

STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

DIVISION OF TAXATION

ADMINISTRATIVE HEARING

FINAL DECISION AND ORDER

#2015-25



## II. JURISDICTION

The Division has jurisdiction over this matter pursuant to R.I. Gen. Laws § 44-30-1 *et seq.*, R.I. Gen. Laws § 44-1-1 *et seq.*, the *Division of Taxation Administrative Hearing Procedures Regulation AHP 97-01*, and the *Division of Legal Services Regulation 1 – Rules of Procedure for Administrative Hearings*.

## III. ISSUE

Whether Mr. Taxpayer is a responsible officer for Taxpayer Company and thus, whether he is liable for the withholding tax assessment issued by the Division.<sup>3</sup>

## IV. MATERIAL FACTS AND TESTIMONY

Senior Revenue Agent, testified on behalf of the Division. She testified that she performed an audit of withholding tax for 2006 and 2007 for the Taxpayer Company. She testified that she reviewed the Taxpayer Company's records including the W-2's which are the records of the employees' wages paid and the W-3's which are the reconciliations of a tax payments made by the Taxpayer to the Division. She testified that there were discrepancies in 2006 and 2007 between wages paid and taxes filed and this was a trust fund tax because wages were withheld but not remitted to the Division. She testified that the Notice of Deficiency for withholding tax was issued to the Taxpayers as responsible officers because both Mr. and Ms. Taxpayer were listed as president of the Taxpayer Company in different records filed with the Division and that Ms. Taxpayer was listed as a 100% shareholder in records filed with the Division. See Division's Exhibits A (Taxpayer Company's Secretary of State records); B (Division's

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<sup>3</sup> As discussed below, Ms. Taxpayer has entered into a settlement agreement with the Division in relation to this matter so this decision only addresses the issue of a responsible officer as related to Mr. Taxpayer.

records for Taxpayer Company); D (withholding tax filings); H (original audit work papers); I (revised audit work papers); and J (Notice of Deficiency).

Ms. Taxpayer testified on her behalf. She testified that she was married to Mr. Taxpayer from 1999 to 2010. She testified that she was never an officer or shareholder of Taxpayer Company. She testified that her name was present on the signature line of the 2006 tax return, but that she did not sign or prepare the 2006 tax return and was not aware that said return listed her as a 100% shareholder. See Division's Exhibit E. She testified that Mr. Taxpayer signed the 2007 tax return for the Taxpayer Corporation, but it listed her as owning 100% of the shares and she was not a 100% shareholder. See Division's Exhibit F. She testified that she did not participate in the day-to-day operations of the Taxpayer Company and that it was Mr. Taxpayer who was responsible for said day-to-day operations. She testified that she was not responsible for payments or payroll and had no authority to file tax returns on behalf of the Taxpayer Company.

The Division entered as an exhibit a settlement agreement with Ms. Taxpayer<sup>4</sup> in regard to her liability as a responsible officer. The Division indicated it sought repayment from Mr. Taxpayer for the full value of the withholding tax owed since the settlement did not affect the joint and several liability of the Taxpayers to repay the same.

## V. DISCUSSION

### A. **Legislative Intent**

The Rhode Island Supreme Court has consistently held that it effectuates legislative intent by examining a statute in its entirety and giving words their plain and ordinary meaning. *In re Falstaff Brewing Corp.*, 637 A.2d 1047 (R.I. 1994). If a statute is clear

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<sup>4</sup> See Division's Exhibit L.

and unambiguous, “the Court must interpret the statute literally and must give the words of the statute their plain and ordinary meanings.” *Oliveira v. Lombardi*, 794 A.2d 453, 457 (R.I. 2002) (citation omitted). The Supreme Court has also established that it will not interpret legislative enactments in a manner that renders them nugatory or that would produce an unreasonable result. See *Defenders of Animals v. Dept. of Environmental Management*, 553 A.2d 541 (R.I. 1989) (internal citation omitted). In cases where a statute may contain ambiguous language, the Supreme Court has consistently held that the legislative intent must be considered. *Providence Journal Co. v. Rodgers*, 711 A.2d 1131 (R.I. 1998). The statutory provisions must be examined in their entirety and the meaning most consistent with the policies and purposes of the legislature must be effectuated. *Id.*

#### **B. Relevant Statutes and Regulation**

R.I. Gen. Laws § 44-30-76 addresses the issue of who is responsible for withholding trust funds. It states in part as follows:

Employer's liability for withheld taxes – Violations – Penalties. – (a)(1) Every employer required to deduct and withhold Rhode Island personal income tax is hereby made liable for the tax. In addition, any amount of Rhode Island personal income tax actually deducted and withheld shall be held to be a special fund in trust for the tax administrator. No employee shall have any right of action against his or her employer in respect to any moneys deducted and withheld from his or her wages and required to be paid over to the tax administrator in compliance or in intended compliance with this law.

