Docket: 2017-4472(IT)G

BETWEEN:

THANH HAI TRAN,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

Appeal heard on August 26 and 27, 2020 at Toronto, Ontario and
heard virtually on July 15, 2021.

By: The Honourable Justice Ronald MacPhee

Appearances:

Counsel for the Appellant:	Richard Yasny
Counsel for the Respondent:	Kanga Kalisa

JUDGMENT

In accordance with the attached Reasons for Judgment;

The appeal with respect to Assessment number 3848917, dated June 9, 2016 pursuant to section 227.1 of the *Income Tax Act*, is allowed.

Costs are payable by the respondent to the appellant. If the parties are unable to agree to a costs amount, the appellant may provide the Court with written

submissions, within 60 days of the date of this judgment. The respondent will have 30 days to respond to the Appellant's submissions. Neither parties' written submissions shall exceed 10 pages.

Signed at Ottawa, Canada this 11th day of August 2021.

"Ronald MacPhee"

MacPhee J.

Citation: 2021 TCC 51
Date: 20210811
Docket: 2017-4472(IT)G

BETWEEN:

THANH HAI TRAN,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

REASONS FOR JUDGMENT

MacPhee J.

[1] The Minister assessed the appellant on the basis that the appellant was a director of Karora Technologies Canada Inc. ("Karora"), his employer during the 1999 to 2011 taxation years. The assessment was made on June 9, 2016, and was confirmed by the Minister on August 18, 2017.

[2] The underlying assessment in issue, preceding the director's liability assessment, was that Karora failed to remit total source withholdings of $305,390.15 under the ITA, the CPP, and EIA for the 2008 to 2014 taxation years.

I. BACKGROUND

[3] The appellant is a computer programmer. He was initially hired by Peter McBride fresh out of the University of Waterloo in 1988 (to work with a separate company than Karora). When that company ran into financial difficulties, the appellant took a job with Karora in 1999, a start up created, in part, by Peter McBride. The appellant was appointed a director of Karora on December 15, 1999.

[4] The appellant's overall evidence at trial is that he had no involvement with Karora's financial management, did not meet the accountants or lawyers of the company, nor did he participate in director's meetings. It was the appellant's

position that Peter McBride; a USA resident who was also a director as well as the CEO, President, and Secretary of Karora; controlled all aspects of the business. McBride seemed to confirm this in his testimony.

[5] In 2001, Karora's business slowed and the company started to experience problems. The evidence is that Karora Summit Technologies Inc., a USA corporation, ("Karora USA") was the only customer of Karora, that Karora never invoiced Karora USA for services rendered, that Karora USA sporadically made payments to Karora to pay Karora's expenses, and that commencing in 2011, Karora USA paid Karora's employees. In particular, it seems that these payments came directly from Mr. McBride to the employees of Karora.

[6] In 2005, Karora had dealt with a separate failure to remit source deductions assessment, and the directors, including the appellant, had faced the possibility of a director's liability assessment. Although the evidence is not clear on this issue, it appears that the directors were able to avoid any liability at that time. After this occurrence, all the other directors, with the exception of the appellant and Mr. McBride, resigned. As of October 2011, Karora had not paid the appellant for five months work and owed him approximately $31,000.

A. Claimed Resignation as a Director

[7] On October 18, 2011 the appellant sent an initial email and a responding email to Mr. McBride in which he terminated his employment with Karora. The appellant submits that this email, as well as a subsequent phone call with Mr. McBride, served as the appellant's resignation as a director of Karora. Neither Karora nor the appellant registered the resignation with the proper authorities. The appellant did subsequently perform part time software development support work for Karora as a subcontractor.

[8] The Appellant alleges that there was nothing that he could have done to prevent Karora's failure to remit because the appellant had no control over the corporation's operations or funds and therefore exercised due diligence. Additionally, the appellant argues that in 2011 and 2012 Karora had refundable tax credits that should not have been refunded and should instead have been used to offset the tax debt.

