

20090526

Docket: T-1360-06

Citation: 2009 FC 531

Ottawa, Ontario, May 26, 2009

PRESENT: The Honourable Mr. Justice Blanchard

BETWEEN:

**THE MINISTER OF
NATIONAL REVENUE**

Applicant

and

GIOVANNI ZEN

Respondent

T-1024-08

AND BETWEEN:

GIOVANNI ZEN

Applicant

and

THE MINISTER OF NATIONAL REVENUE

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

I. Introduction

[1] The Minister of National Revenue (the Minister) brought a summary application before the Federal Court for a compliance order pursuant to subsection 231.7(1) of the *Income Tax Act* (the Act) which reads as follows:

231.7 (1) On summary application by the Minister, a judge may, notwithstanding subsection 238(2), order a person to provide any access, assistance, information or document sought by the Minister under section 231.1 or 231.2 if the judge is satisfied that

(a) the person was required under section 231.1 or 231.2 to provide the access, assistance, information or document and did not do so; and

(b) in the case of information or a document, the information or document is not protected from disclosure by solicitor-client privilege (within the meaning of subsection 232(1)).

231.7 (1) Sur demande sommaire du ministre, un juge peut, malgré le paragraphe 238(2), ordonner à une personne de fournir l'accès, l'aide, les renseignements ou les documents que le ministre cherche à obtenir en vertu des articles 231.1 ou 231.2 s'il est convaincu de ce qui suit :

a) la personne n'a pas fourni l'accès, l'aide, les renseignements ou les documents bien qu'elle en soit tenue par les articles 231.1 ou 231.2;

b) s'agissant de renseignements ou de documents, le privilège des communications entre client et avocat, au sens du paragraphe 232(1), ne peut être invoqué à leur égard.

[2] The Minister, relies on his powers under subsection 231.2(1) in the application for the order, which reads:

(1) Notwithstanding any other provision of this Act, the Minister may, subject to subsection (2), for any purpose related to the administration or enforcement of this Act (including the

(1) Malgré les autres dispositions de la présente loi, le ministre peut, sous réserve du paragraphe (2) et pour l'application ou l'exécution de la présente loi (y compris la perception

collection of any amount payable under this Act by any person), of a comprehensive tax information exchange agreement between Canada and another country or jurisdiction that is in force and has effect or, for greater certainty, of a tax treaty with another country, by notice served personally or by registered or certified mail, require that any person provide, within such reasonable time as stipulated in the notice,

(a) any information or additional information, including a return of income or a supplementary return; or

(b) any document.

d'un montant payable par une personne en vertu de la présente loi), d'un accord général d'échange de renseignements fiscaux entre le Canada et un autre pays ou territoire qui est en vigueur et s'applique ou d'un traité fiscal conclu avec un autre pays, par avis signifié à personne ou envoyé par courrier recommandé ou certifié, exiger d'une personne, dans le délai raisonnable que précise l'avis :

a) qu'elle fournisse tout renseignement ou tout renseignement supplémentaire, y compris une déclaration de revenu ou une déclaration supplémentaire;

b) qu'elle produise des documents.

[3] In this case, the Minister is seeking information from Mr. Giovanni Zen (Mr. Zen). Specifically, the Minister seeks detailed Net Worth Statements for the purpose of collecting outstanding interest and penalties on an assessment against Mr. Zen in his capacity as a Director of Pacific Refineries Inc. (the Corporation).

[4] Mr. Zen has not complied with the notices of requirement for information (RFIs) sent to him by the Minister in order to obtain Net Worth Statements pursuant to subsection 231.2(1) of the Act. As a result, the Minister filed his application for an order for compliance wherein Mr. Zen is the named respondent.

[5] Mr. Zen is the applicant in a second related application. Mr. Zen has applied for judicial review of the RFIs. He seeks a writ of certiorari to quash the RFIs on the basis that the Minister does not have the authority to collect “unassessed interest” on the assessment of Mr. Zen issued in 1986 for the Corporation’s failure to remit source deductions.

