

Letter of Findings Number: 03-20110091
Withholding Tax
For Tax Year 2010

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ISSUE

I. Withholding Tax--Responsible Officer Liability.

Authority: IC § 6-8.1-5-1; IC § 6-3-4-8; Indiana Dep't of State Revenue v. Interstate Warehousing, 783 N.E.2d 248 (Ind. 2003); Indiana Dep't of Revenue v. Safayan, 654 N.E.2d 279 (Ind.1995).

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

STATEMENT OF FACTS

Company "A" failed to properly remit withholding taxes to the State of Indiana during the liability period of September 30, 2010. The Indiana Department of Revenue ("Department") assessed the unpaid withholding taxes for the liability period of September 30, 2010, along with interest and a ten percent penalty, against Taxpayer as a Responsible Officer of Company A. Taxpayer protested the assessment of tax. A telephone hearing was held and this Letter of Findings addressing the September 30, 2010 withholding assessment results. More facts will be provided as needed below.

I. Withholding Tax--Responsible Officer Liability.

DISCUSSION

At the outset, the Department notes that under IC § 6-8.1-5-1(c): "The burden of proving that the proposed assessment is wrong rests with the person against whom the proposed assessment is made." The Department also notes that the rules of statutory construction require that exemption statutes be strictly construed against the Taxpayer. Indiana Dep't of State Revenue v. Interstate Warehousing, 783 N.E.2d 248, 250 (Ind. 2003).

The proposed withholding taxes were assessed against the taxpayer. IC § 6-3-4-8(f) states:

All money deducted and withheld by an employer shall immediately upon such deduction be the money of the state, and every employer who deducts and retains any amount of money under the provisions of this article shall hold the same in trust for the state of Indiana and for payment thereof to the department in the manner and at the times provided in this article. Any employer may be required to post a surety bond in the sum the department determines to be appropriate to protect the state with respect to money withheld pursuant to this section.

And IC § 6-3-4-8(g) also states:

The provisions of [IC 6-8.1](#) relating to additions to tax in case of delinquency and penalties shall apply to employers subject to the provisions of this section, and for these purposes any amount deducted or required to be deducted and remitted to the department under this section shall be considered to be the tax of the employer, and with respect to such amount the employer shall be considered the taxpayer. 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.

(Emphasis added).

The Indiana Supreme Court, in Indiana Dep't of Revenue v. Safayan, 654 N.E.2d 270 (Ind. 1995), has stated: The method of determining whether a given individual is a responsible person is the same under the gross retail tax and the withholding tax. Dunkerson v. Department of Revenue (1987), Ind. Tax, 513 N.E.2d 209. An individual is personally liable for unpaid sales and withholding taxes if she is an officer, employee, or member of the employer who has a duty to remit the taxes to the Department.

Safayan, 654 N.E.2d at 273. Further, the Indiana Supreme Court stated that the "[v]arious factors" in determining whether someone had the authority to pay the taxes are:

We consider, first, the person's position within the power structure of the corporation. The responsible person need not have been a corporate officer, but where the individual was a high ranking officer, we presume that he or she had sufficient control over the company's finances to give rise to a duty to remit the trust taxes. The presumption is especially strong where the person was both a high ranking officer and a member of the board of directors and a major shareholder in a closely held corporation. This presumption may be rebutted by showing the officer did not in fact have that authority. Dunkerson, 513 N.E.2d at 212.

We also look to the authority of the officer or employee as established by the articles of incorporation, bylaws, or the person's employment contract. The explicit duties of the officer or employee may include oversight and payment of tax liabilities.

Finally, we consider whether the person actually exercised control over the finances of the business. This

would include, for instance, whether the person controlled the corporate bank account, signed corporate checks and tax returns, or determined when and in what order to pay creditors.

(Footnote omitted).

Safayan, 654 N.E.2d at 273.

With that in mind, the Department now turns to Taxpayer's facts. The Department sent Taxpayer a letter stating:

Recently the Indiana Department of Revenue issued a bill to [Company A]... for unpaid taxes, plus penalty and interest. Our records indicate you are a responsible officer of [Company A].

The Department also attached a Proposed Assessment for "Tax Type: Withholding" for "Liability Period: September 30, 2010." Records with the Indiana Secretary of State list the Taxpayer as an incorporator and as "Secretary."

Taxpayer in its protest letter states:

[Taxpayer] is not associated with [Company A]. Pursuant to [Taxpayer's] Decree of Dissolution, dated June [], 2006, [Taxpayer's ex-spouse] assumed all right, title and interest in the company along with the assumption of all liability associated with the company, including but not limited to unpaid tax obligations.

Taxpayer provided a copy of the "Property Settlement Agreement," which states in relevant part (file stamped in June of 2006):

Respondent shall have as his sole property all right, title, and interest in the business known as [Company A], free and clear of any claim of Petitioner [Taxpayer]. Moreover, Respondent shall be responsible for, pay in a timely manner, and shall indemnify and hold Petitioner harmless therefrom any debt that is now associated with or becomes associated with [Company A], including but not limited to the following:

[...]

k. All unpaid business tax liability;

Also provided by Taxpayer is the "Decree of Dissolution of Marriage and Judgment," which is file stamped in June of 2006. At the telephone hearing, Taxpayer argued that she was Secretary in title only from 1998 to 2006 at Company A. Taxpayer's argument that she had no contact with Company A—after June of 2006—is evidenced by the divorce documents provided by Taxpayer. Taxpayer has established that she was not a Responsible Officer at Company A during the tax liability period of September of 2010. Given this finding, Taxpayer is also not responsible for any penalty or interest associated with the September of 2010 liability.

FINDING

The taxpayer's protest that she was not a Responsible Officer at Company A for the liability period of September 2010 is sustained.

Posted: 11/30/2011 by Legislative Services Agency

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