Docket: 2011-4027(IT)I

BETWEEN:

GEORGIOS (GEORGE) PRIFTIS,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

Appeals heard on September 7, 2012, at Toronto, Ontario.

Before: The Honourable Justice François Angers

Appearances:

For the Appellant:	The Appellant himself
Counsel for the Respondent:	Rishma Bhimji

JUDGMENT

The appeals from the assessments made under the *Income Tax Act* in respect of the 2001, 2002 and 2003 taxation years are allowed in accordance with the attached Reasons for Judgment.

Signed at Ottawa, Canada, this 5th day of December 2012.

"François Angers"

Angers J.

Citation: 2012 TCC 414
Date: 20121205
Docket: 2011-4027(IT)I

BETWEEN:

GEORGIOS (GEORGE) PRIFTIS,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

REASONS FOR JUDGMENT

Angers J.

[1] The appellant was assessed on July 15, 2010 pursuant to section 227.1 and subsection 227(10) of the *Income Tax Act* (the *Act*) with regard to the liability of his corporation, Acrontech Inc. (the Corporation), for unremitted Canada Pension Plan (CPP) deductions together with penalties and interest, in respect of the 2001, 2002 and 2003 taxation years.

[2] At all material times, the appellant was a director of the Corporation as well as its president and secretary treasurer. He was the decision-maker for the Corporation and the person responsible for source deductions and corporate returns, although the Corporation had an accountant until 1998. At that time, the Corporation was experiencing financial difficulties and from then on, the appellant had to do everything himself. He was aware at all times that a director was responsible for the remittance of source deductions.

[3] In 2001 and 2002, the Corporation's activities were conducted out of the appellant's home and were somewhat limited, involving the resale of certain computer programs. During those two years, the Corporation paid money to the appellant which the appellant considered to be repayments of shareholder loans he had made to the Corporation and as such not subject to any source deductions, including CPP deductions.

[4] The Corporation was later audited for unremitted CPP contributions for 2001, 2002 and 2003 and assessed with respect to an approximate total of $100,000 in pensionable earnings received from the Corporation. That assessment was appealed before this Court on the basis that the amount in question represented shareholder loan repayments to the appellant. The Corporation eventually settled its appeal by consenting on March 2, 2007 to a judgment stating that the Corporation actually paid pensionable earnings of $23,277 in 2001, $11,800 in 2002 and nil in 2003. The appellant says it was a complicated case but he agreed to settle on those terms. The Minister of National Revenue (the Minister) subsequently issued a reassessment to the Corporation but was unable to collect any amount.

[5] A certificate for the amount of the Corporation's liability for unremitted source deductions, penalties and interest was registered in the Federal Court of Canada under subsection 223(2) of the *Act* on October 2, 2009. Execution for those amounts was returned unsatisfied.

[6] The Corporation was dissolved on July 15, 2008. On July 15, 2010, the Minister assessed the appellant for director's liability with respect to the failure by the Corporation to remit the CPP deductions. The appellant filed a notice of objection and the Minister later confirmed the assessment, hence this appeal. The respondent filed the Reply to the Notice of Appeal after the time limit prescribed in subsection 18.16(1) of the *Tax Court of Canada Act*.

[7] This case raises the following issues:

1 - Was the appellant assessed within the time prescribed in subsection 227.1(4) of the *Act*?

2 - Did the appellant exercise the degree of care, diligence and skill to prevent the failure by the Corporation to remit CPP deductions that a reasonably prudent person would have exercised in comparable circumstances?

3 - In the context of the due diligence defence of subsection 227.1(3) of the *Act*, what are the consequences of the fact that the Crown filed its Reply to the Notice of Appeal after the expiration of the time limit specified in subsection 18.16(1) of the *Tax Court of Canada Act*?

[8] The first issue was raised in the appellant's Notice of Appeal, in which he states that he was personally assessed for the aforementioned unpaid deductions two years after the Corporation had been dissolved and he had ceased to be a director. The appellant is correct in saying that he ceased to be a director on the day that the Corporation was dissolved (see *Canada v. Aujla*, 2008 FCA 304). The limitation period under subsection 227.1(4) is set out as follows in that provision:

> No action or proceedings to recover any amount payable by a director of a corporation under subsection 227.1(1) shall be commenced more than two years after the director last ceased to be a director of that corporation.

