

Docket: 2009-2139(GST)G

BETWEEN:

YVON TURCOTTE,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

[OFFICIAL ENGLISH TRANSLATION]

Appeal heard on November 22, 2012, at Montreal, Quebec.

Before: The Honourable Justice Johanne D'Auray

Appearances:

Counsel for the Appellant : Richard Généreux

Counsel for the Respondent : Danny Galarneau

JUDGMENT

The reassessment is referred back to the Minister for reconsideration and reassessment on the basis that the appeal is allowed for the periods of November 2001 and February 2002. The amount determined by the Minister for the period of October 2002 shall also be reduced by \$44.63.

Costs shall be against the appellant.

Signed at Ottawa, Canada, this 18th day of July 2013.

"Johanne D'Auray"

D'Auray J.

Translation certified true
on this 30th day of September 2013.

Erich Klein, Revisor

Citation: 2013 TCC 233
Date: 20130718
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REASONS FOR JUDGMENT

D'Auray J.

Introduction

[1] Mr. Turcotte was the director of Mission Confort Inc., previously known as Centre d'économie en Chauffage Turcotte Inc. (the Turcotte Corporation).

[2] The Turcotte Corporation, until its bankruptcy, carried on business in the distribution and sale of heating and air conditioning equipment.

[3] Pursuant to the *Excise Tax Act* (the Act), the Turcotte Corporation had to file a monthly goods and services tax (GST) return. Thus, at the end of each month, the Turcotte Corporation had to calculate its net tax.

[4] If the calculation of its net tax by the Turcotte Corporation yielded a positive amount, that is, the GST collected and collectable from its clients was greater than the GST paid on the supplies which it had purchased in the course of its commercial activities (commonly called input tax credits or ITCs), the Turcotte Corporation had to remit the difference as a net tax payment to the Receiver General of Canada.¹

¹ See subsections 225(1), 228(2), 228(2.3) and 228(3) of the Act.

[5] However, if the result of the calculation of the net tax was negative, that is, the GST collected or collectable was less than the GST paid on the supplies purchased by the Turcotte Corporation in the course of its commercial activities, the Receiver General had to pay back the difference to the Turcotte Corporation as a net tax refund.

[6] Following an audit, the Quebec Minister of Revenue, who was mandated to act on behalf of the Minister of National Revenue (the Minister), made an assessment whose effect was to increase the net tax of the Turcotte Corporation:

- by increasing the GST collected or collectable for certain periods and;
- by disallowing input tax credits claimed by the Turcotte Corporation for certain periods.

[7] In April 2004, when it made an assignment under the *Bankruptcy and Insolvency Act*, the Turcotte Corporation had a tax liability.

[8] Pursuant to section 323 of the Act, a director of a corporation is jointly and severally liable with the corporation for net tax not remitted to the Receiver General of Canada. Accordingly, Mr. Turcotte, as director, was assessed for the amount of net tax the Turcotte Corporation owed pursuant to the Act.

[9] Mr. Turcotte argues that as director he is only liable for part of the Turcotte Corporation's tax debt, namely the part thereof that relates to the GST collected from its clients.

[10] However, he submits that pursuant to the terms used in subsection 323(1) of the Act, that is, in the pre-2005 version (subsection 323(1) pre-2005), as director, he is not liable for the input tax credit amounts that the Minister disallowed following the audit of the Turcotte Corporation.

Issue

[11] The issue in the present appeal is whether Mr. Turcotte, as director, is liable for the Turcotte Corporation's tax debt pursuant to subsection 323(1) pre-2005, namely for the amounts related to the input tax credits the Minister disallowed.

Agreement on the facts

[12] At the hearing, the parties filed the following agreed statement of facts:

[TRANSLATION]

The parties in this case, through their counsel, enter into this agreement on facts for the purposes of the hearing. The parties do not intend to file any other documents (aside from those noted in the present agreement) and/or call witnesses during the hearing unless there is an agreement between the parties in this regard.

