Docket: 2014-4391(GST)G

BETWEEN:

ROBERT TOZER,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

Appeal heard on April 13 and May 12, 2017, at Montreal, Quebec.

Before: The Honourable Justice Guy R. Smith

Appearances:

Counsel for the Appellant:	Dominic C. Belley
Counsel for the Respondent:	Claude Lamoureux

JUDGMENT

In accordance with the attached Reasons for Judgment, the appeal from the Notices of Assessment made under section 323 of the *Excise Tax Act* with respect to the unremitted net GST, interest and penalties of Atcon Construction Inc. and 058545 N.B. Inc., is allowed, without costs, and the matter is referred back to the Minister for reconsideration and reassessment on the basis that the Appellant is liable for amounts that became due on or after May 1, 2009.

Signed at Ottawa, Canada, this 20th day of March 2018.

"Guy Smith"

Smith J.

Citation: 2018 TCC 56
Date: 20180320
Docket: 2014-4391(GST)G

BETWEEN:

ROBERT TOZER,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

REASONS FOR JUDGMENT

Smith J.

I. Overview

[1] Robert Tozer appeals from Notices of Assessment made 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 "ETA") with respect to his liability as a director of Atcon Construction Inc. ("Atcon") and 058545 N.B. Inc. ("NB Inc.").

[2] The Notice of Assessment dated November 7, 2014 assessed the Appellant for Atcon's unremitted net GST, interest and penalties of $270,378 for the month of March 2009. The Notice of Assessment dated March 7, 2013 assessed the Appellant for NB Inc.'s (previously known as Envirem Technologies Inc.) unremitted net GST, interest and penalties of $240,093 for the months of April, May, and June 2009.

[3] The Appellant argues that he is not liable because the assessments are statute-barred pursuant to subsection 323(5) of the ETA in that they were issued more than two years after he ceased to be a director of both companies and alternatively, that he is not liable because he exercised the requisite degree of care, diligence and skill as provided for in subsection 323(3) of the ETA.

II. Background facts

A. History of Atcon Group

[4] The Appellant testified at the hearing but did not call any other witnesses. In 1978, he established the Atcon group of companies ("Atcon Group") based in Miramichi, New Brunswick. It had a modest beginning as a small construction company that built concrete foundations for houses. It originally had two employees.

[5] But the Atcon Group grew rapidly and by the mid-2000's, it had over 2,000 employees and annual sales of approximately $255 million. It had four business lines: construction services, industrial fabrication services, environmental waste management services, and the production and sale of plywood. Construction services were its core business and accounted for as much as 80% of the group's revenue. It operated throughout Canada, particularly in remote and industrial regions. It also owned plywood mills in New Brunswick and Sweden.

[6] Atcon and NB Inc. were the operating companies in the Atcon Group. The former provided construction services while the latter provided environmental waste management services.

[7] Unfortunately, due to the collapse of the North American housing market and the global financial crisis that followed in 2008 and 2009, the Atcon Group experienced significant cash flow problems. By March 2010, both companies were assigned into bankruptcy.

B. Appellant's role within Atcon Group

[8] The Appellant has a high school education. Prior to establishing the Atcon Group, he was employed as a construction worker and carpenter. At all relevant times, he was the sole director of each company as well as the President and Chief Executive Officer ("CEO").

[9] In the years leading up to the housing and financial crisis, the Appellant's primary role was to develop the business. He was on the road between 175 to 200 days every year, courting prospective customers and visiting existing customers to address concerns about on-going projects. The Appellant described himself as a "one-man show" regarding the marketing of Atcon Group and its services.

[10] The Appellant relied on Atcon Group's Chief Operating Officer ("COO") and Chief Financial Officer ("CFO") for the day-to-day management of the companies in the group. The COO and CFO worked from Atcon Group's head office in Miramichi. The Appellant stated that the CFO, Katrina Donovan, was responsible for global tax compliance. A team of six to eight accountants supported Ms. Donovan in her role.

C. Beginning of Atcon Group's financial difficulties

[11] The Appellant testified that Atcon Group first encountered cash flow problems in late 2008 and that these problems escalated "aggressively" in 2009.

[12] In early 2008, Atcon Group's plywood business became unprofitable due to the collapse of the housing market in Europe and North. This was not a fatal problem because the plywood business represented a small portion of its overall operations. However, by late 2008, the group began experiencing serious cash flow constraints due to the unfavourable outlook in its core business: the provision of construction services. Although the construction business remained stable throughout 2008 because it had a backlog of projects, the group was unable to secure new contracts for 2009. The Appellant attributed this to a sharp drop in oil prices (from a peak of approximately US$147 in July 2008 to a low of US$34 in January 2009) that decreased the need for its services since many of its contracts came from companies operating in Alberta's oil and gas sector.

[13] The Respondent suggested to the Appellant that Atcon Group began having financial difficulties as early as the end of 2007 and referred to a March 2010 court order issued by Riordon J. of the Court of Queen's Bench of New Brunswick (referenced in more detail below), which appointed Ernst & Young Inc ("EY") as Receiver for certain companies in Atcon Group. In his reasons for the order, Riordon J. indicated that default letters from the group's main creditor, the Bank of Nova Scotia ("BNS"), were issued as early as October 19, 2007.

[14] The Appellant disagreed and stated that the judge was incorrect on the timing of the start of Atcon Group's financial difficulties. He maintained that the group did not begin experiencing cash flow problems until late 2008. He was of the view that BNS did not become concerned with Atcon Group's ability to repay its loans until mid-2009. He maintained moreover that BNS could not possibly have been concerned with Atcon Group's liquidity position during 2007, since it increased the group's line of credit throughout that year and into 2008 and again, on two separate occasions in 2009.

D. Appellant's actions between beginning of Atcon Group's financial difficulties and subsequent bankruptcy

(1) General conduct

[15] The Appellant testified that his first response to Atcon Group's financial challenges was to increase his prospecting efforts to secure more business. He stated that at the same time, he spent significant time travelling from project to project, trying to make them as profitable as possible. He testified that he dedicated limited time to the financial reporting of the group and relied on the COO and CFO to manage that process. Although he agreed that he likely received internal financial reports from his subordinates periodically, he admitted that he did not spend a lot of time studying them. He relied on the CFO and accountants in the group to attend to these matters as part of their employment functions.

[16] The Appellant stated that he did not start asking specific questions about Atcon Group's cash flow problems until mid to late 2009. Similarly, he testified that he did not become aware of Atcon and NB Inc.'s failure to remit GST until August or September 2009, when he corresponded with the Canada Revenue Agency (the "CRA") and met with its representatives to discuss the unremitted amounts.

