

Docket: 2020-1862(GST)G

BETWEEN:

MICHAEL AYOUB,

Appellant,

and

HIS MAJESTY THE KING,

Respondent.

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Appeal heard on May 1, 2024, at Ottawa, Ontario

Before: The Honourable Justice Guy R. Smith

Appearances:

Counsel for the Appellant: Harold J. Feder

Counsel for the Respondent: Ahmed Ali

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**JUDGMENT**

UPON hearing the evidence and submissions of counsel for the Appellant and counsel for the Respondent;

AND IN ACCORDANCE with the attached Reasons for Judgment, the appeal made under the *Excise Tax Act* with respect to the Appellant's notice of assessment bearing number 5435383 dated January 31, 2019, is dismissed with costs awarded to the Respondent pursuant to Schedule II, Tariff B.

Signed on this 21<sup>st</sup> day of March 2025.

“Guy R. Smith”

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Smith J.

Citation: 2025 TCC 48  
Date: 20250321  
Docket: 2020-1862(GST)G

BETWEEN:

MICHAEL AYOUB,

Appellant,

and

HIS MAJESTY THE KING,

Respondent.

### **REASONS FOR JUDGMENT**

Smith J.

#### **I. INTRODUCTION**

[1] Michael Ayoub, the Appellant herein, was the sole director of 6545009 Canada Inc. (the “corporation”), a custom home builder operating in Ottawa, Ontario.

[2] The Appellant, in his capacity as sole director of the corporation, was assessed by the Minister of National Revenue (the “Minister”) pursuant to subsection 323(1) of the *Excise Tax Act*, R.S.C. 1985, c. E-15 (the “Act”).

[3] Subsection 323(1) provides that where a corporation fails to remit an amount of net tax, the directors of the corporation at that time, are jointly and severally liable together with the corporation to pay the amount and any interest or penalties relating to such amount.

[4] The Appellant relied on the defence known as the “due diligence defence” set out in subsection 323(3) of the Act. It provides as follows:

A director of a corporation is not liable for the 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.

[5] The Appellant's position can be summarized as follows.

[6] Firstly, the Appellant contends that the corporation's failure to remit net tax arose because of the decision to rent two newly built properties, thus triggering the self-supply rules and liability for GST based on the fair market value of the properties at the time. It can be argued that if the corporation did not receive sale proceeds, then it did not fail to remit tax held in trust.

[7] Secondly, he argues that if the corporation did not receive the proceeds of sale, then the Appellant did not have the proceeds under his control.

[8] Thirdly, he argues that his ongoing efforts to inject substantial personal funds in the corporation to keep it viable, suggest that he went "above and beyond" the degree of care, diligence and skill that a reasonably prudent person would have exercised in comparable circumstances.

[9] The only issue in this appeal is whether the Appellant can avail himself of the due diligence defence and convince the Court that he exercised the requisite degree of care, diligence and skill.

[10] For reasons set out below, the appeal must be dismissed.

## II. PRELIMINARY MATTERS

[11] Before turning to the evidence, I note for the record that the Minister made several assumptions in the Reply to the Notice of Appeal.

[12] In particular, the Minister assumed that the corporation filed quarterly tax returns reporting net tax owing as follows:

December 31, 2014:	\$ 171,987
March 31, 2015:	\$ 52,526
June 30, 2015:	\$ 80,007
September 30, 2016:	\$ 8,840
Total:	\$ 313,360

[13] As will be seen below, most of these tax returns were filed late.

[14] The corporation was assessed "as filed" and the Minister added penalties and interest. It is not disputed that the corporation failed to challenge the assessments

and in the context of this appeal, the Appellant has not attempted to challenge the actual amount of the assessment.

[15] I will add that the Appellant has admitted that the corporation failed to remit net tax in the amount of \$332,862.64, being the amount of the assessment that is the subject matter of this appeal.

### **III. THE EVIDENCE**

[16] Mr. Ayoub testified on his own behalf. There were no other witnesses.

[17] He originally worked as a computer program analyst in the local high-tech industry but had an interest in custom home building.

[18] The corporation was incorporated in early 2000 and used as a business vehicle for smaller projects. He was the sole officer, director and shareholder.

[19] In 2005, the Appellant purchased a parcel of land to build a custom home that became the family residence. He eventually left the high-tech industry to offer his services as a project manager for custom-built homes.