1. The applicable version of subsection 323(1) of the *Excise Tax Act* (ETA) for the periods in question in the present case is that which was in force before the amendments enacted by S.C., c. 30, para. 24, which came into effect on June 29, 2005. The version of subsection 323(1) of the ETA that applies in this case reads as follows:

323(1) Where a corporation fails to remit an amount of net tax as required under subsection 228(2) or (2.3), the directors of the corporation at the time the corporation was required to remit the amount are jointly and severally liable, together with the corporation, to pay that amount and any interest thereon or penalties relating thereto.

2. Notwithstanding the appellant's admission regarding the tax collected for the period of April 2001 (\$14,000.04) and October 2002 (\$4,144), the parties agree that the issue before this honourable court is as follows:
 - (a) In light of the facts of this case, can the respondent rely on subsection 323(1) of the ETA, as applicable during the period at issue, to assess the appellant as director of the Corporation?
3. Without admitting the validity of the respondent's factual assumptions, the appellant abandons the other issues raised in his amended notice of appeal.
4. Mission Confort Inc., previously known as Centre d'économie en Chauffage Turcotte Inc. (hereinafter the Corporation), was incorporated on November 14, 1979, pursuant to the *Canada Business Corporations Act*, R.S.C. (1985), c. C-44 (hereinafter the CBCA) and had its head office in the province of Quebec.
5. Until its bankruptcy, the Corporation carried on business in the distribution and sale of heating and air-conditioning units.
6. The Corporation was at all relevant times a registrant within the meaning of Part IX of the ETA.
7. The Corporation was required to produce a monthly return for the purposes of Part IX of the ETA.

8. The Corporation filed its GST returns for the purposes of Part IX of the ETA within the prescribed times, and the details of those returns are as follows:

Period	GST/HST and Adjustment	ITC and Adjustment	Net Tax
April 2001	\$106,586.10	\$63,711.91	\$42,874.19
May 2001	\$71,617.34	\$68,821.89	\$2,795.45
June 2001	\$93,930.71	\$58,788.13	\$35,142.58
July 2001	\$84,854.06	\$37,921.73	\$46,923.33
August 2001	\$124,376.32	\$112,102.17	\$12,274.15
Sept. 2001	\$60,515.89	\$47,317.98	\$13,197.91
October 2001	\$59,481.61	\$41,195.29	\$18,286.29
November 2001	\$25,053.11	\$34,708.29	- \$9,655.18
December 2001	\$20,153.78	\$15,730.09	\$4,423.69
February 2002	\$19,402.22	\$24,399.14	- \$4,996.92
October 2002	\$25,782.57	\$25,827.20	- \$44.63
July 2003	\$49,786.20	\$29,000.39	\$20,785.81

9. When it filed its GST returns referred to in paragraph 8, the Corporation remitted to the respondent the "net tax" indicated in that paragraph, and the Corporation received a refund of the following amounts noted at paragraph 8: \$9,655.18 for the period of November 2001, \$4,996.92 for the period of February 2002, and \$44.63 for the period of October 2002.
10. On October 1, 2003, the respondent began a tax audit of the Corporation's books.
11. On April 19, 2004, the respondent's auditor presented the draft assessment to Ms. Puppato, the Corporation's internal comptroller.
12. This draft assessment determined the Corporation's net tax to be as follows:

Period	Assessment	Net tax
April 2001	-	\$42,874.19
May 2001	\$21,397.07	\$24,192.52
June 2001	\$14,351.21	\$49,493.79
July 2001	\$14,023.25	\$60,955.58
August 2001	\$24,232.92	\$36,507.07
Sept. 2001	\$13,928.08	\$27,125.99
October 2001	\$17,128.45	\$35,414.74
November 2001	\$5,167.48	-\$ 4,487.70
December 2001	\$21.00	\$4,444.69
February 2002	\$77.00	-\$4,919.92
October 2002	\$12,934.48	\$12,889.85
July 2003	\$7,192.53	\$27,978.34

