

Docket: 2012-4884(GST)I

BETWEEN:

BENTON ANTIFAIFF,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

Appeal heard on March 27, 2014, at Regina, Saskatchewan

Before: The Honourable Justice B. Paris

Appearances:

For the Appellant: The Appellant himself
Counsel for the Respondent: Larissa Benham

JUDGMENT

The appeal from a Notice of Assessment – Third Party (A112511), made under the *Excise Tax Act* and dated December 6, 2007, is dismissed in accordance with the attached Reasons for Judgment.

Signed at Vancouver, British Columbia, this 17th day of July 2014.

“B.Paris”

Paris J.

Citation: 2014 TCC 216
Date: 20140717
Docket: 2012-4884(GST)I

BETWEEN:

BENTON ANTIFAIFF,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

REASONS FOR JUDGMENT

[1] This is an appeal from a director's liability assessment made against the appellant pursuant to section 323 of the *Excise Tax Act* (the *Act*). The Minister of National Revenue (Minister) assessed the appellant for unremitted goods and services tax (GST) and related interest and penalties totalling \$53,575.74 owing by FIS Financial Information Systems Inc. (FIS) in respect of its reporting periods ending between September 30, 1996 and September 30, 2000.

Issues

[2] The issues in this appeal are as follows:

- i) whether the Minister properly applied certain credits to amounts owing by FIS;
- ii) whether the Minister correctly calculated the late-filing penalties and failure to remit penalties owing by FIS under the *Act*;
- iii) whether FIS was entitled to additional input tax credits (ITCs) in respect of its reporting periods ending between October 1, 1998 and September 30, 2000;

- iv) whether the appellant acted with due diligence to prevent the failures by FIS to remit the net tax owing; and
- v) whether the appellant was entitled to any relief because of the delay by the Minister in assessing him for the GST liability of FIS.

Facts

[3] FIS was incorporated in Saskatchewan on May 20, 1993. It operated a computer consulting business. At all times, the appellant was the sole shareholder and director.

[4] FIS was struck off the Saskatchewan corporate register on October 31, 1997, apparently for failing to file its annual returns. However, it continued to carry on business until late 2000.

[5] The evidence showed that FIS was regularly late in filing its GST returns, and did not remit any net tax with any of its GST returns.

[6] A summary of FIS's GST filings and the adjustments made by the Canada Revenue Agency (CRA) to the amounts reported by FIS in its returns is set out in Appendix A to these reasons.

[7] The last GST reassessments for FIS's reporting periods ending between September 30, 1994 and March 31, 1998 were made on September 16, 1998. Those reassessments resulted in a significant increase in net tax payable by FIS. FIS did not object to those reassessments.

[8] The GST returns filed by FIS for its reporting periods ending between June 30, 1996 and September 30, 2000 were all assessed by the Minister as filed. FIS did not object to those assessments.

[9] On November 10, 2005, the Minister certified and registered FIS's unpaid GST liability related to its reporting periods ending between September 30, 1996 and September 30, 2000 in the Federal Court pursuant to section 316 of the *Act*. The amount of the debt was \$53,575.74, made up of unremitted GST of \$22,335.79, interest of \$13,325.43 and penalties of \$17,914.52. The particulars of the debt are set out in Appendix B to these reasons.

[10] A writ of seizure and sale issued by the Federal Court was executed and returned *nulla bona* on January 27, 2006.

[11] On December 6, 2007 the Minister assessed the appellant as director of FIS for the unremitted tax and interest and penalties owing by FIS under the *Act*.

Issue 1: Application of credits

(i) Failure to apply certain credits

[12] The appellant submitted that the Minister failed to credit FIS for refunds of net tax for its reporting periods ending March 31, 1998, June 30, 1998, and September 30, 1998. According to Appendix A, FIS was entitled to credits of \$7007.75, \$452.47 and \$510.27 for these periods, respectively.