(2) Involvement in financing and restructuring activities

[17] The Appellant spearheaded a number of financing and restructuring activities for Atcon Group to try to improve its liquidity. During the first half of 2008, Atcon Group put its plywood business in Sweden up for sale. Although it received an offer, it was withdrawn once the European housing crisis occurred. The Appellant testified that Atcon Group was relying on the successful completion of this transaction when it began to have cash flow problems in late 2008. After the transaction collapsed, it had to resort to high interest rate loans.

[18] Atcon Group borrowed approximately $40 million from McKenna Gale Capital ("McKenna") and Roynat Capital ("Roynat"), a wholly-owned subsidiary of BNS, but the loan terms provided that the interest rate could rise to as high as 20% within six months. BNS continued to provide the operating lines of credit.

[19] By early 2009, Atcon Group required additional financial assistance to stay afloat, particularly because of the onerous interest payments owed to McKenna and Roynat.

[20] Because so many of Atcon Group's employees were from New Brunswick, the Appellant engaged the Province of New Brunswick in discussions to obtain financial support. Those discussions were fruitful and on June 30, 2009, Atcon Group obtained a loan guarantee of $50 million and completed a refinancing with BNS.

[21] The new credit agreement increased the Atcon Group's available line of credit with BNS and advanced four additional term loans totaling $50 million. The Appellant directed the group to use these funds to repay the high interest loans from McKenna and Roynat. After the loans were repaid in full, the Atcon Group had approximately $4 million remaining, which was used as working capital.

[22] In July 2009, BNS engaged the accounting firm EY as its consultants to review Atcon Group's financial information and assess its ability to continue as a going-concern. To perform this work, EY worked from Atcon Group's head office in Miramichi throughout the months of July and August 2009. The Appellant testified that during this time, EY represented to him that the review was for the purpose of helping the business with its financial challenges.

[23] A restructuring plan was finalized on or about September 11, 2009 ("Plan #1"). Its purpose was to help the Atcon Group address its financial challenges by refocusing its operations to its core businesses, being the provision of construction and industrial fabrication services, and the sale of non-core business operations and assets. It also provided for the distribution of a portion of the sale proceeds to the CRA in order to repay some of the outstanding tax debts.

[24] In September or October 2009, Atcon Group entered into a forbearance agreement with BNS (a copy was not available at the hearing) to provide the group an opportunity to carry out Plan #1. Under this agreement, the bank agreed to not undertake any enforcement actions against Atcon Group for amounts owed until after January 31, 2010.

[25] It is not entirely clear who prepared Plan #1. At trial, the Appellant testified that it was an internal document prepared by Atcon Group's COO and CFO in June 2009 and not at the request of a creditor. However, in his affidavit of March 12, 2010 included in an application pursuant to the Companies Creditors Arrangement Act ("CCAA"), he indicated that the plan was developed by EY, on behalf of BNS, and presented to Atcon Group for its acceptance. Further, representations made to the CRA around this time suggested that EY was actively involved in the preparation of Plan #1.

[26] In any event, as part of the implementation of Plan #1, steps were undertaken in September 2009 to create an advisory board (the "Advisory Board") as requested by the Province of New Brunswick. EY and the Advisory Board were charged with supervising the Appellant's and Atcon Group's implementation of Plan #1. Secondly, BNS and Atcon Group entered into an amendment of the June 30, 2009 credit agreement whereby the bank provided an additional term loan of $9.4 million to facilitate the Atcon Group's execution of Plan #1.

[27] In October 2009, BNS requested that Atcon Group enter into a monitoring agreement. The Appellant testified that under the agreement, his decision-making abilities as a director were severely restricted. For example, he could not authorize disbursements greater than $10,000 or bid for work without the pre-approval of EY. He was unhappy with this loss of control, but did not contest the agreement because he did not feel there was anything he could do. The Appellant does not remember who signed the monitoring agreement on the group's behalf and the agreement itself was not entered as evidence.

[28] The Appellant testified that after the monitoring agreement was signed, EY terminated or directed him to terminate certain employees, including the COO. EY also directed him to sell certain key assets during what he felt were inopportune times, resulting in proceeds that were less than what could otherwise have been obtained. Finally, the Appellant indicated that EY was unresponsive to his suggestions to sell the heavy machinery. The Appellant maintained that had EY provided permission on a timely basis, proceeds from these sales would have been sufficient for Atcon Group to pay back its various debts. He stated he did not feel he could direct Atcon Group to refuse EY's directions during this time because the group was dependent on loans from BNS to continue its operations.

[29] By the end of December 2009, it became apparent to the Appellant that Plan #1 was not going to be successful. To maintain continued financial support, a second restructuring plan ("Plan #2") was prepared and presented for approval by BNS and the Province of New Brunswick. As with the Plan #1, the Appellant provided somewhat contradictory evidence regarding the genesis of this revised plan. He testified that the Advisory Board prepared Plan #2. However, in the March 12, 2010 affidavit noted above, he stated that Atcon Group developed Plan #2 under the direction of the Advisory Board. In the end, the revised plan was approved by BNS and the Province.

(3) Interactions with CRA

[30] By letters dated September 3, 2008, addressed to the Appellant's attention, the CRA advised that certain Atcon Group companies, including Atcon and NB Inc., had unpaid balances for corporate taxes, employee payroll withholdings, and/or GST. Specifically, the letter in respect of Atcon stated that the company owed unremitted GST of $751,425. The letter in respect of NB Inc. stated that the company owed income tax arrears and unremitted source deductions of $26,713 and $19,074, respectively. However, it did not mention any unremitted GST.

[31] The September 3, 2008 letters also stated that CRA was considering assessing the Appellant personally for these balances because of his status as a director. They were addressed and sent to the address of Atcon Group's head office. Furthermore, they specified that the unpaid balances were previously brought to the Appellant's attention but that no actions had been taken since that time. Therefore, they warned that a failure to respond could result in the issuance of assessments against the Appellant personally without further notice.

[32] The Appellant testified that he relied on Ms. Donovan as CFO to inform him about any debts that Atcon Group could not pay and that if the CFO did not notify him of such issues, the debts were likely paid in due course. He denied having personally received the letter of September 3, 2008 or recalling Ms. Donovan bringing them to his attention.

[33] On July 3, 2009, Heather Smith, a CRA collections officer, was assigned to collect unremitted amounts by companies within Atcon Group. The amounts included unremitted net GST by Atcon and NB Inc. She testified that based on her review of the companies' files at that time, both Atcon and NB Inc. had unpaid balances for corporate tax, payroll deductions, and GST. In addition, both companies had a pattern of filing debit GST returns but not paying the amounts due, and then waiting for input tax credits to be credited against the amounts owing in the next monthly cycle. For example, Ms. Smith testified that for Atcon, between April 2008 and 2009 the unpaid GST balance for the company would fluctuate up and down, at one time clearing out to nil; however, the fluctuations were due to credit returns, not actual payments by the company.

