Docket: 2008-3655(IT)G

BETWEEN:

MARVIN G. MARSHALL,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

Appeal heard on November 28 and 29, 2011, at Ottawa, Canada

Before: The Honourable Justice Wyman W. Webb

Appearances:

For the Appellant:	The Appellant Himself
Counsel for the Respondent:	April Tate

JUDGMENT

The Appellant's appeal is allowed, with costs, and the assessment of the Appellant as a director of Internorth Ltd. for the unremitted source deductions, penalties and interest for which Internorth Ltd. was assessed, is vacated.

Signed at Halifax, Nova Scotia, this 20th day of January 2012.

"Wyman W. Webb"

Webb J.

Citation: 2012TCC21
Date: 20120120
Docket: 2008-3655(IT)G

BETWEEN:

MARVIN G. MARSHALL,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

REASONS FOR JUDGMENT

Webb J.

[1] The Appellant was assessed as a director of Internorth Limited ("IL") for unremitted source deductions, penalties and interest in relation to amounts paid to certain employees in 2003 and 2004. For simplicity, the unremitted source deductions, penalties and interest will be referred to herein as the unremitted source deductions as the penalties and interest would arise as a result of a failure to remit source deductions as required. The issue in this appeal is whether IL was required to remit the source deductions as assessed. At the hearing the Appellant also raised the issue of whether he satisfied the due diligence defence and the Respondent did not object to the Appellant raising this issue.

[2] There are two preliminary matters in relation to this appeal - one is related to the pleadings and the other matter is related to proposed discovery read-ins.

Pleadings

[3] With respect to the pleadings, the Respondent brought a Motion to amend the Reply. At the discovery examinations that were held on January 26, 2011, counsel for the Respondent informed the Appellant that there were certain errors in the Reply that should be corrected. On February 8, 2011, a copy of the proposed Amended

Reply was sent to the Appellant. Since the Appellant did not consent to the Respondent amending the Reply, a Motion was made at the commencement of the hearing to amend the Reply. With the exception of one minor change to paragraph 19 in relation to the Grounds Relied On and Relief Sought, the Amended Reply included as part of the Motion is the same as the Amended Reply sent to the Appellant on February 8, 2011.

[4] Most of the changes correct the amounts for which IL was assessed and the corrections reduce the amounts. These corrections did not change the amount for which the Appellant was assessed as a director of IL. The amendments to paragraphs 8, 12, and 19 and subparagraph 15(m) to correct the identification of the amounts for which IL was assessed and to correct the amounts for which IL was assessed were allowed. These amendments clearly were made to correct the description of the amounts for which IL was assessed and reduced the amounts stated to be amounts for which IL was assessed and the Appellant had sufficient notice of such amendments.

[5] The Respondent also requested an amendment to paragraph 4 of the Reply. The first sentence of this paragraph had previously read as follows:

> 4. With respect to paragraph 4 of the Notice of Appeal under the heading "Reasons for appeal", he admits that the CRA issued a requirement to pay to Internorth Ltd. in June 2004 and that Internorth Ltd. was not in existence when Internorth Construction failed to remit its source deductions. …

[6] The proposed change was to amend this part of paragraph 4 to read as follows:

> 4. With respect to paragraph 4 of the Notice of Appeal under the heading "Reasons for appeal", he admits that the CRA issued a requirement to pay to Internorth Ltd. in June 2004. He denies that Internorth Ltd. was not in existence when Internorth Construction failed to remit its source deductions. …

[7] The issue in this appeal is related to the assessment of the Appellant as a director of IL, not to the assessment of the Appellant as a director of Internorth Construction Company ("ICC"), a separate company. The issue is therefore whether IL failed to remit source deductions and not whether ICC failed to remit any source deductions. The use of the double negative in the proposed amendment would mean that it would be the position of the Respondent that IL was in existence when ICC failed to remit source deductions. However, as noted, any failure of ICC to remit source deductions is not relevant as the Appellant was assessed as a director of IL. Counsel for the Respondent indicated that she was not concerned about this amendment in any event. This amendment was not made to the Reply.

