

Federal Court
of Appeal



Cour d'appel
fédérale

Date: 20111128

Docket: A-98-11

Citation: 2011 FCA 331

CORAM: PELLETIER J.A.
TRUDEL J.A.
MAINVILLE J.A.

BETWEEN:

NORMAND BALTHAZARD

Appellant

and

HER MAJESTY THE QUEEN

Respondent

Hearing held at Québec, Quebec on October 5, 2011.

Judgment delivered at Ottawa, Ontario, on November 28, 2011.

REASONS FOR JUDGMENT BY:

MAINVILLE J.A.

CONCURRED IN BY:

**PELLETIER J.A.
TRUDEL J.A.**

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REASONS FOR JUDGMENT

MAINVILLE J.A.

[1] This is an appeal of a judgment dated February 9, 2011, the reasons for which were delivered orally by Justice Archambault of the Tax Court of Canada. By that judgment, the appeal of Norman Balthazard (“appellant”) from an assessment in the amount of \$42,925.45, dated August 5, 2008, made under subsection 323(1) of the *Excise Tax Act*, R.S.C. 1985, c. E-15 (the “ETA”) was dismissed on the ground that Mr. Balthazard had not established, in accordance with subsection 323(3) of the ETA, that he had exercised the degree of care, diligence and skill

required of a director to prevent Groupe Contact Image Inc. (“GCI”) from failing to remit the net tax as required by section 228 of the ETA (the “GST-related net tax” or “net tax”) for certain periods leading up to the bankruptcy of that corporation. This net tax is related to the collection of the Goods and Services Tax (the “GST”).

[2] For the reasons that follow, I would allow this appeal in part.

Background

[3] The appellant is a businessman and a seasoned investor who, in 2004, became a shareholder and director of GCI, a corporation then recently incorporated under the *Canada Business Corporations Act*, R.S.C. 1985, c. C-44, specializing in digital imaging and large-format printing.

[4] Since GCI was operating at a loss, the appellant quickly took on a very active role in this corporation, initiating numerous measures to turn the business around. The appellant also injected considerable additional amounts into the business to keep it operating during its periods of financial difficulty, including \$500,000 in early 2005 and an additional \$313,000 between June and December 2006.

[5] The appellant also took steps to ensure that the employee tax deductions and the GST-related net tax were remitted by GCI in accordance with tax laws. As a member of the board of directors, he required that GCI’s accountants present periodic reports to the board,

confirming that these remittances were made. When the accountants stopped providing the desired assurances, he personally contacted the tax authorities to make the required arrangements to pay the remittances by approved instalments.

[6] Despite the appellant's efforts, GCI's future could not be secured. In early 2007, the appellant therefore took steps to allow GCI to make a proposal to its creditors under the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3, and the proposal was presented on February 23, 2007. The following day, on February 24, 2007, the appellant resigned as director of GCI. The appellant first ensured that GCI would issue cheques to the tax authorities to cover the final remittances of the employee tax deductions and the GST-related net tax. The bank refused to honour those cheques. The proposal to creditors was eventually refused, which led GCI to make an assignment in bankruptcy under the *Bankruptcy and Insolvency Act*.

[7] On August 5, 2008, the following assessment was made in respect of the appellant under subsection 323(1) of the ETA:

[TRANSLATION]

PERIOD	NET TAX	INTEREST	PENALTY	TOTAL \$
From 2006-10-01 to 2006-12-31	13,878.71	1,792.05	135.63	15,806.39
From 2006-07-01 to 2006-09-30	15,791.65	2,307.51	492.95	18,592.11
From 2006-03-01 to 2006-06-30	0.00	34.01	245.11	279.12
From 2005-07-01 to 2005-09-30	6,109.49	1,308.72	829.62	8,247.83
AMOUNT OF ASSESSMENT				42,925.45

[8] The GST-related net tax in the amount of \$6,109.49 for the three-month period ending on September 30, 2005, resulted from a recalculation by the Minister long after GCI made its proposal under the *Bankruptcy and Insolvency Act* and the appellant resigned as director. The notes in the record and the evidence filed show that, indeed, both the tax authorities and the appellant had previously shared the opinion that GCI had remitted all of the net tax for the three-month period at issue. The recalculation for that three-month period was therefore a “surprise” for the appellant given that, when he was a director, he had gone to considerable lengths to ensure that all of the amounts claimed for the three-month period in question were indeed remitted by GCI. There are no allegations or evidence in the record to indicate that this recalculation resulted from embezzlement or misrepresentations by GCI.

[9] The assessment in respect of the appellant therefore mainly pertains to the last two remittances of GST-related net tax that preceded GCI’s proposal on February 23, 2007, under the *Bankruptcy and Insolvency Act*, that is, the remittances for the three-month periods ending on September 30, 2006, and December 31, 2006, which were due, respectively, on October 30, 2006, and January 31, 2007.

