



Payroll Withholding Taxes – A notice of assessment is not required for the CRA to enforce collection on unremitted payroll withholding taxes



Marc Weisman

THE CASE OF DUPONT ROOFING & SHEET METAL INC.

In the last two
or three years,

the Canada Revenue Agency ("CRA") has been aggressive in its pursuit of corporate taxpayers and their directors for unremitted payroll withholding taxes and goods and services taxes. As part of our tax practice, we have acted for more than 200 corporate and individual taxpayers in these situations, so we take careful note of court decisions that have a bearing on this field.

In a recent case (*Dupont Roofing & Sheet Metal Inc.* 2011 DTC 5031), the Federal Court of Canada surprisingly ruled that the CRA is not required to issue a notice of assessment before it enforces collection on unremitted payroll withholding taxes.

The corporate taxpayer, Dupont Roofing Sheet Metal Inc. ("Dupont Roofing"), failed to remit payroll withholding taxes on wages paid to employees in 2001 and 2002. In

April 2003, the CRA Trust Examiner provided details of the outstanding unremitted payroll withholding taxes to Dupont Roofing's directors. Shortly thereafter, the CRA Compliance Officer followed normal CRA procedures for causing CRA's system to issue and mail notices of assessment to Dupont Roofing for the 2001 and 2002 taxation years. His evidence was supported by electronic diary entries automatically generated by the CRA database, and there was no evidence that these assessments were undelivered and returned to the CRA.

In May 2004, the CRA certified the \$204,704 accumulated tax debt of Dupont Roofing with the Federal Court,

meaning that it could proceed with seizure of the company's assets in payment of the debt.

In April 2005, one of Dupont's directors, Mr. Gomes, received a Derivative Director's Liability Assessment, under which he was assessed for Dupont Roofing's

unremitted payroll withholding taxes. Mr. Gomes denied that Dupont Roofing received the notices of assessment for the 2001 and 2002 taxation years mailed in 2003 and certified by the CRA in 2004. Through counsel, Mr. Gomes filed a notice of objection to the CRA.

In subsequent correspondence, Mr. Gomes' counsel requested copies of the 2001 and 2002 notices of assessment for Dupont Roofing. Despite repeated requests, the CRA did not produce the assessments. In a letter dated June 10, 2007, the



CRA Access to Information and Privacy Directorate advised Mr. Gomes' counsel that the CRA

was unable to locate copies of Dupont Roofing's 2001 and 2002 notices of assessment. Mr. Gomes' appeal concerning his personal liability under the Derivative Director's Liability Assessment was held in abeyance pending Dupont Roofing's application

(Continued next page)

Payroll withholding.. (Cont'd)

to the Federal Court for judicial review of the CRA's certification of the \$204,704 tax debt.

At issue was whether the CRA was required to issue a notice of assessment before certifying a tax debt for unremitted payroll withholding taxes, and, if so, whether such notice of assessment had been given or whether the certificate should be declared a nullity.

Justice Mosley, speaking for the Federal Court of Canada, clearly found shortcomings in the Minister's evidence concerning the mailing of Dupont Roofing's 2001 and 2002 notices of assessment, but he stated that if it is necessary to find that the notices of assessments were mailed he was satisfied that the 2001 and 2002 notices of assessment were mailed to Dupont Roofing in 2003. Justice Mosley then went on and ruled that the CRA was not required to issue a notice of assessment before certifying a tax debt for unremitted payroll withholding taxes. He stated:

*"The jurisprudence relied upon by the applicant to advance the claim that the Minister is required to provide the taxpayer with a notice of assessment involve cases pertaining to personal income tax, not payroll taxes. **So, although the Minister may be obliged to provide an individual with a notice of assessment, the same is not true for the withholding and remitting of payroll taxes.**"*

Subsection 251.1(1) of the Income Tax Act (Canada) (the "ITA") generally prevents the CRA from collecting a tax debt including certifying a tax debt during the 90-day objection period or while an objection or appeal is pending. The Federal Court based its ruling in this case on subsection 251.1(6) of ITA which provides for an exception to that general rule in subsection 251.1(1) of the ITA. Subsection 251.1(6) makes it clear that the rule in subsection 251.1(1) of the ITA does not apply to amounts required to be deducted or withheld including payroll withholding taxes. Thus, the Court concluded that it is not necessary to issue a notice of assessment which starts the 90-day objection period in order for an amount required to be deducted or withheld to become due.

