Docket: 2007-4472(IT)G

BETWEEN:

BEVERLY A. WILLIAMSON,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

Appeal heard on January 18, 2010 at Edmonton, Alberta

Before: The Honourable Justice J.E. Hershfield

Appearances:

Counsel for the Appellant:	Norman W. Simons
Counsel for the Respondent:	Margaret McCabe

JUDGMENT

The appeal with respect to an assessment made under the *Income Tax Act* for the 2004 taxation year is dismissed, with costs to the Respondent, in accordance with and for the reasons set out in the attached Reasons for Judgment.

Signed at Ottawa, Canada this 25th day of March 2010.

"J.E. Hershfield"

Hershfield J.

Citation: 2010 TCC 169
Date: 20100325
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BETWEEN:

BEVERLY A. WILLIAMSON,

Appellant,

and

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Respondent.

REASONS FOR JUDGMENT

Hershfield J.

Issue

[1] The Appellant was assessed pursuant to subsection 227.1(1) of the *Income Tax Act* (the "*Act*") as a director of 6236251 Canada Incorporated (referred to herein as "Appellant's Company") for unpaid source deductions required to have been remitted in 2004 in respect of 4 employees of 6225471 Canada Incorporated (herein referred to as "M. Henry's Company"), plus interest and penalties.

[2] The Appellant's liability under subsection 227.1(1) as a director of Appellant's Company derives from a prior decision of this Court that Appellant's Company was the deemed employer of the employees of M. Henry's Company and was, thereby, required to make the required remittances.[1]

[3] The Appellant appeals the subject assessment on the grounds that subsection 227.1(3) of the *Act* relieves her of liability for the remittance failure of Appellant's Company. Such relief requires that she establish that, having regard to her

[1] *6236251 Canada Inc. v. M.N.R.*, 2007 TCC 101.

knowledge and experience, she exercised the degree of care, diligence and skill to prevent the failure that a reasonably prudent person of similar knowledge and experience would have exercised in comparable circumstances.[2] The appeal deals specifically with Employment Insurance Premiums and Canada Pension Plan Contributions.

Minister's Assumptions and the Prior Decision of this Court

[4] The following summarizes the relevant assumptions relied on by the Minister of National Revenue (the "Minister") in assessing the Appellant:

a) The Appellant was the sole shareholder and director of Appellant's Company;

b) Appellant's Company was incorporated on May 17, 2004 for the sole purpose of providing banking services to M. Henry's Company;

c) M. Henry's Company was unable to open a bank account in its own name because of its owner's poor credit rating;

d) The banking services provided by Appellant's Company ended when the business operated by M. Henry's Company closed in August 2004;

e) M. Henry's Company employed 4 people;

f) Appellant's Company was responsible for issuing the pay cheques to the employees of M. Henry's Company and did in fact issue cheques to the employees of M. Henry's Company in the amount of their net pay after source deductions;

g) The Appellant operated a payroll service prior to incorporating Appellant's Company and therefore had knowledge regarding source deductions and remittances;

h) The Appellant was the person having the power to direct source deduction remittances by M. Henry's Company to the Minister; and

[2] See *Soper v. The Queen*, [1998] l F.C. 124.

i) The Appellant failed to exercise the degree of care, diligence and skill that a reasonably prudent person would have exercised in comparable circumstances to prevent the failure of M. Henry's Company to remit the required amounts.

[5] Further background information is provided in the Reply relating to the decision of this Court which found Appellant's Company liable for the unremitted amounts. The Reply summarizes the findings of that decision:

a) Appellant's Company provided banking services as a trustee to M. Henry's Company;

b) All funds deposited to the bank in the name of Appellant's Company were in trust for M. Henry's Company and all disbursements were on behalf of M. Henry's Company;

c) The Appellant had the sole signing authority on the bank account of Appellant's Company and issued cheques when requested to do so by the owner of M. Henry's Company, Mark Henry ("Mr. Henry");

d) The Appellant wrote cheques for net pay and gave them to Mr. Henry, who then gave the cheques to the employees of M. Henry's Company;

e) No cheques were written to remit source deductions to Canada Revenue Agency ("CRA") by either M. Henry's Company or Appellant's Company or by Mr. Henry;

f) The Appellant was paid $800 for providing the banking services;

g) The Appellant operated a bookkeeping payroll service prior to incorporating; and

h) Appellant's Company was the deemed employer of the employees of M. Henry's Company with respect to certain of the payments from the bank account of the Appellant's Company.

[6] It is important to emphasize, for greater clarity, that Porter, D.J. expressly identified those payments made by Appellant's Company to M. Henry's Company employees that were net wage amounts. Only those amounts were used to calculate the deduction (withholding) and remittance failure of Appellant's Company and it

is only in respect of those amounts, so calculated, that the Minister has assessed the Appellant pursuant to section 227.1.

