Docket: 2010-2830(IT)G

BETWEEN:

DONALD ANDREW,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

Appeal heard on January 21 and 22, 2014, at Toronto, Ontario.

Before: The Honourable Justice B. Paris

Appearances:

Counsel for the Appellant:	Leigh Somerville Taylor
Counsel for the Respondent:	Craig Maw

JUDGMENT

The appeal from the reassessment made under the *Income Tax Act* in respect of the 2005 and 2006 taxation years is allowed in part and the reassessment is referred back to the Minister of National Revenue for reconsideration and reassessment in accordance with the attached Reasons for Judgment. The respondent is entitled to one set of party and party costs in this appeal and appeal # 2010-2205(GST)G.

Signed at Vancouver, Canada, this 2nd day of January 2015.

"B. Paris"

Paris J.

Docket: 2010-2205(GST)G

BETWEEN:

DONALD ANDREW,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

Appeals heard on January 21 and 22, 2014, at Toronto, Ontario.

Before: The Honourable Justice B. Paris

Appearances:

Counsel for the Appellant:	Leigh Somerville Taylor
Counsel for the Respondent:	Craig Maw

JUDGMENT

The appeals from the reassessments made pursuant to section 323 of the *Excise Tax Act*, notices of which are dated April 23, 2008 and December 13, 2007 are allowed in part and the reassessments are referred back to the Minister of National Revenue for reconsideration and reassessment in accordance with the attached Reasons for Judgment. Penalties and interest, if any, shall be adjusted accordingly. The respondent is entitled to one set of party and party costs in this appeal and appeal # 2010-2830(IT)G.

Signed at Vancouver, Canada, this 2nd day of January 2015.

"B. Paris"

Paris J.

Citation: 2015 TCC 1
Date: 20150102
Dockets: 2010-2830(IT)G,
2010-2205(GST)G

BETWEEN:

DONALD ANDREW,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

REASONS FOR JUDGMENT

Paris J.

[1] These are appeals from three assessments made against Donald Andrew as director of Andrew Paving and Engineering Ltd. ("Andrew Paving") and 1555223 Ontario Inc. ("155"). Mr. Andrew was the president and CEO and the sole director of each corporation.

[2] By notice dated April 23, 2008, Mr. Andrew was assessed pursuant to section 323 of the *Excise Tax Act* ("*ETA*") for Goods and Services Tax ("GST") which Andrew Paving allegedly failed to remit for its reporting periods ending between September 30, 2000 and September 30, 2006. The amount of this assessment is $190,413.45, inclusive of interest and penalties.

[3] By notice dated December 13, 2007, Mr. Andrew was assessed pursuant to section 323 of the *Excise tax Act* ("*ETA*") for GST which 155 allegedly failed to remit for its reporting periods ending June 30, 2003 September 30, 2003 and December 31, 2003. The amount of this assessment was $112,807.03 inclusive of interest and penalties.

[4] By notice dated April 23, 2008, Mr. Andrew was assessed pursuant to section 227.1 of the *Income Tax Act* (*"ITA")* for source deductions which Andrew Paving allegedly failed to remit for the years 2005 and 2006. This assessment was for $166,591.81, inclusive of interest and penalties.

[5] The issues in this appeal are:

i) whether the amounts of the underlying liabilities of Andrew Paving and 155 for which the Minister seeks to hold Mr. Andrew liable are correct;

ii) whether the respondent has the onus to prove the amount of the underlying corporate liabilities; and

iii) whether Mr. Andrew exercised due diligence to prevent any failures by Andrew Paving and 155 to remit the amounts in issue.

Witnesses

[6] The appellant testified on his own behalf and three collections officers from the Canada Revenue Agency ("CRA"), Jay Schafer, Ron Jarman and Rocco Locantore, gave evidence on behalf of the respondent.

Facts

The corporations

[7] Andrew Paving was incorporated in the early 1960's and carried on the business of paving and road-building in the Toronto area. It operated in conjunction with a related company, Meld Development Inc. ("Meld") which was set up around the same time as Andrew Paving.

[8] Mr. Andrew explained that Meld was set up to own the equipment that was used by Andrew Paving in the business, and that this arrangement was intended to protect the equipment from seizure by creditors in the event that Andrew Paving ran into financial difficulties.

[9] According to Mr. Andrew, prior to 2003, Andrew Paving and Meld split the revenue and expenses from the operation of the paving business and each reported a share of the GST and input tax credits ("ITCs") from the business. Most, if not all of the billing was done by Andrew Paving, although Mr. Andrew said that Meld may have had a few paving contracts that it completed on its own.

[10] After August 2003, Andrew Paving began reporting all GST and ITCs in respect of the activities of both companies and Meld reported nothing. Mr. Andrew said that he was advised to proceed in this fashion by Jay Schafer, a

CRA collections officer he dealt with in August 2003. Mr. Schafer, however, unequivocally denied having ever advised Mr. Andrew to consolidate the GST reporting under the name of Andrew Paving. According to Mr. Andrew, Andrew Paving and Meld still filed separate income tax returns after 2003.

[11] The third company in issue, 155, was set up in December 2002 when Mr. Andrew was planning to transfer the paving business to his son. It appears that the plan was to transfer the equipment and paving business of both Meld and Andrew Paving to 155 and to transfer the shares of 155 to Mr. Andrew's son. The shares of 155 were never transferred, because Mr. Andrew said that at some point in 2003, he became aware that his son, who worked for Andrew Paving, had improperly appropriated hundreds of thousands of dollars of payments that were due to the company.

[12] Mr. Andrew said that another reason that the transfer did not take place was because his accountant advised that if the paving business was transferred to 155, Andrew Paving would lose its ability to use the tax losses it was carrying forward. Even though 155 was apparently already operating, he said that his accountant told him that those operations should be treated as the business of Andrew Paving rather than of 155. Mr. Andrew recalled that employee source deductions had already been remitted under the name of 155 and that this could not be reversed but that all other aspects of the transfer were cancelled and that Andrew Paving reported everything else for income tax purposes.

[13] The evidence shows, though, that 155 filed GST returns for the reporting periods ending June 30, 2003, September 30, 2003 and December 31, 2003 and it reported total net GST due of $78,250.82. No payments were remitted with those returns and no amounts have been paid on that account subsequently.

[14] In cross-examination, Mr. Andrew conceded that the GST returns had been filed by 155 and that it owed GST which was assessed pursuant to those returns and that the amount owing by 155 did not relate to employee source deductions.

Financial Difficulties

[15] Mr. Andrew testified that the paving business was seasonal in nature. During the winter months, there would be little paving work but expenses would still be incurred due to the need to repair and maintain equipment and to purchase materials for next season. During the construction season, cash flow was also

often an issue. Customers were slow to pay and this became worse as time went on.

[16] In 2003, the business took a downward turn. Andrew Paving encountered serious problems collecting for work it did on the Sheppard subway line. It took several years to collect about $800,000 that it had billed in 2003. The company also faced financial difficulties because of the improper diversion of funds by Mr. Andrew's son.

[17] As a result, and because Mr. Andrew's son, who was a key employee of Andrew Paving left the company, Mr. Andrew decided to get out of the business. He began to wind down the operations of Andrew Paving and Meld in 2005 but said that the companies worked through 2006 with reduced staff in order to collect amounts that were due. By the end of 2006, operations had virtually ceased. In 2007, 2008 and 2009, Mr. Andrew spent his time collecting payments from various clients and negotiating payments of his companies' bills. He used the amounts he collected from clients as well as money he received from his mother's estate and other personal funds to pay creditors other than the Minister of National Revenue.

Dealings with the CRA

[18] Mr. Andrew testified that Andrew Paving and Meld ran into problems with their GST filings soon after the GST was introduced in 1991. He said that although the corporations filed GST returns showing they were entitled to a refund because their ITCs exceeded the GST collected, no refund was received and no credit to their accounts was posted by the CRA apparently because the CRA had no record of having received those returns. Mr. Andrew testified that the CRA kept asking for returns his companies had already submitted as CRA had no record of those returns having already been submitted.

[19] Later, when the corporations filed returns showing net tax payable, they did not submit any payment with those returns on the expectation that the previous credit returns would balance against the amounts due. Mr. Andrew said, though, that the previous credits were not applied and penalties and interest were charged on the net tax due because the CRA did not process the credit returns it had filed.

