Docket: 2010-2419(GST)I

BETWEEN:

LYNDA M. LAGACÉ,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

Appeal heard on common evidence with the appeal of Richard Eastveld (2010-2421(GST)I) on February 6, 2012, at Montreal, Quebec.

Before: The Honourable Justice Robert J. Hogan

Appearances:

Counsel for the Appellant:	Anick Bouzouita
Counsel for the Respondent:	Joëlle Bitton

JUDGMENT

The appeal from the assessment made pursuant to subsection 323(1) of the *Excise Tax* Act for the period from January 1, 1998 to December 31, 2007, the notice of which is dated September 15, 2009 and bears number PM-15459, is dismissed. The parties are to bear their own costs.

Signed at Vancouver, British Columbia, this 5th day of April 2012.

"Robert J. Hogan"

Hogan J.

Docket: 2010-2421(GST)I

BETWEEN:

RICHARD EASTVELD,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

Appeal heard on common evidence with the appeal of Lynda M. Lagacé (2010-2419(GST)I) on February 6, 2012, at Montreal, Quebec.

Before: The Honourable Justice Robert J. Hogan

Appearances:

Counsel for the Appellant:	Anick Bouzouita
Counsel for the Respondent:	Joëlle Bitton

JUDGMENT

The appeal from the assessment made pursuant to subsection 323(1) of the *Excise Tax* Act for the period from January 1, 1998 to December 31, 2007, the notice of which is dated September 15, 2009 and bears number PM-15457, is dismissed. The parties are to bear their own costs.

Signed at Vancouver, British Columbia, this 5th day of April 2012.

"Robert J. Hogan"

Hogan J.

Citation: 2012 TCC 117
Date: 20120405
Docket: 2010-2419(GST)I

BETWEEN:

LYNDA M. LAGACÉ,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

AND BETWEEN:

Docket: 2010-2421(GST)I

RICHARD EASTVELD,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

REASONS FOR JUDGMENT

Hogan J.

[1] The appellants, Lynda Lagacé and Richard Eastveld, are appealing director liability assessments issued against them under the *Excise Tax Act* (the "ETA") for a corporation's unremitted goods and services tax ("GST") in the amount of $40,721, including tax, interest and penalties, for the period from January 1, 1998 to

December 31, 2007. The appeals were heard on common evidence at the request of the parties.

[2] Ms. Lagacé was the sole *de jure* director of the corporation in question, Eastveld Management Inc. ("Eastveld Management").

[3] The corporation carried on a real estate brokerage business, employing Richard Eastveld, a chartered real estate broker. Mr. Eastveld was assessed on the basis that he was a *de facto* director of Eastveld Management. The respondent's characterization of Mr. Eastveld as a *de facto* director of the corporation was accepted by Mr. Eastveld's counsel, who brought evidence to show that Mr. Eastveld was the sole active director of the corporation.

[4] The Minister of Revenue of Quebec (the "Minister"), acting on behalf of the Minister of National Revenue, relied on the following assumptions of fact in making the assessment against each appellant:

> (a) the Company was incorporated under the *Canada Business Corporations Act* (its title at the time) R.S.C. 1985, c. C-44;
> (b) the Company is registered for the purposes of Part IX of the ETA since September 1998 and its registration number is 879193191;
> (c) The Company filed its return with the Minister for the yearly reporting periods of 1 January 1998 to 31 December 2007, within the time otherwise prescribed or produced amended returns and calculated its net tax therein; that net tax being a positive amount, i.e. $21 368,44;
> (d) When the Company filed the returns, it did not pay to the Receiver General the positive amount of the net tax it calculated therein; that amount being due no later than the day on which the return for the particular period was required to be filed;
> (e) On May 9, 2008, a certificate under article 316 *E.T.A.* was registered at the Federal Court for the relevant period for the amount of $35 638,65;
> (f) The execution of the certificate has been returned unsatisfied;
> (g) From 11 January 1999 to 15 September 2009, the Appellant was a director of the Company;
> (h) During the yearly reporting periods concerned and during the period where the Company had to remit the net tax calculated, the Appellant did not resign, was not replaced and was not dismissed as a Director of the Company;
> (i) The Appellant knew the financial difficulties facing the Company;
> (j) The Appellant did not exercise the required degree of care, diligence and skill, nor did she [/he (appeal No. 2010-2421(GST)I)] take all required measures to prevent the Company's failure to fulfil its obligations in respect of the ETA that a reasonably prudent person would have exercised in

comparable circumstances, among which is the obligation mentioned in subparagraph (d) above;

(k) The Appellant did not take the appropriate measures for implementing an efficient system aimed at ensuring that the Company pay the sums due to the Minister under the ETA.