[8] The final amendments were to the assumptions. Subparagraphs 15(i) and (j) of the Reply originally read as follows:

> 15. In so determining the Appellant's tax liability pursuant to subsection 227.1(1), the Minister relied on the following assumptions of fact:
>
> (i) starting on June 7, 2003, Internorth Ltd. started paying Internorth Construction's employees through two of its own payroll accounts, 885XXXXXXRP0001 and 885XXXXXXRP002;
>
> (j) starting on June 7, 2003, payroll cheques were written on both payroll accounts of Internorth Ltd.;

[9] The proposed amendment would delete subparagraph 15(j) and result in subparagraph 15(i) reading as follows:

> 15. In so determining the Appellant's tax liability pursuant to subsection 227.1(1), the Minister relied on the following assumptions of fact:
>
> (i) starting on June 7, 2003, Internorth Ltd. started paying Internorth Construction's employees through its bank accounts;

[10] Since the payroll accounts described in paragraph 15(i) (as originally drafted) were the accounts with the Canada Revenue Agency they are not bank accounts on which cheques could be written. These amendments simply correct an assumption that was obviously erroneous. These amendments were also allowed.

[11] In the Appellant's Notice of Appeal, the Appellant focused mainly on the requirements to pay that had been issued by the Canada Revenue Agency, which were part of the collection process followed by the Canada Revenue Agency. The actions taken by the Canada Revenue Agency to collect unremitted source deductions are not relevant in determining whether the Appellant was liable as a director of IL for source deductions that IL should have remitted.

[12] The Appellant in his Notice of Appeal did state that IL "never employed anyone and was purely an administrator" which raised the issue of whether the underlying assessment issued against IL was correct. Counsel for the Respondent acknowledged that this was an issue raised by the Appellant.

[13] At the commencement of the hearing the Appellant also appeared to be referring to the due diligence defence, which was not raised in his Notice of Appeal.

Counsel for the Respondent agreed that the Appellant would be permitted to raise the due diligence defence during the hearing.

Discovery Read-ins

[14] The second preliminary matter is related to the discovery read-ins proposed by the Respondent. Counsel for the Respondent proposed to read-in a number of excerpts from the discovery examination of the Appellant at the conclusion of the Respondent's case. The Respondent's position is simply that the provisions of Rule 100(1) of the *Tax Court of Canada Rules (General Procedure)* (the "*Rules*") allow the Respondent to read-in excerpts from the discovery examination of the Appellant.

[15] Subparagraph 100(1) of the *Rules* provides as follows:

> 100. (1) At the hearing, a party may read into evidence as part of that party's own case, after that party has adduced all of that party's other evidence in chief, any part of the evidence given on the examination for discovery of
>
> (*a*) the adverse party, or
>
> (*b*) a person examined for discovery on behalf of or in place of, or in addition to the adverse party, unless the judge directs otherwise,
>
> ***if the evidence is otherwise admissible***, whether the party or person has already given evidence or not.
>
> (emphasis added)

[16] It seems to me that the words "***if the evidence is otherwise admissible***" are an important qualification to the introduction of the discovery evidence. Counsel for the Respondent indicated that she wanted to introduce the excerpts because the answers that the Appellant provided at the hearing were inconsistent with the answers that he provided at the discovery examinations or he provided a more complete answer at the discovery examination (which seems to suggest that the Appellant was not telling the whole truth during his testimony at the hearing).

[17] Since the discovery excerpts would, if admitted, be introduced to impeach the witness, the question and answer provided during the discovery examination must be brought to the attention of the witness. Subparagraph 100(2) of the *Rules* provides that:

> (2) Subject to the provisions of the *Canada Evidence Act*, the evidence given on an examination for discovery may be used for the purpose of impeaching the testimony of the deponent as a witness in the same manner as any previous inconsistent statement by that witness.