[20] Mr. Andrew said he became personally involved with the GST filings in about 1995 when he realized it became too complicated for the bookkeeper who had been responsible for the returns up to that point. He was certain that the

corporations were being overcharged interest and penalties and said he spent a great deal of time trying to sort out the problems with the GST. He also felt that the problem was compounded by the application of payments made by the corporations to those penalty and interest amounts rather than to the net tax that the corporations were required to remit. This, in turn caused further penalties and interest to accrue.

[21] In the fall of 1996, the Minister issued arbitrary GST assessments against Meld totalling $144,861.82 because it had failed to file GST returns for nine reporting periods ending between June 30, 1994 and June 30, 1996.

[22] Mr. Andrew testified that in December 1996, he met with a collections officer named C. Addorisio from the CRA and that they arrived at an agreement concerning Meld's outstanding GST liabilities at that time. He said that Mr. Addorisio agreed that Meld owed only $21,150 rather than $144,861.82. Mr. Andrew produced a copy of a letter dated December 11, 1996 addressed to Meld and signed by both him and Mr. Addorisio. I will refer to this as the "Meld letter."

[23] The Meld letter refers to "section 323 liability of directors" and sets out that the Minister agrees to release a requirement to pay which was issued to Meld's bank in respect of Meld's GST liability and that, in return, Mr. Andrew undertakes not to use the fact of the release as a defence in any action arising out of the application of section 323 of the *ETA*. The first sentence of that letter originally read as follows:

> Whereas, I am a Director of the above captioned corporation and which corporation is at this date indebted to Her Majesty on account of unremitted Goods and Services tax, in the amount of $144,861.82 as assessed under the Excise Tax Act.

[24] The last part of that sentence was amended by inserting in handwriting the following underlined words so that the sentence now reads:

> Whereas, I am a Director of the above captioned corporation and which corporation is at this date indebted to Her Majesty on account of unremitted Goods and Services tax, in the amount of $144,861.82 as <u>arbitrarily</u> assessed under the Excise Tax Act <u>and re-assessed at $21,150 plus penalty and interest up to period ending 96-06-30.</u>

[25] Mr. Andrew stated that he and Mr. Addorisio had reviewed Meld's account and the returns that Meld had filed shortly before the meeting for the periods

covered by the arbitrary assessments and that Mr. Addorisio had agreed to reduce the assessed amount which was set out in the Meld letter. However, Mr. Andrew said that Meld's liability has never been reduced despite his repeated requests to have it done. Mr. Andrew maintains that Meld was entitled to a credit of approximately $123,000 as a result of the agreement he made with Mr. Addorisio, and said that he has been attempting for many years to have the CRA honour that agreement.

[26] Mr. Andrew said that, after the agreement was made with Mr. Addorisio, whenever any CRA collections officers contacted him about amounts owing by either Meld or Andrew Paving, he would explain that the CRA owed the companies money because the $123,000 credit had not been processed.

[27] He referred to certain letters from different CRA collections officers to Andrew Paving between July 2000 and October 2002, and testified that he called the officers on the file and explained about the Meld credit and that the collections officers simply "went away" after the calls.

[28] Sometime in 2000, the CRA began a GST audit of both Meld and Andrew Paving for the period from April 1, 1996 to June 30, 1999. The audit resulted in reassessments in September 2002 for additional GST of $65,362, penalty of $23,530.64 and interest of $17,402.34 for Andrew Paving and additional GST of $48,005.00 for Meld (the amount of penalty and interest on the assessment issued to Meld is not in issue). Andrew Paving had also been reassessed separately in June 2002 to disallow ITCs of $41,246 for its reporting period ending September 30, 2001.

[29] In January 2003, Andrew Paving and Meld each filed a notice of objection to the reassessments. The grounds for Andrew Paving's objection were that the assessment did not include credits to its account for payments made and for credits claimed on its GST returns, and did not take into account ITCs (presumably the disallowed amount of $41,246 for the period ending September 30, 2001.)

[30] In July 2003, Mr. Andrew met with Jay Schafer (the CRA collections officer) who had contacted Mr. Andrew about the outstanding GST debts of Andrew Paving and Meld. According to Mr. Andrew, he met with Mr. Schafer twice and reviewed the accounts of both Meld and Andrew Paving with him. They arrived at an agreement on how much GST both Meld and Andrew Paving owed and Mr. Andrew agreed to file all overdue GST returns for Andrew Paving and to

provide post-dated cheques sufficient to pay the amounts owing for all reporting periods up to that point.

[31] Mr. Andrew also undertook to make a fairness application for a cancellation of penalties and interest, and agreed to write a letter to the Director of the Toronto North Tax Services Office regarding the agreement he said was set out in the Meld letter.

[32] Mr. Andrew wrote to the Director of the Toronto North Tax Services Office of the CRA on August 5, 2003 to request the credit for the $123,000 that he felt was due to Meld from 1996. A confirmation of receipt of the letter was sent to Mr. Andrew by the Assistant Director of that office on August 21, 2003.

[33] On August 18, 2003, Mr. Andrew provided Mr. Schafer with post-dated cheques totalling $342,000 for both companies, as well as GST returns and net tax due for Andrew Paving's reporting periods ending between March 2002 to June 30, 2003. Mr. Andrew said that he expected to receive penalty and interest relief for both Meld and Andrew Paving and a credit for $123,000 respecting the Meld letter and that as a result, he thought that the CRA would not need to cash all of the post-dated cheques.

[34] On September 5, 2003, Mr. Andrew wrote to Lisa Kelly, the CRA appeals officer assigned to handle the objections previously filed by Andrew Paving and Meld, and advised her that, after reviewing Andrew Paving's GST account with Mr. Schafer, he was satisfied that all credits for the reporting periods from April 1, 1996 to June 30, 1999 had been properly accounted for. The only item left outstanding at that point concerned the ITCs disallowed to Andrew Paving for the period ending September 30, 2001. (Those ITCs were ultimately allowed by Ms. Kelly.)

[35] On November 18, 2003, Mr. Andrew prepared the fairness application for each company and set them to the CRA.

[36] On April 30, 2004, both Meld's and Andrew Paving's fairness applications were granted in part. Penalties and interest were reduced by approximately $56,691 for Meld and by approximately $14,910 for Andrew Paving. The letter from CRA collections to Andrew Paving which granted the relief, provided the following details of interest and penalties that had been assessed to Andrew Paving for all of its reporting periods ending from March 31, 1991 on:

> The accrued penalty and interest charges on your account total approximately $77,998.56. Of this amount, $14,910.19 has accrued on the audited periods, and $3,540.26 has accrued on periods in which notional assessments were raised and later replaced by you in November of 1996. The remaining $59,548.11 pertains to periods in which you filed or paid returns late.
>
> . . .
>
> Relief for the audited periods will be granted in full, resulting in the cancellation of approximately $14,910.19. Periods in which notional assessments were raised will not receive relief as the change in penalty and interest charges would be minimal. I should caution you that the cancelled amount is approximate, and total cancellation will not be available until the appropriate adjustments are completed.

[37] The penalties and interest which were cancelled related to the audited period of April 1, 1996 to June 30, 1999.

[38] Mr. Andrew testified that he continued to wait to hear from the Director of the Toronto North Tax Services Office regarding the Meld letter but that he never received a response.

[39] Mr. Andrew said that because he believed that there were credits owing by the CRA to Meld and Andrew Paving, including the $123,000 relating to the Meld letter, and because he could not get a response from anyone at the CRA about those credits, he decided not to pay any more tax amounts that were due by Andrew Paving or 155 until the matter was sorted out. In his view, if the amounts he believed to be owing to Meld and Andrew Paving were credited to them, there would have been sufficient funds available to offset any tax owing by Andrew paving and 155.

[40] Mr. Andrew said that the CRA collections section continued to pursue Andrew Paving and 155 for unpaid amounts, but that each time the companies were contacted by collections officers, he sent them a letter advising them that those companies did not owe anything. He said that he referred them to the Meld letter and to his request to the Director to acknowledge the credit owing to Meld and that each time he sent this information to the various collections officers, he said that he did not hear back from them. He also said that he dealt with between 15 and 20 collections officers during this period. The CRA collections diary, however, showed that far fewer collections officers handled the file after Mr. Schafer.