[6] Pursuant to the order of Madam Justice Mactavish dated July 18, 2008, and by reason of the similar circumstances and issues raised, the Minister’s application and Mr. Zen’s application were heard together.

II. Facts

[7] Mr. Zen was a director of the Corporation at all relevant times. The Corporation was indebted to her Majesty the Queen for unpaid source deductions. Mr. Zen was assessed in relation to the Corporation’s debt on or about December 8, 1986 for \$103,463.32 (the Assessment). The Assessment included the outstanding debt, interest and penalties.

[8] Mr. Zen appealed the Assessment to the Tax Court in 1987. The appeal was discontinued by Mr. Zen.

[9] On August 23, 2005, the Minister served Mr. Zen with five (5) RFIs pursuant to subsection 231.2(1)(a) of the Act (2005 RFIs) seeking his Net Worth Statements as at August 15, 2005, December 31, 2004, December 31, 2003, December 31, 2002 and December 31, 2001, complete with supporting schedules, showing full details of all his assets and liabilities.

[10] The Minister contends that as of February 10, 2006, Mr. Zen was indebted to Her Majesty the Queen for \$615,587.20. This amount included the original Assessment as well as penalties and interest thereon.

[11] In August 2006, Mr. Zen brought an application for judicial review in this Court of the Minister's decision to deny Mr. Zen a "Fairness Package" relieving him of his obligation to pay the interest accruing from his debt.

[12] On or about February 21, 2007, Mr. Zen paid \$103,463.32, being the amount assessed against him in 1986. On May 15, 2008, Mr. Zen received acknowledgment of his payment and notice that his outstanding balance was now reduced to \$629,849.47. The Minister takes the position that the amount which remains outstanding is the accrued interest on the 1986 assessment.

[13] On March 12, 2008, Mr. Zen's application for judicial review of the Minister's decision to deny his request for fairness relief under the Act was dismissed.

[14] On June 2, 2008, the Minister served Mr. Zen's legal representatives with two RFIs pursuant to subsection 231.2(1) of the Act (2008 RFIs) seeking his Net Worth Statements as at December 31, 2006 and December 31, 2007 complete with supporting schedules, showing full details of all of his assets and liabilities.

[15] It is Mr. Zen's position that the sole purpose for these RFIs is to collect the outstanding interest allegedly owing and since, in Mr. Zen's argument, the Minister has no authority to collect such interest, the RFIs ought to be quashed.

III. Issues

[16] Mr. Zen's application will turn on the following issue:

Does the Minister have the authority under the Act to collect interest on the Assessment?

Later in these reasons I will address the extent to which the determination of the above issue will affect the outcome of the Minister's application.

IV. Analysis

[17] The amount of the Assessment is not at issue here. The Assessment was challenged before the Tax Court of Canada. That appeal was discontinued and the debt conceded. What is being challenged before this Court is the authority of the Minister to charge interest on the Assessment. Such authority must be found in the Act. The answer rests in the words of the statute to which I now turn.

[18] Subsection 227.1(1) of the Act reads as follows:

Liability of directors for failure to deduct

227.1 (1) 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

Responsabilité des administrateurs pour défaut d'effectuer les retenues

227.1 (1) Lorsqu'une société a omis de déduire ou de retenir une somme, tel que prévu aux paragraphes 135(3) ou 135.1(7) ou aux articles 153 ou 215, ou a omis de verser cette somme ou a omis

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.

de payer un montant d'impôt en vertu de la partie VII ou VIII pour une année d'imposition, les administrateurs de la société, au moment où celle-ci était tenue de déduire, de retenir, de verser ou de payer la somme, sont solidairement responsables, avec la société, du paiement de cette somme, y compris les intérêts et les pénalités s'y rapportant.

[19] Section 227.1 is the provision of the Act that renders directors liable where a corporation fails to remit source deductions. Mr. Zen, as a director, is therefore “jointly and severally, or solidarily, liable with the corporation” to pay the amount “and any interest or penalties relating to it”.