[18] Subsection 10(1) of the *Canada Evidence Act* provides that:

> 10. (1) On any trial a witness may be cross-examined as to previous statements that the witness made in writing, or that have been reduced to writing, or recorded on audio tape or video tape or otherwise, relative to the subject-matter of the case, without the writing being shown to the witness or the witness being given the opportunity to listen to the audio tape or view the video tape or otherwise take cognizance of the statements, but, ***if it is intended to contradict the witness, the witness' attention must, before the contradictory proof can be given, be called to those parts of the statement that are to be used for the purpose of so contradicting the witness***, and the judge, at any time during the trial, may require the production of the writing or tape or other medium for inspection, and thereupon make such use of it for the purposes of the trial as the judge thinks fit.
>
> (emphasis added)

[19] In *Cholakis* v. *Cholakis*, [2006] 2 W.W.R. 229, Justice Beard of the Manitoba Queen's Bench dealt with the provisions of Rule 31.11 of the Queen's Bench Rules, which is the rule that permits a party to read-in any part of a discovery examination. Justice Beard stated that:

> 7 When an examination for discovery is used to impeach the credibility of the witness who was examined and who subsequently testifies during the trial, rule 31.11(2) states that the examination for discovery is used in the same manner as any other previous inconsistent statement. The use of a previous inconsistent statement to impeach the credibility of a witness is codified in s. 20 of the MEA, which requires that the witness be referred to those parts of the prior statement that are to be used for the purpose of contradicting him.
>
> …
>
> 11 To the extent that questions and answers from Paul's examination are being read in to impeach his credibility and were used for that purpose during cross-examination, they have already been read into the record and form part of the evidence on the issue of his credibility. Reading them in again would be unnecessarily repetitive and add nothing to the proceeding. To the extent that the questions and answers were not brought to Paul's attention on cross-examination, they cannot now be read in as they do not comply with the requirements of s. 20 of the MEA for use as a contradictory statement.

[20] In *International Corona Resources Ltd.* v. *LAC Minerals Ltd.*, [1986] O.J. No. 68, Justice Holland stated that:

> By reason of the provisions of the Evidence Act, set out above, it appears that counsel for Lac can only read in those parts of the examination for discovery of Mr. Bell and Miss Dragovan which are admissions and those parts that go to credibility so long as the provisions of the Evidence Act were complied with when the witness was in the box in connection with such parts.

[21] In *The Law of Evidence in Canada,* (Third Edition) by Justices Bryant, Lederman and Fuerst of the Superior Court of Justice for Ontario, (2009, LexisNexis), it is stated at page 1150 that:

> 16.153 A transcript of an examination for discovery is a special species of a previous statement. In civil cases, Rules of Court generally permit questions and answers to be read by a party adverse in interest as an admission.* When used as previous inconsistent statements to impeach the credibility of a party, it would appear that the statutory requirements must be complied with. Accordingly, if a party testifies, the opposite party is obliged to put the relevant passages from the examination for discovery to the party -- witness.*
>
> (* denotes footnote references that are in the original text but which have not been included)

[22] Counsel for the Respondent did not direct the Appellant's attention to the specific questions and answers from the discovery examination that the Respondent is stating were inconsistent with the testimony of the Appellant during the hearing, including any answers provided by the Appellant at the discovery examination that counsel for the Respondent claimed provided more details. The Appellant was not provided with an opportunity to explain why his answer at the discovery examination was different from his answer during the hearing. Since the Appellant's attention was not drawn to these excerpts prior to the proposed read-in of such excerpts, these excerpts cannot be read-in for the purpose of impeaching the witness and therefore, since no other purpose for reading-in such excerpts was identified by the Respondent, such excerpts cannot be read-in.

Assessment for Unremitted Source Deductions

[23] The Appellant was assessed as a director for amounts for which IL was assessed as unremitted source deductions. Subsection 153(1) of the *Income Tax Act* (the "*Act*"), for 2003 and 2004, provided in part as follows:

> 153. (1) Every person paying at any time in a taxation year
>
> > (*a*) salary, wages or other remuneration, other than amounts described in subsection 212(5.1),
> >
> > …
> >
> > shall deduct or withhold from the payment the amount determined in accordance with prescribed rules and shall, at the prescribed time, remit that amount to the Receiver General on account of the payee's tax for the year under this Part or Part XI.3, as the case may be, and, where at that prescribed time the person is a prescribed person, the remittance shall be made to the account of the Receiver General at a designated financial institution.