[34] Ms. Smith testified that shortly after she was assigned the files in respect of Atcon Group, her office received a fax from Ms. Donovan requesting a discussion for a payment plan for Atcon Group's tax debts. On August 19, 2009, Ms. Donovan and Mr. George Kinsmen from EY met with Ms. Smith and her team

to discuss how Atcon Group would repay its tax debts. Ms. Smith was advised that Mr. Kinsmen was representing BNS to help the group develop and implement a restructuring plan to ensure all creditors were paid, including the CRA. The Appellant did not attend this meeting. The restructuring plan mentioned at this meeting later became Plan #1.

[35] By follow-up letter addressed to Ms. Donovan and dated August 26, 2009, Ms. Smith indicated that the CRA was not prepared to accept the proposed repayment terms because it did not have a clear picture of Atcon Group's projected cash flow. Further, Ms. Smith indicated that the CRA was concerned about its priority relative to the other creditors.

[36] On September 17, September 30, and November 26, 2009, the Appellant participated in further discussions with Ms. Smith regarding the repayment of Atcon Group's tax debts. During these meetings, the Appellant advised the CRA that he was pursuing avenues to obtain funds to make payments, including collecting outstanding receivables from a major customer and amounts pursuant to an insurance claim. Again, the parties did not agree to a payment plan as issues identified in Ms. Smith's August 26, 2009 letter remained unresolved.

[37] On December 1, 2009, BNS issued a "comfort letter" in which it confirmed that it would permit, in accordance with Plan #1, the distribution of certain proceeds from the sale of Atcon Group's assets to the CRA. By letter dated December 9, 2009 and addressed to the Appellant's attention, the CRA indicated that it was expecting Atcon Group to make certain payments to it in accordance with Plan #1. The payments would consist of a series of fixed payments ending with a $1.1 million "balloon" payment, plus a portion of proceeds from the sale of Atcon Group's non-core businesses and assets. The December 9, 2009 letter merely provided the CRA's acknowledgment of the existence of Plan #1 and its understanding of the plan's terms but was not, according to Ms. Smith, an acceptance of same as a payment plan.

[38] Between December 16, 2009 and March 1, 2010, the Appellant regularly corresponded with Ms. Smith and provided information as to how he was working towards financing the fixed payments to the CRA. The Appellant's potential personal liability as director for Atcon Group's tax debts was reiterated in these correspondences. The CRA's intention to register judgments against Atcon Group, which the Appellant strongly opposed, was also discussed in the correspondences.

[39] Ms. Smith testified that from the time she was assigned to collect from Atcon Group, at no time was she given the understanding that payments to the CRA was subject to pre-approval of EY. She stated that any time she discussed potential payments with Atcon Group, it was with some combination of the Appellant, the CFO, or EY; however, she never discussed the matter with EY alone. She was never given the understanding that the Appellant or the group were encumbered in their authority to make payments, although she admitted she never inquired as to whether the Appellant had financial control of Atcon Group. She assumed he did so as a director.

[40] Ultimately, Atcon Group made all of the fixed payments it had committed to making (except for a $400,000 shortfall in the final $1.1 million "balloon" payment) and the CRA received a total of $2.7 million.

E. Atcon Group's bankruptcy

[41] On February 25, 2010, BNS applied to the Court of Queen's Bench of New Brunswick for an order appointing EY as receiver and receiver manager over all the real and personal property of various Atcon related companies (excluding Atcon and NB Inc.), pursuant to section 243 of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 ("BIA"). Parallel proceedings had also been commenced by BNS to bring Atcon and NB Inc. under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, as amended ("CCAA").

[42] On March 1, 2010, Riordon J rendered an oral decision (the "Oral Decision"), in respect to the March 2, 2010 Order. As a result, a receivership order (the "Receivership Order") issued confirming the appointment of EY as Receiver and Receiver Manager effective that date. He also signed an order to bring Atcon and NB Inc. under CCAA protection.

[43] The Appellant testified that shortly after the appointment of EY, he was denied access to the Miramichi head office and from that point on, could only do so by invitation of the Receiver, such as when EY asked him to assist with receivables.

[44] On March 12, 2010, the Appellant signed an affidavit in support of a motion to bring the Atcon Groups under CCAA protection and to appoint BDO Canada Limited as Monitor. On March 30, 2010, Riordon J. signed an order to incorporate, *inter alia*, Atcon and NB Inc. into the March 2, 2010 Receivership Order but in so doing, denied the appellant's motion. On April 23, 2010, Riordon J. signed an

order pursuant to which the Receiver was authorized and directed to make an assignment in bankruptcy in accordance with the BIA on behalf of Atcon and NB Inc.

[45] Kevin Jensen, a complex case officer with the insolvency unit of CRA's collections department, testified that he was assigned to the Atcon Group files on or around March 1, 2010 and Ms. Smith's involvement ended at that point. Mr. Jensen confirmed the Appellant's testimony that he had assisted him with the collection of large amounts due to the Atcon Group to satisfy its tax debts. He stated that on March 26, 2010, the Appellant contacted him to provide information regarding a potential receivable from a major customer. The CRA was able to collect $2 million based on this information. But the amounts collected were not applied against the unremitted net GST owed by Atcon and NB Inc. for the periods in question.

F. Minister's assessments

[46] The Minister assessed Atcon for the unremitted net GST for the month of March 2009, on July 9, 2009. As noted above, the Minister assessed the Appellant for Atcon's unremitted net GST in respect of the amount owed for that month on November 7, 2014.

[47] Similarly, the Minister assessed NB Inc. (or the predecessor company) for unremitted GST for the months of April, May and June 2009 on July 9, July 12 and September 22, 2009, respectively, and the Appellant was assessed for the amount owed on March 7, 2013.

[48] Testimony from Mr. Jensen's examination for discovery was read-in at trial to explain the basis of the Minister's assessments against the Appellant. Mr. Jensen explained that the Appellant was personally liable for unremitted net GST payable by Atcon and NB Inc. in respect of the months noted above, because the Appellant was a director of the companies during those periods and the limitation period defence and due diligence defence did not apply.

[49] Mr. Jensen stated that it was the Minister's position that the Appellant lost financial control of the Atcon and NB Inc. as of March 2, 2010, when Riordon J. issued court orders to put those companies and the Atcon Group into a receivership. Therefore, even though the Appellant remained as a director, the Minister accepted the Appellant's position that he should not be held personally liable for the tax debts assessed against the companies after March 2, 2010.

[50] As noted above, the Minister's Notices of Assessment against Atcon and NB Inc. were issued in 2009, prior to the date of bankruptcy. Since the assessments were made prior to March 2, 2010, the Minister maintained that the Appellant remained personally liable for the unremitted net GST described therein.

