



FILED
GA. TAX TRIBUNAL

AUG 27 2014

**BEFORE THE GEORGIA TAX TRIBUNAL
STATE OF GEORGIA**

THOMAS M. HERRING,

Petitioner,

v.

**DOUGLAS J. MACGINNITIE,
Commissioner, Georgia Department of
Revenue,**

Respondent.

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Yvonne Bouras
Yvonne Bouras
Tax Tribunal Administrator

**TAX TRIBUNAL DOCKET
NO.: TAX - S&UT - 1407352**

DECISION

2014 - 12 Ga. Tax Tribunal, August 27, 2014

I. INTRODUCTION

This case is a “responsible person” case under O.C.G.A. § 48-2-52. It was duly noticed and called for trial on July 1, 2014.

Upon consideration of the testimony and evidence presented, this Tribunal finds that the Petitioner is indeed a responsible person under O.C.G.A. § 48-2-52 and, as such, Respondent’s assessments and tax executions against Petitioner are valid.

II. FINDINGS OF FACT

This case arises from assessments made against Petitioner for the unpaid sales and use tax liability of Jovi, Champ, and Baxter, LLC, d/b/a Cadillac’s (the “Company”).

While it was in operation, the business of the Company was the ownership and operation of a nightclub bar and restaurant known as “Cadillac’s” located on Washington Road in Augusta, Richmond County, Georgia.

The Company was formed and organized as a Georgia limited liability company in August 2002. The Articles of Organization for the Company provide that the Company is a member-managed limited liability company.¹

At the time it was formed, the Company was owned by three members, William Dickson, Joseph Dickson, and Charlie Broome. In 2006, Joseph Dickson gave his interest to his brother William Dickson, leaving William Dickson and Charlie Broome as equal 50% members. Then, in November or December 2008, Charlie Broome sold his 50% interest to the Petitioner. Thereafter, Petitioner and William Dickson were each 50% owners of Jovi, Champ, and Baxter, LLC.

After Mr. Broome sold his interest to Petitioner, Mr. Broome ceased to be involved in the business of the Company. Beginning in January 2009, Petitioner was added as a signatory to the bank account for the Company. Thereafter, Petitioner filed the annual registrations and the electronic sales and use tax returns for the Company, and authorized the electronic payment of sales and use taxes. Indeed, Mr. Dickson was not involved with the online payment of sales taxes at all. Petitioner also handled much of the hiring and firing at Cadillac's, and signed virtually all of the checks, including the payroll checks. Petitioner had the discretion to determine which Company checks to write and whom to pay.

Although Petitioner was added as a signatory to the Company bank account, the organizational documents for the Company were not amended to reflect Petitioner as a member and information as to the changes in ownership structure of the Company was not updated with

¹ The federal tax returns for the Company that were filed on Form 1120S under the name "Jovi, Champ, and Baxter, Inc. Cadillac's" indicate that the Company elected to be taxed as an S Corporation for federal tax purposes under the provisions of the "Check-the-Box" regulations. See Treas. Reg. § 301.7701-2(b)(2), Treas. Reg. § 1.1361-1(c) and Treas. Reg. § 301.7701-3(c)(1)(v)(C). According to Petitioner's testimony, the Company has consistently filed its income tax returns on that basis. Under the conformity provisions of O.C.G.A. § 14-11-1104, the Company would similarly be taxed as an S Corporation for Georgia income tax purposes. But for purposes of O.C.G.A. § 48-2-52, the evidence shows that the Company is a Georgia limited liability company and not a Georgia corporation.

the Georgia Department of Revenue. This was apparently done on the advice of counsel to Petitioner due to concerns of potential liability for Petitioner arising from a then-pending lawsuit that had been filed against the Company.

During its existence, the Company often had difficulty paying its sales and use taxes. Petitioner was the principal contact with the Georgia Department of Revenue on these tax issues. Indeed, Petitioner frequently spoke with Tabitha Strickland at the Department of Revenue about the unpaid taxes, and on occasion personally brought sales tax checks to Ms. Strickland.

Eventually, the Georgia Department of Revenue issued a liquor license citation to the Company for unpaid corporate income tax, individual income tax, withholding taxes, and sales and use taxes. This citation was hand delivered to Petitioner on July 12, 2011.

On September 1, 2011, the Georgia Department of Revenue suspended the Company's liquor license due to the Company's failure to pay outstanding taxes. Cadillac's closed in October 2011.

Although Petitioner was aware of the Company's unpaid sales and use taxes, he continued to write checks to creditors of the Company until the business closed in October 2011.

After the Company's closure, sales tax remained unpaid and due for the following periods: December 2010, January 2011, February 2011, March 2011, April 2011, May 2011, June 2011, July 2011, August 2011, September 2011, and October 2011.

The Company filed sales tax returns reflecting liability for December 2010, January 2011, February 2011, March 2011, April 2011, May 2011, June 2011 and July 2011. The Company did not pay its liability as reflected on the returns for these periods, however. The Company did not file sales tax returns for August 2011, September 2011, and October 2011. The Georgia Department of Revenue therefore estimated the unpaid tax for these three months. The

Department then issued assessments against the Company for all eleven of these sales tax periods that were unpaid.

Subsequently, the Department of Revenue issued two separate assessments against Petitioner as a responsible person for the Company under O.C.G.A. § 48-2-52. The first assessment was for the sales tax periods of December 2010 through June 2011, inclusive, while the second was for the sales tax periods of July 2011 through October 2011, inclusive. These assessments were reduced to tax executions against Petitioner numbered REV 120163871, dated July 6, 2012, for \$20,972.94 and REV 130272572, dated July 16, 2012, for \$18,094.71.