[13] However, evidence adduced by the Respondent showed that all of these amounts were applied against amounts payable by FIS for various periods prior to December 31, 1996 (per Affidavit of Lori Boussad, subparagraphs 12 (e) to (g) and Supplemental Affidavit of Lori Boussad, paragraphs 6 and 7.) Those refunds were credited against amounts owed by FIS as follows:

Reporting period in which refund arose	Refund amount	Reporting period to which refund applied	Tax owing before refund applied	Portion of refund applied	Tax payable remaining after refund applied	Amount applied against interest	Amount applied against penalties	Refund remaining
98/03/31	7,007.75			1,870.41		1,870.41		5,137.34
98/03/31				2,616.76			2,616.76	2,520.58
98/03/31		95/03/31	245.32	249.66	-	2.10	2.24	2,270.92
98/03/31		95/12/31	1,518.52	1,988.49	-	193.83	276.14	282.43
98/03/31		96/03/31	721.68	282.43	439.25			-
98/06/30	452.47	96/03/31	439.25	446.29	-	3.11	3.93	6.18
98/06/30		96/09/30	777.69	6.18	771.51			-
98/09/30	510.27	96/09/30	771.51	510.27	261.24			-

[14] The appellant did not challenge this evidence, and I accept that FIS was given credit for the refunds of net tax.

(ii) Order of application of credits

[15] The appellant next argued that the Minister failed to apply credits to the account of FIS in the manner most favourable to FIS. He maintained that if the credits had been applied first to amounts of net tax owing rather than to interest and penalties that were due, less interest and penalties would have accrued on FIS's account. The appellant submitted that there is no provision in the *Act* that requires the Minister to apply credits to interest and penalties before net tax.

[16] In my view, the appellant's argument is unfounded. There was no proof that FIS's liability would have been reduced if the Minister had applied the credits in a different order to amounts FIS owed. Also, it is well settled in law that in the absence of any direction by a debtor to a creditor when making a payment as to which account to apply the payment, the creditor has the right to allocate the payment as he pleases. This principle is set out by the Federal Court Trial Division in *464734 Ontario Inc. v. R.*, 90 D.T.C. 6206 at page 6215:

Where no direction is given by the debtor then the creditor is free to apply the monies received as the creditor sees fit. The debtor must expressly authorize how the funds he is paying to the creditor are to be applied and failure to do so leaves the creditor to decide: *Can Fishing & Tackle Sports Limited v. Dawe* [1960] OWN 499, 25 D.L.R. (2d) 487 ; and *Re Northern and Central Gas Corp. Ltd. v. Kidd Creek Mines* (1988), 66 O.R. (2d) 11.

[17] No evidence was led to show that FIS gave any direction to the CRA regarding the allocation of credits.

Issue 2: Calculation of penalties

[18] The appellant's third argument is that the failure to remit and late-filing penalties assessed against FIS have been miscalculated by the Minister and exceed the amount due by \$4,591.81.

[19] Prior to April 1, 2007, paragraph 280(1)(a) of the *Act* provided for a penalty of 6% per annum for failure to remit or pay an amount under Part IX of the *Act*:

280. (1) Subject to this section and section 281, where a person fails to remit or pay an amount to the Receiver General when required under this Part, the person shall pay on the amount not remitted or paid

(a) a penalty of 6% per year, and

(b) interest at the prescribed rate,

computed for the period beginning on the first day following the day on or before which the amount was required to be remitted or paid and ending on the day the amount is remitted or paid.

[20] Subsection 280(1) was amended, effective April 1, 2007, to delete the penalty on unremitted or unpaid amounts and the penalty was replaced by an increase to the interest rate payable in respect of such amounts.

[21] Section 280.1 imposes a penalty for failing to file a return for a reporting period as and when required under Part IX of the *Act*. The amount of the penalty is calculated using a two-part formula: part one is calculated as 1% of the amount of net tax owing and part two is 25% of the amount in part one for each complete month overdue, to a maximum of 12 months.