Appellant's Assertions

[7] While essentially conceding that the findings of fact in Porter, D.J.'s decision were accurate, the Appellant did elaborate on the background and operation of the arrangement.

[8] She confirmed that Mr. Henry wished to operate a new business under the trade name Digital Documents and incorporated the company that I have now referred to as M. Henry's Company for that purpose.[3] Due to his credit rating problems, the Appellant agreed to provide banking services to M. Henry's Company. She incorporated a company to enter into a written agreement with M. Henry's Company to provide such services. She did not dispute being the sole shareholder and director of this new company, now being referred to as Appellant's Company.

[9] The agreement between the two companies provided that all funds deposited into Appellant's Company's account would be in trust for M. Henry's Company and that all disbursements would be advanced on behalf of M. Henry's Company.

[10] The Appellant acknowledged that she had operated a bookkeeping payroll service prior to incorporating Appellant's Company and was knowledgeable as to source deductions and remittances. She acknowledged that she knew the principal, Mark Henry, of M. Henry's Company and that Mr. Henry asked her to provide the banking services because he was unable to open a bank account at any bank due to his poor credit rating.

[11] The Appellant acknowledged that Mr. Henry deposited funds in Appellant's Company account which in turn issued cheques to the employees of M. Henry's Company as directed by Mr. Henry. However, she testified that she had no way of knowing if the amounts, paid according to such direction, were net of source deductions or were salary amounts versus expenses. The amounts received were simply paid out as directed. No amounts were withheld. There was no provision for, or funding for, remittances. She pointed out that Porter, D.J. reduced the

[3] The Appellant testified that "Digital Documents" was M. Henry's Company's business name however it appears Appellant's Company did register the name and, according to the written agreement between the two companies, licensed it back to M. Henry's Company.

assessments issued against Appellant's Company having found that some of the payments made to employees were not salaries, as assumed by the Minister in issuing the assessments. She argued that if the CRA could not determine what the correct withholding and remittance amounts were, then how could she be said to have failed in exercising sufficient care and diligence in not making that determination.

[12] The Appellant also expressed concern that in determining the remittance liability amounts, the Minister grossed-up the payments as if they were net salary amounts and then assumed that the difference between the notional grossed up amounts and the payment amounts were source deduction amounts that were to be remitted in accordance with the remittance requirements of the *EIA* and the *CPP*.

The Statutory Framework

[13] The relevant statutory provisions governing this appeal are as follows:

Provisions of the *Act*

> 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 section 153 or 215, has failed to remit such an amount or has failed to pay an amount of tax for a taxation year as required under Part VII or VIII, the directors of the corporation at the time the corporation was required to deduct, withhold, remit or pay the amount are jointly and severally liable, together with the corporation, to pay that amount and any interest or penalties relating thereto.
>
> […]
>
> (3) Idem -- 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]

Provisions of the *Employment Insurance Act*

> 83(1) Liability of directors - If an employer who fails to deduct or remit an amount as and when required under subsection 82(1) is a corporation, the persons who were the directors of the corporation at the time when the failure occurred are jointly and severally liable, together with the corporation, to pay Her Majesty that amount and any related interest or penalties.

[4] The provision of the *Act* reproduced was effective between March 1, 1994 to December 14, 2004.

> (2) Application of *Income Tax Act* provisions - Subsections 227.1(2) to (7) of the Income Tax Act apply, with such modifications as the circumstances require, to a director of the corporation.
>
> (3) Assessment provisions applicable to directors - The provisions of this Part respecting the assessment of an employer for an amount payable under this Act and respecting the rights and obligations of an employer so assessed apply to a director of the corporation in respect of an amount payable by the director under subsection (1) in the same manner and to the same extent as if the director were the employer mentioned in those provisions.[5]

Provisions of the *Canada Pension Plan*

> 21.1(1) Liability - Where an employer who fails to deduct or remit an amount as and when required under subsection 21(1) is a corporation, the persons who were the directors of the corporation at the time when the failure occurred are jointly and severally liable, together with the corporation, to pay to Her Majesty that amount and any interest or penalties relating thereto.
>
> (2) Application of *Income Tax Ac*t provisions - Subsections 227.1(2) to (7) of the *Income Tax Act* apply, with such modifications as the circumstances require, in respect of a director of a corporation referred to in subsection (1).
>
> (3) Assessment provisions applicable to directors - The provisions of this Act respecting the assessment of an employer for an amount payable by the employer under this Act and respecting the rights and obligations of an employer so assessed apply in respect of a director of a corporation in respect of an amount payable by the director under subsection (1) in the same manner and to the same extent as if the director were the employer referred to in those provisions.[6]

Arguments and Analysis

[14] The Appellant argues that she acted as best as anyone could in believing that Appellant's Company was acting as a bank as opposed to being a payer of salary amounts to M. Henry's employees. However, Appellant's Company is a deemed employer and had to withhold and remit the required amounts. Those issues, of Appellant's Company being a deemed employer and determining the proper calculation of the required withholding and remittance amounts, have been

[5] The provision of the *EIA* reproduced was effective between December 12, 1988 to December 14, 2004.