Reasons of the trial judge

[10] The trial judge delivered his reasons orally by telephone conference after reserving judgment on the case. After describing the appellant’s role in the business and the source of GCI’s financial woes, the judge concluded that the appellant is a man of integrity who was not

responsible for those difficulties (at page 47 of the transcript reproduced at page 56 of the Appeal Book):

[TRANSLATION]

To be perfectly clear, I must note that Mr. Balthazard's integrity is not in doubt. There is no question that Mr. Balthazard was not responsible for the corporation's financial difficulties and did not benefit from the amounts not remitted to the tax authorities. Quite the opposite, he, too, is a victim, having lost his capital outlay of \$1,700,000.

[11] However, as part of his analysis of the care, diligence and skill defence under subsection 323(3) of the ETA, the judge gave no weight to the appellant's financial contributions of \$500,000 and \$313,000 to help GCI fulfill its obligations, or to the numerous corrective measures the appellant took for GCI, including his arrangements with the tax authorities that allowed the tax deductions and GST-related net tax to be remitted by instalment arrangements.

[12] Instead, the trial judge rejected the appellant's defence, principally on the grounds that (a) the instalment arrangements negotiated by the appellant are evidence of his liability as a director and (b) since the GST was paid by GCI's clients, the considerable financial advances made and other measures taken by the appellant are irrelevant to his care, diligence and skill defence.

[13] The following passages from the transcript of the reasons for judgment show the trial judge's reasoning (at pages 40 and 41 of the transcript, reproduced at pages 49 and 50 of the Appeal Book):

[TRANSLATION]

Here, I have no doubt that the amounts of net tax that GCI did not remit to the Minister were used to finance the operations of the business. If not, how else can it be explained

that, throughout 2005, 2006 and 2007, GCI was constantly unable to remit, on the dates set out in the Act, the amounts it had collected acting as the Minister's agent? Mr. Balthazard tried to demonstrate having acted with diligence by indicating that he had made considerable capital outlays to GCI. I must note that it was not necessary to make advances to GCI in order for this corporation to remit the net GST as required, since that was remitted to it by its clients when GCI made sales of products and services.

Appellant's argument

[14] The appellant submits that the trial judge erred in law in refusing to consider his grounds for defence, including his considerable financial contributions, as part of his care, diligence and skill defence under subsection 323(3) of the ETA. According to the appellant, this error is threefold.

[15] The first part of the error consisted in having improperly interpreted section 228 of the ETA in asserting that GCI had an obligation to remit to the Crown the amounts paid by its clients as GST. According to the appellant, the only obligation created by this article was that of remitting, to the Crown, the positive amount of net tax for the reporting period, which includes the balance of the amounts that had become payable and the other amounts collected during that period (subsection 225(1) "A" of the ETA), less the input tax credits for that period (subsection 225(1) "B" of the ETA). Furthermore, nothing in the ETA creates an obligation for GCI to keep separate the tax collected.

[16] The appellant therefore submits that, in law, the amount paid by the clients as GST and the amount that must be remitted under section 228 of the ETA are in no way equivalent. As a result, the trial judge misdirected himself in law in concluding that the appellant had the duty to

ensure full remittance of the GST remissions, since that would amount to confusing the failure to remit with imprudence and to denying the defence set out at subsection 323(3) of the ETA.

[17] This incorrect interpretation of the ETA allegedly led the judge to the second and third aspects of his error in law, these being his refusal to consider, as part of the care, diligence and skill defence under subsection 323(3) of the ETA, (a) the appellant's financial contributions to ensure continuity of the business's operations and (b) the appellant's efforts to ensure GCI's remittance of the GST-related net tax by, among other arrangements, instalment agreements.

Respondent's argument

[18] The respondent submits that the care, diligence and skill defence set out at subsection 323(3) of the ETA mainly raises a question of fact. Therefore, this Court should not intervene on appeal except in the event of a palpable and overriding error by the trial judge. The respondent submits that the judge made no such error, since the evidence shows that GCI was managing the arrears in its remittances of GST-related net tax and had adopted a curative rather than preventive attitude toward the remittances.

[19] Therefore, the arrangements negotiated by the appellant to allow GCI to remit its net tax by instalments are evidence of the curative approach taken by both GCI and the appellant with regard to these remittances.

[20] Since the only issue in the case at bar is whether the appellant acted with care, diligence and skill to prevent the failure to remit this net tax, and since the evidence accepted by the judge did provide him with a basis to conclude that the means used were curative rather than preventive, the appeal should be dismissed.

Issues

[21] This appeal raises the following issues:

- a. Did the trial judge err in refusing to take into account the grounds raised by the appellant as part of his care, diligence and skill defence under subsection 323(3) of the ETA?
- b. Does the evidence in the record support a care, diligence and skill defence under subsection 323(3) of the ETA, given the legal framework applicable to such a defence?