13. The appellant was the director of the Corporation during the period covered by the assessment at issue and at the time the Corporation had "to remit an amount of net tax as required under subsection 228(2) or (2.3)" within the meaning of subsection 323(1) of the ETA as in force before June 29, 2005.
14. On April 6, 2004, the Corporation made an assignment in bankruptcy pursuant to the *Bankruptcy and Insolvency Act* (hereinafter the BIA) and Réal Langlois was appointed trustee in bankruptcy, as appears from the notice of bankruptcy and of the first meeting of creditors dated April 8, 2004, submitted as **Exhibit A-1 (I-8)**.
15. The audit referred to in the preceding paragraphs amended the Corporation's net tax for the period from May 1, 2001 to July 30, 2003, as follows:

GST	Management Fees		\$4,144
ITC	9023-0579 Qc Inc.	\$94,653.56	
	Missing documents	\$1,098.90	
	Misc.	\$2,079.93	
	Invoices in wrong name	\$14,022.70	
	Gestion de Services Crémazie	\$12,099.72	
	Summary GST/ITC	\$2,355.66	
			\$126,309.47

As appears from the statement of audit adjustments dated April 9, 2004, submitted as **Exhibit A-2 (A-8)**.

16. On May 4, 2004, the respondent issued to the Corporation a notice of assessment with regard to GST for the period from May 1, 2001 to July 31, 2003, as appears from the notice of assessment dated May 4, 2004, submitted as **Exhibit A-3 (A-7)**.
17. On May 12, 2004, the respondent issued to the Corporation a notice of reassessment with regard to GST for the period from May 1, 2001 to July 31, 2003, as appears from the reassessment dated May 12, 2004 and submitted as **Exhibit A-4 (I-6)**.
18. On June 17, 2004, Her Majesty in right of Canada, represented by the Quebec Minister of Revenue, submitted to the trustee a proof of claim as an unsecured creditor under the BIA for the following periods:

ACT	Period	Amount
Excise Tax Act	2001-5 to 2004-02	\$170,722.98
	2004-03 (estimated)	\$3,830.98

TOTAL \$174,553.96

As appears from the letter from Revenu Québec dated June 17, 2004 and the documents attached thereto, submitted together as **Exhibit A-5** (I-10).

19. On April 20, 2005, Her Majesty in right of Canada filed a revised proof of claim regarding the following reference periods:

ACT	Period	Amount
Excise Tax Act	2001-04 to 2003-07	\$191,911.21
	2004-03 (estimated)	\$3,830.98
	TOTAL	\$195,742.19

As appears from the Revenu Quebec letter dated April 20, 2005 and the documents attached thereto, submitted together as **Exhibit A-6** (I-11).

20. On May 10, 2005, Her Majesty in right of Canada filed a revised proof of claim, which was unchanged in terms of the GST and the reference periods involved.
21. An amount of \$21,188.23 was added by Her Majesty in right of Canada's proof of claim against the Corporation submitted to the trustee on April 20, 2005 (A-6), and this amount was in relation to the period from April 1, 2001 to April 30, 2001.
22. By notice of assessment dated April 5, 2006 bearing the number BR 05 1023, the respondent claimed from the appellant as director of the Corporation a total of \$225,426.93, pursuant to subsection 323(1) of the ETA, for the period from March 31, 2001 to August 31, 2003, as appears from the notice of assessment dated April 5, 2006 and the appendix attached thereto, submitted as **Exhibit A-7** (I-1).
23. The appellant objected to the assessment of which the notice is dated April 5, 2006 within the statutory time limit, as appears from the notice of objection submitted as **Exhibit A-8** (I-2).
24. Under the terms of a settlement reached between the trustee and the respondent around July 2007, the amount assessed against the Corporation was brought down to \$77,077.33 (representing goods and services tax of \$4,144 and input tax credits of \$72,933.33) for the period from May 1, 2001 to July 31, 2003, as appears from the settlement and waiver of the right to appeal submitted as **Exhibit A-9** (I-12).
25. The appellant is not a party to the settlement between the Corporation and the Minister of Revenue.

