

Docket: 2011-3520(IT)G

BETWEEN:

DANDAN QIAN,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

Appeal heard on June 27, 2013, at Vancouver, British Columbia.

Before: The Honourable Justice Réal Favreau

Appearances:

For the Appellant: The Appellant herself
 with Mr. Zhai Fu (a mandarin interpreter)
Counsel for the Respondent: Marcel Prevost

JUDGMENT

The appeal against assessment no. 1085086 dated July 15, 2010 made by the Minister of National Revenue under the *Income Tax Act* is allowed with costs and the assessment is vacated.

Signed at Ottawa, Canada, this 5th day of December 2013.

"Réal Favreau"

Favreau J.

Citation: 2013 TCC 386
Date: 20131205
Docket: 2011-3520(IT)G

BETWEEN:

DANDAN QIAN,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

REASONS FOR JUDGMENT

Favreau J.

[1] This is an appeal against an assessment dated July 15, 2010 bearing number 1085086 (the “Assessment”) made by the Minister of National Revenue (the “Minister”) under subsection 227.1(1) of the *Income Tax Act*, R.S.C. 1985, c. 1 (5th Supp.), as amended (the “Act”).

[2] By way of the Assessment, the Minister assessed the appellant, as director of Goldstaff Personnel Inc. (“Goldstaff”), for unpaid federal income tax, provincial income tax, Canada Pension Plan contributions and employment insurance premiums deducted from salaries and wages paid to the employees of Goldstaff (collectively the “source deductions”) and for interest and penalties payable by Goldstaff for the 2008 and 2009 taxation years in the amount of \$110,578.66.

[3] In determining the appellant’s liability as a director of Goldstaff, the Minister assumed the following facts, set out in paragraph 11 of the Reply to the Notice of Appeal:

- a) the facts admitted above;
- b) Goldstaff was incorporated under the British Columbia *Company Act*, under the number BC0807380 on November 1, 2007; (admitted)

- c) Goldstaff was originally registered under the company name of 0807380 B.C. Ltd., and changed its name on November 23, 2007; (admitted)
- d) Goldstaff carried on business as a staffing agency; (admitted)
- e) the Appellant was employed by Goldstaff as an accountant in November 2007; (admitted)
- f) the Appellant became a director of Goldstaff on June 15, 2008; (admitted)
- g) at all material times, the Appellant was a director and shareholder, and performed accounting for Goldstaff; (admitted)
- h) at all material times, the Appellant regularly participated in telephone meetings with the other directors of Goldstaff; (denied as written)
- i) from June 15, 2008, the Appellant knew or ought to have known that Goldstaff was in financial difficulties; (denied)
- j) Goldstaff was required to withhold source deductions from the remuneration it paid to its employees; (admitted)
- k) Goldstaff failed to remit as and when required the source deductions it withheld from the remuneration it paid to some of its employees; (admitted)
- l) at all material times, the Appellant knew or ought to have known that Goldstaff had failed to remit to the Receiver General as and when required all of the source deductions it withheld from the remuneration it paid to some of its employees; (admitted)
- m) the Appellant failed to take positive steps to ensure that the source deductions were being remitted to the Minister; (denied)
- n) Goldstaff failed to remit to the Receiver General source deductions it withheld from the remuneration it paid to some of its employees for the 2008 and 2009 taxation years, as detailed in Schedule "A", attached hereto and forming part of this Reply; (admitted)
- o) on April 8, 2010, Goldstaff owed the Receiver General source deductions and interest, of not less than \$123,106.16; (admitted)
- p) on April 22, 2010, a Certificate for Goldstaff's liability in the amount of \$123,106.16 plus interest was registered in the Federal Court under section 223 of the *Act*; and (admitted)

- q) Goldstaff's liability relating to the above-noted Certificate was returned unsatisfied in whole on June 21, 2010. (admitted)

[4] The issue to be decided is whether the appellant exercised the degree of care, diligence and skill to prevent the failure to remit the amount of the source deductions as required by Goldstaff that a reasonably prudent person would have exercised in comparable circumstances.