III. Analysis

[51] Subsection 323 of the ETA provides as follows:

> 323 (1) Liability of directors – 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) Diligence - 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.
>
> (…)
>
> (5) Time limit - An assessment under subsection (4) of any amount payable by a person who is a director of a corporation shall not be made more than two years after the person last ceased to be a director of the corporation.
>
> (My Emphasis.)

(a) The limitation period defence

[52] The Appellant argues that he should not be held personally liable for the unremitted GST on the basis of subsection 323(5) since he ceased to be director on March 2, 2010 as a result of the Order issued on that date. He argues that he no longer had control of the affairs of either company. Even though he continued to bear the title of "director", he was no longer actually acting in that capacity for the purposes of corporate law and tax law.

[53] In support of this position, the Appellant refers to the Oral Reasons in which the court explained that: "The effect of a receivership order is to displace those

who would have legal control apart from the appointment of a receiver, such as directors of a corporation or others with legal control of that business."

[54] The Appellant also referred to the March 2, 2010 Order which confirmed EY as Receiver and conferred powers ordinarily only exercisable by directors under corporate law including "to take possession and control of the affected Atcon Group companies' assets and any proceeds, receipts, and disbursements arising from such assets".

[55] The Appellant acknowledges that the March 2, 2010 Order was issued in the context of the insolvency law proceedings but argues nonetheless, that it would be an error in law for this Court to ignore the Order and not give effect to it. Ultimately, the Appellant takes the position the Order had the practical effect of "firing" him as director effective March 2, 2010.

[56] The Appellant argues that this conclusion is consistent with the Minister's position not to assess him for unremitted net GST payable by Atcon and the NB Inc. for periods ending after the periods under appeal. Specifically, he refers to Mr. Jensen's evidence that the Minister considered the Appellant to have lost financial control of the companies as of March 2, 2010, when the companies were put into a receivership.

[57] In the end, it is the Appellant's position that Riordon J. had the authority under the BIA and pursuant to his inherent jurisdiction as a judge of a provincial superior court to remove the Appellant from his office as director. Since it was not appealed, the March 2, 2010 Order is final and binding on all parties. The Appellant relies in particular on two rectification cases, for this position.

[58] In the earlier case of *Dale v. Canada*, [1997] 3 F.C. 235 (FCA) ("*Dale*"), a corporation had failed to file supplementary letters patent to authorize the issuance of preference shares in the context of a section 85 rollover, leading to unintended tax consequences. The shareholder sought and obtained a rectification order from the provincial superior court. On appeal from a decision of the Tax Court of Canada, Robertson J.A. (writing for the majority) indicated (at pages 14 and 15) that "the Tax Court and this Court are required to give effect to orders issued by the superior courts of the provinces" since an order "made by a court having jurisdiction to make it, stands and is binding and conclusive unless it is set aside on appeal or lawfully quashed".

[59] In *Quebec (Agence du Revenu) v. Services Environnementaux AES inc.*, [2013] 3 S.C.R. 838 ("*AES*"), shareholders had filed an application for rectification before the provincial superior court following a corporate reorganization that resulted in unintended tax consequences. The Quebec Court of Appeal granted the application holding that it was authorized to correct discrepancies between the common intentions of the parties and the intention declared in the documents. The Supreme Court of Canada upheld the decision indicating (at para. 43) that the Tax Court of Canada, in determining the validity of a tax reassessment must "consider the consequences of judgments rendered by the civil courts with respect to the transactions that led to the issuance of the notices of assessment."

[60] In essence, the Appellant relies on *Dale* and *AES* to support the proposition that if a superior court has issued a court order removing a director and that order has not been appealed, it is binding on the Minister of National Revenue for the purposes of subsection 323(5) of the ETA.

[61] The question for the Court is whether the March 2, 2010 Order effectively removed the Appellant as a director of the subject companies effective that date. The Respondent argues that it does not and relies on several decisions.

[62] It appears that a number of earlier decisions of this Court including several listed in the decision of *Bonch v. Canada*, [2003] G.S.T.C. 11, had indeed taken the position that for the purposes of the two-year limitation (set out in the similarly worded subsection 227.1 of the *Income Tax Act*), it was not necessary for a director to actually resign or comply with the provisions of the applicable corporate legislation since the purpose of the limitation was "to protect directors from indefinite exposure to collection proceedings" (para. 5) and that such a strict interpretation would "render the limitation period devoid of meaningful substance" (para. 7). However that decision was overturned by the Federal Court of Appeal [2002] T.C.J. No. 687 (QL) and the Court held that a *de jure* director does not cease to be a director until he or she has met the requirements for doing so under the statute governing the company's incorporation.

[63] The Federal Court of Appeal had earlier issued the decision of *Kalef v. Canada*, [1996] 2 C.T.C. 1, relied upon by the Respondent, where it considered a director's liability in the context of the bankruptcy of the corporation. The Court held that there is no requirement for a person to be able to exercise the power of a director or exert direct control over the corporation in order to be a director. In that instance, the Court noted the director had not resigned in accordance with the provisions of the governing corporate legislation and that:

> 15. (…) while it may be open to Parliament to expressly deviate from the principles of corporate law for purposes of the *Income Tax Act*, I do not think such an intention can be imputed. Given the silence of the *Income Tax Act* I think guidance of the applicable corporate legislation (…) should be taken. A director cannot and should not obtain the benefits of incorporation (…) without accepting the responsibilities as well (…)."

(My Emphasis.)

[64] In the later decision of *Butterfield v. Canada*, [2010] G.S.T.C. 185, the Federal Court of Appeal referred to the "well-stablished principle that an assignment in bankruptcy does not trigger a director ceasing to be a director" (at para. 4) and rejected a director's argument that he had been constructively dismissed when the trustees prevented him from performing the functions of a director. A number of recent decisions of this Court have adopted that position including *Sud v. The Queen*, 2017 TCC 106 (para. 48) and *Grant v. the Queen*, 2017 TCC 121 (paras. 22-24).

[65] Both Atcon and NB Inc. were incorporated pursuant to the *New Brunswick Business Corporations Act*, SNB 1981, c. B-9.1 ("NBBCA"). Subsection 66(1) provides as follows:

> 66(1) A director of a corporation ceases to hold office when
>
> (a) he dies or resigns;
>
> (b) he is removed in accordance with section 67; or
>
> (c) he becomes disqualified under subsection 63(1).
>
> 66(2) A resignation of a director becomes effective at the time a written resignation is sent to the corporation, or at the time specified in the resignation, whichever is later.