26. On July 3, 2008, the respondent issued against the Corporation a reassessment confirming the settlement amounts referred to in paragraph 24 of the present agreement, as appears from the notice of assessment dated July 3, 2008 submitted as **Exhibit A-10**.
27. On March 30, 2009, the respondent issued a reassessment against the appellant for the period from April 1, 2001 to July 31, 2003 for a total of \$140,132.64, pursuant to subsection 301(5) of the ETA, which reassessment cancels and supersedes the April 5, 2006 assessment, as appears from the notice of assessment dated March 20, 2009 and the appendix attached thereto, submitted as **Exhibit A-11** (I-4).
28. This reassessment against the appellant dated March 30, 2009 (A-11) followed on from the adjustments made by the respondent to the Corporation's GST returns pursuant to Part IX of the ETA, the details being as follows:

Period	GST/HST and Adjustment	ITC and Adjustment	Net Tax
April 2001	\$120,586.14	\$63,711.91	\$56,874.23
May 2001	\$71,617.34	\$58,123.36	\$13,493.98
June 2001	\$93,930.71	\$51,612.52	\$42,318.19
July 2001	\$84,854.06	\$30,910.11	\$53,943.95
August 2001	\$124,376.32	\$99,985.71	\$24,390.61
Sept. 2001	\$60,515.89	\$40,353.93	\$20,161.96
October 2001	\$59,481.61	\$31,883.97	\$27,597.64
November 2001	\$25,053.11	\$31,084.59	- \$6,031.48
December 2001	\$20,153.78	\$15,719.59	\$4,434.19
February 2002	\$19,402.22	\$24,360.64	- \$4,958.42
October 2002	\$29,926.57	\$17,036.72	\$12,889.85
July 2003	\$49,786.20	\$21,087.86	\$27,978.81

29. The appellant admits, for the purposes of this case only, that the respondent could assess him under subsection 323(1) of the ETA considering the adjustments to the tax collected indicated at paragraph 28 for the periods of April 2001 and October 2002 and the related interest and penalties, namely: (1) tax collected increases by \$14,000.04 for the period of April 2001; (2) tax collected increases by \$4,144 for the period of October 2002.
30. The respondent for her part admits that the periods of November 2001 and February 2002 should be removed from the assessment in their entirety, as well as the amount of \$44.63 for the period of October 2002.
31. By letter dated April 3, 2009, Revenu Québec, as agent for the respondent, sent to the appellant the notice of reassessment dated March 30, 2009 (A-11) and a

notice of changes, as appears from the letter and notice of changes submitted as **Exhibit A-12** (I-3).

32. The objections officer in the appellant's case drafted a report in support of the changes noted in her letter of April 3, 2009, and this report was submitted as Exhibit A-13 (I-13).

Analysis

[13] To facilitate understanding of this case, I reproduce at paragraph 14 of these reasons the amounts the Turcotte Corporation reported in its GST returns, and at paragraph 15 of these reasons, the amounts determined with regard to tax collected, input tax credits and net tax in the last assessment, which confirms the agreement between the Minister and the trustee.

[14] The amounts reported by the Turcotte Corporation in its GST returns are as follows:

Column	1	2	3
Period	GST/HST Collected	ITC	Net Tax
April 2001	\$106,586.10	\$63,711.91	\$42,874.19
May 2001	\$71,617.34	\$68,821.89	\$2,795.45
June 2001	\$93,930.71	\$58,788.13	\$35,142.58
July 2001	\$84,854.06	\$37,921.73	\$46,923.33
August 2001	\$124,376.32	\$112,102.17	\$12,274.15
Sept. 2001	\$60,515.89	\$47,317.98	\$13,197.91
October 2001	\$59,481.61	\$41,195.29	\$18,286.29
November 2001	\$25,053.11	\$34,708.29	- \$9,655.18
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February 2002	\$19,402.22	\$24,399.14	- \$4,996.92
October 2002	\$25,782.57	\$25,827.20	- \$44.63
July 2003	\$49,786.20	\$29,000.39	\$20,785.81

[15] The amounts determined in the last assessment, following the agreement between the trustee and the Minister, are as follows:

