

STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS
DIVISION OF TAXATION

ADMINISTRATIVE HEARING

FINAL DECISION AND ORDER

#2011-04

STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS
DEPARTMENT OF REVENUE
DIVISION OF TAXATION
ONE CAPITOL HILL
PROVIDENCE, RHODE ISLAND 02908

IN THE MATTER OF:

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: Case No.: 10-T-0011
: withholding
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Taxpayers.

DECISION

I. INTRODUCTION

The above-entitled matter came for hearing pursuant to a Notice of Hearing and Appointment of Hearing Officer ("Notice") that was issued on September 2, 2010 to ("Taxpayer") as the Responsible Officer of

("Company") by the Division of Taxation ("Division") in response to the Taxpayer's requests for hearing filed with the Division. See Division's Exhibit 15 (request for hearing). A hearing was scheduled for October 5, 2010 at which time neither the Taxpayer nor his attorney of record appeared. The undersigned contacted the attorney of record and ascertained that the attorney no longer represented the Taxpayer. By letter dated October 6, 2010, the Taxpayer's attorney confirmed that he no longer represented the Taxpayer. The hearing was re-noticed for December 7, 2010 by first class and certified mail forwarded to the Taxpayer's last known addresses. The Taxpayer did not appear at the December 7, 2010 hearing. The Taxpayer received notice of hearing. See Department's Exhibit 16 (U.S. Postal Service tracking sheet showing delivery). The Taxpayer had adequate notice of the hearing since the Notice was sent by first class mail

and not returned to the Division. As the Taxpayer chose not to appear at hearing, the undersigned held the hearing. The Department rested on the record.

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 Legal Services Regulation 1 – Rules of Procedure for Administrative Hearings*, and the *Division of Taxation Administrative Hearing Procedures Regulation AHP 97-01*.

III. ISSUE

Whether the Taxpayer is a Responsible Officer for the Company and thus, whether he is liable for the withholding tax assessments issued by the Division to the Company.

IV. MATERIAL FACTS

Senior Revenue Agent, testified on behalf of the Division. She testified that the Company had a history of paying taxes but it stopped paying taxes in 2005. She testified that the Division discovered that the Company was in bankruptcy. She testified that the Division reviewed the Company for the audit period of 2005 and 2006. She testified that a now-retired Division auditor performed the initial audit on the Company and because there were no available records estimated the withholding tax owed on the basis of the withholding tax for the six (6) months prior to when the Company stopped paying its taxes. She testified the Division issued a Notice of Deficiency on August 21, 2007 on the basis of this estimate. See Division's Exhibit 14. She testified that the Company requested a hearing and provided records so that the assessment against the Company was revised. See Division's Exhibits Eight (8) (revised workpapers) and Ten (10) (revised interest).

testified that the Division determined that the Taxpayer was a Responsible Officer for the Company. She testified that he signed checks on behalf of the Company, signed tax returns on behalf of the Company, and was listed as president of the Company. See Division's Exhibits One (1) (Corporate records list Taxpayer as president of Company); 11 (Taxpayer's signings of various withholding tax returns in 2005); 12 (Taxpayer signing tax remittances to Department of Labor and Training); and 13 (Taxpayer signing tax remittances to the Division).

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 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 Statute

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.

(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. The 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. The Division's *Administrative Decision*, 2009-01 (2/18/09) addresses the issue of a Responsible Officer for withholding tax. It reviewed a Federal case, *Fiataruolo v. U.S.*, 8 F.3d 930 (Conn. 1993), that addressed the Federal statute that is concerned with determining the liability of an employer for a withholding tax delinquency. See 26 U.S.C.A. § 6672. The definition contained in 26 U.S.C.A. § 6671 of a person who is liable for the tax is similar to the Rhode Island definition contained within R.I. Gen. Laws § 44-30-76.¹ Rhode

¹ 26 U.S.C.A. § 6671 states in part as follows:

(b) Person defined.--The term "person", (sic) as used in this subchapter, includes an officer or employee of a corporation, or a member or employee of a partnership, who as such

Island has not made *Fiataruolo* applicable to R.I. Gen. Laws § 44-30-76 but it is instructive in reviewing the issue. The case holds in part as follows:

26 U.S.C. § 6672(a). Under this section, a party may be held liable for unpaid withholding taxes if: first, he is the "responsible person" for collection and payment of the employer's taxes, *see Godfrey*, 748 F.2d at 1574 & n. 4.

Under the first prong of the test, courts generally take a broad view of who qualifies as a responsible person. *See Denbo v. United States*, 988 F.2d 1029, 1032 (10th Cir.1993); *Barnett v. IRS*, 988 F.2d 1449, 1454 (5th Cir.1993). Such determination of responsibility is based upon the individual's "status, duty and authority" to insure compliance with the employer's tax withholding obligations. *Raba v. United States*, 977 F.2d 941, 943 (5th Cir.1992); *accord Barton v. United States*, 988 F.2d 58, 59 (8th Cir.1993). The core question "is whether the individual has *significant control* over the enterprise's finances." *Hochstein*, 900 F.2d at 547 (emphasis added); *accord, e.g., Kinnie v. United States*, 994 F.2d 279, 283 (6th Cir.1993).