[9] Pursuant to subsection 27(5) of the *Interpretation Act (Canada)*, the two-year limitation period referred to above does not include the day that the director ceased to be a director. That question was considered in *Larocque (R.L.) v. M.N.R.*, [1991] 2 C.T.C. 2151 at page 255:

> The issue of this assessment being launched after the two-year limit defined in subsection 227.1(4) of the Act is quickly settled by reference to the time period involved. The resignation of the directors was accepted as being January 26, 1987, while the assessment to recover amounts owing was on January 26, 1989. While the appellants' argument that there cannot be three January 26ths in a two-year period may seem correct in order to determine a legal period of time reference may be made to the *Interpretation Act*, R.S.C. 1985, c. I-21. There subsection 27(5) provides:
>
> > Where anything is to be done within a time after, from, of or before a specified day, the time does not include that day.
>
> Hence in this case by discarding the one January 26, the time limitation in the statute has not been breached.

[10] The Minister therefore had until July 15, 2010 to assess the appellant, which is the day that the appellant was in fact assessed.

[11] The second issue is whether the appellant exercised the degree of care, diligence and skill to prevent the failure to remit the CPP deductions that a reasonably prudent person would have exercised in comparable circumstances.

[12] In two recent decisions of the Federal Court of Appeal (*Balthazard v. Canada*, 2011 FCA 331, and *Canada v. Buckingham*, 2011 FCA 142), Justice Mainville dealt with the legal framework applicable to the care, diligence and skill defence. In *Balthazard*, he summarized that framework as follows at paragraph 32:

a. The standard of care, skill and diligence required under subsection 323(3) of the *Excise Tax Act* is an objective standard as set out by the Supreme Court of Canada in *Peoples Department Stores Inc.(Trustee of) v. Wise*, 2004 SCC 68, [2004] 3 S.C.R. 461. This objective standard has set aside the common law principle that a director's management of a corporation is to be judged according to his or her own personal skills, knowledge, abilities and capacities. However, an objective standard does not mean that a director's particular circumstances are to be ignored. These circumstances must be taken into account, but must be considered against an objective "reasonably prudent person" standard.

b. The assessment of the director's conduct, for the purposes of this objective standard, begins when it becomes apparent to the director, acting reasonably and with due care, diligence and skill, that the corporation is entering a period of financial difficulties.

c. In circumstances where a corporation is facing financial difficulties, it may be tempting to divert these Crown remittances in order to pay other creditors and thus ensure the continuity of the operations of the corporation. That is precisely the situation which section 323 of the *Excise Tax Act* seeks to avoid. The defence under subsection 323(3) of the *Excise Tax Act* must not be used to encourage such failures by allowing a care, diligence and skill defence for directors who finance the activities of their corporation with Crown monies, whether or not they expect to make good on these failures to remit at a later date.

d. Since the liability of directors in these respects is not absolute, it is possible for a corporation to fail to make remissions [*sic*] to the Crown without the joint and several, or solidary, liability of its directors being engaged.

e. 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 amounts at issue.

[13] The same standard applies under subsection 227.1(3) of the *Act*.

[14] The issue of when the standard must be applied to the failure to remit was raised at trial by the respondent. The question was whether it should apply to the Corporation's initial failure to remit CPP contributions as required in 2001 and 2002 or whether it should apply to the Corporation's failure to remit after it was assessed for those contributions and after it consented to judgment in 2007. The respondent's Reply to the Notice of Appeal indicates that the appellant is liable in respect of the Corporation's initial failure to remit CPP contributions as required in 2001 and 2002 and no other. I will leave the matter as it stands in the pleadings.

[15] Subsection 21.1(1) of the *Canada Pension Plan* (*CPP)* renders a director liable for a corporation's failure to deduct or remit an amount at the time the failure occurred. Subsections 21.1(1) and (2) read as follows:

> 21.1 (1) If 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 or solidarily liable, together with the corporation, to pay to Her Majesty that amount and any interest or penalties relating to it.
>
> (2) 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).