Column	1	2	3
Period	GST/HST Collected	ITC	Net Tax

April 2001	\$120,586.14	\$63,711.91	\$56,874.23
May 2001	\$71,617.34	\$58,123.36	\$13,493.98
June 2001	\$93,930.71	\$51,612.52	\$42,318.19
July 2001	\$84,854.06	\$30,910.11	\$53,943.95
August 2001	\$124,376.32	\$99,985.71	\$24,390.61
Sept. 2001	\$60,515.89	\$40,353.93	\$20,161.96
October 2001	\$59,481.61	\$31,883.97	\$27,597.64
November 2001	\$25,053.11	\$31,084.59	- \$6,031.48
December 2001	\$20,153.78	\$15,719.59	\$4,434.19
February 2002	\$19,402.22	\$24,360.64	- \$4,958.42
October 2002	\$29,926.57	\$17,036.72	\$12,889.85
July 2003	\$49,786.20	\$21,087.86	\$27,978.81

[16] Regarding the amounts determined in the last assessment, Mr. Turcotte concedes that he was properly assessed for the periods of April 2001 and October 2002. In April 2001, the tax collected was established at \$120,586.14, resulting in net tax of \$56,874.23. For the period of October 2002, the tax collected was established at \$29,926.57, resulting in net tax of \$12,845.22. This admission goes hand in hand with Mr. Turcotte's argument that he is not responsible for the part of the assessment relating to the Minister's denial of certain input tax credits. For the periods covered by the concession, it can be seen that the input tax credits were not modified by the last assessment (see columns 1 and 2 of the tables at paragraphs 14 and 15 of these reasons).

[17] The respondent for her part concedes that the periods of November 2001 and February 2002 should be removed from the assessment in their entirety pursuant to the wording of subsection 323(1) pre-2005 (see column 3 of the tables at paragraphs 14 and 15 of these reasons).

[18] The respondent also concedes that an amount of \$44.63 should be deducted from the amount determined for the period of October 2002. This amount represents the refund of net tax that the Turcotte Corporation claimed in the calculation of its net tax for October 2002 (see, for the period of October 2002, column 3 of the table at paragraph 14 of these reasons). Therefore, the amount of net tax for the period of October 2002 is \$12,845.22.

[19] The respondent's admissions also go hand in hand with her argument that, pursuant to subsection 323(1) pre-2005, the Minister did not have the authority to assess Mr. Turcotte as director for the periods in which there was a refund of net tax (see paragraph 15, column 3, for the periods of November 2001 and February 2002,

and with regard to the refund of \$44.63 for the period of October 2002, see column 3 at paragraph 14 of these reasons).

[20] The applicable provision for the periods in question, namely subsection 323(1) pre-2005, is worded as follows in English and French:

Where a corporation fails to remit an amount of net tax as required under subsection 228(2) or (2.3), the directors of the corporation at the time the corporation was required to remit the amount are jointly and severally liable, together with the corporation, to pay that amount and any interest thereon or penalties relating thereto.

Les administrateurs de la personne morale au moment où elle était tenue de verser une taxe nette comme l'exigent les paragraphes 228(2) ou (2.3), sont, en cas de défaut par la personne morale, solidairement tenus, avec cette dernière, de payer cette taxe ainsi que les intérêts et pénalités y afférents.

[Emphasis added.]

[21] Subsection 323(1) of the Act is worded as follows in English and French since the 2005 amendments:

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.

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.

[Emphasis added.]

[22] Mr. Turcotte submits that pursuant to subsection 323(1) pre-2005, the Minister can only make a director liable for the tax payable, that is, the tax that the Turcotte Corporation would have collected from its clients following the distribution and sale of heating equipment. That tax payable is the amounts appearing in column 1 of the tables at paragraphs 14 and 15 of these reasons.

[23] This argument is based on the use of the word "*taxe*" in the French version of subsection 323(1) pre-2005 and the definition of "tax" in section 123, as "tax payable under this Part". The end of the French version of subsection 323(1) states:

Les administrateurs . . . sont en cas de défaut par la personne morale, solidairement tenus, avec cette dernière de payer cette taxe . . .

[Emphasis added.]

