(a) in the case of a corporation or Canadian resident partnership, a fiscal period;

(b) in the case of a graduated rate estate, the period for which the accounts of the estate are made up for purposes of assessment under this Act; and

(c) in any other case, a calendar year.

(1.1) References to calendar year — When a taxation year is referred to by reference to a calendar year, the reference is to the taxation year or taxation years that coincide with, or that end in, that calendar year.

(2) References to certain taxation years and fiscal periods — For the purposes of this Act,

(a) a reference to a taxation year ending in another year includes a reference to a taxation year ending coincidentally with that other year; and

(b) a reference to a fiscal period ending in a taxation year includes a reference to a fiscal period ending coincidentally with that year.

CITATION:	2019 TCC 88
COURT FILE NO.:	2016-3167(IT)G 2016-3168(IT)G
STYLE OF CAUSE:	CAROLINE COLITTO AND HER MAJESTY THE QUEEN
PLACE OF HEARING:	Ottawa, Ontario
DATE OF HEARING:	May 18, 2017
REASONS FOR JUDGMENT BY:	Justice Henry A. Visser
DATE OF JUDGMENT:	April 26, 2019

APPEARANCES:

Counsel for the Appellant:	Kristen Duerhammer Adam Gotfried
Counsel for the Respondent:	Amy Kendell

COUNSEL OF RECORD:

For the:	
Name:	
Firm:	
For the Respondent:	Nathalie G. Drouin Deputy Attorney General of Canada Ottawa, Canada