[5] The appellant testified at the hearing with the assistance of a Mandarin interpreter. She essentially confirmed the relevant material facts that were submitted to the Canada Revenue Agency's (the "CRA") Appeals Officer by her solicitor in a letter dated May 4, 2011. The relevant material facts, as set out in the May 4, 2011 letter sent by Ms. Kathy Wang of McMillan LLP to Mr. J.P. Mise of the CRA Appeals Division are as follows:

1. The Taxpayer immigrated to Canada in July 2004. She holds a bachelors degree in engineering and previously worked as an engineer in China. Upon immigrating to Canada, the Taxpayer encountered great difficulties in finding a job. She attended the British Columbia Institute of Technology ("BCIT") full time for one year to learn basic accounting in the hopes of finding employment opportunities in this field.
2. The Taxpayer joined Goldstaff as an accountant in November 2007. Prior to this, she had been employed as a junior accountant for less than a year but had lost the job. This had been her only work experience in Canada up to this point. The Taxpayer did not and does not presently hold any accounting designations (i.e. CA, CGA, CMA).
3. As a condition of her employment, the Taxpayer was effectively required to purchase shares in Goldstaff. Despite her limited financial means, she purchased 5% of the shares of Goldstaff for an investment of \$1,250 because she could only secure her job by doing so.
4. As noted in the Notice of Objection, the directors, officers and shareholders of Goldstaff in November 2007 were:
 - a. Rachel Stafford ("**Stafford**")
President, CEO, and director
40% ownership
 - b. John Goldsmith ("**Goldsmith**")
Director
30% ownership

- c. Tanya Shewchuk (“**Shewchuk**”)
25% ownership
 - d. The Taxpayer
5% ownership
5. In June 2008, Goldsmith resigned as a director of Goldstaff. He owned 30% of the shares of Goldstaff and stated that he wanted to sell his shares or would otherwise close the Vancouver office. Under pressure from Stafford and Shewchuk, the Taxpayer reluctantly agreed to purchase another 10% interest in Goldstaff for \$2,500, believing that failure to do so would render her unemployed.
6. Around the same time, the Taxpayer's manager, Stafford, asked the Taxpayer and Shewchuk to become a director of Goldstaff following the resignation of Goldsmith because Stafford did not want to be the sole director. At this point, the Taxpayer had been in Canada for less than four years. She had never served as a director or officer and lacked full understanding of what the position entailed. She possessed no previous business or management experience outside of her work experience as an accountant. However, fearing that her job was in danger, she consented to become a director on June 15, 2008. Shewchuk also consented to become a director around the same time.
7. During her tenure as a director of Goldstaff, the Taxpayer's duties remained limited to her pre-existing duties as Goldstaff's accountant. At times she also assumed the duties of the office receptionist, who had been laid off. She was never informed of nor attended any meetings of the directors and did not sign or consent to any corporate acts in her capacity as a director. Furthermore, she lacked the ability to exercise any management or control over the conduct of business affairs of Goldstaff as this remained in the hands of Stafford. She came to realize that she effectively had no realistic scope to exercise the normal duties of a director. The Taxpayer's lack of control or influence over Stafford is evidenced in the following:
- a. Stafford was solely responsible for determining the hiring, work hours, salary, training for all staff;
 - b. On numerous occasions, the Taxpayer suggested that changes be made to ensure the continuing viability of the Goldstaff business, including setting personal targets for sales staff, curtailing extra commissions, reducing staff salaries, including her own salary. However, she had no power or influence over Stafford's decision-making and lacked any authority to effect any changes;
 - c. Stafford alone decided to hire Doreen Thibault, an ex-employee who had previously been laid off, and she was able to do so despite the protests of

the Taxpayer and Shewchuk that Ms. Thibault added no value to Goldstaff and had a history of poor performance.