This need for a responsible party to have significant control does not, at least in this Circuit, translate into a requirement of absolute authority. *See Hochstein*, 900 F.2d at 547. Instead, the term "significant control" is meant to encompass "all those connected closely enough with the business to prevent the [tax] default from occurring." *Bowlen*, 956 F.2d at 728. Hence, to be held responsible under § 6672 a person need not have the final word on which creditors are to be paid or how funds are to be allocated. At the same time, the significant control test is not meant to ensnare those who have merely technical authority or titular designation. *See Barton*, 988 F.2d at 59; *Gustin v. United States*, 876 F.2d 485, 492 (5th Cir.1989).

Significant control may be shared by several people within a company, all of whom may be found responsible for a tax delinquency. *See Kinnie*, 994 F.2d at 284. Such authority may not be delegated to others in order to avoid liability. *See, e.g., Hornsby v. IRS*, 588 F.2d 952, 953-54 (5th Cir.1979) (per curiam). The inquiry focuses on whether an individual could have exerted influence, and delegation or avoidance of duties will not deflect its scope.

A number of factors have been assessed when determining whether an individual has the requisite control over an enterprise to be found as a matter of law a responsible person under the statute. Courts have examined whether the person: (1) is an officer or member of the board of directors, (2) owns shares or possesses an entrepreneurial stake in the company, (3) is active in the management of day-to-day affairs of the company, (4) has the ability to hire and fire employees, (5) makes decisions regarding which, when and in what order outstanding debts or taxes will be paid, (6) exercises control over daily bank accounts and disbursement records, and (7) has check-signing authority. *See Barnett*, 988 F.2d at 1455; *Bowlen*, 956 F.2d at 728; *Hochstein*,

officer, employee, or member is under a duty to perform the act in respect of which the violation occurs.

900 F.2d at 547. It should be noted that a person need not hold any particular position in a business and need not actually exercise authority to be held a responsible party for the payment of withheld taxes. The question of control over the employer's finances must be answered in light of the totality of the circumstances; no one factor is determinative. *See generally ALR Annotation, supra*, at 177-79. *Fiataruolo* at 938 -939.

In the *Fiataruolo* matter, the IRS tried to hold taxpayers liable who were not employees, officers, or directors of the corporation. Instead, they were project financiers with no significant control and only limited check signing ability as project managers. *Fiataruolo* held that a person need not actually exercise authority to be held a responsible party but rather the inquiry centers on whether an individual could have exerted influence and more than one party may be responsible. Furthermore, significant control does not mean absolute control but rather the test is used to prevent those with mere technical authority from being held liable and to hold those liable who are closely connected to the business so as to prevent a default from occurring. Finally, no one factor is determinative.

In this matter, the Taxpayer was president of the Company, signed checks on behalf of the Company, and signed tax returns on behalf of the Company. As president, the Taxpayer had responsibility to withhold tax as evidenced by his withholding tax returns filed with the Division. See Division's Exhibit 11. Thus, the Taxpayer exerted influence over the Company.

There was no evidence introduced to demonstrate that the Taxpayer was not a Responsible Officer.

E. Penalties

Pursuant to R.I. Gen. Laws § 44-30-84,² the Division imposed interest on the withholding assessment. Pursuant to R.I. Gen. Laws § 44-30-85,³ the Division imposed certain penalties on the withholding assessment. The initial Notice of Deficiency in the withholding matter assessed three (3) penalties. See Division's Exhibit 14. These are

² 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).

³ 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.

(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.

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).

Thus, the undersigned strikes the second penalty on the withholding assessment as not being statutorily supported.

F. Conclusion

Based on the forgoing, the Taxpayer is a Responsible Officer and is liable for all of the withholding tax as revised by the Division except for the second penalty set forth in the initial Notice of Deficiency. See Division's Exhibits Eight (8), 10, and 14.

VI. FINDINGS OF FACT

1. This matter came before the undersigned as a result of a Notice of Hearing and Appointment of Hearing Officer.
2. A hearing was held on December 7, 2010. The Taxpayer did not appear despite being noticed of hearing. The Division rested on the record.
3. The assessment was not disputed.
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 § 44-30-1 *et seq.* and R.I. Gen. Laws § 44-1-1 *et seq.*

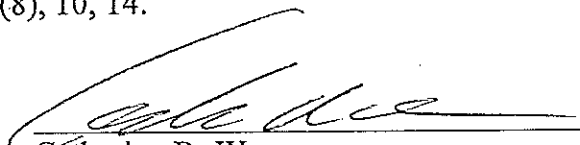
3. Pursuant to R.I. Gen. Laws § 44-30-76, the Taxpayer is a Responsible Officer and is liable for the assessment of withholding tax. Pursuant to R.I. Gen. Laws § 44-30-85 and R.I. Gen. Laws § 44-30-84, the Taxpayer is liable for the assessed interest and penalties except for the failure to pay the withholding tax on time penalty.

VIII. RECOMMENDATION

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

The 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 the Taxpayer is a Responsible Officer and is liable for revised deficiency including interest and penalties except for the second penalty in the initial Notice of Deficiency. See Division's Exhibits Eight (8), 10, 14.

Date: 2/14/11

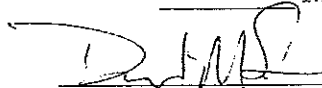

Catherine R. Warren
Hearing Officer

ORDER

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

 V ADOPT
 REJECT
 MODIFY

Dated: 2/16/11


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.

CERTIFICATION

I hereby certify that on the 16th day of February, 2011 a copy of the above Decision and Notice of Appellate Rights were sent by first class mail, postage prepaid and return receipt requested to the Taxpayers' address on file with the Division of Taxation and by hand delivery to Linda Riordan, Esquire, Department of Revenue, Division of Taxation, One Capitol Hill, Providence, RI 02908.