[41] The first of those CRA collections officers sent a demand for payment to Andrew Paving on June 9, 2005 for GST arrears of $167,957.90. Mr. Andrew replied by letter dated July 7, 2005, stating that the account had been paid in full up to June 2003 and that the amounts owing to Meld and Andrew Paving would eliminate the balance owing for subsequent reporting periods.

[42] In that letter and in a subsequent letter, he claimed that Andrew Paving and Meld had been granted additional relief from penalties and interest in the amount of $9,810 and $16,302.53, respectively, in June 2004 in respect of a second fairness review, but that neither company had received credit for those amounts.

[43] Mr. Andrew was not asked about this claim at the hearing and there was no reference to a second fairness review in any CRA letters or documents.

[44] The next contact with CRA collections occurred in March 2006 when collections officer Kevin Bailey called Mr. Andrew who followed up with a letter setting out his position that Andrew Paving, Meld and 155 did not owe any tax. Mr. Andrew said that Mr. Bailey suggested that he get a lawyer to assist him with the matter. Mr. Andrew testified that he then hired a lawyer to deal with the CRA.

[45] In June 2006, Andrew Paving was audited and assessed for unremitted employee source deductions and penalty and interest in the amount of $142,335.98 for 2005 and $1,365.05 for the months of January to May 2006. Mr. Andrew said that he was unaware of the audit and that the matter would have been handled by "the office." He said that he thought that the company was up-to-date on its source deductions. However, a T-4 Summary report filed by Andrew Paving for 2005 that was included in the source deduction audit papers filed at the hearing showed that Andrew Paving had reported a balance owing for source deductions of $164,377.21 for that year. The amount of the unremitted source deductions for 2005 was reduced to $124,377.21 by the auditor, exclusive of penalties and interest. Mr. Andrew admitted that he instructed personnel in Andrew Paving's office not to remit source deductions because he believed that Andrew and Meld had overpaid their taxes.

[46] In the spring of 2007, the CRA collections files for Andrew Paving, Meld and 155 were assigned to a collections officer named C. Andrews, and then, in the fall of 2007, to Ron Jarman.

[47] Mr. Andrew and his lawyer met on at least two occasions with Mr. Jarman. It was Mr. Jarman's recollection that Mr. Andrew was only disputing the CRA's

accounting in Meld's GST account, in particular with respect to the $123,000 Meld letter amount and with respect to three payments made to the Meld's account by cheque from Andrew Paving.

[48] Mr. Andrew testified that Mr. Jarman attempted to find where the three payments had been applied to but that he was unable to do so.

[49] Mr. Jarman, on the other hand, testified that he reconciled the three payments, one of which had taken some time to trace. Parts of one payment had been applied to three different reporting periods and therefore the statement of account did not show a credit in an amount that matched the payment. Mr. Jarman was therefore able to show that the entire amount of that payment as well as the two other contested payments had in fact been credited to Meld's account.

[50] In cross-examination, Mr. Andrew acknowledged that Mr. Jarman had been able to reconcile the payments in question to Meld's account, but was upset that without Mr. Jarman's assistance, he would not have been able to tell how the one payment that was split up, had been applied.

[51] In a letter dated April 23, 2008 to Mr. Andrew's lawyer, Mr. Jarman also explained the CRA's position that there was no $123,000 credit owing to Meld. Mr. Jarman wrote that:

> Secondly, there has been on-going confusion on Mr. Andrew's part regarding the letter of December 11, 1996. This letter was issued as the result of a Requirement to Pay issued on Meld's bank. As of that date, Meld was arbitrarily assessed in the amount $144,861.82. This amount was for the unfiled returns for periods ending 1994-06-30, 1994-09-30, 1994-12-31, 1995-03-31, 1995-06-30, 1995-09-30, 1995-12-31, 1996-03-31 and 1996-06-30. As standard Agency practice, Meld would have had to file these outstanding returns before release of the Requirement to Pay would be entertained. I am attaching a schedule of Meld's returns for these periods:

Period End Date	GST Collected	Input Tax Credit	Period Total
30-Jun-94	13,180.00	7,623.00	5,557.00
30-Sep-94	15,481.00	8,201.00	7,280.00
31-Dec-94	17,822.00	8,607.00	9,215.00

31-Mar-95	650.00	5,157.00	-4,507.00
30-Jun-95	11,857.00	7,789.00	4,068.00
30-Sep-95	19,602.00	12,080.00	7,522.00
31-Dec-95	24,075.00	14,690.00	9,385.00
31-Mar-96	0.00	5,100.00	-5,100.00
30-Jun-96	12,600.00	6,100.00	6,500.00
Totals	115,267.00	75,347.00	39,920.00

The figures set out in Mr. Jarman's letter were taken from a complete statement of Meld's GST account which Mr. Jarman subsequently sent to Mr. Andrew's lawyer on May 6, 2008. That statement confirmed that the GST collectable and ITCs available to Meld for the periods covered by the returns referred to above, were assessed in the amounts reported by Meld in the returns the company filed with the CRA.

[52] Mr. Jarman also wrote in the April 23, 2008 letter that:

> During our meeting on March 6, 2008, Mr. Andrew agreed to the balances owing on Andrew and 1555223. As such I am unable to grant your request to release the Requirements to Pay issued."

[53] The GST director's liability assessments against Mr. Andrew were issued on April 23, 2008. The source deduction director's liability assessment had been issued previously on December 13, 2007.

The Appellant's Position

[54] The appellant submits that as a director of these corporations, he exercised the degree of care, diligence and skill required to prevent the failure of these remittances that a reasonably prudent person would have exercised in comparable circumstances. He maintains that he had a reasonable belief that the CRA owed Meld more money than what Andrew Paving and 155 owed the CRA and that his attempts to have this debt recognized was all a reasonably prudent director could

have done in the circumstances to prevent Andrew Paving's and 155's failure to remit.

[55] The appellant also disputes the correctness of the underlying corporate assessments and submits that given the circumstances of the case, the Minister bears the burden of establishing the correctness of the assessments. He argues that the Minister failed to do so.

The Respondent's Position

[56] The respondent submits that the appellant did not exercise due diligence. Instead, he intentionally caused the corporations' failure to remit. He used these remittances to operate the business and then to pay creditors. The appellant's belief that Meld was owed a refund and that the Minister had misapplied or improperly calculated credits did not relieve him of his duty to prevent failures to remit source deductions and GST.

[57] The respondent also submits that while the postings to the GST account for Andrew Paving may be confusing, the underlying corporate assessments are correct and easily understood. The assessments are based on returns filed by the corporations. The appellant chose to deal with the account issues himself, despite having no accounting training and despite having an accountant and a bookkeeper. As well, the CRA met and spoke with the appellant on many occasions and provided account information when requested. The CRA officers called to testify provided cogent explanations of the statements of account, and the appellant did not show any errors with respect to the underlying assessments.

Statutory Provisions

Income Tax Act

[58] Subsections 227.1(1) and (3) provide:

> 227.1(1) Where a corporation has failed to deduct or withhold an amount as required by subsection 135(3) or 135.1(7) or section 153 or 215, has failed to remit such an amount or has failed to pay an amount of tax for a taxation year as required under Part VII or VIII, the directors of the corporation at the time the corporation was required to deduct, withhold, remit or pay the amount are jointly and severally, or solidarily, liable, together with the corporation, to pay that amount and any interest or penalties relating to it.

> . . .
>
> (3) A director is not liable for a failure under subsection 227.1(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.

Excise Tax Act

[59] Subsections 323(1) and (3) provide:

> 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.

Analysis

Onus

[60] The appellant's counsel argued that, on the particular facts of this case, the onus of establishing the correctness of the underlying tax assessments against Andrew Paving and 155 should be shifted to the respondent. The circumstances that in the appellant's view result in reversing the normal onus in this case are that the GST statement of account for Andrew Paving do not reflect adjustments agreed to by the CRA, that amounts assessed include interest and penalties in respect of periods for which credit balances ought to have existed based on the net tax assessed, that the collections officers did not verify the correctness of the underlying corporate assessments and that the account statements were not comprehensible on their face.