[66] Section 67 provides that shareholders may remove a director from office generally by an ordinary resolution and subsection 63(1) disqualifies certain individuals, such as someone who is bankrupt, less than nineteen years of age, of unsound mind, or convicted of a criminal office involving fraud. There is no evidence that the Appellant satisfied any of these requirements.

[67] Can the Appellant rely on *AES* and *Dale* and argue that even if the Appellant had not resigned in accordance with the requirements of the NBBCA, the March 2,

2010 Order is effectively binding on the Minister as far as the two-year limitation period is concerned?

[68] I have concluded that this argument must be rejected. As acknowledged by the Appellant, the March 2, 2010 Order was issued in the context of insolvency proceedings under the provisions of the BIA. It must be considered within that context. There are parallel statutory provisions in the NBBCA, Part VII of which is entitled "Receivers and Receiver-Managers". It includes the following provision:

> 54. If a receiver-manager is appointed by the Court (…), the powers of the directors of the corporation that the receiver-manager is authorized to exercise may not be exercised by the directors until the receiver-manager is discharged.
>
> (My Emphasis.)

[69] In other words, even though section 60(1) of the NBBCA provides that "(…) the business and affairs of a corporation shall be managed by one or more directors", those powers are displaced and may not be exercised by the directors until such time as the receiver or receiver-manager has been discharged. Section 59 then provides that the receiver manager shall, upon completion of his duties, "send a copy of the final report to each of the directors", clearly supporting the notion that directors who have not effectively resigned continue to hold office for purposes of the provincial legislation despite the court ordered appointment of EY as receiver-manager.

[70] I am of the view that there is nothing in Riordan J.'s Oral Decision or the March 2, 2010 Order, that would suggest otherwise. On that basis and on the basis of the authorities cited above, I conclude that the Appellant did not cease to be a *de jure* director (*MacDonald v. The Queen*, 2014 TCC 308, para. 30) and as such, is not entitled to rely on subsection 323(5) of the ETA.

(b) The due diligence defence

[71] The Appellant's argument, in the alternative, is that he exercised the degree of care, diligence, and skill to prevent the failure of the corporations to remit GST that a reasonably prudent person would have exercised in comparable circumstances, pursuant to subsection 323(3) of the ETA.

[72] The Appellant refers to the recent decisions of the Federal Court of Appeal in *The Queen v. Buckingham*, 2011 FCA 142 ("*Buckingham*") and *Balthazard v.*

Canada, 2011 FCA 331 ("*Balthazard*"). In *Balthazard*, Mainville J.A. summarized the matter as follows (para. 32):

> 32. (…)
>
> a. The standard of care, skill and diligence required under subsection 323(3) of the *Excise Tax Act* is an objective standard as set out by the Supreme Court of Canada in *Peoples Department Stores Inc.(Trustee of) v. Wise*, 2004 SCC 68 (CanLII), [2004] 3 S.C.R. 461. This objective standard has set aside the common law principle that a director's management of a corporation is to be judged according to his or her own personal skills, knowledge, abilities and capacities. However, an objective standard does not mean that a director's particular circumstances are to be ignored. These circumstances must be taken into account, but must be considered against an objective "reasonably prudent person" standard.
>
> b. The assessment of the director's conduct, for the purposes of this objective standard, begins when it becomes apparent to the director, acting reasonably and with due care, diligence and skill, that the corporation is entering a period of financial difficulties.
>
> c. In circumstances where a corporation is facing financial difficulties, it may be tempting to divert these Crown remittances in order to pay other creditors and thus ensure the continuity of the operations of the corporation. That is precisely the situation which section 323 of the *Excise Tax Act* seeks to avoid. The defence under subsection 323(3) of the *Excise Tax Act* must not be used to encourage such failures by allowing a care, diligence and skill defence for directors who finance the activities of their corporation with Crown monies, whether or not they expect to make good on these failures to remit at a later date.
>
> d. Since the liability of directors in these respects is not absolute, it is possible for a corporation to fail to make remissions [sic] 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.

(i) Duty of loyalty vs. due diligence defence

[73] The Appellant refers to paragraph 38(a) in *Balthazard*, as noted above, and emphasizes that while the standard of care expected of a director is an "objective standard", the Federal Court of Appeal has clarified that "a director's particular circumstances" should not be ignored and must be taken into account and considered against an objective "reasonably prudent person" standard.

[74] The Appellant then refers to a director's duty of loyalty and duty of care under corporate law and argues that a director's liability for tax purposes should be applied harmoniously with the director's liability's for corporate law purposes (*BP Canada Energy Company v. Canada (Minister of National Revenue)*, 2017 FCA 61, paras. 96 and 97). Therefore, in this instance, simply focusing on whether the Appellant had met the duty of care to prevent Atcon and NB Inc. from failing to remit net GST is insufficient to determine whether the due diligence defence applied.

[75] *People Department Stores Inc. (Trustee of) v. Wise*, 2005 SCC 68, (2004) 3 S.C.R. 461 ("*Peoples*"), was a corporate law case in which the Supreme Court of Canada dealt with a director's duty of loyalty and duty of care under paragraphs 122(1)(a) and (b) of the *Canada Business Corporations Act*, R.S.C. 1985, c. C-44, respectively. The Appellant argues that the reference to the *Peoples* decision in *Balthazard*, reflects the Federal Court of Appeal's implicit affirmation that the director's liability scheme for tax purposes should be applied harmoniously with the director's liability's scheme for corporate law purposes. Therefore, in this case, simply focusing on whether the Appellant had met the duty of care to prevent the subject companies from failing to remit net GST, is insufficient to determine whether the due diligence defence applied. The Appellant argues that the Court must also consider whether the Appellant's actions were consistent with his duty of loyalty under corporate law, which, as stated in *Peoples*, is owed to a broad spectrum of stakeholders, with the government being only one of them. The Appellant refers to the following provision of the NBBCA:

> 79(1) Every director and officer of a corporation in exercising his powers and discharging his duties shall
>
> (a) act honestly and in good faith, and
>
> (b) exercise the care, diligence and skill that a reasonably prudent person would exercise in comparable circumstances

> in the best interests of the corporation.

[76] The Appellant submits that he has satisfied the duty of loyalty on the basis of the unchallenged evidence that he dedicated considerable time and effort to secure work for Atcon Group in order maintain its ongoing operations.

[77] In the same vein, the Appellant argues that there could be no duty of care without any power to perform actions that would satisfy that duty. Therefore, the Court must take into consideration the fact that he had very little power to manage the financial affairs of the Atcon Group beginning from the time that EY became involved. He submits that his active participation in discussions with the CRA beginning in August 2009 regarding the group's tax debts and his efforts to assist the CRA to obtain payments from Atcon Group even after he was prevented access to the group's office were consistent with the conclusion that he had satisfied his duty of care.

