Docket: 2010-1210(GST)G

BETWEEN:

DANIEL MARCOTTE,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

[OFFICIAL ENGLISH TRANSLATION]

Appeal heard on common evidence with the appeal in file No. 2008-3789(GST)G on May 17, 2012, at Ottawa, Ontario.

Before: The Honourable Chief Justice Gerald J. Rip

Appearances:

Counsel for the Appellant	Jean Faullem
Counsel for the Respondent:	Gérald Danis

JUDGMENT

The appeal from the reassessment made under subsection 323(1) of Part IX of the *Excise Tax Act*, the notice of which is dated July 16, 2008, and bears the number PH2008-045, is dismissed.

Signed at Ottawa, Canada, this 7th day of February 2013.

"Gerald J. Rip"

Rip C.J.

Translation certified true
on this 26th day of April 2013.

Erich Klein, Revisor

Citation: 2013 TCC 49
Date: 20130207
Docket: 2010-1210(GST)G

BETWEEN:

DANIEL MARCOTTE,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

[OFFICIAL ENGLISH TRANSLATION]

REASONS FOR JUDGMENT

Rip C.J.

[1] This appeal is related to appeals involving the same parties dealt with in a previous decision of this Court (2012 TCC 336). The reassessment is based on the same facts. In the present case, Daniel Marcotte, director of 3634451 Canada Inc. (hereinafter JORA), is appealing a reassessment made on July 16, 2008, under subsection 323(1) of the *Excise Tax Act* (ETA). [1]

[2] To briefly recount the facts,[2] after negotiations with officials of Quebec's Ministère du Revenu (Revenu Québec), on August 8, 2004 JORA issued a $500,000 cheque to Revenu Québec in payment of the balance of the net tax owed by JORA, give or take a few thousand dollars. After splitting the amount of the cheque into two portions of $250,000 for goods and services tax (GST) and for Quebec sales tax (QST), Revenu Québec allocated the total amount of the cheque to JORA's account balance.

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1 The other appeals involved the assessments issued against Mr. Marcotte under subsection 325(1) of the ETA. All of the appeals were heard on common evidence.

2 More detailed facts can be found in the reasons for judgment in the appeals involving the same parties: 2012 TCC 336.

[3] In October 2007, the appellant entered into negotiations with Revenu Québec to change the way in which the cheque issued by JORA on August 18, 2004, was allocated. As stated in the letter dated October 12, 2007, from Jacques Plourde, a representative of Revenu Québec, the parties agreed that the cheque issued by JORA would be allocated as follows:

Gale Maloney	$61,852.79
Daniel Marcotte	$285,975.38
Guy Marcotte	$38,564.21
JORA	$113,607.62

[4] Ms. Maloney, Daniel Marcotte and Guy Marcotte were shareholders or employees of JORA.

[5] Following on the new allocation, Revenu Québec retroactively adjusted JORA's GST balance and issued notices of reassessment against the appellant under sections 323 and 325 of the ETA.

Issue

[6] The issue in this appeal is whether the appellant, as the director of JORA, is solidarily liable with JORA for the net tax that JORA failed to remit to the Minister. More specifically, the case concerns the appellant's entitlement to rely on the due diligence defence in subsection 323(3) of the ETA in order to avoid liability as a director of JORA.

The appellant's arguments

[7] In his written submissions, the appellant claims to have exercised the degree of care and diligence to prevent the failure that a reasonably prudent person would have exercised in comparable circumstances. More specifically, the appellant contends that he did the self-assessment for JORA in accordance with the requirements of the ETA and that, when he saw that there was a problem with respect to the calculation the amount of net tax owed by JORA, he immediately contacted a representative of Revenu Québec, Mr. Picard, to make sure that he was meeting his obligations. According to the appellant, an agreement was reached with Mr. Picard to treat five buildings constructed by JORA as a housing complex, which would thus allow all the self-assessments concerning the five buildings to be completed by December 31, 2004, without interest or penalties. Since Revenu Québec denies the

existence of such an agreement, the appellant claims that he was misled by Mr. Picard, whom he had trusted.

[8] The appellant points out that the Court must, in its assessment of the due diligence defence, consider in the light of the objective test set out by the Federal Court of Appeal in *Canada v. Buckingham*, 2011 FCA 142, 2011 DTC 5078, the circumstances the appellant found himself in during the period in question.