[61] The appellant argues that *Simon v. Her Majesty the Queen*, [2001] T.C.J. No. 526 stands for the proposition that the Minister bears the onus of establishing

the correctness of the underlying assessments in a director's liability case. In *Simon*, Archambault J. stated at paragraph 74:

> We are dealing here with a "derivative" assessment, as Rothstein J.A. put it in Gaucher, supra, and the approach adopted by the courts must take into account the fact that at issue are two separate assessments made by the Minister against two different taxpayers. Accordingly, where the SD amount in an assessment against a director is challenged, it is necessary to call as a witness the auditor who made the assessment against the corporation that failed to remit the SDs pursuant to section 153 of the Act, which assessment served as the basis for the assessment made against the director. It is not enough for a collection officer who assessed the director to state that he relied on the assessment made against the corporation by the SD auditor, just as it would not be enough merely to file that corporation's assessment. The Court cannot act on blind faith by assuming that all the audit work concerning the corporation was done in accordance with good practice and that the relevant documents were reviewed in making the assessment against the corporation.

[62] This statement, however, must be read alongside Archambault J.'s earlier comment at paragraph 68 of his decision that when a derivative assessment is based on the taxpayer's own filings, the Minister would not bear the onus of proving the correctness of the assessments.

> I added that it was not enough to produce the primary tax debtor's notice of assessment unless the amount established by the Minister in that assessment corresponded to that indicated by the tax debtor in his or her tax return.

[63] Also, at paragraph 41 of my decision in *Mignardi v Her Majesty the Queen*, 2013 TCC 67, [2013] T.C.J. No. 66, I held that the onus to prove an underlying tax liability did not shift to the Minister in every appeal from a derivative assessment:

> I return now to the proposition that appears to flow from the Gestion Yvan Drouin Inc. case that the Minister bears the onus to prove the underlying tax liability in every appeal from a derivative liability assessment under subsection 160(1) or section 227.1 of the ITA or sections 323 or 325 of the ETA. I agree with respondent's counsel that such a conclusion is inconsistent with the decisions of the Supreme Court and Federal Court of Appeal to which I have referred. It is only where the facts concerning the underlying tax debt are exclusively or peculiarly within the knowledge of the Minister that the burden will be shifted. Each case will turn on its own facts. Although there may be situations where the tax liability of the original tax debtor is something that is solely within the knowledge of the Crown, more often a taxpayer will have access to that information from the original tax debtor. It should be recalled that one of the

> bases on which a person is assessed under those provisions is his or her relationship with the tax debtor, either as in this case as a director of the debtor corporation or as a party not dealing at arm's length with the tax debtor. As a result of this relationship, a taxpayer may very well already have or be able to obtain the information required to verify the existence or amount of the underlying liability.

[64] In *Mignardi*, I recognized that in exceptional circumstances, the burden of proof may be shifted from the taxpayer to the Minister. However, this will occur only where the facts concerning the underlying tax debt are "exclusively or peculiarly within the knowledge of the Minister." In the context of a director's liability assessment, this might occur when a taxpayer does not have and cannot obtain the information required to verify the existence or amount of the underlying tax liability.

[65] I disagree with the appellant that the onus of proof of the underlying corporate assessments should be shifted to the respondent in this case because I am not satisfied that the appellant has demonstrated, as the appellant in *Mignardi* did, that the underlying assessments of Andrew Paving and 155 are exclusively or peculiarly within the knowledge of the Minister.

[66] First, both Mr. Jarman and Mr. Locantore testified that the amounts of net tax assessed to Andrew Paving and 155 under the *ETA* for the periods relevant to the director's liability assessments were the amounts of net tax reported on the returns filed by those companies. Mr. Andrew confirmed this as well. Since Mr. Andrew, according to his own testimony, was personally involved in the filing of all of the GST returns, it would follow, in my view, that Mr. Andrew would be in the best position to what errors, if any, the underlying assessments contained. It is also clear that, while employees in the office of Andrew Paving handled source deductions, this was done under Mr. Andrew's authority and that all information concerning source deductions by that company was available to him. As well, there is evidence that Andrew Paving itself reported that it owed source deductions for the 2005 year in excess of the amount assessed to the appellant.

[67] Therefore, I find that there are no circumstances like those in *Mignardi*, whereby Mr. Andrew has been denied access to the records of either Andrew Paving or 155. In fact, the evidence suggests that Mr. Andrew would have been in a position to retain possession of all of the files and records of both companies after they ceased operations, and that this would include all files and records pertaining to GST and source deductions.

[68] The fact that the underlying assessments were based on the corporations' own filings would also mean that verification of those assessments by the collections officer who raised the director's liability assessments would not be necessary.

[69] Next, contrary to the appellant's submission, it also appears that the CRA was responsive to Mr. Andrew's requests for an explanation or reconciliation of the GST liabilities of Andrew Paving and Meld. He admitted that on at least two occasions, in 2003 and 2008, CRA collections officers provided reconciliations of those accounts. The evidence shows that Mr. Andrew appeared satisfied with the 2003 reconciliation, telling the appeals officer handling notices of objection filed by Andrew Paving and Meld that Mr. Schafer had demonstrated that all credits for the period under objection had been applied. He also said that after meeting with Mr. Schafer, they had come to an agreement on what is owed by Meld and Andrew Paving up to that point, except with respect to Mr. Andrew's claim regarding the Meld letter. In 2008, Mr. Jarman dealt with each of the specific cheques that the appellant felt had not been credited to the companies' accounts and demonstrated where the credits had been applied. There is no evidence to show that Mr. Schafer and Mr. Jarman were unable to account for any payments made by the companies or unable to answer any of the appellant's questions relating to those accounts.

[70] While it is true that the Director of the Toronto North Tax Services Office and some of the collections officers that Mr. Andrew dealt with did not respond to his request to look into the Meld letter situation, the CRA's position on the issue was ultimately communicated to him by Mr. Jarman in his letter of April 23, 2008. By the time Mr. Andrew was assessed as Director of Andrew Paving and 155, he had been provided with the details of the assessments made against Meld for the reporting periods for which Mr. Andrew believed Meld was entitled to the $123,000 credit. No evidence was led to show that the explanation provided by Mr. Jarman was incorrect.

[71] For these reasons, I am unable to conclude that Mr. Andrew lacked the information necessary for him to determine the correctness of the assessments against Andrew Paving, 155 and Meld, or that the CRA failed to provide information to Mr. Andrew concerning the GST accounts of those companies.

[72] The appellant also submitted that in this case, the CRA documents that set out the calculation and application of various credits and the interest and penalties were "not comprehensible on their face or without the explanation of a collections

officer." The testimony from the CRA collections officers confirmed that it would take an auditor's report to gain a complete understanding of what had happened at various times.

[73] However, the appellant brought no evidence that suggested he did not have access to the corporations' books and records and no evidence that he would not have had access to the audit reports or any of the other information required to verify the existence or amount of the underlying tax liability. He also appears to have received assistance from the CRA in reconciling various payments and credits made to corporations' accounts.

Alleged errors in underlying GST assessments of Andrew Paving

[74] As I noted above, a taxpayer who has been assessed under section 227.1 of the *ITA* or section 323 of the *ETA* is entitled to challenge an underlying assessment or assessments made against the corporation of which he was a director on any basis that the corporation could have challenged that assessment.

[75] The appellant alleges that the Minister's calculation of the total net tax, interest and penalty owing was too high. I assume that the appellant is referring to the amounts the Minister says are owing by Andrew Paving under the *ETA*, since none of the alleged errors, to which I will refer below, relate to the GST account of 155 or to the source deductions account of Andrew Paving. Furthermore, Mr. Andrew agreed with the amounts that were assessed against Andrew Paving for unremitted source deductions and against 155 for unremitted GST.

[76] Prior to dealing with the particular errors that the appellant alleges were made on Andrew Paving's GST account, I note that most of them relate to reporting periods not included in the director's liability assessment against the appellant. For example, the appellant submits that certain credits arising from net credit returns (i.e. ones where the ITCs claimed by the taxpayer exceeded the GST collectable for the period were not applied to Andrew Paving's account in a timely manner). While counsel did not specify the reporting periods for which the relevant net credit returns were filed, it appears that credit returns were filed after the return due date for each of the following reporting periods: March 31, 1991, March 31, 1992, March 31, 1993, March 31, 1996, March 31, 1998, March, 1999, March 31, 2004 and March 31, 2006. In the appellant's view, this led to excess penalties and interest being charged.

[77] All but two of the periods for which the credit returns were filed pre-dated the reporting periods of Andrew Paving that are covered by the director's liability assessment against the appellant, and the credits were applied to earlier periods as well. In this case, the appellant had been assessed for net tax that Andrew Paving failed to remit for reporting periods commencing in 2000.