[24] The Appellant's position in relation to the assessment issued against him for the unremitted source deductions of IL is that IL did not have any employees and therefore should not have been assessed for unremitted source deductions. Although the Respondent, in the Reply, denied the allegation that IL did not have any employees, the basis for the assessment against IL was not that IL had employees but that IL paid the employees of ICC. The Appellant controlled IL and ICC.

[25] The first question in relation to the appeal itself that must be addressed is whether the assessment of IL for unremitted source deductions is correct. The Respondent acknowledged that, based on the decision of Chief Justice Rip in *Barry* v. *The Queen*, 2009 TCC 508, 2009 DTC 1339, [2010] 1 C.T.C. 2189, the Appellant could raise the issue of the correctness of the assessment of IL for the unremitted source deductions.

[26] In determining whether the assessment of IL was correct, it is necessary to determine whether IL was paying salaries or wages. Justice Teitelbaum in *Mollenhauer Ltd.* v. *Canada (Minister of National Revenue*, [1992] 2 C.T.C. 121, 92 DTC 6398 (F.C.T.D.) stated that:

> It is very clear that s. 153(1) of the Act does not speak of whether persons doing the paying are employers or not. I am satisfied that if a person or company is paying "salary or wages or other remuneration" it must deduct or withhold the required amount pursuant to the Income Tax Act.

[27] In *Marché Lambert et Frères Inc.* v. *The Queen*, 2008 DTC 3815, Justice Paris reviewed several cases in which the person making the payments to employees was not the employer. He stated his conclusions as follows:

> 17 First, I agree with the Appellant that the element of decision-making power with respect to the funds paid to the employees is determinative as to the application of subsection 153(1).
>
> 18 The relevant case law of the Federal Court of Appeal shows that a person is only liable under that subsection if it had decision-making powers over the payments to employees. In the case where a person physically makes the payments, but has no independent authority over the funds used to make them, that person is not liable to make remittances. In other words, if the person who makes the payments upon the directives of another person and not on his her own initiative, subsection 153(1) does not apply to him or her.
>
> …
>
> 33 In my opinion, that case law is clearly to the effect that a person will be held liable under subsection 153(1) if he or she has decision-making power as to the payments of wages made to employees. He or she will not be held liable if he or she pays wages or salaries as a mere conduit or as an agent of another person.

[28] Therefore while the person making the payments to employees need not be the employer to become liable for the source deductions, the person making the payments must have some decision making power with respect to the payment of the salaries or wages and not simply be making the payments as an agent of some other person (presumably the employer) in order to be liable to remit the required source deductions. If, however, the individuals who were paid were the employees of IL, then the assessment of IL for the unremitted source deductions would be correct.

[29] Since the Respondent denied the allegation that IL did not have any employees, the analysis of whether the assessment of IL for the unremitted source deductions is correct will be based on the following questions:

(a) Did IL have any employees?

(b) If IL did not have any employees, did it pay the employees of ICC?

(c) If IL did not have any employees and was paying the employees of ICC, was it doing so as the agent of ICC or did IL have any decision making power with respect to the payment of the salaries or wages?

Did IL Have any Employees?

[30] If the individuals who were paid salaries or wages were employees of IL, then the assessment of IL for the unremitted source deductions would be correct. Therefore this question must be addressed first.

[31] There are two related companies – ICC and IL. The Appellant owned the majority of the shares of ICC and all of the shares of IL. ICC was a construction company that encountered financial difficulties in 2002. It did not remit all of its source deductions as required. The Appellant invested $750,000 in the company in June 2002 but the company continued to struggle. As a result of the financial difficulties encountered by ICC, IL was formed in June 2003. IL managed construction projects. The Appellant described the activities of IL as follows:

> It would identify a project-management opportunity; it would negotiate a contract to manage that project for a fee; it would then hire a project manager or ask for Internorth Construction to assign a project manager to that project, in return for paying a fee to Internorth Construction to cover the overhead of this individual plus additional costs associated with the general overhead of Internorth Construction.