[22] It was not disputed by the appellant that FIS was liable for penalties under paragraph 280(1)(a) up to March 31, 2007 and penalties under section 280.1. However, the appellant calculated those amounts to be lower than what was assessed by the Minister.

[23] The Minister's calculation of the combined penalties is shown in Appendix B, by reporting period.

[24] The appellant's calculations are set-out in Exhibit A-2 as follows:

Using pre April 1, 2007 rules			Failure to file penalty										
Penalty compounded daily			A	B	C								
Penalty			Max of 12			Amount @	As per						
Annual	Daily Rate	Net Tax	1%	25% of A	mths	Penalty	Days late	6%	Minister	Difference	Dates		
6%	0.00016	261.24	2.61	0.65	7.84	10.45	4053	175.80	444.18	268.38	Per end 1996-09-30, due on 1996-10-31 to 2007-12-06		
6%	0.00016	3,727.70	37.28	9.32	111.83	149.11	3961	2,451.65	3,394.97	943.32	Per end 1996-12-31, due on 1997-01-31 to 2007-12-06		
6%	0.00016	3,394.58	33.95	8.49	101.84	135.78	3872	2,182.40	2,749.60	567.20	Per end 1997-03-31, due on 1997-04-30 to 2007-12-06		
6%	0.00016	3,433.54	34.34	8.58	103.01	137.34	3780	2,154.99	2,781.13	626.14	Per end 1997-06-30, due on 1997-07-31 to 2007-12-06		
6%	0.00016	1,624.01	16.24	4.06	48.72	64.96	3688	994.47	1,315.42	320.95	Per end 1997-09-30, due on 1997-10-31 to 2007-12-06		
6%	0.00016	4,666.72	46.67	11.67	140.00	186.67	3596	2,786.40	3,780.00	993.60	Per end 1997-12-31, due on 1998-01-31 to 2007-12-06		
6%	0.00016	1,050.00	10.50	2.63	31.50	42.00	3231	563.30	793.18	229.88	Per end 1998-12-31, due on 1999-01-31 to 2007-12-06		
6%	0.00016	787.50	7.88	1.97	23.63	31.50	3142	410.84	568.30	157.46	Per end 1999-03-31, due on 1999-04-30 to 2007-12-06		
6%	0.00016	787.50	7.88	1.97	23.63	31.50	3050	398.81	540.41	141.60	Per end 1999-06-30, due on 1999-07-31 to 2007-12-06		
6%	0.00016	787.50	7.88	1.97	23.63	31.50	2958	386.78	514.78	128.00	Per end 1999-09-30, due on 1999-10-31 to 2007-12-06		
6%	0.00016	787.50	7.88	1.97	23.63	31.50	2866	374.75	489.47	114.72	Per end 1999-12-31, due on 2000-01-31 to 2007-12-06		
6%	0.00016	6.30	0.06	0.02	0.19	0.25	2684	2.81	3.52	0.71	Per end 2000-06-30, due on 2000-07-31 to 2007-12-06		
6%	0.00016	1,021.70	10.22	2.55	30.65	40.87	2592	439.71	539.56	99.85	Per end 2000-09-30, due on 2000-10-31 to 2007-12-06		
								13,322.71	17,914.52	4,591.81			

[25] The fourth to seventh columns of the appellant's calculations set out in Exhibit A-2 relate to the section 280.1 late-filing penalties and the eighth and ninth columns relate to the paragraph 280(1)(a) failure to remit penalties.

[26] It appears though that the appellant has made a significant error in the calculation of the paragraph 280(1)(a) failure to remit penalties since he has not accounted for the requirement that the penalty amounts be compounded daily as required by subsection 124(1) of the *Act*:

124. (1) Interest computed at a prescribed rate and any penalty computed at a rate per year under any provision of this Part shall be compounded daily.