8. Goldstaff employed both temporary and regular staff and a system was in place for payroll deductions and remittance.
 - a. Regular staff payroll was processed through ADP, which automatically made the source deductions and remitted same to the CRA on a bi-monthly basis. Since ADP fully remitted the source deductions for Goldstaff's regular staff, the arrears presently in dispute should relate only to payroll deductions for the temporary staff.
 - b. Payroll deductions and remittances for temporary staff were done manually. The Taxpayer prepared a cash flow report daily containing all outstanding payables. This was sent to Stafford who then advised as to who should be paid. Once the payees were confirmed, the Taxpayer prepared the cheques which were then signed by Stafford. Goldstaff's policy was that all payments must be authorized by Stafford. This was communicated to the Taxpayer on her first day of employment and the practice continued until her termination. The Taxpayer did not have authority at any time to make direct payments to any of the anticipated payees, including the CRA.
9. Following various changes in personnel and the downturn in the economy, Goldstaff began to experience financial difficulties in August 2008. At around this time, Goldstaff began to experience problems in making its payroll remittances.
10. In order to monitor Goldstaff's financial situation and to alert Stafford of Goldstaff's financial responsibilities, including its responsibility to make remittances to the CRA, the Taxpayer prepared daily cash flow reports for Stafford and Shewchuk, which included all outstanding source deductions and their due dates. A copy of a sample cash flow report is attached to this letter. When a source deduction became due, the Taxpayer always requested payment authorization from Stafford, who consistently refused to provide the required authorization. On a daily basis, the Taxpayer advised the Stafford and Shewchuk verbally and through e-mail of the source deductions due to the CRA. The Taxpayer did not have authority to make the payments herself.
11. Realizing that she was unable to convince Stafford to give authorization to make the remittances and to make other changes to the business, the Taxpayer enlisted the help of Shewchuk (who acted as the Branch Manager of Goldstaff's Edmonton office) by telephoning her numerous times to explain Goldstaff's financial situation and the daily cash flow reports. Together, they pleaded with Stafford to reduce all of their salaries, including Goldstaff's payment of commissions, car allowance and RRSP contributions

for Stafford in order to enable Goldstaff to make its remittances. At all relevant times, Stafford refused to authorize the suggested changes.

12. After finally realizing that she had no influence over Stafford's continued mismanagement of Goldstaff's business conduct and failure to meet its tax liabilities even with the help of Shewchuk, the Taxpayer resigned as a director on February 26, 2009. Shewchuk resigned on February 28, 2009.

[6] No one testified on behalf of the appellant to corroborate her version of the facts. Ms. Stafford had accepted to testify at the hearing but, on the date of hearing, she could not make it as she was very sick fighting a cancer in terminal phase. Mr. Mark Sheaffer, a former employee of Goldstaff had also agreed to testify but, on the date of the hearing, he was in Australia. He sent an e-mail which was not admissible in Court as it was not part of the appellant's list of documents.

[7] In terms of documentary evidence, the appellant filed in Court a Shareholders' Agreement of Goldstaff dated November 30, 2007 (Exhibit A-1) to which was attached a copy of the opening balance sheet of Goldstaff as of November 21, 2007. This opening balance sheet was prepared because Goldstaff purchased the Vancouver and Edmonton assets and assumed certain liabilities from Coape Management Network LLC t/a Coape Staffing Network, effective November 21, 2007. The opening balance sheet shows that Goldstaff had total assets of \$224,366.96 and total liabilities of \$196,866.96, including payroll liabilities of \$105,282.18.

[8] The appellant also filed the Central Securities Register of Goldstaff (Exhibit A-2) which shows that the appellant became a shareholder of Goldstaff on January 24, 2008 when she acquired 1 250 common shares of Goldstaff at a price of \$1 per share. The appellant acquired 2 500 additional common shares of Goldstaff on July 31, 2008 at a price of \$1 per share. On June 15, 2008 the date on which the appellant became a director, the shareholding of Goldstaff was as follows:

	<u>Class A Common Shares (1 vote)</u>	<u>Class B Common Shares (10 votes)</u>
Apple Core Enterprises Inc.	17 500	2 500
Dandan Qian	1 250	
Tanya Roy Shewchuk	6 250	

Rachel C. Stafford	<u>Nil</u>	
Total	25 000	2 500

On July 31, 2008, the shareholding of Goldstaff was as follows:

	<u>Class A</u> <u>Common Shares (1 vote)</u>	<u>Class B</u> <u>Common Shares (10 votes)</u>
Apple Core Enterprises Inc.	Nil	2 500
Dandan Qian	3 750	
Tanya Roy Shewchuk	8 750	
Rachel C. Stafford	<u>12 500</u>	
Total	25 000	2 500

[9] The appellant also filed in Court a sample of her daily cash flow report dated April 14, 2009 (Exhibit A-3) that she was presenting to Rachel Stafford and Tanya Shewchuk which included the following information:

- the balance of each bank account;
- the accounts payable (payroll, taxes, etc.);
- the anticipated cash balance at some future dates;
- the accounts receivable aging summary;
- the unpaid bills details; and
- the upcoming CRA taxes details.