[6] The provision of the *CPP* reproduced was effective between June 30, 1996 to December 14, 2004.

expressly or implicitly decided.[7] That being the case, it follows that the business of Appellant's Company included ensuring it had the required information and funds to deduct the required amounts and then remit them.

[15] As a knowledgeable inside director, it could not be said that she took any steps to ensure that this latter part of Appellant's Company's business was being monitored and complied with. Inside directors have less recourse to a due diligence defence as noted by Marceau, J.A. in *Soper* at paragraph 44:

> … it is difficult to deny that inside directors, meaning those involved in the day-to-day management of the company and who influence the conduct of its business affairs, will have the most difficulty in establishing the due diligence defense. For such individuals, it will be a challenge to argue convincingly that, despite their daily role in corporate management, they lacked business acumen to the extent that that factor should overtake the assumption that they did know, or ought to have known, of both remittance requirements and any problem in this regard. In short, inside directors will face a significant hurdle when arguing that the subjective element of the standard of care should predominate over its objective aspect.

[16] It is true that as long as she allowed Appellant's Company to follow Mr. Henry's directions to distribute all deposited amounts to employees of M. Henry's Company, there would be no amounts retained in Appellant's Company's account to remit. It is also true, however, that the Appellant caused Appellant's Company to enter into an agreement that required it to follow Mr. Henry's directions. The Appellant cannot rely on being handcuffed by an agreement that she herself as an inside director, indeed as the only director and only human presence acting on behalf of the company, acquiesced to enter into. That the Appellant knew Mr. Henry was a credit risk suggests to me that she ought to have known that the arrangement, in which she was becoming a part, was going to leave remittance obligations unfunded. That is, a person in her position with her background would realize that if Appellant's Company did not withhold source deduction amounts, the Company would be at risk of having a shortfall of funds to cover its remittance obligations. The creation of Appellant's Company and the banking arrangement came about on a premise that leads to only one conclusion; namely, Appellant

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[7] The deemed employer status of Appellant's Company and the determination of the deduction and remittance amounts are issue estopped. However, the Respondent cannot so readily rely on issue estoppel in respect of prior findings relating to the Appellant's involvement in this case as neither the parties nor the issues are the same as in this Court's decision in *6236251 Canada Inc.* See *Angle v. Canada (Minister of National Revenue - M.N.R.)*, [1975] 2 S.C.R. 248.

Company's bank account would be the only account from which deductions and remittances could be made. Given her knowledge, experience and background and the purpose of this arrangement, the Appellant should have realized that Appellant's Company could be accountable to comply with withholding and remittance requirements when making payments to employees that she would have to have known included wages.

[17] It appears to me that as experienced as the Appellant is, she might not have known of or understand the scope of the deemed employer provisions. However, in the same way payroll service companies are caught by these provisions,[8] so is Appellant's Company. The failure of the Appellant, by virtue of ignorance or possible naivety, to ensure that company's adherence to practices that would have enabled compliance with these provisions, effectively frustrates the application of the subsection 227.1(3) due diligence defence that she relies on in this appeal.

[18] Quite simply, she knew enough to see the problem. That she did not see personal consequences to ignoring the problem cannot assist her. In the course of the performance of her duties as the sole director of Appellant's Company she should have been alerted to the problem and she should have taken positive steps to see how the problem could be resolved. This standard of care, confirmed by the Federal Court of Appeal in *Soper* has not been met by the Appellant in this case. It is described succinctly by Marceau, J.A. at paragraph 53:

> In my view, the positive duty to act arises where a director obtains information, or becomes aware of facts, which might lead one to conclude that there is, or could reasonably be, a potential problem with remittances. …

[19] Indeed, this recitation of a director's duty to act is aimed primarily at outside directors. The suggestion then is that even if the Appellant were an outside director, removed from the day to day operations of the company, she would still not be able to avail herself of the due diligence defense given her awareness of facts that suggested a very real problem concerning remittances. As an inside director, the Appellant simply has no ground to be exonerated from the liability imposed by section 227.1 of the *Act*.

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[8] *Scavuzzo v. The Queen*, 2005 TCC 772.

[20] Accordingly, the appeal is dismissed with costs.

Signed at Ottawa, Canada this 25th day of March 2010.

"J.E. Hershfield"

Hershfield J.

CITATION:	2010 TCC 169
COURT FILE NO.:	2007-4472(IT)G
STYLE OF CAUSE:	BEVERLY A. WILLIAMSON AND HER MAJESTY THE QUEEN
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APPEARANCES:

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