Issue

[5] The issue in these appeals is whether the appellants, in their capacity as directors of Eastveld Management, are liable for Eastveld Management's unremitted GST, or whether they satisfied the requirements of the due diligence defence under subsection 323(3) of the ETA.

Appellants' position

[6] The appellants invoke the due diligence defence under subsection 323(3) of the ETA, submitting that they exercised the degree of care, diligence and skill that a reasonably prudent person would have exercised in comparable circumstances to prevent the failure of the corporation to remit the GST. According to counsel, Mr. Eastveld was the directing mind and sole active director of the corporation. Counsel labelled Mr. Eastveld as an inside director. On the grounds that Ms. Lagacé was a passive director, counsel invites me to show greater leniency in my assessment of the due diligence defence presented on her behalf.

[7] The appellants submit that the corporation's failure to remit GST was directly caused by the negligent actions of the corporation's external tax accountant. According to the appellants, the Minister made matters worse for them by applying payments made by the corporation to other tax debts for which they are not liable.

Analysis

[8] Subsection 321(1) of the ETA outlines the liability of directors where a corporation fails to remit net tax owed:

> 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.

[9] The appellants invoke the due diligence defence that is available under subsection 323(3) of the ETA to a director who has been assessed as liable for a corporation's unremitted tax. Subsection 323(3) states:

> 323. (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.

A New Objective Standard Set in The Queen v. Buckingham

[10] It was held in the recent Federal Court of Appeal decision in *The Queen v. Buckingham*[1] that the Court should apply an objective standard when evaluating a director's due diligence defence under both subsection 323(3) of the ETA and subsection 227.1(3) of the *Income Tax Act* (the "ITA").[2]

[11] Before *Buckingham*, the leading authority on the applicable test was *Soper v. Canada*, a case in which the Federal Court of Appeal determined that the objective-subjective standard was the appropriate test.[3] As stated by the Court:

> [40] . . . The standard of care laid down in subsection 227.1(3) of the Act is inherently flexible. Rather than treating directors as a homogeneous group of professionals whose conduct is governed by a single, unchanging standard, that provision embraces a subjective element which takes into account the personal knowledge and background of the director, as well as his or her corporate circumstances in the form of, *inter alia*, the company's organization, resources, customs and conduct. Thus, for example, more is expected of individuals with superior qualifications (e.g. experienced business-persons).
>
> [41] The standard of care set out in subsection 227.1(3) of the Act is, therefore, not purely objective. Nor is it purely subjective. It is not enough for a director to say he or she did his or her best, for that is an invocation of the purely subjective standard. Equally clear is that honesty is not enough. However, the standard is not a professional one. Nor is it the negligence law standard that governs these cases. Rather, the Act contains both objective elements – embodied in the reasonable person language – and subjective elements – inherent in individual considerations like "skill" and the idea of "comparable circumstances". Accordingly, the standard can be properly described as "objective subjective".

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[1] 2011 FCA 142.

[2] [1998] 1 F.C. 124, R.S.C. 1985, c. 1 (5th Supp.). See paras. 30-40 of *Buckingham*.

[3] 97 DTC 5407, [1997] F.C.J. No. 881 (QL).

After the *Buckingham* decision, the objective standard established in *Peoples Department Stores Inc (Trustee of). v. Wise*,[4] replaced the "objective-subjective" test from *Soper*.

[12] On October 11, 2011, in two Tax Court of Canada decisions, *Gougeon v. The Queen*, 2011 TCC 420, and *Latulippe v. The Queen*, 2011 TCC 388, Justice Angers also referred to the standard set out in *Buckingham*. As Justice Angers stated in *Latulippe*:

> [20] I cannot ignore the recent decision of the Federal Court of Appeal rendered in *Buckingham v. The* Queen, 2011 FCA 142, which sets aside the subjective standard and established that the test should be objective. The application of this more strict standard is such that the arguments based on personal shortcomings should be aside . . .