Standard of review

[22] *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235, sets out the appropriate standard of review for appeals of Tax Court of Canada judgments. The standard of review on a question of law is correctness, while findings of fact are not to be disturbed unless it can be established that the trial judge made a palpable and overriding error. The application of a legal standard to a set of facts is a question of mixed fact and law that also requires deference unless an extricable question of law can be identified.

[23] The first issue raised by this appeal requires interpreting the nature of the remittance obligation under section 228 of the ETA, with regard to the scope of the care, diligence and skill defence set out at subsection 323(3) of the ETA. This is principally a question of law reviewable on a standard of correctness.

[24] The second issue entails the identification of the appropriate legal rules and standards for a care, diligence and skill defence, and the application of this legal framework to the facts. The identification of the appropriate legal rules and standards is a question of law reviewable on a standard of correctness. However, deference is required in respect of the application of these rules and standards to the facts at issue.

Analysis

First issue: Did the trial judge err in refusing to take into account the grounds raised by the appellant as part of his care, diligence and skill defence under subsection 323(3) of the ETA?

[25] In the trial judge's opinion, the appellant's defence under subsection 323(3) of the ETA is without merit, given that the GST amounts are remitted by the clients of GCI, which thus has the funds required to make the quarterly remittances under section 228 of the ETA. Thus, as the judge saw it, it was not appropriate to take into account the appellant's grounds of defence since the corporation at issue received the funds to make the remittances of GST-related net tax. I cannot agree with this approach.

[26] The trial judge's reasons were delivered before this Court's decision in *Canada v. Buckingham*, 2011 FCA 142 ("*Buckingham*"). I am satisfied that if the trial judge had had the advantage of this Court's reasons in that file, he would have made a different decision in the appellant's case.

[27] The trial judge who delivered the first judgment in *Buckingham* was also of the opinion that, since GST is paid by third parties, it was very difficult, if not impossible, to use the standard of care, diligence and skill defence under subsection 323(3) of the ETA. This Court rejected that approach on the ground that it would convert the liability of directors under section 323 of the ETA into an absolute liability, which was not the intention of Parliament in light of subsection 323(3): *Buckingham* at paragraphs 47 and 52.

[28] The GST is a value-added tax levied at every stage in the manufacturing and marketing of goods and services. It is payable by the recipient, who is also the debtor of the tax obligation to the Crown: subsection 165(1) of the ETA. Even so, the supplier of a product or service is still responsible for collecting and remitting the tax: subsection 221(1) of the ETA. However, the ETA sets out, for each stage in the supply of a product, a system of input credits. Those credits correspond to the taxes that each supplier has remitted to its own suppliers: subsection 169(1) of the ETA. Thus, the remittance obligation for a reporting period applies to the net tax corresponding to the amounts of tax "that became collectible and all other amounts collected" less the input tax credits and other authorized deductions: subsection 225(1) of the ETA. The net tax calculations may therefore be carried out on the basis of the amounts collectible but not

actually collected, or even, in some circumstances, lead to a refund request for a reporting period.

[29] Therefore, there is no direct correlation between the amounts of GST collected by a supplier from its clients and the amount of net tax that must be remitted for a reporting period. In this regard, Justice LeBel stated the following in *Quebec (Revenue) v. Caisse populaire Desjardins de Montmagny*, 2009 SCC 49, [2009] 3 S.C.R. 286:

[24] This mechanism [of the ETA] is designed to implement a direct tax that is also a tax on the value added at each stage of the production and marketing of the good or service until it is acquired by its ultimate recipient. In such a system, as Duval Hesler J.A. noted, [TRANSLATION] “[t]he dollar collected is not the dollar remitted” (para. 52).

[25] First of all, the collection mechanism does not require separate invoices for the GST and the QST. These taxes are indicated and included in the invoice or other document given to the recipient (s. 223 *ETA*; s. 425 *AQST*). Next, the tax amounts collected by suppliers are remitted in accordance with the accrual, not cash, method of accounting. At periodic intervals, which vary depending on the individual supplier’s sales and sometimes on the nature of the business, suppliers remit to the tax authorities amounts corresponding to the tax amounts that have been billed for and are collectible during the reporting period in question even if these collectible amounts have not in fact been collected from the recipients. When sending remittances, suppliers deduct from the amounts being remitted credits corresponding to their own inputs, that is, to the taxes they have paid to their own suppliers. Thus, they remit net tax amounts based on the difference between the taxes they have collected and the taxes they themselves have paid (s. 228 *ETA*; s. 437 *AQST*). At times, under this system, they can obtain rebates.