[24] According to Mr. Turcotte, subsection 323(1) pre-2005 does not refer to net tax but rather to the tax payable pursuant to Part IX. A director would thus only be responsible for the corporation's failure with respect to the tax payable, that is, the tax the Turcotte Corporation was required to collect from its clients on the distribution and sale of heating and air conditioning equipment.

[25] According to Mr. Turcotte, the input tax credits are refunds, as they represent amounts the Turcotte Corporation paid in GST when it purchased goods and services in the course of its commercial activities. He argues that the way the Act works is that the GST/ITC paid by the Turcotte Corporation to its suppliers must be refunded by the Minister. Those amounts are therefore refunds. Thus, as the text of subsection 323(1) pre-2005 does not refer to the concept of a refund within the meaning of section 230.1, it is clear that, under the pre-2005 version, the director cannot be responsible following the changes that the Minister made to these input tax credit refunds on the basis that the corporation was not entitled to the refunds, when the corporation had in fact claimed and received the input tax credit refunds.

[26] To come to this conclusion, he compares the current version of subsection 323(1), which states that a director will also be liable for any refund overpayment contemplated by section 230.1, with the pre-2005 version of subsection 323(1), which does not make any reference to refund overpayments contemplated by section 230.1. Section 230.1 states:

Where an amount is paid to, or applied to a liability of, a person as a refund, or as interest, under this Division and the person is not entitled to the refund or interest, as the case may be, or the amount paid or applied exceeds the refund or interest, as the case may be, to which the person is entitled, the person shall pay to the Receiver General an amount equal to the refund, interest or excess, as the case may be, on the day the refund, interest or excess, as the case may be, is paid to, or applied to a liability of, the person.

[27] I do not agree with Mr. Turcotte's arguments.

[28] First, I do not agree with his interpretation of the word "tax" in subsection 323(1) pre-2005.

[29] Although the word "tax" is defined at section 123 of the Act as being "tax payable", on analyzing the overall context of the Act, Parliament's intention, and the ordinary and grammatical meaning of the words, as advocated by the Supreme Court of Canada in *Canada Trustco Mortgage v. Canada*, 2005 SCC 54, it can be seen that the word "tax" in subsection 323(1) pre-2005 refers to "net tax" and not to "tax payable".

[30] The word "*taxe*" in the French version of subsection 323(1) pre-2005 is qualified by the demonstrative adjective "*cette*", and the word "*cette*" can only refer to the words "*taxe nette*" used earlier in the paragraph. For ease of understanding, I will paraphrase the French version of subsection 323(1) pre-2005:

Les administrateurs de la personne morale au moment où elle était tenue de verser une taxe nette . . . sont, en cas de défaut par la personne morale . . . tenus de payer cette taxe.

[31] My interpretation of the French word "*taxe*" as referring to net tax is confirmed in the English version of subsection 323(1) pre-2005. To paraphrase the English text:

Where a corporation fails to remit an amount of net tax, the directors of the corporation at the time the corporation was required to remit the amount are liable to pay that amount.

[32] In the English version of subsection 323(1) pre-2005, the word "amount" is used to refer to the amount of the net tax. Therefore, Mr. Turcotte's argument that the word "*taxe*" refers to tax payable is untenable. The French version is clear, but if there were any doubt as to the meaning of the word "*taxe*", the English version dispels such doubt. First, the English version speaks of the "amount of net tax" ("*montant de taxe nette*") and then of "the amount" and "that amount" ("*ce montant*") in referring to the "amount of net tax" ("*montant de taxe nette*").

[33] Explained briefly, the net tax in subsection 225(1) of the Act is the difference between the GST a person collected for a given period and the input tax credits for a given period.

[34] A person's net tax for a given period corresponds to a positive or negative amount. Thus, there is positive net tax when a person must pay the Receiver General the difference between the GST collected and the input tax credits (see subsection 228(1) of the Act).

[35] Negative net tax occurs when a person receives a net tax refund, because the person paid more GST (input tax credits) than he or she collected in taxes (see subsection 228(3) of the Act).