(2) For purposes of this section the term "employer" includes an officer or employee of a corporation, including a dissolved corporation, or a member or employee of a partnership, if the officer, employee, or member is under a duty to deduct and withhold Rhode Island personal income tax.

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(d) The provisions of subsections (b) and (c) of this section shall not be exclusive, and shall be in addition to all other remedies which the tax administrator may employ in the enforcement and collection of taxes.

### C. Whether the Mr. Taxpayer is a Responsible Officer

Pursuant to R.I. Gen. Laws § 44-30-76, every employer including an officer or employee of a corporation who is under a duty to deduct and withhold Rhode Island personal income tax is liable for paying the withholding tax. Mr. Taxpayer was a president of the Taxpayer Corporation. See Division's Exhibits A, C, D, and F. As president, Mr. Taxpayer had the responsibility to withhold tax as evidenced by his signing of quarterly withholding tax returns filed with the Division. See Division's Exhibit E. Mr. Taxpayer had the authority to file tax returns on behalf of the Taxpayer Company. See Division's Exhibits D and F. Additionally, the undisputed evidence at hearing was that Mr. Taxpayer exercised day-to-day control over the Taxpayer Company. Based on R.I. Gen. Laws § 44-30-76, Mr. Taxpayer is a responsible officer as he was an officer of the Taxpayer Company under a duty to deduct and withhold Rhode Island personal income tax. Therefore, based on the statute, Mr. Taxpayer is liable for paying the withholding tax.<sup>5</sup>

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<sup>5</sup> In *Administrative Decision*, 2009-01 (2/18/09), the taxpayers challenged the Division's assertion that one of them was a responsible officer. That decision discussed the determination of a responsible officer in terms of withholding tax and addressed *Fiataruolo v. U.S.*, 8 F.3d 930 (Conn. 1993) which applies a test to determine whether a person exerted influence in a corporation, but has not been made applicable in Rhode Island to R.I. Gen. Laws § 44-30-76. Another *Administrative Decision*, 1998 WL 661390 found as follows:

Whether an officer of the corporation is responsible for or under a duty to pay sales or use tax or payroll taxes is a factual question to be determined in each individual case. Although there are no specific Rhode Island Supreme Court cases on the matter, there are several state and federal cases which outline the pertinent indicia for responsibility such that would make an officer of a corporation liable for taxes due the state.

Among the indicia of the duty to pay are the officer's day to day responsibilities and involvement with the financial affairs and management of the corporation, his knowledge of such matters, the officer's duties and functions outlined by the certificate of incorporation and by-laws, and the regular preparation and filing of sales tax forms or other tax returns. Other cases have outlined the indicia of responsibility as holding corporate office, control over financial affairs, authority to disburse funds, stock ownership, or ability to hire and fire. (citations omitted). See 1998 WL 661390 (R.I.Div.Tax.), 4

As it is undisputed that Mr. Taxpayer was an officer of the Taxpayer Company under the duty to deduct and withhold Rhode Island personal income tax, there is no reason to conduct a further analysis over whether he is responsible officer for the Taxpayer Company. However, it was undisputed that he had day-to-day responsibilities for the Taxpayer Company and filed tax returns for said company with the Division. Such duties are consistent with previous determinations of whether someone is a responsible officer.

## D. Penalties

Pursuant to R.I. Gen. Laws § 44-30-84,<sup>6</sup> the Division imposed interest on the withholding assessment. Pursuant to R.I. Gen. Laws § 44-30-85,<sup>7</sup> the Division imposed certain penalties on the withholding assessment. The Notice of Deficiency in the

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<sup>6</sup> R.I. Gen. Laws § 44-30-84 states in part as follows:

Interest on underpayment. – (1) If any amount of Rhode Island personal income tax, including any amount of the tax withheld by an employer, is not paid on or before the due date, interest on the amount at the annual rate provided by § 44-1-7 shall be paid for the period from the due date to the date paid, whether or not any extension of time for payment was granted. The interest shall not be paid if its amount is less than two dollars (\$2.00).

