

CORPORATE DIRECTORS BEWARE - TRAP LURKS BENEATH THE SURFACE OF RECENT COVID-19 GST-HST-QST REMITTANCE RELIEF

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Corporate directors may ultimately be held personally liable for taxes that are not remitted upon the expiry of the GST/HST/QST relief recently announced by the Federal and Quebec governments.

On March 27, 2020, the federal government announced that taxpayers will be entitled to defer the remittance of Goods and Services Tax (“**GST**”) and Harmonized Sales Tax (“**HST**”) until June 30, 2020. The deferral is being provided to (i) monthly filers in respect of their February, March and April reporting periods, (ii) quarterly filers in respect of the first quarter of 2020, and (iii) annual filers whose GST/HST returns or instalments are due in March, April or May 2020.

Similarly, the deadlines to file Quebec Sales Tax (“**QST**”) returns and make QST remittances have been deferred until June 30, 2020 in respect of QST remittances due between March 27, 2020 and June 1, 2020.

These measures are intended to allow businesses that may currently be unable to meet their GST and HST remittance, and QST filing and remittance obligations to defer such obligations until June 30, 2020. However, directors of corporate taxpayers should be wary of allowing GST, HST or QST collected from being used to finance the corporation’s operations.

Pursuant to subsection 323(1) of the *Excise Tax Act* (Canada), directors of a corporation are jointly and severally liable with the corporation for any net GST/HST, penalties and interest that the company fails to remit to the Canada Revenue Agency (or Revenu Québec, where applicable). Comparable joint and several liability is imposed on corporate directors in respect of QST under section 24.0.1 of the *Tax Administration Act* (Quebec).

Nevertheless, a director may avoid personal liability for GST, HST and QST-related amounts if the individual can establish that he or she exercised the degree of care, diligence and skill to prevent the failure to remit that would have been exercised by a reasonably prudent person in comparable circumstances.

Unfortunately, a decision of the Federal Court of Appeal released last week reminds us that a corporation in financial difficulty cannot use GST or HST amounts it previously collected to help finance its operations.

In *Ahmar v. Canada*, 2020 FCA 65, the Court confirmed that the sole director of the corporate taxpayer did not exercise the degree of care, diligence and skill that would have been exercised by a reasonably prudent person in comparable circumstances when he allowed corporate funds to be applied to satisfy other obligations of the corporation, instead of satisfying standing HST liabilities, in the hopes of turning the company's financial position around. The Court stated that:

[W]here a company is facing financial difficulties “it may be tempting to divert ... Crown remittances in order to pay other creditors and thus ensure the continuation of the operations of the corporation”.
...[H]owever, ... this was precisely the mischief that section 323 of the *Excise Tax Act* sought to avoid.
...[T]he defence under section 323 “should not be used to encourage such failures by allowing a due diligence defence for directors who finance the activities of their corporation with Crown monies on the expectation that the failures to remit could eventually be cured”...

Given the current economic challenges, it may be tempting for businesses to use GST, HST or QST collections to help keep the business afloat. However, corporate directors should be mindful that these amounts, once collected, are considered to be held in trust for the Crown and they must make every reasonable effort to ensure that such amounts are ultimately remitted to the appropriate tax authorities. The failure to do so can result in corporate directors being held personally liable for such tax amounts.

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A Cautionary Note

The foregoing provides only an overview and does not constitute legal advice. Readers are cautioned against making any decisions based on this material alone. Rather, specific legal advice should be obtained.

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