[Emphasis added.]

The Objective Standard and Its Rationale

[13] In *Buckingham*, the Federal Court of Appeal outlined how to apply the objective standard and explained the underlying rationale of the Supreme Court of Canada in *Peoples* for imposing such a standard:

> [38] 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 own personal skills, knowledge, abilities and capacities: *Peoples Department Stores* at paras. 59 to 62. To say that the standard is objective makes it clear that the factual aspects of the circumstances surrounding the actions of the director are important as opposed to the subjective motivations of the directors: *Peoples Department Stores* at para. 63. The emergency of stricter standards puts pressure on corporations to improve the quality of board decisions through the establishment of good corporate governance rules: *Peoples Department Stores* at para. 64. Stricter standards also discourage the appointment of inactive directors chosen for show or who fail to discharge their duties as director by leaving decisions to the active directors. Consequently, 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: Kevin P. McGuinness, *Canadian Business Corporations Law*, 2nd ed. (Markham, Ontario: LexisNexis Canada, 2007) at 11.9.

[Emphasis added.]

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[4] 2004 SCC 68, [2004] 3 S.CR 461.

Contextual Factors Are Relevant

[14] The Court must evaluate, on an objective standard, whether the appellants demonstrated the degree of care, diligence and skill to prevent the failure to remit that a reasonably prudent person would have exercised in comparable circumstances. This evaluation should not be undertaken, however, without considering the particular circumstances facing the corporation and the appellants. The Federal Court of Appeal asserted in *Buckingham* that contextual factors are part of an objective analysis:

> [39] 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. As noted in *Peoples Department Stores* at paragraph 62:
>
>> The statutory duty of care in s. 122(1)(*b*) of the CBCA emulates but does not replicate the language proposed by the Dickerson Report. The main difference is that the enacted version includes the words "in comparable circumstances", which modifies the statutory standard by requiring the context in which a given decision was made to be taken into account. This is not the introduction of a subjective element relating to the competence of the director, but rather the introduction of a contextual element into the statutory standard of care. It is clear that s. 122(1)(*b*) requires more of directors and officers than the traditional common law duty of care outlined in, for example, *Re City Equitable Fire Insurance, supra* [[1925] 1 Ch. 407].

[15] Here, the context includes the appellants' allegation that the corporation's tax accountant's negligence contributed to the corporation's failure to pay the GST.

Focus Is on Efforts to Prevent Failures, Not Attempts to Remedy

[16] In *Buckingham*, the Federal Court of Appeal specifically notes that the test under subsections 227.1(3) of the *Income Tax Act* and 323(3) of the *Excise Tax Act* requires consideration of a director's actions undertaken to prevent a failure to remit. The Court states:

> [40] The focus of the inquiry under subsections 227.1(3) of the *Income Tax Act* and 323(3) of the *Excise Tax Act* will however be different than that under 122(1)(*b*) of the CBCA, since the former require that the director's duty of care, diligence and skill be exercised to prevent failures to remit. In order to rely on these defences, a director must thus establish that he turned his attention to the required remittances

> and that he exercised his duty of care, diligence and skill with a view to preventing a failure by the corporation to remit the concerned amounts.

[17] It is not sufficient to take actions to remedy failures to remit net tax; the concern in considering a due diligence defence is to determine what actions were taken to prevent failures to remit in the first place. A director cannot claim due diligence, as the appellants do in this case, by arguing that he negotiated an arrangement by which the corporation would repay its debt as it earned commission income.

[18] The appellants have failed to convince me that the corporation's failure to remit GST was caused by the negligent actions of Mr. Clayman. The evidence shows that the corporation's GST liability was assessed on the basis of the returns that it filed and the payments that it made. The shortfall was due to the fact that the corporation did not remit all the GST it collected.