[20] Clients would acquire a parcel of land and submit proposed drawings. The Appellant would prepare a spreadsheet estimating all costs associated with the completion of the new home including all labour and materials. The Appellant would manage the project until the delivery of an occupancy permit. Since clients were responsible for all costs incurred, the Appellant's risk was limited.

[21] In or about 2012, the Appellant decided to build homes for resale.

[22] He acquired properties for this purpose and obtained financing secured by construction mortgages that were generally due within 12 months. This included 1st or 2nd ranking mortgages from private lenders with higher interest rates calculated at prime plus 4.5 per cent.

[23] In some instances, his siblings held title to the properties as nominees for the corporation and consequently appeared on title as mortgagors.

[24] The Appellant's difficulties commenced with the construction of six properties located at 286, 288 and 290 Dovercourt Avenue and 7, 9 and

11 Electric Street in Ottawa, Ontario. The market had softened in 2014–2015 and he was having difficulty selling the homes. He was forced to reduce prices.

[25] Once the properties were sold, there was rarely enough money to cover the closing costs and he was often required to advance funds to pay the outstanding mortgage(s), realty taxes, sales commission and legal fees. At times, there were insufficient funds to pay the sales commissions. In all instances, he ensured that building materials and trades, were paid.

[26] Over time, he injected his own money and borrowed from friends and family or from private lenders to cover the closing costs and other ongoing costs associated with the projects. As time passed, the corporation was experiencing cash flow problems and, in his own words, was “bleeding money” as the mortgages fell into arrears. The Appellant received demand letters from the mortgagees.

[27] He also received calls from his lawyer relaying that the lenders were requesting payment of the outstanding mortgages that were past due. He understood the risk associated with a potential power of sale when properties were often sold at a loss. He wanted to avoid this.

[28] As a result of these financial difficulties, the Appellant sold his personal residence and moved in with his parents. This was a difficult period in his life that also caused marital stress. He cashed in some savings and remortgaged his parent’s home to inject more capital into the corporation.

[29] In 2015, on the advice of his lawyer and real estate agent, he eventually decided to rent the properties at 286 and 290 Dovercourt Avenue to generate some cash flow. He did so while they remained listed for sale.

[30] The property located at 290 Dovercourt Avenue was rented to a third party on April 10, 2015. It was later sold in July 2017.

[31] The property located at 286 Dovercourt Avenue was also rented to a third party on October 28, 2015. It too was later sold on October 21, 2016.

[32] In October 2015, he was informed by his accountant that, by renting the properties, he was still responsible for collecting the GST/HST but since the corporation had not collected it, it was unable to make the remittance.

[33] The Appellant testified that he was aware of his obligation to collect GST/HST on the sale of a new property and had always done so.

[34] He indicated that he had advanced capital to the corporation and pointed to the shareholder loan of \$446,000 in the corporation's financial statement to December 31, 2016. He also indicated that he personally advanced approximately \$200,000 to pay the outstanding GST.

#### **A. Cross-Examinations**

[35] In cross-examination, the Appellant acknowledged he was responsible for all revenue and expenses and would deliver all source documents to his accountant. He reviewed the corporation's tax returns as prepared by his accountant.

[36] For the four quarterly reporting periods at issue, he acknowledged that the tax returns were filed late and did not include a payment.

[37] He acknowledged that the corporation incurred input tax credits during the construction phase and claimed refunds of approximately \$187,000.

[38] He also acknowledged that for the reporting period ending on June 30, 2014, he had reported sales of \$2,000,000 and net tax owing of approximately \$243,000. When shown the CRA Statement of Arrears (Ex. R-1), the Appellant acknowledged that payments of \$151,503 made from November 2015 to November 2016, were applied to the reporting period ending June 30, 2014.

[39] The Appellant admitted that his lawyer would receive and distribute the proceeds of sale as required to close the sale transaction but was not specifically instructed to collect and set aside the GST/HST collected on closing.

[40] He admitted that although some of the mortgages were past due, none of the mortgagees had initiated power of sale or foreclosure proceedings.

[41] With respect to the rented properties, the Appellant testified that in late October 2015 he was made aware of the corporation's obligation to assess GST/HST on the fair market value of the rental property.