[16] The appellant has been the director of the Corporation since 1987. He attended Ryerson University for two years and was the decision-maker for the Corporation. Up until it began to experience financial difficulties in 1998, the Corporation had an accountant and the appellant was assisted by a bookkeeper in preparing corporate returns.

[17] In 2001 and 2002, he managed the Corporation's business out of his home. The appellant believed that the amounts of money taken out of the Corporation were not salary but rather were shareholder's loan repayments and that, consequently, the Corporation did not need to remit CPP deductions on those amounts.

[18] When the Corporation settled out of court in 2007, the appellant was not aware that the Corporation would have to pay anything as a result of the consent. He was aware, though, that by virtue of his consenting to judgment the amounts agreed to became income in his hands. He did not understand that this would make him an employee and that the Corporation would have to remit CPP deductions.

[19] In order for a director to become jointly and severally liable with an employer corporation, to pay an amount of CPP deductions under subsection 21(1) of the CPP, the employer corporation must have failed to deduct or remit such an amount. In our fact situation, the appellant's credibility is not at issue. In 2001 and 2002, the Corporation was indeed paying back shareholder's loans to the appellant and, as a consequence, it did not have to deduct or remit CPP contributions as no salaries were paid in either of those years. The Corporation therefore did not fail to remit CPP deductions as and when required in those years and, in my opinion,

subsection 21.1(1) of the *CPP* has no application in that the appellant director cannot be held jointly and severally liable with the Corporation as no failure occurred.

[20] The out-of-court settlement reached in 2007 was a compromise or an amicable solution to a complex problem for the Corporation and it chose to settle on those terms. I do not consider the out-of-court settlement as an admission of any failure by the Corporation to remit or deduct amounts that should have been remitted or deducted in 2001 and 2002. The appellant only understood that the consequence of the out-of-court settlement was to make him liable to pay income tax on the agreed amounts. What the appellant did not understand was that the settlement made the Corporation liable for the remittance of the CPP deductions for 2001 and 2002. Indeed, his belief at that time was that the Corporation was not liable to deduct or remit anything. Such a situation makes it impossible for a director to avail himself of the defence of due diligence, for how could the appellant have been diligent in preventing a failure by the Corporation when the Corporation firmly believed that it did not fail to deduct and remit CPP contributions?

[21] I repeat that the appellant's credibility is not in issue. I do agree that his business experience dictates that he would have had knowledge of the Corporation's obligations to deduct CPP contributions from its employee's salary and to remit those contributions and of a director's obligation to make sure that the remittances are made by the Corporation, and it appears that the Corporation met this legal obligation prior to 2001 and 2002. If the Corporation and its director were of the belief that no salary was paid in 2001 and 2002, there was no failure to deduct or remit and no reason to be diligent in ensuring that deductions and remittances were made.

[22] I accept the appellant's explanation that he thought the amounts he received were shareholder's loan repayments so that the Corporation had no CPP deductions to remit, and that he, as a director, had no reason to be diligent or to exercise the requisite degree of care when, to his mind, no obligation of the Corporation to remit existed.

[23] That being said, I will still deal with the issue of the consequences, in this case, of the fact that the Reply to the Notice of Appeal was filed after the deadline imposed by subsection 18.16(1) of the *Tax Court of Canada Act*. In the present case, the appellant did not consent to an extension of time nor did the respondent apply to this Court for permission to file the Reply beyond the prescribed 60-day time limit. On the other hand, subsection 18.16(4) does not prevent the Minister from filing a Reply late, but it does spell out the consequences of doing so. The relevant subsections read as follows:

> 18.16 (1) The Minister of National Revenue shall file a reply to a notice of appeal within sixty days after the day on which the Registry of the Court transmits to that Minister the notice of appeal unless the appellant consents, before or after the expiration of the sixty day period, to the filing of that reply after the sixty day period or the Court allows the Minister, on application made before or after the expiration of the sixty day period, to file the reply after that period.
>
> . . .
>
> (4) The Minister of National Revenue may file a reply to a notice of appeal after the period limited under subsection (1) or (3), as the case may be, and where that Minister files the reply after that period or after the extension of time consented to by the appellant or granted by the Court, the allegations of fact contained in the notice of appeal are presumed to be true for the purposes of the appeal.