[30] Parliament has decreed that directors are jointly and severally, or solidarily, liable for their corporations’ failure to remit GST-related net tax or overpayments of refunds their corporations have received. However, Parliament has also provided that this liability is not

absolute; rather, it is subject to a care, diligence and skill defence. In fact, the language of subsections 323(1) and (3) of the ETA is as follows:

323. (1) If a corporation fails to remit an amount of net tax as required under subsection 228(2) or (2.3) or to pay an amount as required under section 230.1 that was paid to, or was applied to the liability of, the corporation as a net tax refund, the directors of the corporation at the time the corporation was required to remit or pay, as the case may be, the amount are jointly and severally, or solidarily, liable, together with the corporation, to pay the amount and any interest on, or penalties relating to, the amount.

(3) A director of a corporation is not liable for a failure under subsection (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.

323. (1) Les administrateurs d'une personne morale au moment où elle était tenue de verser, comme l'exigent les paragraphes 228(2) ou (2.3), un montant de taxe nette ou, comme l'exige l'article 230.1, un montant au titre d'un remboursement de taxe nette qui lui a été payé ou qui a été déduit d'une somme dont elle est redevable, sont, en cas de défaut par la personne morale, solidairement tenus, avec cette dernière, de payer le montant ainsi que les intérêts et pénalités afférents.

(3) L'administrateur n'encourt pas de responsabilité s'il a agi avec autant de soin, de diligence et de compétence pour prévenir le manquement visé au paragraphe (1) que ne l'aurait fait une personne raisonnablement prudente dans les mêmes circonstances.

[31] The trial judge therefore had to consider all of the evidence filed in support of that defence. He could not exclude the appellant's grounds of defence from his deliberations on the ground that clients remitted GST to the corporation of which the appellant was a director. In doing so, he converted the liability of directors under subsection 323(1) into an absolute liability. Given the language of subsection 323(3) of the ETA, that conclusion is an error of law reviewable by this Court.

Second issue: Does the evidence in the record support a care, diligence and skill defence under subsection 323(3) of the ETA, given the legal framework applicable to such a defence?

Legal framework

[32] In *Buckingham*, this Court recently summarized the legal framework applicable to the care, diligence and skill defence under subsection 323(3), as follows:

- a. The standard of care, skill and diligence required under subsection 323(3) of the *Excise Tax Act* is an objective standard as set out by the Supreme Court of Canada in *Peoples Department Stores Inc.(Trustee of) v. Wise*, 2004 SCC 68, [2004] 3 S.C.R. 461. 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 or her own personal skills, knowledge, abilities and capacities. However, an objective standard does not mean that a director's particular circumstances are to be ignored. These circumstances must be taken into account, but must be considered against an objective "reasonably prudent person" standard.
- b. The assessment of the director's conduct, for the purposes of this objective standard, begins when it becomes apparent to the director, acting reasonably and with due care, diligence and skill, that the corporation is entering a period of financial difficulties.
- c. In circumstances where a corporation is facing financial difficulties, it may be tempting to divert these Crown remittances in order to pay other creditors and thus ensure the continuity of the operations of the corporation. That is precisely the situation which section 323 of the *Excise Tax Act* seeks to avoid. The defence

under subsection 323(3) of the *Excise Tax Act* must not be used to encourage such failures by allowing a care, diligence and skill defence for directors who finance the activities of their corporation with Crown monies, whether or not they expect to make good on these failures to remit at a later date.

- d. Since the liability of directors in these respects is not absolute, it is possible for a corporation to fail to make remissions to the Crown without the joint and several, or solidary, liability of its directors being engaged.
- e. 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 amounts at issue.

[33] The trial judge failed to apply these legal standards to the appellant's care, diligence and skill defence. In these circumstances, this Court could refer the file back to the Tax Court of Canada for reinvestigation and rehearing. Assessing the facts of each case is, in fact, the task of the Tax Court of Canada judges, and, to the extent that the applicable legal standards are taken into account in the factual analysis, this Court will but rarely intervene in the assessment of those facts, and only when a palpable and overriding error may be identified.

[34] However, this Court may make the required decision when conducting a reinvestigation and rehearing serves no purpose or is impractical and when there is already sufficient evidence in the record: *Sharbern Holding Inc. v. Vancouver Airport Centre Ltd.*, 2011 SCC 23, [2011] 2

S.C.R. 175 at paragraph 94; *Masterpiece Inc. v. Alavida Lifestyles Inc.*, 2011 SCC 27, [2011] 2 S.C.R. 387 at paragraphs 102 and 103; *Hollis v. Dow Corning Corp.*, [1995] 4 S.C.R. 634 at paragraph 33.

[35] Given that it would be impractical to refer this matter back to the Tax Court of Canada and that all of the evidence is already in the record, this Court may make the necessary decision, as permitted, moreover, by subparagraph 52(c)(i) of the *Federal Courts Act*, R.S.C. 1985, c. F-7.