[78] Two other errors that the appellant alleges were made by the CRA in accounting for payments or credits also relate to periods that preceded those contained in the director's liability assessments. The appellant says that an adjustment for Andrew Paving's reporting period ending September 30, 1996 to increase ITCs was not processed for five years and five months after a CRA auditor determined that Andrew Paving was entitled to them. Also, the appellant takes issue with the adjustments made to interest and penalty as a result of Andrew Paving's fairness application. Those adjustments relate to reporting periods ending before July 1999.

[79] In challenging the underlying corporate liability for unremitted net tax, the appellant is limited to those arguments that the corporations could have raised in an appeal of the underlying assessments.

[80] In an assessment relating to a particular reporting period, I do not believe that this Court has jurisdiction to consider how the CRA applied credits or payments in respect of other reporting periods because it would not affect the amount of tax assessed for the particular reporting period. Under the *ETA*, net tax is assessed for each particular reporting period, per paragraph 296(1) which reads:

> 296. (1) Assessments — The Minister may assess
>
> (a) The net tax of a person under Division V for a reporting period of the person…

[81] In my view, it is not open for the appellant to challenge the director's liability assessments against him on the basis of alleged errors made in assessing net tax, interest or penalties for reporting periods other than those which underlie the director's liability assessments because the corporations themselves would not have been able to make those arguments if they had appealed the underlying assessments. Accounting for payments made on a taxpayer's account for periods other than those assessed, is a collections matter and is outside the jurisdiction of the Court: see *Neuhaus v. The Queen* 2002 FCA 391, [2002] F.C.J. No. 1480. For the same reason, it is also not open to the appellant to challenge the assessments

on the basis of alleged errors in applying payments to amounts owing for other reporting periods.

[82] Even if this Court had jurisdiction to deal with these matters, I would have found that the appellant did not show that errors were in fact made in accounting treatment of the items listed above.

[83] First, the appellant's counsel submitted that credits reported on credit returns were not applied to the corporation's debt until the date the return was received by the CRA rather than the date the return was due. She said that this led to excess interest and penalty charges under subsection 280(1) of the *ETA* because in cases where a credit return was filed later than the due date for the return, the credits were not applied to the appellant's account as soon as the appellant became entitled to the credits.

[84] The appellant's counsel argued that the net credits reported on those returns should have been available to be applied to any amount owing by the taxpayer as of the date the return was due to be filed, rather than as of the date the return was actually received by the CRA, which was after the due date in those cases.

[85] The appellant's position runs contrary to the decision of this Court in *Paquin v. The Queen*, 2004 TCC 597. In *Paquin*, former Chief Justice Garon came to the conclusion that the right to an ITC does not arise until it is claimed. After reviewing sections 169 and 225 of the *ETA*, he stated at paragraphs 17 and 18 of his decision that:

> The above indicates that this right to input tax credit does not exist until it is claimed. The legislation does not set out that this right is retroactive to the period when it could have been validly claimed by the taxpayer in his return for a preceding period. Furthermore, it is not set out in the legislation that, when calculating the interest and penalties on the net tax payable, the amounts representing input tax credit must be taken into account as of the time this credit could have been validly claimed. In this respect, I am referring in particular to section 280 of the Excise Tax Act.
>
> . . . In addition, when calculating the interest and penalties on the amount of the net tax, the Minister could take into account amounts representing input tax credit only as of the time the right to input tax credit arose. For this case, that time began when the return claiming the input tax credit was filed and the net tax was remitted.

[86] The finding that the entitlement to a credit does not arise until the credit is claimed is also consistent with section 229 of the *ETA* which provides that interest on a refund due in respect of a credit return becomes payable starting 30 days after the later of the day the return is filed or the day following the last day of the reporting period. Therefore, in the case of a late-filed credit return, interest on the credit would not begin to run until the return is filed.

[87] The appellant maintains that the *Paquin* decision should not be followed because the Court did not consider the application of subsection 296(2) of the *ETA*. That section deals with unclaimed ITCs and requires the Minister, in assessing, to take into account any ITC available to a supplier in calculating net tax that has not yet been claimed by the supplier and which would have been allowed if claimed by the supplier in a return for the particular reporting period.

> 296 (2) Where, in assessing the net tax of a person for a particular reporting period of the person, the Minister determines that
>
> (a) an amount (in this subsection referred to as the "allowable credit") would have been allowed as an input tax credit for the particular reporting period or as a deduction in determining the net tax for the particular reporting period if it had been claimed in a return under Division V for the particular reporting period filed on the day that is the day on or before which the return for the particular reporting period was required to be filed and the requirements, if any, of subsection 169(4) or 234(1) respecting documentation that apply in respect of the allowable credit had been met,
>
> (b) the allowable credit was not claimed by the person in a return filed befor the day notice of the assessment is sent to the person or was so claimed by was disallowed by the Minister, and
>
> (c) the allowable credit would be allowed, as an input tax credit or deduction in determining the net tax for a reporting period of the person, if it were claimed in a return under Division V filed on the day notice of the assessment is sent to the person or would be disallowed if it were claimed in that return only because the period for claiming the allowable credit expired before that day,
>
> the Minister shall take the allowable credit into account in assessing the net tax for the particular reporting period as if the person had claimed the allowable credit in a return filed for the period

[88] Where an ITC is allowed under subsection 296(2), "subsection 296(5) deems it to have been claimed in a return and deems the offset to net tax to have been

paid. The effect of subsection 296(2) is not only that the ITC is allowed, but that it is allowed in the same period as the tax assessed. Thus, no interest and penalty accrue under subsection 280(1) on the unpaid tax to the extent it is offset by the ITC, because the offset applies retroactive to the application of the tax." (David Sherman: *GST Commentary*, section 296).

[89] The appellant submits that once the Minister determined the ITCs were due for the periods that credit returns were filed by Andrew Paving and the Minister accepted the returns in accordance with subsection 296(2), the credits should have been available as if they were claimed in a return filed for the period and no later than the date the tax was assessed for the later periods.

[90] The first difficulty with this argument is that Andrew Paving claimed the ITCs in returns it filed with the Minister for the periods in which the ITCs arose and the Minister allowed the ITCs for those periods prior to Andrew Paving filing returns for the periods in which net tax was due. Therefore, the condition in paragraph 296(2)(*b*) would not be met because the ITCs had already been claimed and allowed. In *Pawlak v. Her Majesty the Queen*, 2012 TCC 355, [2012] T.C.J. No. 289, this Court noted at paragraph 19 that:

> . . . the purpose of the condition in paragraph 296(2)(b) of the ETA is to ensure that a person has not already been allowed the benefit of such ITCs in determining that person's net tax for any reporting period. Therefore, the condition in paragraph 296(2)(b) of the ETA will be satisfied as long as the ITCs had not been previously allowed as ITCs in computing the net tax of the person for any reporting period. . . .

[91] The appellant also relied on the case of *Humber College v. Her Majesty the Queen*, 2013 TCC 146, [2013] T.C.J. No. 117, which dealt with the application of subsection 296(2.1) of the *ETA*. Subsection 296(2.1) provides for an allowance for an unclaimed rebate. The appellant in *Humber College* was assessed interest in respect of the late GST payment that it was required to self-assess and remit on the purchase of real property. Since the appellant was a public college, it was entitled to a public service body rebate of 67% or the GST payable on the purchase of the real property. The question before the Court was whether the Minister correctly imposed interest on the full amount of GST due before taking into account the rebate or whether the interest on the late payment was only payable on the net amount of GST due after setting off the rebate.

Campbell Miller J. held that interest on a late payment of GST was to be calculated on the net amount of GST owing.

[92] However, that case did not, as the appellant's counsel contends, deal with a claim for ITCs. In fact in *Humber College*, Campbell Miller J. was careful to distinguish between the entitlement to rebates and the entitlement to ITCs. At paragraph 17 he stated:

> Mr. Cheung, the Respondent's counsel, argues that former Chief Justice Garon's decision in Claude Paquin v. Her Majesty the Queen1 is dispositive of this Appeal. I disagree. Former Chief Justice Garon was dealing with late filed remittances claiming Input Tax Credits ("ITC's"), which were only allowed as of the time of the late filing. Interest was charged accordingly on the full tax owed, without retroactively crediting the ITC's against the tax. Interestingly, subsection 296(2) of the Act was never mentioned. Clearly, credit for ITC's was not applied at the point when the taxpayer would have been entitled to claim them, only when the taxpayer did claim them. However, entitlement to ITC's is not the same as entitlement to rebates, given the contextual and purposive interpretation of the legislation surrounding rebates. ITC's are not inextricably linked to the transaction giving rise to the GST. They are not specific to clearly identified special public organizations, granted special treatment.