II. ISSUES

[9] The main issue in this case is whether the appellant is liable under section 227.1 of the ITA for Karora failing to make remittances while he was a director. However, the appellant submits that, in order to decide this issue, there are a number of sub issues that must first be resolved. To be clear, as a result of my findings, it is unnecessary for me to deal with many of these issues. These issues are:

1. Did the appellant resign as a director of Karora on October 11, 2011? If he did, what was the effective date of his resignation?

2. Was Karora's liability in respect of unremitted sourced deductions, interest, and penalties $305,390.15 or another amount?

    (a) Who bears the burden of proving the amounts failed to be remitted?

    (b) What is the amount that Karora failed to remit?

        (i) The appellant alleges that Karora never actually withheld tax when paying employees. Is Karora liable for just interest and penalties in relation to those amounts (pursuant to subsection 227(8)-(8.6) of the *Act*, or is Karora responsible for the amounts assessed by the Minister pursuant to 227(9.4)of the *Act*?

    (c) Does Karora's entitlement to refundable tax credits change the amount that the corporation owes?

3. While the appellant was a director, did he exercise the requisite degree of care, diligence and skill to prevent the corporation's failure to remit?

    (a) Does the appellant's subjective belief that he resigned in 2011 matter?

(1) Did the Appellant Resign as a Director on October 11, 2011?

[10] The appellant relies upon the limitation period set out in subsection 227.1(4) of the *Act* as a defence. This position can be dealt with succinctly. The only evidence of the resignation of the appellant from Karora put forth at trial was that

on October 18, 2011 the appellant provided an email to Peter McBride. The email makes no mention of the appellant resigning as director. What it does discuss is that the appellant needed to "pull himself off at Karora payroll" for at least six months. At that time the parties would determine whether the appellant returned to Karora. As a result of that email, and a subsequent telephone conversation that evening, the appellant claims he resigned. Nothing in writing was provided by the appellant to Karora Canada.

[11] In the 2016 Federal Court of Appeal decision, *Chriss v. R*[1], at paragraph 10, ample guidance was provided on what is required for the Tax Court to find that a director has resigned. The Federal Court of Appeal, in referencing Subsection 121(2) of the *Ontario Business Act*, R.S.O. 1990, c. B.16 (OCBA) (which is also applicable in this case) stated that a resignation of a director is effective at the time a written resignation is received by the Corporation or at a time specified in the resignation. In this case, there was no written resignation sent by the appellant nor received by the corporation. Therefore I am unable to agree with the appellant's position that he had resigned at any time prior to the assessment before the Court.

(2) Was Karora's liability in respect of unremitted sourced deductions, interest, and penalties $305,390.15 or another amount?

Who bears the burden of proving the amounts failed to be remitted?

[12] I will deal with both the above two issues at the same time. In the Further Amended Notice of Appeal, the Appellant asserts that he does not have access to Karora's financial records nor the Minister's grounds for assessing the corporation, and therefore, it is appropriate that the Minister bear the onus of proving the assessment is correct.[2]These submissions were also made by appellant's counsel in closing arguments.

[13] Factually, the position is contradictory to the evidence called at trial. Peter McBride testified on behalf of the appellant. He was knowledgeable of the financial happenings of Karora. Furthermore, he provided the Court with bank statements, T4s and other relevant business records. At no point in his testimony did he state he had a lack of knowledge, or documentation, concerning the underlying assessment. I do not accept that the appellant had an inability to attack the underlying assessment.

---

1 *Sally Anne Chriss v. H.M.Q.* 2016 FCA 236 at para 10.