[19] The respondent provided a letter dated March 20, 2003, prepared by Mr. Clayman and addressed to the two appellants, concerning the corporation's unpaid GST. The relevant passages read as follows:

> . . .
>
> This is further to our recent discussions regarding amounts due by Eastveld Management Inc. to Revenue Quebec aggregating approximately $60,000.00 and consisting largely of net G.S.T. and Q.S.T. amounts due by the company but not remitted to Revenue Quebec as well as accumulated penalties and interest due to said non-remittance and insufficiency of installment payments required to have been paid.
>
> . . .
>
> (1) That Eastveld Management Inc. is indebted to Revenue Quebec in the approximate amount indicated above is indisputable. <u>This indebtedness has been determined by our own books and records and, accordingly, reported to Revenue Quebec on a self-reporting basis via documents etc, normally used by taxpayers for that purpose</u>.
>
> (2) The indebtedness is <u>not</u> the result of any reassessment(s) of the amounts reported to Revenue Quebec. If such were the case, the company would have the legal right to object directly to the Minister to any or all parts of said reassessment(s) via a "Notice of Objection" normally filed under such circumstances.

> (3) Directors of a corporation are generally personally liable for that corporation's G.S.T./Q.S.T. indebtedness. Accordingly, as you have been advised by me (and others) in the past, Lynda's assets may be subject to seizure with respect to such indebtedness.
>
> . . .
>
> Lynda and Richard – on a personal note, you have been my clients and friends for many years and I understand the frustration and stress that this situation has caused you both. I would hate to see you lose your home – a likely scenario unless this matter is resolved shortly. I urge you to carefully consider my previous advice that you borrow on your house an amount sufficient to liquidate the debt in question. The incremental monthly mortgage payment is, in my opinion, well worth the relief that you would enjoy from, finally, bringing closure to this matter in the only way I can see as being feasible under the circumstances. As the company's cash flow permits, you can repay the loan and, eventually, have your monthly mortgage payments return to their former amounts. Finally, I urge you, as well, to consider another piece of advice that I have offered in the past. Insufficiency of funds is not an acceptable excuse for non-compliance with the requirements of the laws and regulations which govern the G.S.T./Q.S.T. system. All persons (individuals and corporations) who charge and collect G.S.T. and Q.S.T. do so as a mandatary of Revenue Quebec and, therefore, said funds must be remitted to their rightful destination. Accordingly, I recommend again that, for every commission deposited into the company's bank account, segregate approximately 15% of said amounts so that, as installment or other payments are due, you will be in a position to comply with the requirements of the system.

[Emphasis added.]

[20] This letter confirms that the appellants were aware of the corporation's failure to remit the GST. Furthermore, Mr. Clayman advises the appellants to take action to ensure that the corporation did not continue to fail to remit GST due in the future. Interestingly, the appellants appear to have ignored Mr. Clayman's advice, as the assessment issued against them covers unpaid GST for the period up to December 31, 2007.

[21] A successful due diligence defence requires evidence of the directors taking concrete actions to prevent failure. Applying *Buckingham* here, it is not sufficient to say that Ms. Lagacé should not be found liable because she was an outside director. The evidence shows that she was in business with Mr. Eastveld. They lived together and worked together in the business out of a home office. The appellants had the burden of establishing that they took steps to prevent the corporation's failure. As the tax was not paid when the returns were filed, the only reasonable inference that I can draw is that the corporation and/or the appellants used the funds for other purposes.

No allegation was made that the tax consultant diverted corporate funds for his personal benefit.

[22] For these reasons the appeals are dismissed, and the parties are to bear their own costs.

Signed at Vancouver, British Columbia, this 5th day of April 2012.

"Robert J. Hogan"

Hogan J.

CITATION:	2012 TCC 117
COURT FILE NOS.:	2010-2419(GST)I 2010-2421(GST)I
STYLE OF CAUSE:	LYNDA M. LAGACÉ, RICHARD EASTVELD v. HER MAJESTY THE QUEEN
PLACE OF HEARING:	Montreal, Quebec
DATE OF HEARING:	February 6, 2012
REASONS FOR JUDGMENT BY:	The Honourable Justice Robert J. Hogan
DATE OF JUDGMENT:	April 5th, 2012

APPEARANCES:

Counsel for the Appellant:	Anick Bouzouita
Counsel for the Respondent:	Joëlle Bitton

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