[93] For these reasons I find that subsection 296(2) would not have been available to Andrew Paving to challenge any of the interest and penalties that were assessed.

[94] The appellant's counsel also argued that the Minister had failed to credit Andrew Paving with interest on a refund that was due for its reporting period ending September 30, 2001. Andrew Paving had claimed ITCs of $41,246 in its return for that period which was received by the CRA on November 22, 2001. The ITCs were disallowed by the Minister on June 6, 2002 but subsequently allowed in a lesser amount, which still resulted in a credit balance of $2,074.96 for the period. That credit was applied to Andrew Paving's tax owing for another period, but only with an effective date of June 6, 2002 rather than November 22, 2001, the date that the return was received by the CRA. Mr. Jarman and Mr. Locantore were not able to say whether any interest for the period between November 22, 2001 and June 6, 2002 was ever credited in respect of the $2,074.96, and there was no entry on the account that appeared to relate to interest for that amount for that period. However, at another point in his testimony, Mr. Locantore stated that audit adjustments could also contain amounts in respect of interest and penalty without identifying them as such in the adjustments shown on the account. Since the

entries related to the disallowance and subsequent allowance of the ITCs were identified as audit adjustments, it would be necessary to refer to the audit records to determine what the amounts shown on the account consisted of. The onus of proof of the alleged error is on the appellant, it would incumbent on him to produce sufficient evidence to satisfy the Court that the adjustment amounts did not include the interest in question. I am not convinced that Mr. Locantore or Mr. Jarman were in a position to confirm that no interest was allowed as a credit to Andrew Paving in these circumstances, and in the absence of any definitive proof of what was done by the auditor, I find that the appellant has not shown that an error was made in this regard.

[95] Interest credit for another similar audit adjustment for the period ending September 30, 1996 was also put in issue by the appellant. No questions on this point were put to either Mr. Jarman or Mr. Locantore and no other evidence was presented. Therefore, I decline to find that an error was made in this respect either.

[96] At this point, I would point out that these particular alleged errors, like those I set out below, were not specifically pleaded by the appellant nor was there evidence that they were raised at the examination for discovery of Mr. Locantore or communicated to the respondent prior to the hearing. As such, although the matter of interest would normally be within the knowledge of the Minister, the respondent cannot be faulted for not having information available to refute the particulars of the claim.

[97] The appellant also alleged that payments were posted to Andrew Paving's account for the periods ending March 31, 2002 to September 30, 2003 rather than to the oldest outstanding balance at the time those payments were made, thereby causing extra interest and penalties to accumulate. The appellant's counsel also said that the payments for the March 31, 2002 to September 30, 2003 periods were only applied to some of the amounts due for each period, with the result that each period maintained an amount outstanding on which interest and penalties continued to accumulate.

[98] The simple answer to this argument is that the payments made to those periods, were made as directed by Andrew Paving in a letter to Mr. Schafer dated August 18, 2003. Mr. Andrew provided cheques to Mr. Schafer for the outstanding net tax for each of these periods and according to CRA policy, the payments were applied as directed, even though there were outstanding balances owing for previous periods. Since the returns for those periods were late filed, interest and penalties were charged, which increased the balance owing for the

period beyond what was reported and paid by Andrew Paving. Therefore, small balances remained outstanding for those periods after applying the payments made by Andrew Paving on August 18, 2003.

[99] The appellant maintains that there were errors in the accounting for fairness relief granted to Andrew Paving on April 30, 2004 in respect of the periods ending June 30, 1996 to June 30, 1999. Counsel stated that there do not appear to be any credits applied to other periods with an effective date of April 30, 2004, which should be the case if credits previously applied to the audit period were transferred to other periods as a result of the reduction of interest and penalties granted by the fairness committee. Counsel also said that the collections' diary did not reflect a reduction in the total amount outstanding between April 27, 2004 and April 30, 2004. If there had been a downward adjustment to interest and penalties effective April 30, 2004, one would expect the account balance to drop.

[100] Mr. Locantore testified that he had reviewed the accounting for the interest and penalty relief that was granted to Andrew Paving and that he satisfied himself that all amounts had been properly accounted for. He was never asked specifically about why no entries with an effective date of April 30, 2004 appear on the account, but he did testify that under the accounting system used by the CRA at the time, reductions of interest and penalties that were granted under the fairness legislation did not appear as entries on the account. At the time, adjustments were made to stop interest and penalties from accumulating for the periods covered by the relief, effectively backing out the interest and penalties as if they had not been charged from the outset. This meant that adjustments for interest and penalties did not show up on the account. This may also explain why there are no entries for payment transfers relating to the relief that was granted. The appellant’s failure to question the CRA officers on this point, leaves it open to speculation as to how the accounting was done to reflect the fairness relief. In the absence of any evidence on this point, I accept Mr. Locantore’s evidence that he reviewed the accounting that was done and was satisfied that the adjustments were credited to Andrew Paving. Likewise, none of the CRA officers were questioned about the balance showing in the collections' diary around April 30, 2004 and so it is not possible to draw any conclusion from what was shown. I do note, though, that the collections' diary does show a substantial reduction in the total owing by Andrew Paving by May 4, 2004.

[101] The appellant also maintains that the GST amount assessed to Andrew Paving after 2003 included the GST liabilities of Meld, and that Meld’s portion of

the GST liability should be subtracted from the director's liability assessment against the appellant.

[102] However, Mr. Andrew was unable to give any specifics on the proportion of GST and ITCs each company reported in 2005 and 2005, at one point saying that in 2005, very little of the amount would relate to Meld, then that the shares might have been equal, then that Meld's share may have been less than 40% but that it was difficult to say. No evidence whatsoever was led to show what specific amount of GST, if any, that Andrew Paving reported on behalf of Meld.

[103] In the absence of any proof of the actual amount of Meld's post-2003 GST liability that was reported by Andrew Paving, the appellant's submission cannot succeed. Only he is in a position to provide evidence on this point, and he has failed to do so.

[104] The appellant also submitted that the director's liability assessments should be reduced by $21,564.67 which was the total of three amounts that were paid by the Minister to Meld in 2010 as a refund of credits owing for periods prior to 2004. However, these amounts related to Meld and not to Andrew Paving or 155, and the appellant has not shown any reason why the director's liability assessments should be reduced to account for those refunds.

[105] For these reasons, I find that the appellant has not shown that errors were made in determining amounts owing by Andrew Paving under the *ETA*.

Due diligence

[106] The last question to be determined is whether Mr. Andrew exercised the degree of care, diligence and skill to prevent the failures to remit by Andrew Paving and 155 that a reasonably prudent person would have exercised in comparable circumstances.

[107] In *Buckingham v. The Queen*, 2011 FCA 142, 2011 DTC 5078, the Federal Court of Appeal held that in order to make out a defence of due diligence under subsection 227.1(3) of the *ITA* and subsection 323(3) of the *ETA*, a director must prove that he was specifically concerned with the tax remittances, and that he exercised care, diligence and skill to prevent a failure to remit. Relying on the decision of the Supreme Court of Canada in *Peoples Department Stores Ltd. v. Wise*, 2004 SCC 68, [2004] 3 SCR 461, the Court of Appeal found that the

applicable standard of care, diligence and skill was an objective rather than subjective one:

> An objective standard does not however entail that the particular circumstances of a director are to be ignored. These circumstances must be taken into account, but must be considered against an objective "reasonably prudent person" standard. (at paragraph 39)

[108] The Court of Appeal also confirmed that, in order to succeed in a due diligence defence, a director must be found to have taken positive steps to prevent the failure to remit.

[109] In *Buckingham*, the director was assessed in respect of failures by the corporation to remit source deductions for the months of October 2002 to August 2003 and GST in March and June 2003. The Tax Court found that, starting in 2002, reasonable business measures had been taken by the corporation to address its financial difficulties and to avoid the failures to remit up to February of 2003. Those business measures consisted of various attempts to raise additional operating capital. The Tax Court held that up to February 2003, the director had a reasonable expectation that the efforts to obtain funding would succeed in avoiding the failures to remit taxes and that he had thereby met the standard of care required of a director under subsection 227.1(3) of the *ITA*.