[32] The Appellant was adamant during his testimony that IL did not have any employees. The financial statements (which were identified as "DRAFT FOR DISCUSSION") for ICC and IL were presented during the hearing. The financial statements for ICC as at December 31, 2003 and the financial statements for IL as at December 31, 2003 were submitted by the Appellant in his book of documents as well as by the Respondent. The Appellant did not include financial statements for either company as at December 31, 2004 but these were included in the Respondent's book of documents. The Appellant did, however, include a draft balance sheet for IL as of April 30, 2004 and a draft Statement of Operations of IL for the period from June 5, 2003 to April 30, 2004.

[33] The year end financial statements of each company as presented are consistent with the statement that IL did not have any employees. These statements indicate that the following amounts were claimed by ICC and IL for salaries and benefits in 2003 and 2004:

	ICC	**IL**
Amount claimed for salaries and benefits in 2003	$1,365,516	0
Amount claimed for salaries and benefits in 2004	$410,160	0

[34] However, included in the Appellant's book of documents was a draft Statement of Operations for IL for the period from June 5, 2003 to April 30, 2004.

For some unexplained reason this statement shows an amount of $339,249 for salaries. Neither party referred to this statement and it seems to me that since this statement is inconsistent with the year end statements that were presented and inconsistent with the testimony of the Appellant, I do not give any weight to the inclusion of an amount for salaries in this Statement of Operations for IL which was prepared for the approximately 11 month period from June 5, 2003 to April 30, 2004.

[35] As noted by Associate Chief Justice Bowman (as he then was) in *VanNieuwkerk* v. *The Queen*, 2003 TCC 670, [2004] 1 C.T.C. 2577:

> 6 …. It has been said on many occasions in this Court that accounting entries do not create reality. They simply reflect reality. There must be an underlying reality that exists independently of the accounting entries.

[36] It seems to me that it is more likely than not that the Statement of Operations prepared for IL for the period from June 5, 2003 to April 30, 2004 did not reflect reality. It seems to me that it is more likely than not that the underlying reality was as reflected in the year end financial statements prepared for IL for 2003 and 2004 and as stated by the Appellant, i.e. that IL did not have any employees. As noted above, although the Respondent denied the allegation that IL did not have any employees, the basis upon which IL was assessed, as set out in the assumptions made by the Respondent, was not that IL had employees or that the employees of ICC became the employees of IL, but rather that IL paid the employees of ICC. As a result, I find that IL did not have any employees in 2003 or 2004.

Did IL pay the Employees of ICC?

[37] The assessment of IL for unremitted source deductions is based on the assumption that IL paid the employees of ICC. Paragraph 15 of the Amended Reply provides in part as follows:

> 15. In so determining the Appellant's tax liability pursuant to subsection 227.1(1), the Minister relied on the following assumptions of fact:
>
> …
>
> (c) Internorth Ltd. was incorporated on June 5, 2003;
>
> …
>
> (g) prior to June 5, 2003, Internorth Construction was paying its employees through two of its own payroll accounts;

(h) Internorth Construction stopped paying its employees through its own payroll accounts on June 5, 2003;

(i) starting on June 7, 2003, Internorth Ltd. started paying Internorth Construction's employees through its bank accounts;

(j) (deleted)

(k) Internorth Ltd. did not invoice Internorth Construction for the salaries and wages paid;

(l) Internorth Construction did not reimburse Internorth Ltd. for the salaries and wages paid to the employees from June 5, 2003 and thereafter;

[38] Justice Rothstein (as he then was), writing on behalf of the Federal Court of Appeal, in *The Queen* v. *Anchor Pointe Energy Ltd.*, 2003 DTC 5512 stated that:

> [23] The pleading of assumptions gives the Crown the powerful tool of shifting the onus to the taxpayer to demolish the Minister's assumptions. The facts pleaded as assumptions must be precise and accurate so that the taxpayer knows exactly the case it has to meet.