<sup>7</sup> R.I. Gen. Laws § 44-30-85 states in part as follows:

Additions to tax and civil penalties. – (a) *Failure to file tax returns or to pay tax.* In the case of failure:

(1) To file the Rhode Island personal income tax return or the employer's withheld tax return on or before the prescribed date, unless it is shown that the failure is due to reasonable cause and not due to willful neglect, an addition to tax shall be made equal to five percent (5%) of the tax required to be reported if the failure is for not more than one month, with an additional five percent (5%) for each additional month or fraction thereof during which the failure continues, not exceeding twenty-five percent (25%) in the aggregate. For this purpose, the amount of tax required to be reported shall be reduced by an amount of the tax paid on or before the date prescribed for payment and by the amount of any credit against the tax which may properly be claimed upon the return;

(2) To pay the amount shown as tax on the personal income tax return on or before the prescribed date for payment of the tax (determined with regard to any extension of time for payment) unless it is shown that the failure is due to reasonable cause and not due to willful neglect, there shall be added to the amount shown as tax on the return five-tenths percent (0.5%) of the amount of the tax if the failure is for not more than one month, with an additional five-tenths percent (0.5%) for each additional month or fraction thereof during which the failure continues, not exceeding twenty-five percent (25%) in the aggregate; or

(3) To pay any amount in respect of any tax required to be shown on a return which is not so shown, including an assessment made as a result of mathematical error, within ten (10) days of the date of the notice and demand therefor, unless it is shown that the failure is due to reasonable cause and not due to willful neglect, there shall be added to the amount of tax stated in the notice and demand five-tenths percent (0.5%) of the amount of the tax if the failure is for not more than one month, with an additional five-tenths percent (0.5%) for each additional month or fraction thereof during which the failure continues, not exceeding twenty-five percent (25%) in the aggregate.

(b) *Negligence.* If any part of a deficiency is due to negligence or intentional disregard of the Rhode Island personal income tax law or rules or regulations under this section (but without intent to defraud), five percent (5%) of that part of the deficiency shall be added to the tax.

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(i) *"Person" defined.* As used in this section, the term "person" includes an officer or employee of a corporation, including a dissolved corporation, or a member or employee of a partnership, who as an officer, employee, or member is under a duty to perform the act in respect of which the violation occurs.

withholding matter assessed three (3) penalties. These are listed as failure to file return on time (penalty one (1)), failure to pay on time (penalty two (2)), and negligence (penalty three (3)). The undersigned finds a statutory basis for the failure to file a return on time penalty in R.I. Gen. Laws § 44-30-85(a)(1). The undersigned finds a statutory basis for the negligence penalty in R.I. Gen. Laws § 44-30-85(b). However, it is unclear to the undersigned what the statutory basis is for the penalty for the failure to pay the withholding tax on time. R.I. Gen. Laws § 44-30-85(a)(2) speaks of failing to pay the amount shown on time for a personal income tax return but does not reference withholding tax as does R.I. Gen. Laws § 44-30-85(a)(1) which references penalties for both withholding and personal income tax returns as does R.I. Gen. Laws § 44-30-85(b).

While the Mr. Taxpayer did not dispute any of the assessments, the undersigned strikes the second penalty on the withholding assessment as not being statutorily supported.

#### **E. Conclusion**

Based on the forgoing, Mr. Taxpayer is a responsible officer and as such is liable for all of the withholding tax and interest and penalties in the Notice of Deficiency except for penalty two (2) as set forth in Division's Exhibit J.

#### **VI. FINDINGS OF FACT**

1. This matter came before the undersigned as a result of Notice of Hearing and Appointment of Hearing Officer issued to Taxpayers.
2. A hearing was held on September 8, 2015.
3. Mr. Taxpayer did appear for the hearing. As he had been adequately notified of the hearing, the hearing was held.