[78] The Respondent argues that the Court should not rely on corporate law principles to apply the due diligence defence. It notes that in *Buckingham*, the Federal Court of Appeal clearly held that the duty of care contemplated in subsection 323(3) is a specific duty of care owed by a director to the Minister to prevent the failure of the corporation to remit taxes; it is not a general duty of care with no specifically identified beneficiaries.

[79] This issue was specifically addressed in *Buckingham* where Mainville J.A. wrote:

> [30] There has been some debate in recent years as to whether the objective standard of care, diligence and skill developed by the Supreme Court of Canada in *Peoples Department Stores* in relation to paragraph 122(1)(b) of the *Canada Business Corporations Act*, R.S.C. 1985, c. C-44 ("CBCA") can extend to subsection 227.1(3) of the *Income Tax Act* and to subsection 323(3) of the *Excise Tax Act* which use almost identical language in their English versions and similar language in their French versions: *Hartrell v. Canada*, above at para. 12; compare *Higgins v. Canada*, above at paras. 6 to 11, with *Liddle v. Canada*, 2009 TCC 451 (CanLII), 2009 D.T.C. 1296 at paras. 33 to 35. Paragraph 122(1)(b) of the CBCA reads as follows:
>
> | | |
> |---|---|
> | 122. (1) Every director and officer of a corporation in exercising their powers and discharging their duties shall | 122. (1) Les administrateurs et les dirigeants doivent, dans l'exercice de leurs fonctions, agir : |
> | (b) exercise the care, diligence and | b) avec le soin, la diligence et la |

skill that a reasonably prudent person would exercise in comparable circumstances.	compétence dont ferait preuve, en pareilles circonstances, une personne prudente.

[31] Though similar, the provisions of paragraph 122(1)(b) of the CBCA and of subsections 227.1(3) of the *Income Tax Act* and 323(3) of the *Excise Tax Act* have fundamentally different purposes. The different purposes to which these various provisions relate must inform the application of the standard of care, diligence and skill in each case.

[32] The duty of care in paragraph 122(1)(*b*) of the CBCA does not refer to an identifiable party as the beneficiary of the duty: *Peoples Department Stores* at para. 57. Thus, the identity of the beneficiaries of the duty of care under paragraph 122(1)(b) of the CBCA is open-ended and includes all creditors. This provision sets out a standard of behaviour that should reasonably be expected, though it does not provide an independent foundation for claims: *BCE Inc. v. 1976 Debentureholders*, 2008 SCC 69, [2008] 3 S.C.R. 560 at para. 44.

[33] On the other hand, subsection 227.1(1) of the *Income Tax Act* and subsection 323(1) of the *Excise Tax Act* specifically provide that the directors "are jointly and severally, or solidarily, liable, together with the corporation, to pay the amount and any interest or penalties relating to" the remittances the corporation is required to make. Subsection 227.1(3) of the *Income Tax Act* and subsection 323(3) of the *Excise Tax Act* do not set out a general duty of care, but rather provide for a defence to the specific liability set out in subsections 227.1(1) and 323(1) of these respective Acts, and the burden is on the directors to prove that the conditions required to successfully plead such a defence have been met. The duty of care in subsection 227.1(3) of the *Income Tax Act* also specifically targets the prevention of the failure by the corporation to remit identified tax withholdings, including notably employee source deductions. Subsection 323(3) of the *Excise Tax Act* has a similarly focus. The directors must thus establish that they exercised the degree of care, diligence and skill required "to prevent the failure". The focus of these provisions is clearly on the prevention of failures to remit.

(My Emphasis.)

[80] A textual, contextual and purposive analysis, consistent with the authorities cited above, notably paragraph 33 above, suggests that the due diligence defence set out in subsection 323(1) targets a specific and identifiable beneficiary. As such, it must not be confused with the "open-ended" duty of loyalty or duty of care under corporate law which is intended to benefit a broad spectrum of stakeholders including "shareholders, employees, suppliers, creditors, consumers, governments

and the environment": *BCE Inc. v. 1976 Debentureholders*, (2008) 3 S.C.R. 560, para. 39.

[81] I find that there is no basis for concluding that the reference in *Balthazard* to the *Peoples* decision reflects the Federal Court of Appeal's implicit affirmation that the director's liability scheme for income tax or GST purposes should be applied harmoniously with the director's liability's scheme for corporate law purposes. It merely establishes that a director's duty to exercise a "degree of care, diligence and skill" should be evaluated in accordance with "an objective standard" (*Peoples*, para. 63). In any event, such a conclusion would be contrary to the elements of the due diligence defence described in *Balthazard*, notably at paragraphs 32(c) and (e) (see also *Maddin v. The Queen*, 2014 TCC 277 at paragraph 24, and *D'Amore v. The Queen*, 2012 TCC 373 at paragraphs 27 and 32).

(ii) A period of financial difficulties?

[82] The Appellant argues (on the basis of paragraphs 32(b) and (c) in *Balthazard*), that an assessment of a director's conduct for the purposes of the due diligence defence should only begin when it becomes apparent to the director, acting reasonably, that the corporation is entering a period of financial difficulties.

[83] The Appellant argues that the Court should assess his conduct as of August 2009, when he first became aware of the unpaid GST remittances and began actual discussions with Ms. Smith. He argues that 2008 would not be the appropriate time to assess his conduct because it was a "good year" for Atcon Group and therefore the business was not experiencing financial difficulties.

[84] The Appellant admits that the Atcon Group was experiencing cash flow problems in late 2008 and early 2009, but maintains they were manageable. In support of this, he indicates that BNS was not overly concerned with the outstanding indebtedness which stood at approximately $66 million by the end of June 2009. Once the $50 million guarantee from the Province of New Brunswick was put in place, the BNS lines of credit were increased to over $99 million.

[85] The Respondent submits that the relevant periods for considering the Appellant's conduct are the months of March to July 2009 and that during those months the Appellant's actions were directed at generating business, obtaining financing and sufficient cash flow to maintain Atcon Group's operations. Since there is no evidence of any positive steps to ensure that the subject companies

made the GST remittances, the due diligence defence does not apply for that period.

[86] The Respondent also challenges the Appellant's assertion that he did not have knowledge of the letters from the CRA commencing in September 2008 which indicated that certain Atcon Group companies, including Atcon and NB Inc., had failed to remit GST. Given the large amounts involved, the Respondent suggests that it is unlikely that the Appellant was not informed of the contents of those letters.

[87] If the Appellant's conduct as a director is to be assessed when it became apparent to him "acting reasonably and with due care, diligence and skill" that the corporation "was entering into a period of financial difficulties", the question for the Court is at what point did that period begin?