[36] For the purposes of applying the legal rules and standards to the facts at issue, it is useful to distinguish between the remission periods at issue.

Periods for the year ending June 30, 2006

[37] The evidence in the record shows clearly that the appellant concerned himself with GCI's tax remittances as soon as this business began having financial difficulties and that he made a number of arrangements, both to turn the business around and to ensure that the GST-related net tax was remitted.

[38] In fact, at board of directors meetings, the appellant demanded attestations from GCI's chief of financial operations confirming that the tax deductions and remittances of GST-related net tax were carried out on time.

[39] In early 2006, no longer receiving those attestations, the appellant personally took charge of discussions with the tax authorities to ensure that the remittances were made by instalments. Various agreements were indeed reached with the persons in charge of the file for the tax authorities, which enabled GCI to remit in full the GST-related net tax for all of the periods at issue ending on June 30, 2006.

[40] In addition, the appellant took serious corrective actions during this period to ensure the continuity of GCI's operations, including making a sizeable capital advance. An amount of \$500,000 was injected in early 2005 and, although it was not intended solely for the tax authorities, this advance surely facilitated the remittances of the amounts owing as source deductions and GST-related net tax deductions for the periods at issue.

[41] Although these remittances resulted in part from the instalment agreements negotiated by the appellant and were made behind schedule, the appellant cannot reasonably be blamed for having made arrangements that enabled the tax authorities to obtain full payment of the remittances of net tax owing for the periods at issue.

[42] If those instalment agreements had not been followed by the remittance of the amounts owing, the appellant's liability under section 323 of the ETA could be more easily upheld. However, since the corrective actions and the instalment agreements did indeed make it possible for the amounts owing to the tax authorities for the periods at issue to be remitted, nothing supports holding the appellant liable under subsection 323(1) of ETA for those periods, given

that such liability is only incurred to the extent that the corporation in fact fails to remit the amounts at issue. Once the amounts are remitted by the corporation at issue, even belatedly, the director ceases to be liable under section 323 in respect of those amounts.

[43] The notice of assessment for the period from July 1, 2005, to June 30, 2006, pertains mainly to an amount of net tax of \$6,109.49 attributed to the three-month period from July 1 to September 30, 2005, to which the related interest and penalties were added. However, this amount results from a recalculation by the tax authorities after the GCI's bankruptcy, and neither GCI, nor the appellant, nor the tax authorities suspected that it was owing when the instalment agreements were reached and the resulting remittances of net tax were made: see the transcript of Norman Balthazard's examination at pages 72 and 73 (pages 464–65 of the Appeal Book) and the [TRANSLATION] "List of collection actions" at pages 264–65 of the Appeal Book).

[44] Although the appellant's joint and several, or solidary, liability in respect of this net tax in the amount of \$6,109.49 is engaged by the operation of subsection 323(1) of the ETA, the care, diligence and skill defence set out at subsection 323(3) applies in this regard, since a director acting in good faith and as a prudent person could not prevent the failure to remit an amount that neither the director, nor his corporation, nor the tax authorities could reasonably identify, before the business's bankruptcy, as owing to the tax authorities. I note, once again, that the good faith of GCI and of the appellant in respect of the quarterly net tax reports is not challenged in this file.

[45] In addition, the appellant has amply shown that, for the remittance periods leading up to June 30, 2006, he took every appropriate action to have the GST-related net tax remitted by GCI, and there is every reason to believe that the amount of \$6,109.49 resulting from the recalculation for the period in issue would also have been remitted by GCI had that amount been identified during the relevant period.

Period from July 1 to September 30, 2006

[46] The appellant's notice of assessment mainly pertains to the final remittance periods for GST-related net tax leading up to the proposal made on February 23, 2007, under the *Bankruptcy and Insolvency Act*, that is, the period from July 1 to September 30, 2006, and the period from October 1 to December 31, 2006.

[47] The record shows that the appellant made various advances to GCI between June 8 and December 15, 2006, totalling \$313,000. Those advances helped GCI pay off certain debts, but were not used for the remittance of GST-related net tax. In fact, although cheques were issued by GCI for those remittances, the bank did not honour them. Moreover, it was following these failures to remit that the appellant took the steps required for GCI to prepare a proposal to its creditors under the *Bankruptcy and Insolvency Act*.

[48] In this case, for the period at issue from July 1 to September 30, 2006, the appellant (a) continued to make considerable financial contributions to GCI so it could continue its operations; (b) attempted, unsuccessfully, to negotiate a new instalment agreement for the remittance due on

October 30, 2006, (c) ensured that GCI issued cheques to the tax authorities for the remittance due on October 30, 2006, although those cheques were not honoured by the bank, and (d) made arrangements for GCI to make a proposal to its creditors.