2 Further Amended Notice of Appeal, para 64.

[14] The law concerning onus was well summarized by Justice Paris in the 2015 case *Andrew* v. *The Queen*[3], in which he found as follows:

> **63.** Also, at paragraph 41 of my decision in *Mignardi v. R.*, 2013 TCC 67, [2013] G.S.T.C. 39, [2013] T.C.J. No. 66 (T.C.C. *[Informal Procedure]*) , I held that the onus to prove an underlying tax liability did not shift to the Minister in every appeal from a derivative assessment.
>
> I return now to the proposition that appears to flow from the *Gestion Yvan Drouin Inc.* case that the Minister bears the onus to prove the underlying tax liability in every appeal from a derivative liability assessment under subsection 160(1) or section 227.1 of the ITA or sections 323 or 325 of the ETA. I agree with respondent's counsel that such a conclusion is inconsistent with the decisions of the Supreme Court and Federal Court of Appeal to which I have referred. It is only where the facts concerning the underlying tax debt are exclusively or peculiarly within the knowledge of the Minister that the burden will be shifted. Each case will turn on its own facts. Although there may be situations where the tax liability of the original tax debtor is something that is solely within the knowledge of the Crown, more often a taxpayer will have access to that information from the original tax debtor. It should be recalled that one of the bases on which a person is assessed under those provisions is his or her relationship with the tax debtor, either as in this case as a director of the debtor corporation or as a party not dealing at arm's length with the tax debtor. As a result of this relationship, a taxpayer may very well already have or be able to obtain the information required to verify the existence or amount of the underlying liability.

[15] The facts in this case, concerning the Karora assessment, are not *exclusively or peculiarly within the knowledge of the Minister*. I find that the onus is not reversed in this case. The initial onus is upon the appellant to demolish the respondent's assumptions.

The Appellant has destroyed a key assumption

[16] The Minister has made a number of assumptions in regards to this appeal. One crucial assumption, relied upon the Minister, is:

> **13.10** Karora failed to remit source deductions and related penalties and interest as and when required by the Income Tax Act, the Canada Pension Plan and the Employment Insurance Act, as set out in Schedule A to this Reply.

---

3 *Andrew v R*, 2015 CarswellNat 382 at para 63.

[17] Schedule A of the Reply sets out the exact amounts assessed against Karora. These figures are crucial. These amounts, as a result of the director's liability assessment, are the amounts the appellant has been assessed.

[18] The Appellant has challenged the assumption set out above. In particular, the appellant lead evidence from Mr. McBride that the assessment of Karora was based on T4s prepared at Mr. McBride's request and direction and that the T4s did not reflect reality in that they were incorrectly prepared. Specifically, the T4s relied upon by the Minister did not accurately reflect the salaries that were actually paid to the employees. They also did not reflect the timing of when the payments were received by the employees. In some cases, employees were paid in a different year than what was listed on the T4s. Employees were also often paid different overall amounts than were listed on the T4s.

[19] This evidence was not challenged by the respondent. The evidence is consistent with the bank statements put before the Court. On this basis, I accept the appellant's position that the underlying assessment overstated the amount that Karora owed the Minister.

[20] The Crown called no evidence. The Crown also did not use the banking documents and T4s put into evidence by the appellant in cross-examination, nor in closing arguments. The Crown's position is that the underlying assessment is correct in its entirety against Karora and that, presumably, I am unable to reduce the director's liability assessment before the Court.

[21] What I am left with, after hearing all the evidence at trial, is a conclusion that the underlying assessment is incorrect and is overstated. In hearing the evidence of Mr. McBride and reviewing the documents submitted, I have accepted that Karora withheld employee deductions, and did not remit these amounts as required. I base this conclusion on the fact that Mr. McBride never directly testified that he did not withhold source deductions. I also accept the assumption made by the Crown that between 2008 and 2014 Karora paid salaries to its employees from which it deducted and/or withheld amounts for federal tax, provincial tax, employment insurance and Canada Pension Plan contributions. This assumption was not seriously challenged by the appellant's evidence.

[22] But, as stated, I also accept that, on the balance of probabilities, the underlying assessment was incorrect.