#### **IV. CHRONOLOGY**

[42] Before turning to the Appellant's arguments and a discussion of the applicable jurisprudence, I will review the chronology of the corporation's activities focusing primarily on the Statement of Arrears entered as Exhibit R-1.

#### **A. 2013 Calendar Year**

[43] For the 2013 calendar year, the record indicates that the corporation received net tax refunds of approximately \$150,000. Other tax refunds were transferred and applied to subsequent reporting periods.

#### **B. 2014 Calendar Year**

[44] For the 2014 calendar year and the reporting period ending March 31, 2014, the corporation was entitled to a tax refund of \$46,739 but it was transferred and applied to the reporting period ending June 30, 2014. Other tax refunds for subsequent reporting periods ending September 30, 2014 and September 30, 2015 were also applied to this period.

[45] As admitted by the Appellant, in the first six months of 2014, the corporation sold three properties. A review of the Appellant's book of documents suggests that this included 9 Electric Street, 11 Electric Street and 288 Dovercourt Avenue. As appears on the statement of adjustments for these properties, GST/HST was added to the purchase price and collected from the purchasers on closing.

[46] The corporation filed its tax return late and was assessed on January 9, 2015. It reported gross sales of \$2,000,000 and net tax owing of about \$243,000. It was assessed a late filing penalty of \$2,969.

[47] The balance owed for that particular reporting period was settled in part by the transfer of tax refunds from other reporting periods, as noted above, but the corporation also made several lump sum payments from November 25, 2015 to November 17, 2016 for a total of \$151,503.

[48] In other words, the net tax that was due within 30 days of the reporting period ending June 30, 2014 was not paid for over 24 months.

[49] For the reporting period ending on December 30, 2014, the tax return and payment were due on January 31, 2015, but was not filed until 12 months later on April 11, 2016. The corporation reported net tax owing of \$171,987 and was assessed as filed, plus a late filing penalty.

[50] The corporation only made two payments in November and December 2016 totalling \$19,496, no other payments were made.

### **C. 2015 Calendar Year**

[51] For the 2015 calendar year and the reporting period ending March 31, 2015, the corporation filed its tax return on November 11, 2015, reporting net tax of \$52,526. It was assessed as filed and the Minister added a late filing penalty. No remittances were made.

[52] Additionally, for the reporting period ending June 30, 2015, the tax return was filed on November 11, 2015, reporting net tax of \$80,007. It was assessed as filed and the Minister added a late filing penalty.

[53] As will be discussed below, the liability for net tax arose because of the application of the self-supply rules and the Appellant's decision to rent the properties at 286 and 290 Dovercourt Avenue.

[54] At this point, I will note that I have reason to doubt that the applicable GST/HST was reported following the rental of the 290 Dovercourt Avenue property since the assessment for the reporting period ending on December 31, 2015 resulted in a credit of \$5,204. This was not raised or addressed by either party.

[55] In any event, I note that when the 286 Dovercourt Avenue property was sold on October 21, 2016, no GST/HST was collected because it was an exempt sale.

[56] Similarly, when the 290 Dovercourt Avenue property was sold on July 17, 2017, no GST/HST was collected because it was also an exempt sale.

### **D. 2016 Calendar Year**

[57] For the 2016 calendar year and the reporting period ending September 30, 2016, the corporation filed a tax return on October 20, 2016, and reported tax owing in the amount of \$8,840. The corporation was assessed as filed. No payments or remittances were made.

## **V. ANALYSIS**

### **A. Application of subsection 191(1) of the Act**



[58] I now turn to the first argument, being that the corporation did not receive proceeds of sale or collect GST when it rented the two properties in 2015 as such it did not “fail to remit” and consequently, the Appellant did not have proceeds under his control.

[59] Given the chronology reviewed above, I find that this argument is only relevant to the assessment for the reporting period ending June 30, 2015, when the property at 286 Dovercourt Avenue was rented. More specifically, it does afford a defence for the other assessments for the reporting periods ending December 31, 2014, March 31, 2015 and September 30, 2016.

[60] As explained above, the rental of the 286 Dovercourt Avenue property on October 28, 2015, appears not to have been declared for the reporting period ending December 31, 2015. To the extent that it was, these reasons would apply.