[49] The issue raised in this file concerns the delay of nearly four months between the due date on October 30, 2006, for the remittance of the net tax for the period from July 1 to September 30, 2006, and GCI's proposal to creditors on February 23, 2007.

[50] In fact, to exempt themselves from liability by means of a care, diligence and skill defence, directors must establish that they took the appropriate actions in a timely manner to limit the amounts at risk for the tax authorities as tax deductions or GST-related net tax remittances. A reasonably prudent director facing the imminent bankruptcy of his or her corporation would take the appropriate actions to minimize the tax authorities' losses. Although each case turns on its own facts and must be analyzed in light of all of the relevant circumstances, the more a business falls behind in making its tax remittances, the more difficult it is to argue that the business is not using the sums owing to the tax authorities to finance its activities. Therefore, it is important for directors to quickly make the necessary decisions if they wish to successfully mount a due diligence defence against their joint and several, or solidary, liability.

[51] In this particular case, the delay of nearly four months between the due date of the remittance on October 30, 2006, and the proposal to shareholders on February 23, 2007, remains

largely unexplained. The appellant contacted the tax authorities on or about October 30, 2006, to try to agree on instalments, but those discussions did not lead to an agreement. Throughout November and December, the appellant could not have been unaware that the business was in a very precarious situation, and it was therefore up to him to take the appropriate actions to minimize the tax authorities' losses. He did indeed make arrangements for a proposal to be made to creditors, but that proposal was not submitted until the end of February 2007. That shows a lack of diligence within the meaning of subsection 323(3) of the ETA, which affords the appellant no escape from his joint and several, or solidary, liability for the net tax remittance due on October 30, 2006, for the period from July 1, 2006, to September 30, 2006.

Period from October 1 to December 31, 2006

[52] However, a different approach must be taken regarding the final net tax remittance covering the period from October 1 to December 31, 2006, which was due on January 31, 2007.

[53] I emphasize once more that the liability of directors under section 323 of the ETA is not absolute. The defence set out at subsection 323(3) of this statute must therefore be assessed against the objective standard of "a reasonably prudent person . . . in comparable circumstances". Furthermore, the director's conduct must be examined for the entire period during which the corporation was in financial difficulty.

[54] This is why directors who concerned themselves with their corporation's tax remittances, took reasonable steps to ensure that those remittances were made to the tax authorities, did not

let the tax debts accumulate, and otherwise showed the care, diligence and skill required for those purposes may often successfully mount a defence under subsection 323(3) of the ETA with regard to their corporation's final net tax remittance.

[55] As I mentioned above, allowing tax debts to accumulate may be an impediment to the care, diligence and skill defence. However, what of the final remittance period? For that period, the director's liability must be assessed in light of his or her conduct since the beginning of the corporation's financial difficulties.

[56] Thus, a number of facts weigh in favour of such a defence being successful in this case. I note, in particular, the appellant's constant concern for his corporation's tax remittances, his numerous efforts since the beginning of GCI's financial difficulties to ensure remittance of the net tax, his numerous additional capital contributions to support the corporation throughout the period of its financial difficulties, the fact that the net tax was remitted in full for the period leading up to June 30, 2006, etc.

[57] Furthermore, the appellant's alleged lack of diligence with regard to the remittance dated October 30, 2006, cannot extend to the remittance of January 31, 2007. The appellant took the necessary action to stop the corporation's tax debts from accumulating. Although this action should have been taken sooner, the fact remains that the action was taken and that it enabled GCI to avoid further failures to remit the net tax. This effort by the appellant must be considered even if the action was taken somewhat belatedly.

[58] Considering all of the circumstances, the appellant may, in this particular case, make a care, diligence and skill defence under subsection 323(3) of the ETA with regard to the final remittance of net tax due on January 31, 2007.

[59] To conclude, I would add a general comment. In this case, the appellant made financial contributions to the corporation of which he was the director in order to support it during its difficulties. Although these contributions must be considered in the context of the care, diligence and skill defence under subsection 323(3) of the ETA, they are not necessary to establish that defence. Since the standard of care, diligence and skill required is an objective standard, and since a director acting as a “reasonably prudent person” is not required to contribute financially to the corporation of which he or she is the director, a defence under this subsection may be established by a director even if he or she has not contributed financially to his or her corporation. It is a matter of analyzing the particular facts of each case in light of the applicable legal standards.

Conclusions

[60] I would therefore allow the appeal in part, set aside the judgment of the Tax Court of Canada and, delivering the judgment that should have been delivered, refer the file back to the Minister for him to amend the appellant’s notice of assessment dated August 5, 2008, so that it applies only to the period from July 1, 2006, to September 30, 2006, for a total of \$15,791.65,

being the net tax owing, to which will be added the interest and penalties relating to that amount.

Given the outcome of this appeal, I would make no order as to costs.

“Robert M. Mainville”

J.A.