The appellant did not have access to her daily cash flow reports because Goldstaff had closed its doors.

[10] The appellant filed her resignation letter as director of Goldstaff effective February 26, 2009 (Exhibit A-4), her notice of objection dated September 10, 2010 (Exhibit A-5) and the letter of representation from her solicitor, Kathy Wang, dated May 4, 2011 (Exhibit A-6).

The Law

[11] The relevant provisions of the *Act* for the purpose of this appeal are paragraph 153(1)(a) and subsections 227.1(1), (2) and (3). In general terms, paragraph 153(1)(a) provides for income tax withholdings from employee wages, and for the remittance of these withholdings to the Receiver General. Subsection 227.1(1) sets out that the directors of a corporation who have failed to withhold and remit, are jointly and severally, or solidarily, liable together with the corporation to pay the amount of tax and any related interest or penalties. Subsections 227.1(2) and (3) provide for certain limitations on this liability of directors, notably by allowing a defence of care, diligence and skill. These provisions read as follows:

153.(1) Withholding [source deduction] —Every person paying at any time in a taxation year

(a) salary, wages or other remuneration, other than amounts described in subsection 115(2.3) or 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.

...

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 135.1(7) 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, or solidarily, liable, together with the corporation, to pay that amount and any interest or penalties relating to it.

(2) Limitations on liability —A director is not liable under subsection 227.1(1), unless

(a) a certificate for the amount of the corporation's liability referred to in that subsection has been registered in the Federal Court under section 223 and execution for that amount has been returned unsatisfied in whole or in part;

(b) the corporation has commenced liquidation or dissolution proceedings or has been dissolved and a claim for the amount of the corporation's liability referred to in that subsection has been proved within six months after the earlier of the date of commencement of the proceedings and the date of dissolution; or

(c) the corporation has made an assignment or a bankruptcy order has been made against it under the *Bankruptcy and Insolvency Act* and a claim for the amount of the corporation's liability referred to in that subsection has been proved within six months after the date of the assignment or bankruptcy order.

(3) Idem—A director is not liable for a failure under subsection 227.1(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.

[12] The relevant provisions of the *Employment Insurance Act*, S.C. 1996, c. 23, as amended, are subsections 82(1) and 83(1) and (2):

82.(1) Every employer paying remuneration to a person they employ in insurable employment shall

(a) deduct the prescribed amount from the remuneration as or on account of the employee's premium payable by that insured person under section 67 for any period for which the remuneration is paid; and

(b) remit the amount, together with the employer's premium payable by the employer under section 68 for that period, to the Receiver General at the prescribed time and in the prescribed manner.

[...]

83.(1) 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, or solidarily, liable, together with the corporation, to pay Her Majesty that amount and any related interest or penalties.

(2) 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.

[13] Subsections 21(1) and 21.1(1) and (2) of the *Canada Pension Plan* set out similar withholding and remittance obligations in relation to contributions to the Canada Pension Plan:

21.(1) Every employer paying remuneration to an employee employed by the employer at any time in pensionable employment shall deduct from that remuneration as or on account of the employee's contribution for the year in which the remuneration for the pensionable employment is paid to the employee such amount as is determined in accordance with prescribed rules and shall remit that amount, together with such amount as is prescribed with respect to the contribution required to be made by the employer under this Act, to the Receiver General at such time as is prescribed and, where at that prescribed time the employer is a prescribed person, the remittance shall be made to the account of the Receiver General at a financial institution (within the meaning that would be assigned by the definition "financial institution" in subsection 190(1) of the *Income Tax Act* if that definition were read without reference to paragraphs (d) and (e) thereof).

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).

[14] Section 57 of the British Columbia *Income Tax Act*, R.S.B.C. 1996, c. 215 imposes similar withholding and remittance obligations and similar liability on directors who failed to exercise the degree of care, diligence and skill required to prevent the failure.

