

Director's Liability for Remittances - Due Diligence When Relying on Employee

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Roitelman v The Queen, [2014 TCC 139](#)

The appellant appealed a director's liability assessment made pursuant to subsection 227.1(1). The MNR issues assessments against the corporation for late-remitted or unremitted Federal and Provincial income taxes, EI premiums, and CPP contributions, plus penalties and interest, and registered a certificate of the corporate debt with the Federal Court. The Appellant argued against the personal assessment as director on the basis that he had exercised the degree of care, diligence and skill to prevent the failure that a reasonable prudent person would have exercised in comparable circumstances - the due diligence defense.

FACTS

The appellant made a lump sum payment in respect to the principal owing by the corporation for outstanding source deductions, and later, the minister assessed the appellant as director for the balance (plus penalties and interest).

The Appellant has control over the corporate activities and operations during the relevant period, and was a Director of the corporation. A bookkeeper and office manager was hired who was responsible for source deductions and remittances, and the Appellant provided training. After the period of training, the Appellant did not consistently or directly supervise this person's work. The Appellant did check the work intermittently and relied on assurances that work has been completed.

Notices were sent by the MNR, but the Appellant claimed not to have received many of them because his employee kept them from him. After he became aware of the failure to remit, he sought assurance from the employee that the mistake would not be repeated and increased supervision of her work temporarily. The bookkeeper eventually left the service of the corporation.

ANALYSIS

The burden of proving the due diligence defense available under subsection 227.1(3) of the ITA is on the Appellant. The applicable test is an objective one: *Peoples Department Stores Ltd v Wise*, [2004 SCC 68](#). A director's personal skills, knowledge, abilities, and capacities are not relevant, but the objective circumstances surrounding the actions of the director are relevant: *The Queen v Buckingham*, [2011 FCA 142](#), para 38.

To establish the due diligence defense in subsection 227.1(3) of the ITA, the director must establish that (*The Queen v Buckingham*, [2011 FCA 142](#), para 52):

- They were specifically concerned with the tax remittances;
- They exercised their duty of care, diligence and skill with a view to prevent a failure by the corporation to remit; and
- Action to remedy the failure to remit is not sufficient.

However, after-the-fact behaviour and corrective measures can be relevant (*Balthazard v The Queen*, [2011 FCA 331](#)), though the focus on the defense is the care, diligence and skill exercised in preventing a failure to remit (para 23). Importantly, the oversight duties of the director cannot be delegated (*Kaur v The Queen*, [2013 TCC 227](#), at paragraph 18). There is no requirement that the steps taken are actually effective in ensuring future compliance, but only that the proactive steps be taken and be reasonable and prudent in the circumstances (para 28). Perfection is not required and hind-sight bias must be avoided (*Cloutier v MNR*, 93 DTC 544, at paragraph 10).

The TCC accepted that the bookkeeper purposefully and actively kept the information from the Appellant. The Court held that the Appellant took proactive steps to prevent the failure to remit, and felt that the steps were reasonable and sufficient in the circumstance of the case (para 26). Hiring a bookkeeper, providing training, providing increased supervision when mistakes were made were sufficient and appropriate.

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