[39] No assumptions were made with respect to how IL would have financed the payment of the salaries and wages for the employees of ICC. Based on the assumptions as set out above, one obvious question is how did IL pay the employees of ICC if ICC did not reimburse IL? It seems to me that the only logical conclusion, based on the two assumptions that IL paid the employees of ICC and that ICC did not reimburse IL, is that the Minister assumed that IL was paying the employees of ICC from its own resources[1].

---

[1] In the Canadian Oxford Dictionary, 2nd edition, "reimburse" is defined as "repay (a person who has expended money)". Based on this definition, if ICC provided funds in advance to IL to allow IL to make the payments of salaries and wages to the employees of ICC, then it could be argued that ICC did not *reimburse* IL since IL was not funding the payment and then receiving funds from ICC. However, since "the facts pleaded as assumptions must be precise and accurate", if the Minister had assumed that ICC was advancing the money to IL to allow IL to pay the salaries and wages, then this assumption should have been clearly stated. In any event the Respondent did not lead any evidence to show how IL would have been able to pay the salaries or wages nor did the Respondent offer any possible explanation. If the Respondent would have alleged that ICC had advanced the funds to IL to allow IL to pay the salaries and wages, the onus of proof would have rested with the Crown. As noted by Justice Sharlow, writing on behalf of the Federal Court of Appeal in *The Queen* v. *Loewen*, 2004 FCA 146 in paragraph 11, "[i]f the Crown alleges a fact that is not among the facts assumed by the Minister, the onus of proof lies with the Crown".

[40] IL was only incorporated on June 5, 2003. It was not a company that had been carrying on business for several years and which would have had large reserves of capital to pay individuals who were not its employees. As of December 31, 2003 the only assets of IL (as stated on its balance sheet) were cash and accounts receivable of $1,220,125 in total. The balance sheet also indicates that IL had a deficit of $105,554 as it had total liabilities of $1,325,678 and share capital of $1.

[41] During the cross-examination of the Appellant, the following exchange took place between counsel for the Respondent and the Appellant:

> Q. Do you agree that the employees of Internorth Construction Company were paid by Internorth Limited, from -- and to be clear -- from June 7, 2003, going forward?
>
> A. I don't have any first-hand knowledge of that. I would -- the financial managers were paying the payroll and the bills and I believe that they were paying them through the Internorth Construction construction accounts, is my understanding. I don't think there was ever any sort of payroll account set up for Internorth Limited, but there were payroll accounts for Internorth Construction. So that was my understanding.
>
> Q. So it's your understanding that Internorth Limited did not pay Internorth Construction's employees from June 7, 2003 going forward?
>
> A. It was my -- the understanding, the generation of the funds we were administering. Internorth Limited, the understanding was that Internorth Limited would administer the payroll accounts on behalf of Internorth Construction and make those payments, you know, based on their -- providing the information as it related for the -- as it related to the payment of payroll.
>
> Q. So when you say Limited, so Internorth Limited would make the payments. So does that mean that employees were paid through Limited's bank accounts?
>
> A. I don't know that they were. I understood it to be paying the obligations of Internorth Construction by whatever process. As I understood it, the payments were made. The funds were made available to pay the payroll and that the documentation, as far as I know, Internorth Limited never had any employees and never issued any T4s or anything to any employees.
>
> So it's my understanding that we were helping to administer the process with the obligations to Internorth Construction as far as payroll was concerned.
>
> Q. I understand that, but who paid the employees from June 7, 2003, going forward? Not the subcontractors.

A. It could have been Internorth Limited had issued cheques on behalf of Internorth Construction to pay the employees, yes. That could be the case.

Q. Do you have any evidence that would suggest or prove that Internorth Construction actually paid those employees from June 7, 2003 going forward?