[61] The change of use or self-supply rules arise because of the application of subsection 191(1) of the Act. In *Weyand v. The Queen*, 2004 TCC 355 (“Weyand”), Justice Mogan explained it as follows :

11. The effect of subsection 191(1) is significant. If a person constructs a building with the intention of selling it and then, for whatever reason, grants possession of the building to a tenant under a lease as a place of residence, that person is deemed to have sold the building at the time (...).

[62] The rationale for this provision is that the builder of the home has in effect become the acquirer of the property. There is a deemed sale, and the GST/HST is calculated based on the fair market value of the property at that time. Were it otherwise, the Minister would never be able to collect GST/HST despite having granted input tax credits during the construction phase.

[63] As borne out of the facts in this instance, both rental properties were later sold, and no GST/HST was collected because they were GST/HST exempt sales.

[64] I agree with the Respondent that it does not matter that GST was not collected by the corporation because subsection 225(1) of the Act provides that a registrant has an obligation to calculate net tax based on the amount of GST “(...) that became collectible and all other amounts collected by the person in the particular reporting period(...)”.

[65] As a result, I reject the Appellant’s argument that the corporation “did not fail to remit” because the GST was never collected.

[66] I find that the corporation failed to remit the GST that was due at the end of the reporting period by the application of subsection 191(1), as referenced above.

[67] The Appellant admitted that he decided to rent the properties based on the advice of his lawyer and real estate agent, but he did so without consulting his accountant or any other tax professional.

[68] As will be discussed below, a director who is aware that the corporation is experiencing financial difficulties, has an onus to take active steps to prevent the failure of the corporation to remit net tax.

[69] Had the Appellant been concerned with the payment of GST/HST, he would have consulted his accountant before the properties were rented.

[70] To conclude, I reject this argument and find that the Appellant's conduct fell short of the degree or care, diligence and skill expected of a reasonably prudent person in comparable circumstances.

## **B. The Due Diligence Defence**

[71] I now turn to the Appellant's argument that his actions were "above and beyond" the degree of care, diligence and skill as required by subsection 323(3).

[72] The leading decision on the interpretation of subsection 323(3), is *Balthazard v. The Queen*, 2011 FCA 331 ("*Balthazard*") where the Federal Court of Appeal reiterated the test from the earlier decision of *Buckingham v. The Queen*, 2011 FCA 142 ("*Buckingham*").

[73] The analytical framework was described as follows (para 32):

a) The standard of care, skill and diligence required under subsection 323(3) of the *Excise Tax Act* is an objective standard (...). 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(3) of the *Excise Tax Act* seeks to avoid. **The defence (...) 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.

(My emphasis.)

[74] While recognizing that the liability of directors is not absolute, the test raises the bar and imposes a higher standard of care where the directors are aware that the corporation is facing financial difficulties.

[75] In this instance, there is little doubt that the Appellant was acutely aware of the corporation's financial difficulties by the end of June 30, 2014.

[76] During that reporting period, the corporation reported sales of \$2,000,000 but was unable to remit net tax of \$243,000 by the due date.

[77] From this point in time, it can be said that the bulk of the Appellant's efforts in connection with the GST was to make advances to the corporation to ensure payment of net tax owed for that reporting period. Those efforts were successful but over a period of approximately 24 months.

[78] As has been recognized on many occasions, the due diligence defence relates to a director's efforts to prevent the failure of the corporation to remit but not to cure failures after the fact over time: *Buckingham* (para 51) and *Ahmar v. Canada*, 2020 FCA 65 (para 18).

[79] When the Appellant states that the corporation made payments of \$150,000 to \$200,000 over time, this was clearly to cure the failure of the corporation to remit for the reporting period ending June 30, 2014. However, none of those efforts relate to the assessments that are at issue.

[80] Having sold the three properties in the spring of 2014, the Appellant continued the operations of the corporation and at times received input tax refunds. He did so notwithstanding an apparent lack of capital, using the GST/HST collected to continue his operations with no apparent course of action to prevent the failure of the corporation to remit net tax.

[81] To quote from *Balthazard*, what is required is that the Appellant demonstrate that he was “specifically concerned with the tax remittances” and proactively took steps to prevent the failure of the corporation to make those remittances (para 32).

[82] There was no evidence to suggest that the lawyer responsible for the closing of the transactions had received from the Appellant any instructions or directions with respect to collecting GST/HST on closing.