[23] To be clear, it would be improper for me to say there is no evidence before the Court concerning the underlying assessment. There are T4s and bank statements. However, as I told the parties at the outset of the trial, the Court will not be conducting a fresh audit in coming to a decision in this matter. At the end of the day, I am left with a crucial assumption that has been destroyed, and bits of evidence that an auditor could use in determining what the correct assessment concerning Karora should have been.

[24] In deciding this case, I am mindful of the guidance provided in the Federal Court of Appeal decision in *House*[4]. In particular, I rely upon the following directions provided by the FCA, at paragraph 30:

> **30.** In determining the issue before us, it is important to keep in mind the Supreme Court of Canada's decision in *Hickman Motors Ltd. v. Canada*, [1997] 2 S.C.R. 336 (*Hickman*), where Madam Justice L'Heureux-Dubé enunciated, at paragraphs 92 to 95 of her Reasons, the principles which govern the burden of proof in taxation cases:
>
> 1. The burden of proof in taxation cases is that of the balance of probabilities.
>
> 2. With regard to the assumptions on which the Minister relies for his assessment, the taxpayer has the initial onus to "demolish" the assumptions.
>
> 3. The taxpayer will have met his initial onus when he or she makes a prima facie case.
>
> 4. Once the taxpayer has established a prima facie case, the burden then shifts to the Minister, who must rebut the taxpayer's prima facie case by proving, on a balance of probabilities, his assumptions.
>
> 5. If the Minister fails to adduce satisfactory evidence, the taxpayer will succeed.

[25] As directed by the Federal Court Appeal in the same case, in my analysis I must not confuse the appellant's initial onus to "demolish" the Minister's assumptions with the overall burden resting on the parties to prove their respective cases. In considering the appellant's evidence, I have concluded that the appellant

---

4 *House v. R.*, 2011 CarswellNat 5165 at para. 30.

had made a *prima facie* case "demolishing" the Minister's crucial assumption[5] concerning the underlying assessment.

III. CONCLUSION

[26] With this crucial assumption demolished, and with no evidence before the Court to allow me to reduce the underlying assessment to its proper amount, I must find in favour of the appellant. The appeal is allowed.

[27] Costs are payable by the respondent to the appellant. If the parties are unable to agree to a costs amount, the appellant may provide the Court with written submissions, within 60 days of the date of this judgment. The respondent will have 30 days to respond to the Appellant's submissions. Neither parties' written submissions shall exceed 10 pages.

Signed at Ottawa, Canada this 11th day of August 2021.

"Ronald MacPhee"

MacPhee J.

---

5 In *Amiante Spec Inc. v. Canada*, 2009 FCA 239, 2009 FCJ No. 603 (QL), our Court, at paragraph 23, explained a *prima facie* case in the following terms:

> **[23]** A *prima facie* case is one "supported by evidence which raises such a degree of probability in its favour that it must be accepted if believed by the Court unless it is rebutted or the contrary is proved. It may be contrasted with conclusive evidence which excludes the possibility of the truth of any other conclusion than the one established by that evidence" (*Stewart v. Canada*, [2000] T.C.J. No. 53, paragraph 23).

CITATION:	2021 TCC 51
COURT FILE NO.:	2017-4472(IT)G
STYLE OF CAUSE:	THANH HAI TRAN AND HER MAJESTY THE QUEEN
PLACE OF HEARING:	Toronto, Ontario
DATE OF HEARING:	August 26 and 27, 2020 at Toronto, Ontario and heard virtually on July 15, 2021
REASONS FOR JUDGMENT BY:	The Honourable Justice Ronald MacPhee
DATE OF JUDGMENT:	August 11, 2021

APPEARANCES:

Counsel for the Appellant:	Richard Yasny
Counsel for the Respondent:	Kanga Kalisa

COUNSEL OF RECORD:

For the Appellant:

Name:	Richard Yasny
Firm:	Richard Yasny Tax Law

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