[24] What subsection (4) basically does is shift the onus of proof to the respondent, who must then prove her case against the appellant, and the facts alleged in the Notice of Appeal are presumed to be true.

[25] In *Hartrell v. Canada*, 2008 FCA 59, at paragraph 3, the Federal Court of Appeal held that the existence of a due diligence defence is a question of mixed fact and law. In order for a finding to be made that a due diligence defence has been established, the application of a legal standard to a set of facts is required. Thus, facts that are presumed to be true and are not rebutted may assist a taxpayer in making out a defence of due diligence. It may be, though, that in certain circumstances the existence of a factual presumption may not be sufficient and that the ultimate persuasive burden may rest on the taxpayer, who must prove due diligence.

[26] In *Buckingham, supra*, at paragraph 33, the Federal Court of Appeal held that the burden is on the director to prove the existence of the required diligence:

> [33] . . . Subsection 227.1(3) of the *Income Tax Act* and subsection 323(3) of the *Excise Tax Act* do not set out a general duty of care, but rather provide for a defence to the specific liability set out in subsections 227.1(1) and 323(1) of these respective Acts, and the burden is on the directors to prove that the conditions required to successfully plead such a defence have been met. The duty of care in subsection 227.1(3) of the *Income Tax Act* also specifically targets the prevention of the failure by the corporation to remit identified tax withholdings, including notably employee source deductions. Subsection 323(3) of the *Excise Tax Act* has a similarly [*sic*] focus. The directors must thus establish that they exercised the degree of care, diligence and skill required "to prevent the failure". The focus of these provisions is clearly on the prevention of failures to remit.

[Emphasis added.]

[27] In his Notice of Appeal, the appellant alleges certain facts relating to his diligence in preventing the failure of the Corporation to remit CPP contributions. In the fifth, sixth and seventh unnumbered paragraphs, the appellant alleges the following:

> Under the Income Tax Act 227.1(3) and because the original 2004 assessments were not in respect of straight salary, the shareholders had thought the amount[s] taken out of Acrontech Inc. (the subject corporation) were something other than salaries. We thought that they were loan repayments to shareholders. This was a complex matter especially when we (the two related shareholders) had lent funds to Acrontech Inc. and I was simultaneously operating two related corporations with funds flowing in and out of them. As a result, the corporation didn't pay CPP on these amounts.
>
> The fact that CRA disagreed and I eventually settled doesn't mean that I was not diligent. As a layperson I understood that these amounts were not "CPPable" and so the corporation didn't take any deductions. When I settled the matter with CRA and confirmed that only some part was CPPable, this at least justified my initial position and shows that I was diligent.
>
> I therefore feel that I have acted responsibly, diligently and under these circumstances I (as a director) could not have prevented the corporation's failure to remit. Hence, I don't think that I am personally liable for this amount.

[28] What the appellant is saying is that he is a layperson, that he did not believe in 2001 and 2002 that certain payments to shareholders were pensionable earnings for CPP purposes, that the Corporation settled on the basis that only some of them were a dispute with the Canada Revenue Agency with respect to whether those payments were pensionable earnings, and that the settlement justifies his initial belief that the payments were not pensionable earnings.

[29] Not only must I presume that these facts are true but they were also repeated by the appellant under oath. I do not find that the respondent has met her burden in this case. I therefore conclude that, if the defence of due diligence were applicable, the appellant's presumed facts and his evidence at trial would support that defence.

[30] The appeal is allowed.

Signed at Ottawa, Canada, this 5th day of December 2012.

"François Angers"

Angers J.

CITATION:	2012 TCC 414
COURT FILE NO.:	2011-4027(IT)I
STYLE OF CAUSE:	Georgios (George) Priftis and Her Majesty the Queen
PLACE OF HEARING:	Toronto, Ontario
DATE OF HEARING:	September 7, 2012
REASONS FOR JUDGMENT BY:	The Honourable Justice François Angers
DATE OF JUDGMENT:	December 5, 2012

APPEARANCES:

For the Appellant:	The Appellant himself
Counsel for the Respondent:	Rishma Bhimji

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