[83] I find that a reasonably prudent person in comparable circumstances, having knowledge of the corporation’s financial difficulties, would have instructed his lawyer to set aside the GST/HST amounts in trust.

[84] Even if the Court accepts that a) the market prices for new homes in the area had softened in the period from 2014 to 2015 and b) that the proceeds of sale were just enough or at times insufficient enough to discharge the mortgages on title and realty taxes, I find that the Appellant failed to recognize the priority afforded to the GST/HST collected on closing as agent for the Crown.

[85] I also find the Appellant’s efforts were focused on the payment of materials and trades as well as closing costs and mortgages. While this can be viewed as a sound business practice, it was to the detriment of the corporation’s obligation to remit net tax.

[86] It is also difficult to ignore that some properties were held by the Appellant’s siblings in trust as nominees for the corporation. Ensuring that the mortgages were discharged, shielded them from any liability. I can reasonably infer that the Appellant preferred their interest over the corporation’s obligation to remit net tax.

[87] The Appellant was the sole officer, director and shareholder of the corporation. Knowing that the corporation was in dire financial straits, he nonetheless continued its operations by completing the construction of more properties that were eventually rented in 2015.

[88] It is clear from *Balthazard*, noted above, that the due diligence defence cannot be used to shield directors “who finance the activities of their corporation with Crown monies” (para 32).

[89] The Appellant argues that his shareholder loan with the corporation at the end of the calendar year 2016 was \$446,000 thus demonstrating that he made good faith efforts to continue the operations of the corporation.

[90] However, while recognizing that this was commendable, I find that the bulk of those advances were used to cure the failure of the corporation to remit net tax for the reporting period ending June 30, 2014. They were used only to secure sufficient funds on closing and discharge the mortgages but not to pay the tax authorities. This issue was addressed in *Amb's v. The Queen*, 2020 TCC 62 (para 37).

[91] When trying to determine whether the Appellant acted with the requisite “degree of care, diligence and skill to prevent the failure” (ss. 323(3)), it is difficult to ignore that most, if not all, tax returns during the subject period were filed several months after the due date without any payment being made. This does not assist the Appellant nor demonstrate that he was “specifically concerned with the tax remittances.” (*Balthazard*, para 32(e)).

[92] The Appellant claims that there were never enough proceeds to close the sale transactions and that he was required to personally advance additional funds.

[93] It is apparent that the corporation was undercapitalized and often short of funds. However, I find that this does not absolve the Appellant of his obligation to prevent the failure of the corporation from remitting net tax. As noted in *White v. Minister of National Revenue*, [1990] T.C.J. No. 925 (para 7) , quoting from an earlier decision, allowing undercapitalized corporations to avail themselves of the due diligence defence “(...) could create a distortion adversely affecting the directors of adequately financed and cautiously managed operations.”

[94] The Appellant also refers to the decision of *Weyand*, noted above, where the GST registrant transferred its properties to a non-arm’s length mortgagee when there was no evidence that it was being pressed by creditors (para 30). Counsel for the

Appellant contrasts that decision with the facts in this instance, where all the lenders were at arm's length and thus it was not possible to request a reduction of the outstanding balance on closing. It is argued that the corporation had no ability to request that a lesser amount be accepted to discharge the mortgage.

[95] With respect, I attach little weight to this argument because it does not change the Appellant's obligation as a director, with knowledge that the corporation is in dire financial straits, to prevent the failure to remit.

[96] For all the above reasons, I once again conclude that the Appellant's conduct fell short of the degree or care, diligence and skill expected of a reasonably prudent person in comparable circumstances.

## VI. CONCLUSION

[97] For all the foregoing reasons, the appeal is dismissed with costs awarded to the Respondent pursuant to Schedule II, Tariff B.

Signed on this 21<sup>st</sup> day of March 2025.

“Guy R. Smith”

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Smith J.

CITATION: 2025 TCC 48  
COURT FILE NO.: 2020-1862(GST)G  
STYLE OF CAUSE: MICHAEL AYOUB AND HIS MAJESTY THE KING  
PLACE OF HEARING: Ottawa, Ontario  
DATE OF HEARING: May 1, 2024  
REASONS FOR JUDGMENT BY: The Honourable Justice Guy R. Smith  
DATE OF JUDGMENT: March 21, 2025

APPEARANCES:

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