[20] The language of section 227.1 expressly provides that directors be liable for any applicable interest or penalties relating to the amount owing by the Corporation for failure to deduct and remit. It follows, in the plain words of the section, that interest would continue to accrue on the amount until it is paid. The Minister’s authority to assess for amounts payable under section 227.1 is found in subsection 227(10) of the Act which provides as follows:

Assessment

227(10) The Minister may at any time assess any amount payable under

(a) subsection 227(8), 227(8.1), 227(8.2), 227(8.3) or 227(8.4) or 224(4) or 224(4.1) or section 227.1 or

Cotisation

227(10) Le ministre peut, en tout temps, établir une cotisation pour les montants suivants :

a) un montant payable par une personne en vertu des paragraphes (8), (8.1), (8.2), (8.3) ou (8.4) ou

235 by a person,	224(4) ou (4.1) ou des articles 227.1 ou 235;
(b) subsection 237.1(7.4) by a person or partnership,	b) un montant payable par une personne ou une société de personnes en vertu du paragraphe 237.1(7.4);
(c) subsection 227(10.2) by a person as a consequence of a failure of a non-resident person to deduct or withhold any amount, or	c) un montant payable par une personne en vertu du paragraphe (10.2) pour défaut par une personne non-résidente d'effectuer une déduction ou une retenue;
(d) Part XIII by a person resident in Canada,	d) un montant payable en vertu de la partie XIII par une personne qui réside au Canada.

and, where the Minister sends a notice of assessment to that person or partnership, Divisions I and J of Part I apply with any modifications that the circumstances require.

Les sections I et J de la partie I s'appliquent, avec les modifications nécessaires, à tout avis de cotisation que le ministre envoie à la personne ou à la société de personnes.

[21] Subsection 227(10) does not expressly provide that directors are liable for interest on the amount assessed, rather it provides that Divisions I and J of Part I of the Act apply with “any modifications that the circumstances require”. Division I of Part I, deals with “Returns, Assessments, Payments, and Appeals”, and includes the section on interest (section 161). Subsection 161(1) provides for the payment of interest, at the prescribed rate, on “taxes payable”. In Mr. Zen’s argument, interest cannot accrue on the amount assessed because it is not a tax but rather a third party debt. He contends that the Minister cannot rely on the application of Divisions I and J of Part I to collect interest because this would entail reading in a substantive change to the Act and rewriting the interest provisions.

[22] Mr. Zen argues that to claim interest there must be a charging provision in the Act. He maintains that subsection 161(1) provides authority to claim interest on tax payable but not on his debt because it is not a tax. He cites *Ho-A-Shoo v. Canada (Attorney General)* 2000 D.T.C. 6293, at paragraph 21 in support of his argument. Mr. Zen also relies on *Algoa Trust v. MNR* 98 DTC 1614 for the proposition that absent an express provision, interest cannot be charged on an assessed amount. Both cases dealt with the liability of a transferee under section 160 of the Act. That provision essentially provides for joint and several liability limited by a formula in the section, to non-arms length transferees of property and for their assessment.

[23] In *Algoa Trust*, the Tax Court held that there is no provision of the Act regarding interest that may be applicable to an assessment issued pursuant to s. 160 of the Act. The Tax Court found that the Act provided for interest on the tax debt of the transferor and not on the third party liability created by section 160. It held that there was only one tax debt and concluded that interest did not accrue on the assessment of a transferee of property under section 160 of the Act. The Tax Court focused on the singularity of the tax debt, the internal limitation of liability on the transferee provided for in section 160 and on the fact that the Act does not specifically provide for interest to be charged on such an assessment.

[24] In *Ho-A-Shoo* the Ontario Superior Court relying on *Algoa Trust* found that interest could not accrue on an assessment made pursuant to subsection 160(2). The Court held that applying interest in such circumstances would have resulted in a substantive change to the provisions of the Act since section 161 provides this authority only with respect to “taxes payable”. The

amount owed by a transferee under section 160 is fixed by a liability limit and is not a tax but is rather a debt.