4. The facts contained in Section IV and V are reincorporated by reference herein.

## **VII. CONCLUSIONS OF LAW**

Based on the testimony and facts presented:

1. The Division has jurisdiction over this matter pursuant to R.I. Gen. Laws § 44-1-1 *et seq.*, R.I. Gen. Laws § 44-1-1 *et seq.*, and pertinent regulations.

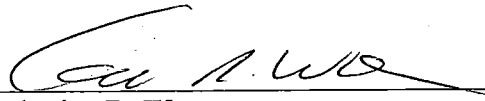
2. Pursuant to R.I. Gen. Laws § 44-30-76, Mr. Taxpayer is a responsible officer and as such is liable for the assessment of withholding tax. Pursuant to R.I. Gen. Laws § 44-30-85 and R.I. Gen. Laws § 44-30-84, Mr. Taxpayer is liable for the assessed interest and penalties except for the failure to pay the withholding tax on time penalty. See the Division's Exhibit J (Notice of Deficiency).

## **VIII. RECOMMENDATION**

Based on the above analysis, the Hearing Officer recommends as follows:

Mr. Taxpayer did not make a showing that he was not a responsible officer. Pursuant to R.I. Gen. Laws § 44-30-76, R.I. Gen. Laws § 44-30-85, and R.I. Gen. Laws § 44-30-84, Mr. Taxpayer is a responsible officer and as such is liable for the tax, interest, and penalties in the Notice of Deficiency (Division's Exhibit J) except for the second penalty.

Date: October 16, 2015

  
Catherine R. Warren  
Hearing Officer

**ORDER**

I have read the Hearing Officer's Decision and Recommendation<sup>9</sup> in this matter, and I hereby take the following action with regard to the Decision and Recommendation:

  X   ADOPT  
       REJECT  
       MODIFY

Dated:   12/11/15  

  David M. Sullivan    
David Sullivan  
Tax Administrator

**NOTICE OF APPELLATE RIGHTS**

**THIS DECISION CONSTITUTES A FINAL ORDER OF THE DIVISION. THIS ORDER MAY BE APPEALED TO THE SIXTH DIVISION DISTRICT COURT PURSUANT TO THE FOLLOWING WHICH STATES AS FOLLOWS:**

**R.I. Gen. Laws § 44-30-90 Review of tax administrator's decision**

(a) *General.* Any taxpayer aggrieved by the decision of the tax administrator or his or her designated hearing officer as to his or her Rhode Island personal income tax may within thirty (30) days after notice of the decision is sent to the taxpayer by certified or registered mail, directed to his or her last known address, petition the sixth division of the district court pursuant to chapter 8 of title 8 setting forth the reasons why the decision is alleged to be erroneous and praying relief therefrom. Upon the filing of any complaint, the clerk of the court shall issue a citation, substantially in the form provided in § 44-5-26 to summon the tax administrator to answer the complaint, and the court shall proceed to hear the complaint and to determine the correct amount of the liability as in any other action for money, but the burden of proof shall be as specified in § 8-8-28.

(b) *Judicial review sole remedy of taxpayer.* The review of a decision of the tax administrator provided by this section shall be the exclusive remedy available to any taxpayer for the judicial determination of the liability of the taxpayer for Rhode Island personal income tax.

(c) *Date of finality of tax administrator's decision.* A decision of the tax administrator shall become final upon the expiration of the time allowed for petitioning the district court if no timely petition is filed, or upon the final expiration of the time for further judicial review of the case.

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<sup>9</sup> For clarification, there is currently a statutory basis for a penalty for the failure to pay the withholding tax on time for periods after June 30, 2009 because R.I. Gen. Laws § 44-30-85(a)(2) was amended by the enactment of Rhode Island Public Law 2009, chapter 68, article 16 Section 7 on June 30, 2009 to add "the employer's withheld tax return." The Notice of Deficiency in this matter is dated prior to that statutory change.

**CERTIFICATION**

I hereby certify that on the 16<sup>th</sup> day of December, 2015 a copy of the above Decision and Notice of Appellate Rights were sent by first class mail, postage prepaid to Ms. Taxpayer's attorney's address on file with the Division of Taxation and by first class mail, postage prepaid and return receipt requested to Mr. Taxpayer's address on record with the Division and by hand delivery to Meaghan Kelly, Esquire, Department of Revenue, Division of Taxation, One Capitol Hill, Providence, RI 02908.

Gail Belasco