“I agree.

J.D. Denis Pelletier J.A.”

“I agree.

Johanne Trudel J.A.”

Certified true translation
Sarah Burns

ANNEX

Excerpts from the *Excise Tax Act*, R.S.C. 1985, c. E-15.

Imposition of goods and services tax

165. (1) Subject to this Part, every recipient of a taxable supply made in Canada shall pay to Her Majesty in right of Canada tax in respect of the supply calculated at the rate of 5% on the value of the consideration for the supply.

Collection of tax

221. (1) Every person who makes a taxable supply shall, as agent of Her Majesty in right of Canada, collect the tax under Division II payable by the recipient in respect of the supply.

Net tax

225. (1) Subject to this Subdivision, the net tax for a particular reporting period of a person is the positive or negative amount determined by the formula

$$A - B$$

where

A

is the total of

(a) all amounts that became collectible and all other amounts collected by the person in the particular reporting period as or on account of tax under Division

Taux de la taxe sur les produits et services

165. (1) Sous réserve des autres dispositions de la présente partie, l'acquéreur d'une fourniture taxable effectuée au Canada est tenu de payer à Sa Majesté du chef du Canada une taxe calculée au taux de 5 % sur la valeur de la contrepartie de la fourniture.

Perception

221. (1) La personne qui effectue une fourniture taxable doit, à titre de mandataire de Sa Majesté du chef du Canada, percevoir la taxe payable par l'acquéreur en vertu de la section II.

Taxe nette

225. (1) Sous réserve des autres dispositions de la présente sous-section, la taxe nette pour une période de déclaration donnée d'une personne correspond au montant, positif ou négatif, obtenu par la formule suivante :

$$A - B$$

où :

A

représente le total des montants suivants :

a) les montants devenus percevables et les autres montants perçus par la personne au cours de la période donnée au titre de la

II, and

(b) all amounts that are required under this Part to be added in determining the net tax of the person for the particular reporting period; and

B

is the total of

(a) all amounts each of which is an input tax credit for the particular reporting period or a preceding reporting period of the person claimed by the person in the return under this Division filed by the person for the particular reporting period, and

(b) all amounts each of which is an amount that may be deducted by the person under this Part in determining the net tax of the person for the particular reporting period and that is claimed by the person in the return under this Division filed by the person for the particular reporting period.

Calculation of net tax

228. (1) Every person who is required to file a return under this Division shall, in the return, calculate the net tax of the person for the reporting period for which the return is required to be filed, except where subsection (2.1) or (2.3) applies in respect of the reporting period.

taxe prévue à la section II;

b) les montants à ajouter aux termes de la présente partie dans le calcul de la taxe nette de la personne pour la période donnée;

B

le total des montants suivants :

a) l'ensemble des montants dont chacun représente un crédit de taxe sur les intrants pour la période donnée ou une période de déclaration antérieure de la personne, que celle-ci a demandé dans la déclaration produite en application de la présente section pour la période donnée;

b) l'ensemble des montants dont chacun représente un montant que la personne peut déduire en application de la présente partie dans le calcul de sa taxe nette pour la période donnée et qu'elle a indiqué dans la déclaration produite en application de la présente section pour cette période.

Calcul de la taxe nette

228. (1) La personne tenue de produire une déclaration en application de la présente section doit y calculer sa taxe nette pour la période de déclaration qui y est visée, sauf si les paragraphes (2.1) ou (2.3) s'appliquent à la période de

déclaration.

Remittance

(2) Where the net tax for a reporting period of a person is a positive amount, the person shall, except where subsection (2.1) or (2.3) applies in respect of the reporting period, remit that amount to the Receiver General,

(a) where the person is an individual to whom subparagraph 238(1)(a)(ii) applies in respect of the reporting period, on or before April 30 of the year following the end of the reporting period; and

(b) in any other case, on or before the day on or before which the return for that period is required to be filed.

Liability of directors

323. (1) If a corporation fails to remit an amount of net tax as required under subsection 228(2) or (2.3) or to pay an amount as required under section 230.1 that was paid to, or was applied to the liability of, the corporation as a net tax refund, the directors of the corporation at the time the corporation was required to remit or pay, as the case may be, the amount are jointly and severally, or solidarily, liable, together with the corporation, to pay the amount and any interest on, or penalties relating to, the amount.

Versement

(2) La personne est tenue de verser au receveur général le montant positif de sa taxe nette pour une période de déclaration dans le délai suivant, sauf les paragraphes (2.1) ou (2.3) s'appliquent à la période de déclaration :

a) si elle est un particulier auquel le sous-alinéa 238(1)a)(ii) s'applique pour la période, au plus tard le 30 avril de l'année suivant la fin de la période;

b) dans les autres cas, au plus tard le jour où la déclaration visant la période est à produire.