Analysis and Conclusion

[15] In *Buckingham v. R.*, 2011 FCA 142, the Federal Court of Appeal has clearly stated that the standard of care, skill and diligence required under subsection 227.1(3) of the *Act* is an objective standard, as set out by the Supreme Court of Canada's decision in *People's Department Stores Ltd. (1992) Inc.*, Re 2004 SCC 68, [2004] 3 S.C.R. 461 (S.C.C.), and does not take into account the directors "personal skills,

knowledge, abilities and capacities.” In paragraph 38, Justice Mainville pointed out that:

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 own personal skills, knowledge, abilities and capacities.

[16] However, in paragraph 39, Justice Mainville recognized that a director’s particular circumstances are to be considered and measured against a reasonably prudent person standard:

An objective standard does not however entail that the particular circumstances of a director are to be ignored. These circumstances must be taken into account, but must be considered against an objective “reasonably prudent person “standard”.

[17] The Court of Appeal also ruled in *Buckingham, supra*, that the focus of the “due diligence defence “is to prevent the failure to remit, not to cure failures to do so” (para. 51 and 52):

51 It is thus important to note that *Worrell* did not modify the focus of the defence of care, diligence and skill, which is to prevent the failure to remit, not to cure failures to do so.

...

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.

[18] In this case, I consider that the appellant took all the necessary measures within her power and under the circumstances, to prevent the failure. She did the best that anyone could reasonably have done in the circumstances to convince Ms. Stafford to make the remittances, and she quit when she realized that Ms. Stafford would simply never agree and given the policies and practices in place at Goldstaff.

[19] Considering the fact that the appellant did not have the necessary authority to herself make the payments to the CRA, she alerted the other directors, of Goldstaff’s liabilities on a daily basis and to the remittance requirements as they became due.

The appellant enlisted the help of Ms. Shewchuk, who operated the Edmonton office, to address the company's financial situation. She suggested numerous methods to reduce Goldstaff's liabilities, including a wage cut for herself, by terminating the receptionist and by cutting Ms. Stafford's RRSP contribution and car allowance.

[20] As director of Goldstaff, the appellant had no authority, no input as to the direction of Goldstaff and how the finances should be handled. The appellant neither participated in the decision not to remit to the Receiver General of Canada the amount of the source deductions nor in the decision to pay a bonus to certain Goldstaff's employees at the end of 2008 even though the company was not profitable. She became aware of the bonus only after it had been paid.

[21] During the appellant's tenure as director of Goldstaff, she did not have any power to manage the business and affairs of Goldstaff or exercise control over its officers. That power was exercised by Ms. Stafford. The appellant never signed any documents as a director and never sat at a board of directors meeting. She did not have the authority to sign cheques drawn on Goldstaff's bank accounts.

[22] Concerning the particular circumstances of the appellant, consideration shall be given to the fact that the appellant had cultural and language barriers. At the hearing, the appellant explained that she was not invited to participate at the various telephone conversations that were taking place between Ms. Stafford and Ms. Shewchuk. As those telephone conversations were behind closed doors, the appellant respected the privacy of these matters. The appellant admitted that she would have had difficulties following discussions as her English was not good at that time.

[23] The appellant was, in 2008, a recent immigrant to Canada who had had to obtain new training to make a significant career change upon moving to Canada. Mr. Goldsmith and Ms. Stafford took advantage of the appellant's lack of knowledge of Canadian rules concerning potential liability of the company's directors. Ms. Stafford took full advantage of the appellant's vulnerable position and of her naivety.

[24] At the hearing, the appellant pointed out that Ms. Stafford was not assessed by the CRA because she had declared bankruptcy.

[25] For these reasons, the appeal is allowed with costs and the assessment is vacated.

Signed at Ottawa, Canada, this 5th day of December 2013.

"Réal Favreau"

Favreau J.

CITATION: 2013 TCC 386
COURT FILE NO.: 2011-3520(IT)G
STYLE OF CAUSE: Dandan Qian and Her Majesty the Queen
PLACE OF HEARING: Vancouver, British Columbia
DATE OF HEARING: June 27, 2013
REASONS FOR JUDGMENT BY: The Honourable Justice R  al Favreau
DATE OF JUDGMENT: December 5, 2013

APPEARANCES:

For the Appellant: The Appellant herself with
Mr. Zhai Fu (a mandarin interpreter)
Counsel for the Respondent: Marcel Prevost

COUNSEL OF RECORD:

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