[27] The appellant uses the daily rate of 0.00016% for the penalty which amounts to 6% per annum with no compounding. This can be seen by dividing the rate of 6% per annum by 365 days per year (rounding to 5 decimal places):

$$\frac{.06}{365} = 0.00016$$

[28] The correct formula for calculating an amount that is required to be compounded daily is:

$$A = P(1+r)^n$$

where "P" is the beginning amount, "r" is the interest or penalty rate (expressed as a decimal), "n" is the total number of compoundings, and "A" is the ending amount: V. Krishna, "Understanding Financial Statements" (Toronto: Irwin Law Inc. 2013), at 32.

[29] It is apparent that the failure to account for the compounding of the penalty is a significant error, and therefore I find that the appellant's calculations are not reliable and that he has not shown that the penalties assessed against FIS were too high.

Issue 3: Claim for additional input tax credits

[30] The appellant also submitted that FIS should be allowed additional input tax credits (ITCs) for the reporting periods ending between December 31, 1998 and September 30, 2000. No ITCs were claimed by FIS in its returns filed for those periods, but the appellant maintained that it was only logical that FIS would have

paid GST on taxable supplies it acquired in the course of carrying on its business during that time. He estimated ITCs for those periods using a ratio determined for other reporting periods by comparing ITCs allowed by the Minister to total GST collected by FIS.

[31] The appellant's argument relating to ITCs cannot succeed because he has not provided the necessary proof of the ITCs. Subsection 169(4) of the *Act* requires a registrant to obtain "sufficient evidence in such form containing such information as will enable the amount of the input tax credit to be determined, including such information as may be prescribed." Section 3 of the *Input Tax Credit Information (GST/HST) Regulations*, SOR/91-45, sets out the information that is required to support an ITC claim, including certain details of the supplies on which the claimant paid GST. The amount of details depends on the amount paid for the supplies, but at a minimum section 3 requires the name of the supplier or intermediary in respect of the supply, the date of the supply or date of the invoice issued in respect of the supply and the total of the amount paid for the supply.

[32] The information requirements set out in subsection 169(4) and the related *Regulations* are mandatory: *Key Property Management Corporation v. The Queen*, 2004 TCC 210 at paragraph 14.

[33] The appellant has failed to provide any of the necessary information required to support the claim for additional ITCs for FIS, and there is no provision in the *Act* for basing an ITC claim on estimated amounts. Therefore, he has not shown that FIS was entitled to additional ITCs during the relevant periods.

Issue 4: Due diligence

[34] The appellant's final argument is that he exercised due diligence to prevent FIS's failures to remit net tax owing, and therefore that he should escape liability under subsection 323(3) of the *Act*.

[35] With respect to the due diligence defence, the Federal Court of Appeal in *The Queen v. Buckingham*, 2011 FCA 142 said, at paragraph 52:

Parliament did not require that directors be subject to an absolute liability for the remittances of their corporations. Consequently, Parliament has accepted that a corporation may, in certain circumstances, fail to effect remittances without its directors incurring liability. What is required is that the directors establish that they were specifically concerned with the tax remittances and that they exercised

their duty of care, diligence and skill with a view to preventing a failure by the corporation to remit the concerned amounts. (emphasis added)

[36] In this case, the appellant testified that FIS had financial difficulties. He did not elaborate on those problems, except to state that he was unable to borrow any more money to put into FIS that would have allowed it to pay its debts. He also testified that he reduced his wages from FIS in 1998, 1999 and 2000, and worked as hard as he could to make FIS a success.

[37] In my view, the appellant has not shown that he took sufficient specific actions to prevent the failures by FIS to remit GST collected from its customers. The evidence shows that the failures to remit by FIS which led to the assessment against the appellant occurred repeatedly over a period of approximately 4 years. It also appears that FIS was often in default of its obligation to file timely GST returns from 1994 on, and that no GST returns for its reporting periods ending from September 30, 1998 to September 30, 2000 were filed until September 2005.