Responsabilité des administrateurs

323. (1) Les administrateurs d'une personne morale au moment où elle était tenue de verser, comme l'exigent les paragraphes 228(2) ou (2.3), un montant de taxe nette ou, comme l'exige l'article 230.1, un montant au titre d'un remboursement de taxe nette qui lui a été payé ou qui a été déduit d'une somme dont elle est redevable, sont, en cas de défaut par la personne morale, solidairement tenus, avec cette dernière, de payer le montant ainsi que les intérêts et pénalités afférents.

Limitations

(2) A director of a corporation is not liable under subsection (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 316 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 subsection (1) 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 subsection (1) has been proved within six months after the date of the assignment or bankruptcy order.

Diligence

(3) A director of a corporation is not liable for a failure under subsection (1) where the director exercised the degree of care, diligence

Restrictions

(2) L'administrateur n'encourt de responsabilité selon le paragraphe (1) que si :

a) un certificat précisant la somme pour laquelle la personne morale est responsable a été enregistré à la Cour fédérale en application de l'article 316 et il y a eu défaut d'exécution totale ou partielle à l'égard de cette somme;

b) la personne morale a entrepris des procédures de liquidation ou de dissolution, ou elle a fait l'objet d'une dissolution, et une réclamation de la somme pour laquelle elle est responsable a été établie dans les six mois suivant le premier en date du début des procédures et de la dissolution;

c) la personne morale a fait une cession, ou une ordonnance de faillite a été rendue contre elle en application de la *Loi sur la faillite et l'insolvabilité*, et une réclamation de la somme pour laquelle elle est responsable a été établie dans les six mois suivant la cession ou l'ordonnance.

Diligence

(3) L'administrateur n'encourt pas

and skill to prevent the failure that a reasonably prudent person would have exercised in comparable circumstances.

Assessment

(4) The Minister may assess any person for any amount payable by the person under this section and, where the Minister sends a notice of assessment, sections 296 to 311 apply, with such modifications as the circumstances require.

Time limit

(5) An assessment under subsection (4) of any amount payable by a person who is a director of a corporation shall not be made more than two years after the person last ceased to be a director of the corporation.

Amount recoverable

(6) Where execution referred to in paragraph (2)(a) has issued, the amount recoverable from a director is the amount remaining unsatisfied after execution.

Preference

(7) Where a director of a corporation pays an amount in respect of a corporation's liability referred to in subsection (1) that is proved in liquidation, dissolution or bankruptcy proceedings, the director is entitled to any preference that Her Majesty in

de responsabilité s'il a agi avec autant de soin, de diligence et de compétence pour prévenir le manquement visé au paragraphe (1) que ne l'aurait fait une personne raisonnablement prudente dans les mêmes circonstances.

Cotisation

(4) Le ministre peut établir une cotisation pour un montant payable par une personne aux termes du présent article. Les articles 296 à 311 s'appliquent, compte tenu des adaptations de circonstance, dès que le ministre envoie l'avis de cotisation applicable.

Prescription

(5) L'établissement d'une telle cotisation pour un montant payable par un administrateur se prescrit par deux ans après qu'il a cessé pour la dernière fois d'être administrateur.

Montant recouvrable

(6) Dans le cas du défaut d'exécution visé à l'alinéa (2)a), la somme à recouvrer d'un administrateur est celle qui demeure impayée après l'exécution.

Privilège

(7) L'administrateur qui verse une somme, au titre de la responsabilité d'une personne morale, qui est établie lors de procédures de liquidation, de dissolution ou de faillite a droit au

right of Canada would have been entitled to had the amount not been so paid and, where a certificate that relates to the amount has been registered, the director is entitled to an assignment of the certificate to the extent of the director's payment, which assignment the Minister is empowered to make.

privilège auquel Sa Majesté du chef du Canada aurait eu droit si cette somme n'avait pas été versée. En cas d'enregistrement d'un certificat relatif à cette somme, le ministre est autorisé à céder le certificat à l'administrateur jusqu'à concurrence de son versement.

Contribution

(8) A director who satisfies a claim under this section is entitled to contribution from the other directors who were liable for the claim.

Répétition

(8) L'administrateur qui a satisfait à la réclamation peut répéter les parts des administrateurs tenus responsables de la réclamation.

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET: A-98-11

APPEAL FROM A JUDGMENT BY JUSTICE ARCHAMBAULT OF THE TAX COURT OF CANADA, DATED FEBRUARY 9, 2011.

STYLE OF CAUSE: Normand Balthazard v. Her Majesty the Queen

PLACE OF HEARING: QUÉBEC

DATE OF HEARING: October 5, 2011

REASONS FOR JUDGMENT BY: MAINVILLE J.A.

CONCURRED IN BY: PELLETIER J.A.
TRUDEL J.A.

REASONS DATED: November 28, 2011

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