[110] In arriving at this conclusion, the Tax Court relied on the Federal Court of Appeal decision in *Worrell v. The Queen*, 2000 DTC 6593, [2001] 1 C.T.C. 79. In that director's liability case, efforts had been undertaken on behalf of a corporation to find a new investor after the corporation had run into financial difficulties. During the time that the search for an investor was being conducted, the corporation failed to make certain tax remittances. Although no investor was ultimately found, the Court considered that it was reasonable of the directors to believe that, had an investor been found, the failures to remit might have been prevented. Therefore, the Court held that the directors had made reasonable efforts to prevent the failures to remit.

[111] In the present case, the appellant maintains that his efforts to recover overpaid GST in respect of the GST accounts of both Meld and Andrew Paving were as reasonable as the directors' efforts in *Buckingham* and *Worrell* to secure additional capital. Counsel submits that the appellant had a reasonable belief that Meld's and Andrew Paving's accounts would be corrected and reconciled and that the credits available would be paid and applied against any future liability.

Counsel also says that the appellant could not reasonably have anticipated that no one at the CRA would review the accounts despite his repeated requests that they do so.

[112] I agree with the appellant that if a director reasonably believed that a corporation had a credit balance available in its GST account, this would amount to a reasonable belief that the corporation had sufficient funds available to pay future GST remittances as they came due, or even that the future remittances had in effect already been satisfied. Like in *Worrell* and *Buckingham*, relevant efforts of a director to prevent a failure to remit would include steps taken to have funds available to pay remittances on time. That those funds would be obtained by means of a credit for prior overpayments of tax rather than by means of a capital investment by an investor is immaterial.

[113] I am not satisfied, however, that the appellant has shown that his belief that Meld and Andrew Paving were entitled to additional GST credits was objectively reasonable.

[114] First, the evidence shows that it is unlikely that a credit of $123,000 was due to Meld for the period up to June 30, 1996. The appellant says that the credit arose as a result of the Meld agreement dated December 11, 1996 which he alleges obliged the Minister to reduce by approximately $123,000 amounts which had been arbitrarily assessed to Meld. The arbitrary assessments covered Meld's GST reporting periods ending June 30, 1994 to June 30, 1996. The appellant says that Meld was never reassessed to reduce the GST due for those periods. However, this position is contradicted by the statement of Meld's GST account provided by Mr. Jarman to the appellant in 2008, which shows that the total net tax assessed by the Minister for those reporting periods was $39,920. The statement of account indicates that those assessments were made on December 13, 1996. Furthermore, the evidence shows that the assessments were based on returns filed by Meld itself in the fall of 1996 after the arbitrary assessments had been issued. In his letter dated August 5, 2003 to the Director of the Toronto North Tax Services Office concerning the Meld agreement, the appellant confirms that the returns for those periods were filed in the fall of 1996 after arbitrary assessments had been issued.

[115] It is noteworthy that in the appellant's letter to the Director concerning the Meld agreement, he was not claiming a credit of $123,000. Instead, he referred to an amount of $78,859.12 of payments and credits he said had been wrongly applied by the CRA to reporting periods ending prior to June 30, 1996. The details of how the appellant calculated this latter amount were not included in the letter,

and it is not apparent from a review of the Meld account statement that there were credits and payments totalling anywhere close to that amount applied after 1996 to the reporting periods ending up to June 30, 1996. The claim for a credit of $123,000 does not appear until 2005, in the appellant's letter dated July 7, 2005 referred to earlier in these reasons.

[116] I also find that it was not reasonable for the appellant to believe that the Meld letter obliged the Minister to reassess Meld or constituted a binding agreement with respect to Meld's GST liability. The letter deals with the release of a requirement to pay that had been issued to Meld's bank. I find it difficult to believe that the appellant thought that the handwritten note on the letter referring to a liability of $21,150 plus penalty and interest would displace assessments made in accordance with the returns filed by Meld shortly before. It seems to me that if Meld felt that the assessments that were issued on December 13, 1996 were wrong, based on the Meld letter, it would have objected to the assessments. There was no evidence that Meld did so.

[117] There is no evidence that the appellant sought any legal advice or assistance in relation to enforcing the alleged agreement in the Meld letter at any point in the years after it was allegedly entered into. This is surprising, given that the appellant now says that he believed that Meld was owed $123,000 and that the Minister refused to acknowledge the alleged agreement.

[118] This apparent absence of professional advice is another factor that leads me to conclude that the appellant's belief that the Minister owed Meld $123, 000 in relation to the Meld letter was not objectively reasonable.

[119] The appellant says that he also believed that the amounts assessed to both Meld and Andrew Paving were too high for reporting periods ending prior to 1996 due to improper application of credits and payments. According to the appellant, Andrew Paving and Meld filed credit returns that were not acknowledged by the Minister and had to be re-filed, and as a result, penalty and interest charges were imposed for reporting periods when net tax was due. According to the fairness request prepared by Mr. Andrew for Andrew Paving, the penalty and interest amounts erroneously imposed were $28, 953.69 up to that point. No amount was set out in Meld's fairness request.

[120] A cursory review of Andrew Paving's GST account statement casts substantial doubt on the appellant's position that the Minister lost or failed to acknowledge its credit returns prior to 1996. According to the CRA witnesses, the

dates corresponding to the entries "GST/HST Collectable" and "Input Tax Credits" on the statement of account were the dates the GST returns were received by the Minister. According to Andrew Paving's GST statement of account, Andrew Paving's first GST return was a credit return that was processed on February 9, 1993. Andrew Paving's returns for the next six reporting periods were processed at the beginning of March, 1993 and included one credit return. Andrew Paving's returns for the next six reporting periods were processed on December 20, 1994 and included two credit returns. The next five returns were processed on January 12, 1996. None of those returns were credit returns. Therefore, it appears that except for the first return filed, Andrew Paving filed its returns in batches. The credit returns in those batches bore the same processing dates as the returns in which Andrew Paving reported net tax due. This would lead me to conclude that credit returns were not lost or and that they were processed by the Minister in a timely fashion. In fact, it appears that Andrew Paving filed most of its returns late and this is what led to the substantial interest and penalty charges.

[121] There is no convincing evidence, either, that the Minister misapplied payments to Andrew Paving's account.

[122] Therefore, I find that the appellant has not shown that his belief that the amounts of penalties and interest assessed for reporting periods up to 1996 were too high, was reasonable.

[123] The final alleged error to be addressed concerns two fairness amounts that the appellant refers to, in his letters to Sylvia Williams and Kevin Bailey. He claims in those letters that in June 2004, he met with Mr. Malisani and discussed the fairness relief granted to Meld and Andrew Paving on April 30, 2004 as well as his letter to the Director of the Toronto North Tax Services Office to which he had not received a response. In the letters to Ms. Williams and Mr. Bailey, he says that as a result of that meeting, Meld was granted additional relief from interest and penalties in the amount of $16,302.53 and Andrew Paving was granted additional relief of $9,810.63. However, in his letters, the appellant stated that those amounts had not been credited to Meld or Andrew Paving. Counsel for the appellant did not address these amounts specifically in her written submissions and none of the witnesses were questioned about them. Apart from the appellant's letters, nothing appears anywhere else in the documents to show that Meld and Andrew Paving were entitled to credits in those amounts. Therefore, I find that the appellant has not shown that his belief that Andrew Paving and Meld were entitled to those credits was reasonable.

[124] Although counsel for the appellant questioned the CRA witnesses at some length about other possible errors in the GST assessments against Andrew Paving, those were not ones that the appellant raised at any point in his discussions or correspondence with members of the CRA collections section and therefore would not have formed a basis for his belief that tax and interest and penalties had been overpaid on Meld's and Andrew Paving's accounts. The appellant may not have agreed with what was owing, but a belief that there were overpayments or mistakes in the CRA's accounting, without having obtained accounting assistance from a professional advisor to confirm the overpayments or mistakes would not be a reasonable basis for not remitting GST and source deductions due by Andrew Paving and 155. Even at the hearing, the appellant was unable to point out erroneous entries in Andrew Paving's GST statement of account. All he was able to say was that he knew there were errors in it.