[38] It is not clear from the appellant's testimony what particular circumstances led to the failure by FIS to file returns and remit GST as required by the *Act*, nor is it clear what steps he took, if any, beyond reducing his salary, to prevent the failures to remit. The appellant's testimony relating to the salary reductions is insufficient in itself to demonstrate that he exercised due diligence since it was not shown that any savings from the salary reductions were directed to paying remittances of GST. Overall, there was no indication of any coherent plan to ensure that GST remittances were made as required. In fact, for the years during which the appellant took less salary, (as well as all previous periods) FIS did not remit any amounts of GST at all. All reductions to the net tax payable by FIS were made by applying refunds of net tax arising in other reporting periods.

Issue 5: Delay in assessing

[39] At the hearing, the appellant voiced concerns over the long delay between the time FIS ceased operating in late 2000 and the time that he was assessed in December 2007. He pointed out that a very substantial portion of the amount assessed against him consisted of interest and penalties, which could have been partially avoided if he had been assessed earlier.

[40] The time limit for issuing a director's liability assessment under the *Act* is set out in subsection 323(5):

(5) An assessment under subsection (4) of any amount payable by a person who is a director of a corporation shall not be made more than two years after the person last ceased to be a director of the corporation.

[41] Under section 103 of the Saskatchewan *Business Corporations Act*, RSS 1978, c. B-10, a director of a corporation ceases to hold office when:

(a) he dies or resigns;

(b) he is removed by the shareholders; and

(c) he becomes disqualified.

[42] In the absence of any evidence that the appellant ever resigned, was removed or had become disqualified as a director, it has not been shown that the 2 year limit for a director's liability assessment ever began to run.

[43] In light of the fact that FIS was struck from the company register, it might be argued that the corporation ceased to exist at that point and that the appellant ceased to be a director. However, according to the decision of the Saskatchewan Court of Queens Bench in *R. v. Rasmussen and Saskatoon Salvage Co.*, (1985) Ltd., 130 Sask. R. 308, a corporation which is struck from the register in Saskatchewan is not thereby dissolved and may continue to carry on business. The only consequence of being struck is that the corporation is no longer capable of commencing or maintaining an action in respect of a contract made in Saskatchewan. In this case there is no basis for holding that FIS has ever been dissolved.

[44] I therefore find that the director's liability assessment in issue was not made outside the time limit in subsection 323(5).

Conclusion

[45] For all these reasons, the appeal is dismissed.

Signed at Vancouver, British Columbia, this 17th day of July 2014.

“B.Paris”

Paris J.