A. No, that is what I have been asking for --

[42] Based on this exchange it is not clear how the employees of ICC were paid. As part of the Appellant's documents the Appellant submitted two schedules that appear to have been prepared for a meeting with the Canada Customs and Revenue Agency (as they were then) on June 22, 2004. These schedules identify the cash deposited in the bank accounts of IL and ICC during the period from January 1, 2003 to May 31, 2004. The Appellant stated that these schedules indicated the total amounts deposited to these bank accounts. During this period the following amounts were identified as being deposited in these bank accounts:

Total amount deposited in the bank account of ICC:	$7,379,250
	+ $412,805
	= $7,792,055
Total amount deposited in the bank account of IL:	$540,547
	+ $2,527,116
	= $3,067,663

[43] The financial statements for ICC and IL for 2003 and 2004 indicate the following amounts of revenue for each company:

	ICC	**IL**
Revenue reported for 2003	$22,361,741	$2,724,625
Revenue reported for 2004	$241,724	$1,589,776

[44] The revenue would be reported on an accrual basis. However, with combined revenue of more than $25 million in 2003 for both companies, why were the total bank deposits for 2003 and the first five months of 2004 less than one-half of this amount? This does raise questions but does not establish that IL paid the employees of ICC. Since the Minister has assumed that ICC did not reimburse IL for any salaries that it may have paid, in the absence of any other evidence, it will be assumed that any revenue of ICC collected in excess of the deposits referred to above was either deposited in the bank account of ICC or in the bank account of IL as

payment of some expense other than salaries or wages. As well, the bank deposits identified for IL for the period from January 1, 2003 to May 31, 2004 were $3,067,663 while the total revenue for IL for 2003 and 2004 (which is a longer period of time) was $4,314,401. It therefore seems reasonable that the amount identified as the amount deposited in the bank account for IL would represent its revenue that it had collected during the period from January 1, 2003 to May 31, 2004.

[45] The financial statements for IL indicate that for 2003 (which is only part of the period covered by the above bank deposit schedule) the total revenue of IL was $2,724,625 and its cost of sales was $2,697,125. Therefore the revenue being generated by IL was only $27,500 more than its cost of sales and not sufficient to pay the employees of ICC.

[46] In *House* v. *The Queen*, 2011 FCA 234, Justice Nadon, writing on behalf of the Federal Court of Appeal, stated that:

> 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 (in this case, that Hunt River held at the end of taxation year 2002 a long-term investment of $305,000, which it transferred to the appellant in 2003).
>
> 5. If the Minister fails to adduce satisfactory evidence, the taxpayer will succeed.
>
> …
>
> 57 In my view, the Associate Chief Justice made two errors of law. First, he confused the appellant's initial onus to "demolish" the Minister's assumptions with the overall burden resting on the parties to prove their respective cases. Second, he erred in failing to consider Mr. Cole's evidence. Had he considered Mr. Cole's evidence, as he was bound

> to, he would necessarily have concluded, in my view, that the appellant had made a *prima facie* case "demolishing" the Minister's assumptions. In *Amiante Spec Inc. v. Canada*, 2009 FCA 139, [2009] F.C.J. 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).

[47] It seems to me that the Appellant has raised a *prima facie* case that IL did not pay the employees of ICC. There was not enough money deposited into the bank account of IL to pay its cost of sales and the employees of ICC. While there appears to have been more revenue generated by ICC and IL than what is reflected in the bank deposit schedules, it appears that the additional revenue was revenue of ICC and since the Minister has assumed that ICC did not reimburse IL for any salaries or wages paid by IL, in my opinion the Appellant has raised a *prima facie* case that IL did not pay the employees of ICC as IL would not have had the financial resources to make such payments.