[125] For these reasons, I conclude that the appellant has not shown that he exercised the degree of care, skill and diligence to prevent the failures by Andrew Paving and 155 to remit GST and the failure by Andrew Paving to remit source deductions that a reasonably prudent person in comparable circumstances would have exercised.

Reliability of Mr. Andrew's testimony

[126] Before concluding, I believe it is necessary to comment generally on the appellant's testimony. Overall, I find that Mr. Andrew, despite his sincerity, was not a reliable witness. His testimony lacked details and was often difficult to follow and confused. Previously in these reasons, I have referred to certain parts of the appellant's testimony that in my view were not reliable.

[127] In addition, Mr. Andrew's explanation of how 155 operated and accounted for tax made little sense and was at odds with the GST returns filed by 155. Initially, he said that all tax filings by 155 except employee source deduction remittances were reversed after he received advice from the company's accountant in early 2004 that by transferring Andrew Pavings's business to 155, Andrew Paving would no longer be able to use up tax losses from previous years. In cross-examination, he changed his testimony to say that it was in fact the GST filings by 155 that could not be reversed, at the point the tax advice was received. However, the GST statement of account appears to indicate that three of the GST returns for 155 were not filed until December 2004 whereas the tax advice was apparently received in early 2004. There is also a reference by the appellant in material

submitted to the CRA income tax auditor Betty Chan in January 2006 to amounts of income reported by 155 in the year ended December 31, 2003.

[128] I also find that Mr. Andrew's testimony concerning his dealing with Mr. Schafer was implausible in a number of respects. For example, Mr. Andrew said that even though Mr. Schafer told him that he had no authority to confirm the alleged agreement in the Meld letter, Mr. Schafer said, "you'll get this money back from the Meld (*sic*) for that hundred and twenty-three plus the interest. I can't see where you won't, but I can't say that because it's not – I didn't do it, I didn't make the agreement with you." It is difficult for me to believe that Mr. Schafer would specifically caution Mr. Andrew that he had no authority to accept the alleged agreement in the Meld letter but then go on to encourage Mr. Andrew in the manner suggested. I also note that Mr. Schafer was not asked on cross-examination by counsel for the appellant about making any assurances that the $123,000 credit sought by Mr. Andrew would be accepted. In my view, it is very unlikely that Mr. Schafer would have done so.

[129] Mr. Andrew also said that Mr. Schafer assisted him with the preparation of the fairness applications, but Mr. Schafer denied this. On this point as well, I prefer the evidence of Mr. Schafer, as I find it highly unlikely that Mr. Schafer would have provided such assistance.

[130] Next, Mr. Andrew testified that he understood that the post-dated payments he made on the accounts of Andrew Paving and Meld in August 2003, covered all of the amounts owing by Andrew Paving and Meld, including penalties and interest. Mr. Schafer's recollection of the arrangement entered into with Mr. Andrew was that the payments were only for the net tax owing by each company and not the penalties or interest that had been assessed from 1991 up to 2003, because Mr. Andrew intended to make a fairness application for cancellation of all of the penalties and interest.

[131] I find that Mr. Schafer's recollection of the arrangement is more reliable since it is consistent with a summary of the agreement that was signed by both Mr. Andrew and Mr. Schafer on August 22, 2003 for Andrew Paving concerning the payments to be made by Andrew Paving and it is also consistent with statements made by Mr. Andrew himself. In a letter to Mr. Schafer dated July 16, 2003, Mr. Andrew accepted that Meld owes $107,200 of "principal of quarterly reports" and agreed to pay this amount. In his fairness application dated November 2003, Mr. Andrew wrote that "the balance of Penalty and Interest is not paid as yet but the amount is agreed as directed by CCRA representative to allow the submission of

request to the Fairness Review Board." Also, in his letter dated July 7, 2005 to the CRA collections officer, Mr. Andrew referred to "principal amounts due" having been paid up.

[132] Mr. Andrew also testified, as I have noted earlier in these reasons, that Mr. Schafer recommended that Andrew Paving and Meld file consolidated GST returns under the name of Andrew Paving. Again, I accept Mr. Schafer's evidence on this point that he did not make this recommendation.

[133] The appellant's recollection of the source deduction audit of Andrew Paving in 2006 was also confusing. At first, he said that he was not aware of it and that it would have been handled by "the office". Later, he said that he recalled that Mr. Jarman had sent out an auditor to review the source deductions and that no amounts were found owing. However, the source deduction audit took place in June 2006, whereas Mr. Jarman was not assigned the file until the fall of 2007. Mr. Jarman was not asked about initiating a source deduction audit and nothing else in the evidence suggests that he did.

[134] Furthermore, despite his insistence that he was never given answers by the CRA to his concerns that Meld and Andrew Paving had overpaid tax, starting from the first returns filed in the early 1990s, there is evidence that Andrew Paving, at its request, was sent a statement of its GST account in October 2002. In 2003, e met with Mr. Schafer who appears to have provided explanations concerning amounts owing. In April 2004, the Minister allowed parts of the fairness requests made by Andrew Paving and Meld and included a breakdown of the total interest and penalties charged on the accounts since 1991. Subsequent to receiving the fairness relief, the appellant's complaint with the tax liability shown for Andrew Paving focused on three items: the Meld letter amount and two amounts he said should be credited to Andrew Paving's and Meld's accounts in respect of a second fairness review**.** This is apparent from his letters to the CRA collections officers in 2005 and in 2006. It was also Mr. Jarman's opinion that in 2008, the appellant was not contesting the amount of Andrew Paving's GST liability. While counsel for the appellant referred Mr. Jarman to a letter from the appellant to the CRA that appeared to show the amount was in dispute, that letter was sent to another collections officer well before Mr. Jarman was assigned the file. Mr. Jarman also dealt with the appellant's concern that certain payments made by Andrew Paving on Meld's GST account in 2003 had not been credited to Meld's account. It was not disputed that Mr. Jarman was able to show the appellant where the credits had been applied.

[135] It is apparent, though, that the Director of the North Toronto Tax Services Office failed to respond to the appellant's letter regarding the Meld letter and that no explanation of the Minister's position on the matter was provided until 2008. Without a doubt, the Director's failure to respond was one of the major causes of the appellant's frustration in his dealings with the CRA and in these proceedings. No explanation was ever given why the Director never responded to the appellant's letter. This treatment of the appellant is deplorable, regardless of the strength of the appellant's claim concerning the Meld letter. Unfortunately, the conduct of the CRA is not something over which this Court has jurisdiction: *Main Rehabilitation Co. v. Canada*, 2004 FCA 403, 247 D.L.R. (4th) 597.

Conclusion

[136] The respondent conceded at the hearing that the amount of $385 in respect of the assessment of Andrew Paving's liability for source deductions should be deleted and that the amount of $100 in respect of the assessment of 155's GST liability should be deleted as well. These amounts related to costs incurred in attempting to collect the outstanding balances from the companies and were not amounts which the companies failed to remit.

[137] Also, the director's liability assessments relating to Andrew Paving's GST liability should be reduced by $1,070, $1,141 and $2,202, plus related penalties and interest, if any, to reflect payments made on Andrew Paving's GST account in May 2008 after the GST director's liability assessment against the appellant was issued.

[138] The appeals are allowed in part and the reassessments are referred back to the Minister for reconsideration and reassessments in accordance with the two preceding paragraphs. The respondent is entitled to one set of party and party costs for both appeals.

Signed at Vancouver, Canada, this 2nd day of January 2015.

"B. Paris"

Paris J.

CITATION:	2015 TCC 1
COURT FILE NOS:	2010-2830(IT)G and 2010-2205(GST)G
STYLE OF CAUSE:	Donald Andrew and Her Majesty the Queen
PLACE OF HEARING:	Toronto, Ontario
DATES OF HEARING:	January 21 and 22, 2014
REASONS FOR JUDGMENT BY:	The Honourable Justice B. Paris
DATE OF JUDGMENT:	January 2, 2015

APPEARANCES:

Counsel for the Appellant:	Leigh Somerville Taylor
Counsel for the Respondent:	Craig Maw

COUNSEL OF RECORD:

For the Appellant:

Name:	Leigh Somerville Taylor
Firm:	Leigh Somerville Professional Corporation

For the Respondent: William F. Pentney
Deputy Attorney General of Canada
Ottawa, Canada