DEPARTMENT OF STATE REVENUE

LETTER OF FINDINGS NUMBER 00-0421

RESPONSIBLE OFFICER

WITHHOLDING TAX

For Tax Periods: 1988-1990

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Issue

Withholding Tax -Responsible Officer Liability

Authority: IC 6-3-4-8 (f), IC 6-8.1-5-1 (b), Indiana Department of Revenue v. Safayan 654 N.E. 2nd 270 (Ind.1995)

The taxpayer protests the assessment of responsible officer liability for unpaid corporate withholding taxes.

Statement of Facts

The taxpayer was vice-president and shareholder of a corporation that did not remit the proper amount of withholding taxes to Indiana. The taxpayer was personally assessed for the taxes and protested these assessments. More facts will be provided as necessary.

Withholding Tax-Responsible Officer Liability

Discussion

The proposed withholding taxes were personally assessed against Taxpayer pursuant to IC 6-3-4-8(f), which provides that "In the case of a corporate or partnership employer, every officer, employee, or member of such employer, who, as such officer, employee, or member is under a duty to deduct and remit such taxes shall be personally liable for such taxes, penalties, and interest."

Indiana Department of Revenue assessments are prima facie evidence that the taxes are owed by the taxpayer who has the burden of proving that the assessment is incorrect. IC 6-8.1-5-1 (b).

Pursuant to Indiana Department of Revenue v. Safayan 654 N.E. 2nd 270 (Ind.1995) at page 273: "The statutory duty to remit trust taxes falls on any officer or employee who has the authority to see that they are paid. The factors considered to determine whether a person has such authority are the following:

> 1. The person's position within the power structure of the Corporation;
>
> 2. The authority of the officer as established by the Articles of Incorporation, By-laws or employment contract; and
>
> 3. Whether the person actually exercised control over the finances of the business including control of the bank account, signing checks and tax returns or determining when and in what order to pay creditors.

Id. At 273.

The issue to be determined in this matter is whether or not the taxpayer was an officer or employee with the duty to remit the withholding taxes to the state of Indiana.

The taxpayer was a shareholder in the corporation and a vice-president. As a vice-president, the taxpayer could be found to be a person with the duty to remit withholding taxes to Indiana. The amount of power and authority a vice-president actually has varies from corporation to corporation. Therefore it will be necessary to consider the second and third indicia of authority as set out in the Safayan case.

The Articles of Incorporation do not give any indication of the actual authority of the taxpayer within the corporation structure. The corporate copy of the By-laws has been misplaced. Neither were the By-laws available from the Indiana Secretary of State. Testimony at the hearing indicated that there never was an employment contract between the corporation and the taxpayer.

The final indicia concerns the actual authority and control the taxpayer had over corporate activities, particularly financial activities. After the hearing, the taxpayer submitted several affidavits by former employees of the corporation. The affidavits all indicated that the taxpayer was merely peripherally involved in the operations of the corporation. He came to the office on an occasional and

irregular basis. He had no authority to write checks or determine which creditors would be paid.
The taxpayer has satisfied his burden of proving that he was not a corporate officer with the duty to remit withholding taxes.

Finding

The taxpayer's protest is sustained.

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