[36] The concept of net tax is important in this case because the 2005 amendment to subsection 323(1) refers to "an amount of net tax" or "a net tax refund" under section 230.1. To paraphrase the amended version of subsection 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 the corporation as a net tax refund, the directors of the corporation at the time the corporation was required to remit or pay the amount are liable, together with the corporation, to pay the amount and any interest on, or penalties relating to, the amount.

[37] The 2005 amendment to subsection 323(1) allows the Minister to render a director liable for a net tax refund obtained without entitlement or as an overpayment.

[38] Thus, pursuant to subsection 323(1) pre-2005, the Minister could not assess to make the director liable for any net tax refund obtained by the Turcotte Corporation without entitlement or as an overpayment.

[39] It was in light of this reasoning that the respondent consented to judgment for the periods of November 2001 and February 2002 and that a \$44.63 credit was applied for the period of October 2002.

[40] In this regard, the explanatory notes with respect to the amendment of subsection 323(1) state:

Clause 26 – Liability of Directors

ETA

323(1)

Where a corporation fails to remit an amount of net tax as required under subsection 228(2) or (2.3) of the Act, existing subsection 323(1) of the Act provides that a director of a corporation can, subject to certain conditions set out

in section 323, be held jointly and severally liable, together with the corporation, to pay the net tax and any interest or penalties relating to the net tax. One of those conditions, is that the director has not exercised due diligence in ensuring that the remittances are made.

Subsection 323(1) is amended to provide that a director of a corporation may also be held liable for the failure by the corporation to pay an amount of net tax refund to which the corporation is not entitled, as required under section 230.1 of the Act, and any interest and penalties relating to that amount.

Subsection 323(1) is also amended to harmonize it with the civil law applicable in the province of Quebec by adding in the English version of the subsection a reference to the directors being "solidarily" liable, which is comparable to the common law concept of joint and several liability.

The amendment applies in respect of net tax refund amounts paid to, or applied to the liability of, a corporation on or after Royal Assent.

[Emphasis added.]

[41] I therefore do not agree with Mr. Turcotte when he contends that under subsection 323(1) pre-2005, the Minister could not change the input tax credits.

[42] Under subsection 323(1) pre-2005, the Minister had the authority to assess net tax. He could thus change either the tax collected or the input tax credits. Contrary to Mr. Turcotte's position, it is impossible for me to associate input tax credits with net tax refunds. "Net tax" and "net tax refund" the terms are used in the relevant provisions in this case.

[43] Moreover, Mr. Turcotte's argument regarding tax payable is untenable. Tax payable applies to the recipient who must pay the GST. The concept of tax payable under the Act is different from the concept of net tax that is involved in this case.

Conclusion

[44] The Minister correctly assessed Mr. Turcotte as a director, under subsection 323(1) pre-2005 of the Act, for the amounts relating to the input tax credits the Minister disallowed.

[45] As the respondent conceded, the Minister could not assess Mr. Turcotte as a director, under subsection 323(1) pre-2005, with respect to the net tax refunds the Turcotte Corporation obtained without entitlement or as overpayments, because

subsection 323(1) pre-2005 does not make reference to the concept of net tax refund found in section 230.1 of the Act.

[46] Accordingly, the appeal is allowed with regard to the periods of November 2001 and February 2002. An amount of \$44.63 shall also be deducted from the amount the Minister determined for the reporting period of October 2002, resulting in net tax of \$12,845.22. The appeal is dismissed with regard to the other reporting periods.

[47] Costs shall be against the appellant.

Signed at Ottawa, Canada, this 18th day of July 2013.

"Johanne D'Auray"

D'Auray J.

Translation certified true
on this 30th day of September 2013.

Erich Klein, Revisor

CITATION: 2013 TCC 233

COURT FILE NO.: 2009-2139(GST)G

STYLE OF CAUSE: YVON TURCOTTE v. HER MAJESTY
THE QUEEN

PLACE OF HEARING: Montreal, Quebec

DATE OF HEARING: November 22, 2012

REASONS FOR JUDGMENT BY: The Honourable Justice Johanne D'Auray

DATE OF JUDGMENT: July 18, 2013

APPEARANCES:

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