[88] On the one hand, it is difficult to reconcile the resort to high interest rate loans with McKenna and Roynat in late 2008, with the Appellant's position that the Atcon Group was not experiencing financial difficulties or at least serious cash flow problems at that time. However, looked at objectively, it is not inconceivable that the Appellant viewed those loans as a temporary measure to support a rapid expansion of their business activities. Detailed income statements were not provided to the Court but reviewing the monthly GST Notices of Assessment for Atcon (included in the Appellant's Book of Documents), it is apparent that for the 12 month period from March 2008 to March 2009, Atcon reported "Sales and Other Revenue" of approximately $250 million or an average of about $21 million per month. There was then a sharp drop to $2.2 million in April and $5.9 million in May 2009; no figures were provided for June 2009.

[89] On that basis, the Court accepts the Appellant's testimony and concludes that the financial difficulties were not apparent to him in 2008. That said, the Court must still determine at what point, "acting reasonably and with due care, diligence and skill", the Appellant should have concluded that the corporations were entering a period of financial difficulties in 2009?

[90] In *Thistle v. Canada*, 2015 TCC 149, ("*Thistle*") Owen J. found as a fact that a director had no reason to believe that the corporation was in financial difficulty or behind in its remittances until he received a call from CRA (para. 98). He posited the next question as follows:

> [99] The question that must still be answered, however, is whether, prior to the phone call from the CRA in mid- to late February 2011, the Appellant ought to have known that Enterprises was in financial difficulty and had failed to make its payroll and GST/HST remittances as early as March 2010. In view of the standard described in paragraph 46 of the Federal Court of Appeal decision in *Buckingham*, *supra*, this in turn requires a determination of whether a hypothetical individual, acting reasonably and with due care, diligence and skill, would have known that Enterprises was facing financial difficulty if confronted with circumstances comparable to those faced by the Appellant. This is not to ask whether the Appellant was willfully blind to the possibility of difficulties faced by Enterprises but rather to ask whether a reasonable individual, faced with comparable circumstances, would have suspected that Enterprises was in financial difficulty or was failing to make the required remittances.
>
> (My Emphasis.)

[91] In this instance, I find that "a reasonably prudent person acting reasonably and with due care, diligence and skill", faced with comparable circumstances, would have realized that Atcon and NB Inc. were facing serious financial difficulties by no later than the end of April 2009. I reach that conclusion on the basis of the following analysis:

1. The high interest loans with McKenna and Roynat needed to be replaced as soon as possible given that the loan terms included an increase to 20% per annum after 6 months;

2. The existing BNS lines of credit were regularly at their upper limit and the bank was not prepared to extend additional funding to the Atcon Group;

3. Discussions with the Province of New Brunswick were at a preliminary stage and there was no certainty that it would agree to provide a guarantee;

4. The precipitous drop in Atcon's gross revenue to $2.2 million in April 2009 as compared to an average of about $21 million per month in the previous 12 month period;

[92] The parties did not lead evidence as to the state of the Canadian economy but I nonetheless take judicial notice of the fact that the global financial crisis reached its peak in March 2009. It is inconceivable that the Appellant was not acutely aware of this state of affairs since it coincided with the precipitous drop in

Atcon's gross revenue, a fact that would have been plain and obvious to the Appellant by the end of April 2009 or shortly thereafter.

[93] On the basis of all the foregoing circumstances, I conclude that the Appellant would have known that Atcon and NB Inc. were in serious financial straits by no later than April 30, 2009 and therefor his conduct, for purposes of the due diligence defence, should be examined from that point on.

(iii) Preventative measures

[94] The Appellant's evidence is that he had instructed his accounting staff, notably his CFO, Ms. Donovan (and her staff of six to eight chartered accountants) to ensure payment of all payroll and GST remittances and as far as he knew this was being done, notwithstanding the delays reported by Ms. Smith, the CRA collection officer assigned to the file in July 2009.

[95] To the extent that there were GST arrears in 2008, as testified by Ms. Smith, these were paid in full, albeit belatedly, and the Appellant has no liability for those amounts.

[96] The Appellant's evidence is that he relied on Ms. Donovan to process the monthly GST remittances as required and to inform him of any difficulties. He maintains that even the CRA letters that were addressed to him personally with a reminder of his liability as a director for unpaid GST, were not brought to his attention. He had no recollection of receiving or reviewing those letters and insists that he first became aware of the GST arrears in August 2009.

[97] The Respondent argues that during the months in question, the Appellant delegated his oversight duties to Ms. Donovan and did not turn his attention to the required tax remittances. In fact, he admitted that he received internal financial reports on a periodic basis and failed to pay much attention.

[98] The Respondent acknowledges that positive actions for due diligence defence purposes may differ between the sole director of a small business and a director of a complex business that employs highly trained personnel, as was the case for the Appellant. Nonetheless, the Respondent argues that the Appellant was at least required to check with Ms. Donovan as to the status of the GST remittances.

[99] The issue for the Court is whether, and to what extent, the Appellant was entitled to delegate his oversight duties to his subordinates, notably Ms. Donovan. The Respondent relies on *Kaur v. The Queen*, 2013 TCC 227, where Hogan J. found that a director who admitted having knowledge of a corporation's financial difficulties and knew it would not be able to meet its GST remittance obligations, could not rely on a due diligence defence and, notably, could not delegate that responsibility to a subordinate:

> [18] To establish a due diligence defence, the director must show that he or she took positive action to prevent the corporation's failure to remit the amounts in question. The director's oversight duties with respect to the GST cannot be delegated in their entirety to a subordinate, as was done in the present case.
>
> (My Emphasis.)

[100] The Appellant relies on the earlier case of *Smith v. Canada*, 2001 FCA 84 ("*Smith*"), where Noël J.A. (as he then was), reviewed a director's entitlement to rely on the due diligence defence set out in subsection 323(3) of the ETA. He commented as follows (page 5):

> In assessing the objective reasonableness of the conduct of a director, the factors to be taken into account may include the size, nature and complexity of the business carried on by the corporation, and its customs and practices. The larger and more complex the business, the more reasonable it may be for directors to allocate responsibilities among themselves, or to leave certain matters to corporate staff and outside advisers, and to rely on them.

[101] It is not clear whether this remains an accurate statement of the law, particularly in light of the fact that this decision, and many before it, sought to distinguish between the obligations of active directors vs. inactive directors. As noted by the Federal Court of Appeal in *Her Majesty the Queen v. Chriss*, 2016 FCA 236 ("*Chriss*"), those distinctions are no longer relevant:

> [21] As noted by the Court in *Buckingham*, a higher standard is an incentive for corporations to improve the quality of board decisions through the establishment of good corporate governance rules and discourages the appointment of inactive directors who fail to discharge their duties as director by leaving decisions to the active directors. One consequence of this is that a person who is appointed as a director must carry out the duties of that function on an active basis and will not be allowed to defend a claim for malfeasance in the discharge of his or her duties by relying on his or her own inaction.
>
> (My Emphasis.)