[9] Last, the appellant submits that the fact that JORA provided a cheque for $500,000 although no notice of assessment had yet been issued is evidence of the appellant's due diligence. For all these reasons, the appellant submits that the exemption from liability pursuant to subsection 323(3) of the ETA is available to him.

Respondent's arguments

[10] The respondent is of the opinion that all of the requirements of subsection 323(2) of the ETA have been met since a certificate and a writ of seizure were issued on April 7, 2008, and June 10, 2008, respectively, and the writ was executed without the full amount of JORA's tax debt being collected.

[11] Relying on the pronouncements of the Federal Court of Appeal in *Buckingham* (*supra*), the respondent argues that the appellant's negligence can be seen on two levels. First, the respondent does not recognize the existence of an agreement between Mr. Picard and the appellant. Consequently, the respondent maintains that the appellant wilfully let the date for the mandatory filing of JORA's net tax returns pass. Accordingly, the filing of the New Residential Rental Property GST Rebate Application forms on February 28, 2004, demonstrates the appellant's voluntary failure to remit JORA's net tax within the prescribed time.

[12] Second, the respondent contends that the appellant, by requesting that the allocation of the payment of August 18, 2004, be amended, made a deliberate choice to pay his personal debt to the detriment of JORA's debt. Since JORA's failure to remit resulted from the appellant's decision, the appellant cannot claim that he acted diligently to prevent the failure contemplated in subsection 323(1) of the ETA.

Analysis

[13] I agree with the Minister's position. An assessment under subsection 323(1) is against a person who is a director of a corporation that owes net tax for one or more

reporting periods (or a refund overpayment or interest overpayment) and that has not remitted that tax. An assessment under subsection 325(1) is against a transferee of property who has received that property from a transferor who is not at arms length and who, at the time of the transfer, owed net tax for one or more reporting periods. In the appellant's appeal from the assessment made under subsection 325(1), I found that, at the time the transfer actually took place, the transferor did not owe any net tax and that events subsequent to the transfer that were not foreseen or reasonably foreseeable at the time of the transfer should not result in the transferee's liability under subsection 325(1).

[14] The assessment made under subsection 323(1) concerns the net tax owing for one or more reporting periods. When a net tax amount for a reporting period is remitted to the Receiver General by a taxpayer and the taxpayer subsequently allocates the amount of the payment so as to benefit other persons, it cannot reasonably be argued that the taxpayer paid an amount of net tax for a reporting period. Remitting an amount and then withdrawing it does not constitute a payment.

[15] I have considerable difficulty accepting the appellant's position that he exercised the degree of care, diligence and skill to prevent JORA's failure to meet its obligation to pay that a reasonably prudent person would have exercised in comparable circumstances: subsection 323(3). In this case, Mr. Marcotte is the one who [TRANSLATION] "withdrew" the tax amount that JORA had previously remitted to the Receiver General and who directed that other people, including the appellant himself, should be credited for the amount so remitted. The appellant acknowledged signing the tax remittance cheques and stated that he took the time to review the supporting documentation that his assistant brought him along with the cheques to be signed. A reasonable businessman placed in the same circumstances would thus have been aware of the extent of JORA's tax obligations and would by virtue of that fact have realized that amending the allocation of the payment would result in the creation of a debt for JORA. In such circumstances, it would be absurd to find that Mr. Marcotte acted diligently and that JORA paid an amount of net tax for a reporting period. In the end, JORA remains liable to pay an amount to the Crown for one or more reporting periods. Indeed, it is Mr. Marcotte who created the situation that resulted in the revival of JORA's debt.

[16] The appeal is dismissed.

Signed at Ottawa, Canada, this 7th day of February 2013.

"Gerald J. Rip"

Rip C.J.

Translation certified true
on this 26th day of April 2013.

Erich Klein, Revisor

CITATION:	2013 TCC 49
COURT FILE NO.:	2010-1210(GST)G
STYLE OF CAUSE:	DANIEL MARCOTTE v. HER MAJESTY THE QUEEN
PLACE OF HEARING:	Ottawa, Ontario
DATE OF HEARING:	May 17, 2012
REASONS FOR JUDGMENT BY:	The Honourable Chief Justice Gerald J. Rip
DATE OF JUDGMENT:	February 7, 2013

APPEARANCES:

Counsel for the appellant:	Jean Faullem
Counsel for the respondent:	Gérald Danis

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