Appendix A

Period End Date	Date Return Filed	Reported Tax Collected	Input Tax Credits Claimed	Net Tax Payable reported	Tax Collected Per Audit	Input Tax Credits Per Audit	Total Audit Adjustment	Revised Net Tax Payable (Refundable)
30/09/1994	09/06/1995	2,673.15	-3,295.31	-622.16	As filed	-3,122.76	172.55	-449.61
31/12/1994	10/12/1996	1,309.69	-1,485.23	-175.54	As filed	-1,146.85	338.38	162.84
31/03/1995	02/10/1997	475.15	-460.25	14.90	5,064.67	As filed	4,589.52	4604.42
30/06/1995	10/03/1997	2,864.38	-6,256.31	-3,391.93	As filed	-5,992.92	263.39	-3128.54
30/09/1995	10/03/1997	2,291.82	-3,979.98	-1,688.16	As filed	-3,685.22	294.76	-1393.40
31/12/1995	10/03/1997	4,698.73	-2,793.35	1,905.38	As filed	As filed	0.00	1905.38 (as filed)
31/03/1996	02/10/1997	4,653.44	-5,650.28	-996.84	As filed	-3,931.76	1,718.52	721.68
30/06/1996	02/10/1997	2,300.23	-2,462.89	-162.66	As filed	As filed	0.00	-162.66 (as filed)
30/09/1996	02/10/1997	11,679.30	-10,838.86	840.44	As filed	As filed	0.00	840.44 (as filed)
31/12/1996	02/10/1997	3,862.59	-2,213.12	1,649.47	3,890.36	0.00	2,240.89	3890.36
31/03/1997	10/11/1997	0.00	0.00	0.00	3,394.58	As filed	3,394.58	3394.58
30/06/1997	10/11/1997	0.00	0.00	0.00	3,433.54	As filed	3,433.54	3433.54
30/09/1997	10/11/1997	0.00	0.00	0.00	1,624.01	As filed	1,624.01	1624.01
31/12/1997	13/07/1998	0.00	0.00	0.00	4,666.72	As filed	4,666.72	4666.72
31/03/1998	13/07/1998	0.00	0.00	0.00	3,609.80	-10,617.55	-7,007.75	-7007.75
30/06/1998	09/11/1998	1343.34	1795.81	-452.47	As filed	As filed	0.00	-452.47 (as filed)
30/09/1998	09/11/1998	2222.94	2733.21	-510.27	As filed	As filed	0.00	-510.27(as filed)
31/12/1998	08/09/2005	1,050.00	0.00	1,050.00	As filed	As filed	0.00	1,050.00(as filed)
31/03/1999	08/09/2005	787.50	0.00	787.50	As filed	As filed	0.00	787.50(as filed)
30/06/1999	08/09/2005	787.50	0.00	787.50	As filed	As filed	0.00	787.5(as filed)0
30/09/1999	08/09/2005	787.50	0.00	787.50	As filed	As filed	0.00	787.50(as filed)
31/12/1999	08/09/2005	787.50	0.00	787.50	As filed	As filed	0.00	787.50(as filed)
31/03/2000	08/09/2005	0.00	0.00	0.00	As filed	As filed	0.00	0.00(as filed)
30/06/2000	08/09/2005	6.30	0.00	6.30	As filed	As filed	0.00	6.30(as filed)
30/09/2000	08/09/2005	1,021.70	0.00	1,021.70	As filed	As filed	0.00	1,021.70(as filed)

Appendix B

Period End Date	Tax	Interest	Penalty	Total
1996-09-30	\$261.24	\$319.79	\$444.18	\$1,025.21
1996-12-31	\$3,727.70	\$2,515.21	\$3,394.97	\$9,637.88
1997-03-31	\$3,394.58	\$2,057.15	\$2,749.60	\$8,201.33
1997-06-30	\$3,433.54	\$2,080.76	\$2,781.13	\$8,295.43
1997-09-30	\$1,624.01	\$984.19	\$1,315.42	\$3,923.62
1997-12-31	\$4,666.72	\$2,808.10	\$3,780.00	\$11,254.82
1998-12-31	\$1,050.00	\$592.27	\$793.18	\$2,435.45
1999-03-31	\$787.50	\$423.66	\$568.30	\$1,779.46
1999-06-30	\$787.50	\$402.23	\$540.41	\$1,730.14
1999-09-30	\$787.50	\$382.58	\$514.78	\$1,684.86
1999-12-31	\$787.50	\$363.17	\$489.47	\$1,640.14
2000-06-30	\$6.30	\$2.60	\$3.52	\$12.42
2000-09-30	\$1,021.70	\$393.72	\$539.56	\$1,954.98
	\$22,335.79	\$13,325.43	\$17,914.52	\$53,575.74

CITATION: 2014 TCC 216

COURT FILE NO.: 2012-4884(GST)I

STYLE OF CAUSE: BENTON ANTIFAIFF AND HER
MAJESTY THE QUEEN

PLACE OF HEARING: Regina, Saskatchewan

DATE OF HEARING: March 27, 2014

REASONS FOR JUDGMENT BY: The Honourable Justice B. Paris

DATE OF JUDGMENT: July 17, 2014

APPEARANCES:

For the Appellant: The Appellant himself
Counsel for the Respondent: Larissa Benham

COUNSEL OF RECORD:

For the Appellant:

Name:

Firm:

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