[102] Since *Chriss* establishes that a director must carry out his or her duties "on an active basis", it would appear to follow logically that a director cannot simply delegate his or her oversight duties to a subordinate, at least not without some evidence of an established management system involving, for example, periodic reporting. If a system had been put in place to prevent the failure of the corporation to make the remittances, the director could thus demonstrate that he or she was "specifically concerned with the tax remittances" (*Balthazard*, para. 32(e)).

[103] In the end, I find there is a gap in the evidence. Having concluded that the Appellant must have known by no later than the end of April 2009 that Atcon Group was facing serious financial difficulties, the onus was on him to satisfy the Court that indeed a management system had been put in place. His evidence on this issue was self-serving and more importantly, uncorroborated. It falls short of convincing the Court that the Appellant had sought to fulfill his duties "on an active basis" and that he had taken measures to prevent the failure of Atcon and NB Inc. to effect GST remittances after April 30, 2009.

(iv) Corrective measures

[104] Although subsection 323(3) refers to "the degree of care, diligence, and skill to prevent the failure" (My Emphasis), the Appellant argues that the due diligence defence is not limited to preventative actions by the director. Corrective actions must also be considered.

[105] The Appellant refers to the numerous meetings that took place between Ms. Smith, the CRA collections officer, and his COO and CFO commencing in August 2009 as well as his own meetings with her in the fall of 2009. The Appellant contends that the preparation of an instalment plan that lead to the payment to CRA of about $2.7 million prior to the bankruptcy and his later efforts to assist Mr. Jensen in his collection efforts generally (and specifically the collection of a $2.0 million receivable), all suggest that he has satisfied his due diligence obligations.

[106] The Appellant relies on paragraphs 41 and 42 of *Balthazard*, in which the Federal Court of Appeal noted that the appellant had negotiated an instalment arrangement that enabled the Minister to obtain full payment of late GST remittances and that "[o]nce the amounts are remitted by the corporation at issue, even belatedly, the director ceases to be liable under section 323" (para 42).

[107] The Appellant maintains that the same reasoning should apply in this appeal. He argues that even though he had no financial control of Atcon Group as a result of EY's presence, he negotiated an instalment arrangement with the Minister and assisted Atcon Group in making nearly all of the agreed amounts under Plan #1. He submits that these actions indicate that he was specifically concerned with Atcon Group's tax remittances. Furthermore, they were significant corrective actions sufficient for the Court to find that the due diligence defence applied.

[108] In conclusion, the Appellant argues that when the global circumstances are taken into consideration, his actions regarding the outstanding GST debts of the Atcon and NB Inc. were consistent with a reasonably prudent and diligent director. Therefore, he should be entitled to rely on the due diligence defence.

[109] In *Balthazard*, the Federal Court of Appeal reviewed the evidence and concluded that, on the basis of the record, the director had concerned himself with the tax remittances and had taken "corrective measures" (para. 40.). However, those comments pertain specifically to GST remittances that resulted from a tax recalculation by the authorities after the bankruptcy and consequently, were not included in the instalment agreements.

[110] The critical time period at issue in *Balthazard*, were the final months prior to the bankruptcy. Mainville J.A. noted as follows:

> [50] (…) it is important for directors to quickly make the necessary decisions if they wish to successfully mount a due diligence defence against their joint and several, or solidary, liability.
>
> [51] In this particular case, the delay of nearly four months between the due date of the remittance on October 30, 2006, and the proposal to shareholders on February 23, 2007, remains largely unexplained. The appellant contacted the tax authorities on or about October 30, 2006, to try to agree on instalments, but those discussions did not lead to an agreement. Throughout November and December, the appellant could not have been unaware that the business was in a very precarious situation, and it was therefore up to him to take the appropriate actions to minimize the tax authorities' losses. He did indeed make arrangements for a proposal to be made to creditors, but that proposal was not submitted until the end of February 2007. That shows a lack of diligence within the meaning of subsection 323(3) of the ETA, which affords the appellant no escape from his joint and several, or solidary, liability for the net tax remittance due on October 30, 2006, for the period from July 1, 2006, to September 30, 2006.
>
> (My Emphasis.)

[111] In this instance, it is indeed regrettable that the monies collected and paid to CRA as a result of the Appellant's efforts were not applied to the Notices of Assessment at issue in this appeal. However, much like Mainville J.A. in *Balthazard*, I find that the gap between the end of April 2009 and the end of August 2009, "remains largely unexplained". Since the Appellant must be taken to have known that Atcon Group was in serious financial difficulties by the end of April, 2009, the corrective measures undertaken during the fall of 2009 and 2010 do not absolve him of the necessity of having taken preventative measures when those financial difficulties should have become apparent to him.

[112] Consequently, I agree with the submissions of the Respondent that the focus must be on the preventative measures undertaken by the Appellant after April 30, 2009 and that the corrective measures undertaken after August 2009, do not absolve him of those obligations.

(v) Due diligence defence / Conclusion

[113] *Balthazard* sets out a legal framework to determine under what circumstances a director is entitled to rely on the due diligence defence described in subsection 323(3) and in so doing, also recognizes that a director's liability for GST remittances "is not absolute" (para 32(d)).

[114] A director's liability "is not absolute" in the sense that such a director can be absolved of the joint obligation for unpaid tax remittances on the basis of the due diligence defence. However, the Court must be satisfied on the balance of probabilities and on the basis of cogent and credible evidence that preventative measures were undertaken to prevent the failure.

[115] As noted in paragraph 103 above, the Appellant's testimony on that critical period of time, falls short of convincing the Court that sufficient preventative measures were taken. His suggestion that he had no knowledge of the unpaid GST until sometime in August 2009, quite frankly, stretches credulity. Although genuine and generally credible, I find that the Appellant's testimony was self-serving and at times vague and inconsistent on certain key issues. In the absence of corroborating evidence, his testimony alone cannot carry the day.

IV. Conclusion

[116] On the basis of the foregoing reasons, the appeal is allowed, and the matter is referred back to the Minister for reconsideration and reassessment on the basis

that the Appellant is liable for Atcon's or NB Inc.'s unremitted net GST, interest and penalties due on or after May 1, 2009.

[117] All circumstances considered, I exercise my discretion not to award costs.

Signed at Ottawa, Canada, this 20th day of March 2018.

"Guy Smith"

Smith J.

CITATION:	2018 TCC 56
COURT FILE NO.:	2014-4391(GST)G
STYLE OF CAUSE:	ROBERT TOZER v. HER MAJESTY THE QUEEN
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