[48] The only evidence presented by the Minister was a copy of the report prepared by the officer for the Canada Revenue Agency who determined that IL should be assessed for the source deductions commencing June 5, 2003. The person who prepared the report did not testify as he was no longer working for the Canada Revenue Agency. In the report it is stated that:

> Following a review of the books and records, it was determined that all payroll activity has been routed through Internorth Ltd since June 7, 2003 (RP0001 and RP0002). The business was experiencing financial difficulties and a number of creditors had taken legal action against Internorth Construction Company. The business was unable to pay its employees from the bank account of Internorth Construction Company and began paying from the account of Internorth Ltd.
>
> As a result, the payroll of Internorth Construction Company ceased on June 6, 2003 and the payroll of Internorth Ltd commenced on June 7, 2003. The assessments raised on the associated accounts of Internorth Construction Company will be cancelled and raised on the subject payroll accounts. The 2003 T4’s filed on the associated accounts will be deleted and replaced by new T4’s reflecting the earnings and deductions from January to June 2003 on Internorth Construction Company and from June to December 2003 on Internorth Ltd.

[49] There is no indication of what books and records were actually reviewed nor were any of the books and records that were apparently reviewed introduced at the hearing. It seems to be the position of the Respondent that I should conclude that IL paid the employees of ICC without hearing from the person who made this determination and without reviewing the documents that were reviewed and which led to this determination. Without reviewing the documents that led to the conclusions as stated above it is impossible to determine whether I would reach the same conclusion. As well, the officer, who wrote the report, referred to the payroll activity being "routed" through IL and in the last sentence of the first paragraph indicates that the "business … began paying from the account of [IL]". This seems to suggest that ICC was still paying the employees but simply "routing" the funds through an account of IL which implies that IL was only the agent to deliver payment. Even if I were to accept the statements of the officer it does not appear that an assessment of IL could be supported as IL would not be liable for source deductions if it was simply acting as the agent of ICC in paying the employees of ICC (*Marché Lambert et Frères Inc., supra*).

[50] Counsel for the Respondent indicated that there were no documents in the file of the Canada Revenue Agency. The absence of documents means that the Respondent was unable to produce any evidence to rebut the Appellant's *prima facie* case that IL did not pay the employees of ICC.

[51] If IL did pay the salaries or wages of the ICC employees and ICC did not reimburse IL, then either IL paid the salaries or wages from its own resources or someone else financed such salaries or wages. It seems clear that IL would not have had sufficient resources to pay such salaries or wages (which for 2004 would have been $410,160) unless it received the funds from someone else. There is no indication that there was any other person who would finance the salaries or wages of the ICC employees. As a result either the assumption that IL paid the employees of ICC is wrong or the assumption that ICC did not reimburse IL is wrong. Since the Respondent made the assumption that ICC did not reimburse IL, the Appellant did not have to challenge this assumption but could rely on it to dispute the other assumption that IL paid the employees of ICC.

[52] In my opinion the Appellant has raised a *prima facie* case that the assumption that IL paid the employees of ICC is incorrect. The onus would then shift to the Respondent to introduce evidence to support this assumption that IL paid the employees of ICC. The Respondent has not submitted satisfactory evidence to rebut this *prima facie* case.

[53] As a result, the Appellant will succeed in relation to the question of whether IL paid the employees of ICC and I find that IL did not pay the employees of ICC. As a result, since IL did not pay any salaries or wages, IL would not have any liability for source deductions and the assessment of the Appellant as a director of IL is vacated.

[54] Since IL did not pay the employees of ICC, the third question posed above is not relevant. However, as noted above, based on the report of the officer for the Canada Revenue Agency, it would appear that even if the bank account of IL was being used to pay the employees of ICC, that IL may have been simply acting as the agent of ICC in delivering payment to the employees of ICC. As noted above, a person who simply acts as an agent of an employer in paying the employees of that employer is not liable for the unremitted source deductions in relation to the amounts paid to such employees.

[55] Since the Appellant has successfully challenged the underlying assessment of IL, the issue of whether the Appellant exercised the required due diligence is not relevant.

[56] As a result the Appellant's appeal is allowed, with costs, and the assessment of the Appellant as a director of IL for the unremitted source deductions, penalties and interest for which IL was assessed, is vacated.

Signed at Halifax, Nova Scotia, this 20th day of January 2012.

"Wyman W. Webb"

Webb J.

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