[25] In my view both *Algoa Trust* and *Ho-A-Shoo* can be distinguished from the case at bar. The liability of a transferee under section 160 of the Act is limited by the specific liability limit formula in paragraph 160(1)(e) and as a consequence incorporating the interest provision in Divisions I and J would result in a substantive change, as found by the Courts in those cases. In contrast, section 227.1 contains no express provision limiting liability of directors, it specifically addresses interest and does not rely solely on the application of subsection 227(10) for interest to apply.

[26] The substantive authority, therefore, for the accrual of interest on the liability of a director assessed pursuant to subsection 227(10) is found in section 227.1 of the Act; it need not be read in. Parliament intended that directors be liable, on an ongoing basis, for interest and penalties on amounts outstanding under that provision. Modification of the language of the Act to ensure this result is expressly provided for in subsection 227(10) and doing so does not bring about a substantive change to the Act. In my view the combined effect of section 227.1 and subsection 227(10) is to provide for interest to accrue on the Assessment of a director. It follows that Mr. Zen is liable for the accrued interest on the Assessment.

[27] The Tax Court of Canada applied similar reasoning in *Robert D. Green v. The Minister of National Revenue* 90 DTC 1898 and in *Canadian Imperial Bank of Commerce (CIBC) v. Canada (Minister of National Revenue)*, [1992] T.C.J. No. 662.

[28] To decide otherwise would result in directors not being liable for interest and penalties on amounts owing under section 227.1 after the date of an assessment which, in my view, would be contrary to the clear language of the provision. It would also result in the Minister having to issue a new assessment in order to collect what is clearly a continuing liability of directors for accrued interest under the Act. This would be inconsistent with the clear language of the Act and the intention of Parliament.

V. Conclusion

[29] For the above reasons I am satisfied that interest may properly accrue on an assessment under section 227.1. In the result, Mr. Zen's application will be dismissed.

[30] Given my above determination, it was open to the Minister to issue the impugned RFIs for the purpose of collecting the outstanding amounts owing by Mr. Zen. I am satisfied that Mr. Zen was required to provide the requested information pursuant to subsection 231.2(1) of the Act and did not do so. I am also satisfied that the information requested is not protected from disclosure by solicitor-client privilege within the meaning of subsection 232(1). Consequently, the Minister's application will be allowed. The Order sought under section 231.7 of the Act will issue. To that end, the Minister is to submit a draft order for the Court's consideration.

VI. Costs

[31] The determinative issue in these applications, the accrual of interest on a director's liability under section 227.1, is before the Court for the first time. Given the complexity of the

Income Tax Act, the issue raised is not frivolous. This initial judicial pronouncement on the issue will be welcomed as guidance in further cases. Further, having regard to Rule 400(3)(h) of the *Federal Courts Rules*, SOR/2004-283, s. 2, there is, in my view, a public interest in having this issue litigated. For these reasons and in the exercise of my discretion, no costs will be awarded on the applications.

JUDGMENT

THIS COURT ORDERS AND ADJUDGES that:

1. Mr. Zen's application is dismissed without costs.
2. The Minister's application is allowed without costs.
3. The Order sought by the Minister under section 231.7 of the Act will issue.
4. The Minister will submit a draft order for the Court's consideration within ten (10) days of the date of this order.

“Edmond P. Blanchard”

Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET: T-1360-06

STYLE OF CAUSE: THE MINISTER OF NATIONAL REVENUE v.
GIOVANNI ZEN

DOCKET: T-1024-08

STYLE OF CAUSE: GIOVANNI ZEN v. THE MINISTER OF NATIONAL
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PLACE OF HEARING: Vancouver, British Columbia

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**REASONS FOR JUDGMENT
AND JUDGMENT :** Blanchard J.

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