

## A Question of Timing: Section 160 and a Director's Liability Under Section 227.1

*Colitto v. The Queen* (2019 TCC 88) concerned the interaction between section 160 and section 227.1. The facts in the case were relatively straightforward and were agreed to by the parties. At all relevant times, Domenic Colitto was a director and shareholder of Core Precision Technologies (CPT). CPT failed to remit source deductions between February and August 2008, and the minister issued a notice of assessment for the unremitted deductions on October 10, 2008.

On May 2, 2008, Domenic Colitto transferred a 50 percent interest in two real properties with an aggregate FMV of \$228,750 to Caroline Colitto, his spouse (the appellant), for nominal consideration of \$4. On August 6, 2009, a certificate for CPT's tax debt was registered in the FC; on November 23, 2010, the direction to enforce the writ was made to the sheriff. CPT's tax debt was executed and returned unsatisfied on January 4, 2011.

On March 28, 2011, the minister issued a notice of assessment pursuant to section 227.1 to Domenic Colitto in the amount of \$733,812. On January 13, 2016, the minister issued assessments pursuant to section 160 to the appellant in the amount of \$228,746.

The parties agreed that the due diligence and limitation-period defences in subsections 227.1(3) and (4), respectively, did not apply. The appellant did not challenge the validity of the underlying director's liability assessment. The only issue in dispute was the meaning of subparagraph 160(1)(e)(ii), which limits the liability of a transferee under section 160 to the total amounts "each of which is an amount that the transferor is liable to pay under this Act . . . in or in respect of the taxation year in which the property was transferred or any preceding taxation year."

The appellant relied on *Canada v. Livingston* (2008 FCA 89) to argue that the transferor (Domenic Colitto) was not liable to pay amounts until the conditions in subsection 227.1(2) were satisfied—that is, January 4, 2011. One of the conditions was that a certificate for the corporation's tax debt be filed in the FC and an execution for that amount be returned unsatisfied. The appellant further argued that once those conditions were satis-

fied, the provision did not have retroactive effect to the time of the corporation's failure to remit the source deductions. Therefore, in the appellant's view, Domenic Colitto was not liable for those unremitted source deductions on May 2, 2008, and thus the appellant was not liable under section 160 because the conditions in subsection 227.1(2) were not satisfied.

The minister argued that once the conditions were satisfied, the director's liability under section 227.1 applied retroactively as of the date on which CPT failed to remit the source deductions in 2008. Therefore, according to the minister, Domenic Colitto's liability for CPT's failure was in or in respect of his 2008 taxation year, and thus the appellant was subject to subsection 160(1) in respect of the property transfers that occurred in 2008.

The TCC first considered the decision in *Livingston* (and other prior case law) and held that *Livingston* was distinguishable from the current case and was not intended to overrule the precise language of section 160. The court then reviewed subparagraph 160(1)(e)(ii) and held that the words "the taxation year in which the property was transferred" must refer to the taxation year of the transferor (Domenic Colitto) and not that of CPT.

The next consideration was whether Domenic Colitto was liable to pay the amount of the section 227.1 assessment in or in respect of his 2008 taxation year (the year during which the property transfer occurred). The court said that section 227.1 was silent as to when the liability arose, but it noted that subsections 227.1(2), (3), (4), and (5) set out a number of preconditions and other limitations on the section's liability.

Applying the principles of statutory interpretation, the TCC concluded that the liability in subsection 227.1(1) arises only when, among other things, the provisions in subsection 227.1(2) have been satisfied. The court rejected earlier decisions, which had held that liability arises at the time of the failure to remit, in favour of the decision in *Worrell v. Canada*, sub nom. *Canada (Attorney General) v. McKinnon* (2000 CanLII 16269 (FCA)) and certain other key decisions, which found that liability under section 227.1 arises when, among other things, the conditions in subsection 227.1(2) were satisfied.

Finally, the TCC rejected the minister's argument that the wording in subparagraph 160(1)(e)(ii), which states that the

transferor is liable to pay an amount “in respect of” the relevant taxation year (2008 in this case), was broad enough to capture the section 227.1 liability that arose in 2011. The court held that although CPT’s failure to remit in 2008 coincided with Domenic Colitto’s 2008 taxation year, that did not mean that the failure was “in respect of” his 2008 taxation year, and there was no evidence that there was any nexus between CPT’s failure to remit in 2008 and Domenic Colitto’s income or the amount of tax payable by him in 2008.

Therefore, the TCC held that Domenic Colitto’s liability as director of CPT arose when the preconditions in subsection 227.1(2) were met—namely, when CPT’s tax debt was executed and returned unsatisfied on January 4, 2011 and in his 2011 taxation year. The appeal was allowed.

This case offers tax practitioners welcome clarification on when an assessment for a director’s liability under section 227.1 crystallizes such that it can give rise to a derivative assessment under section 160. It also serves as a helpful reminder that it is often unclear at what time a test under the Act is engaged, and that timing can be critical in determining the substantive application of a statutory provision. The case is currently under appeal.

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