Accordingly, Justice Mosley held that CRA's certification of the \$204,704 tax debt was valid and CRA was entitled to proceed with collection of the debt. He stated: *"In other words, the CRA is entitled to verify that payroll taxes have been properly remitted to the Receiver General. Nothing in the present matter suggests that the CRA pursued a course of action that was beyond the ambit of its power as provided by the ITA. The applicant Dupont did fail to withhold employee tax and remit that tax to the Receiver General. The CRA had the statutory authority to follow up on that failure through the*

certification of the tax debt. Having found that it was unnecessary for the Minister to issue notices of assessment to the taxpayer Dupont for unpaid payroll taxes, the question of whether the applicant received these assessments becomes moot. In any event, and has already been suggested, the applicant may apply to the Minister to request an extension of time for filing a notice of objection prior to appealing to the Tax Court of Canada: ITA s. 166.1(1); ITA s. 166.2(5)(b)(iii).

*Based on the foregoing, I cannot find that it was unreasonable for the Minister to certify the debt in the amount of \$204,704.21 plus interest. **The ITA does not require the Minister to provide notices of assessments to corporate taxpayers who have an ongoing obligation to remit payroll taxes.** Furthermore, it is clear from the evidence that the applicant was either fully aware, or ought to have been aware, of the debt owed and the obligation to pay it. As such, the certificate shall not be declared a nullity and this application for judicial review is dismissed with costs to the respondent."*

To conclude that a liability arises and becomes enforceable without a notice of assessment runs contrary to the scheme of the ITA and does away with the checks and balances that allow taxpayers to contest CRA decisions. It is clear that liability for unremitted payroll withholding taxes arise under subsection 227(9.4) of the ITA. Arguably, the Federal Court did

(Continued next page)

Payroll withholding.. *(Cont'd)*
 not consider subsection 227 (10.1) of the ITA which states that “[t]he Minister may at any time assess any amount payable under...[subsection] 227(9.4)...and, where the Minister sends a notice of assessment to the person, sections 150 to 163 [and others]...of Part I apply [mutatis mutandis],” implying that a notice of assessment for payroll withholding taxes is required.

Unfortunately, Dupont Roofing has not been appealed to the Federal Court of Appeal. Perhaps the courts will revisit this issue at some point in the future. In the meantime, the CRA may have been given *carte blanche* to proceed with collection action against taxpayers who have failed to remit

payroll withholding taxes without having to issue a notice of assessment that can be objected to and appealed at first instance.

Do you have a question about a tax matter, or a topic that you would like to see discussed here? Contact (416) 777 5455 or mweisman@torkinmanes.com.

Torkin Manes' Tax Group has significant experience in tax planning and dispute resolution matters. Marc Weisman's practice focuses on corporate and personal income tax and commodity tax planning, and dealing with the Canada Revenue Agency and provincial tax authorities. Marc works with accountants, financial advisors and non-tax lawyers on a variety of tax and trusts matters on behalf of their clients.

Please contact members of our Tax, Business, Trusts and Estates, and Financial Services & Corporate Recovery Groups for more information.

Risa Awerbuck, Trusts and Estates Law
 416 777 5425 | raverbuck@torkinmanes.com

Allan S. Bronstein, Business Law
 416 777 5369 | abronstein@torkinmanes.com

Howard Burshtein, Business Law
 416 777 5456 | hburshtein@torkinmanes.com

Barry A. Cohen, Financial Services and Corporate Recovery
 416 777 5434 | bcohen@torkinmanes.com

Jeffrey I. Cohen, Business Law
 416 777 5422 | jcohen@torkinmanes.com

Matthew Tevlin, Business Law
 416 777 5401 | mtevlin@torkinmanes.com

Marc Weisman, Tax, Trusts and Estates Law
 416 777 5455 | mweisman@torkinmanes.com

On November 15, our Business Law Group and Tax Law Group will be presenting its annual morning breakfast seminar, “**LOOK BEFORE YOU LEAP: Six Issues to Consider before Buying a Business.**” For more information and to register for this free seminar, [click here](#).

The issues raised in this release by Torkin Manes LLP are for information purposes only. The comments contained in this document should not be relied upon to replace specific legal advice. Readers should contact professional advisors prior to acting on the basis of material contained herein.