On August 27, 2013, Petitioner filed his Petition in the Georgia Tax Tribunal as a Small Claims Division case asserting that he was not a responsible person for the Company and challenging the validity of the assessments and executions issued against him. Petitioner did not challenge the amount of unpaid sales tax reflected in the tax executions either in his Petition or at trial.

III. CONCLUSIONS OF LAW

A. Jurisdiction

Petitioner in this case has challenged the validity of tax executions issued against him as a responsible person for the unpaid sales and use taxes of the Company. This case is thus in the nature of an Affidavit of Illegality over which this Tribunal has subject matter jurisdiction. O.C.G.A. § 48-3-1 (“Whenever any writ of execution has been issued by the Commissioner for the collection of any tax, or any penalty, interest, or collection costs imposed with respect to any tax, the taxpayer may file a petition in the Georgia Tax Tribunal in accordance with Chapter 13A of Title 50 to obtain a determination of whether any such amounts are legally due.”).

B. The “Responsible Person” Penalty of O.C.G.A. § 48-2-52

This case is an all too common example of a sad story that recurs with alarming regularity. It is the story of a failing enterprise where the principals unwisely “borrow” sales and use taxes that they have collected and use those funds to continue to operate, rather than remit those funds to the state. Often this is done with good intentions in the hope and expectation that the diverted funds will be “made up” and remitted when business improves. Unfortunately, there is much truth in the sad proverb that the road to hell is paved with such good intentions. This case is yet another example of why it is never wise to divert and use sales taxes for business purposes.

In Georgia, sellers at retail, such as the Company in this case, do not pay sales taxes on their retail sales. Rather, those sellers are obligated to collect sales taxes for the state from their customers. O.C.G.A. § 48-8-34. It is the purchaser who pays the tax and the tax collected is the state’s money, not the seller’s. The dealer is the state’s collection agent for collecting the tax and the funds collected are the state’s funds.² The money collected as sales tax thus is the property of the state and belongs to the state of Georgia. The state accordingly takes an understandably dim view when a taxpayer misappropriates those funds and diverts them to its own use. The Department of Revenue is justifiably and appropriately zealous in pursuing those who permit such diversions of funds to occur.

The statutory vehicle for deterring such conduct is to make the individuals who are supposed to remit the taxes collected to the state liable for such amounts if they fail to do so. In

² The seller will itself become liable if it fails to collect and remit the tax that it is obligated to collect, but the liability is ultimately that of the purchaser. And in theory, if not always in practice, the seller is entitled to recoup from its customers any unpaid sales taxes for which it is held liable by the state. O.C.G.A. § 48-8-35.

the context of an enterprise organized as a limited liability company such as the Company, O.C.G.A. § 48-2-52 provides in relevant part:

Any . . . member, manager, or employee of any limited liability company . . . who has control or supervision of collecting from purchasers or others amounts required under this title or of collecting from employees any taxes required under this title, and of accounting for and paying over the amounts or taxes to the commissioner, and who willfully fails to collect the amounts or taxes or truthfully to account for and pay over the amounts or taxes to the commissioner, or who willfully attempts to evade or defeat any obligation imposed under this title, shall be personally liable for an amount equal to the amount evaded, not collected, not accounted for, or not paid over.

O.C.G.A. § 48-2-52 is patterned after Internal Revenue Code (“IRC”) § 6672. It is therefore appropriate to look to federal decisions interpreting IRC § 6672 as a guide to the application of O.C.G.A. § 48-2-52. See Blackmon v. Mazo, 125 Ga. App. 193, 196 (1971).

The vast majority of cases in this area, such as Mazo, arose before the explosion of limited liability companies and other unincorporated entities in the 1990’s. But the principles for the application of the statute to members, managers, and employees of a limited liability company are the same as those applicable to officers or employees of a corporation.³ The issue ultimately turns upon the question of whether the person assessed has the power to effect payment of the tax liabilities of the entity. If that person has the power, but fails to see that such taxes are remitted, that person is subject to the assessment of responsible person liability for the unremitted taxes.

O.C.G.A. § 48-2-52 thus imposes individual liability upon (1) a responsible member, manager, or employee of a limited liability company who has (2) willfully failed to perform a duty to collect, account for, or pay over taxes. Thosteson v. United States, 331 F.3d 1294, 1298 (11th Cir. 2003); Thibodeau v. United States, 828 F.2d 1499, 1503 (11th Cir. 1987); Mazo v.

³ Indeed, amendments to O.C.G.A. § 14-11-303 of the Georgia Limited Liability Company Act and O.C.G.A. § 48-2-52 itself in 2009 explicitly made it clear that the same rules apply to members, managers, and employees of limited liability companies such as the Company as well as to entities organized as corporations.

United States, 591 F.2d 1151, 1153 (5th Cir. 1979); Ga. Dep't of Revenue v. Moore, 2014 Ga. App. LEXIS 545, at 3-4 n.8 (July 16, 2014).⁴

An enterprise may, and often does, have more than one responsible person and each responsible person is jointly and severally liable for the unpaid taxes. See Mazo, 591 F.2d at 1157. As such, the Department of Revenue may proceed against each responsible person separately. Moore, 2014 Ga. App. LEXIS 545, at *5-7.

1. Responsible Person

A person is responsible within the scope of the statute if that person has a duty to collect, account for, or pay over the taxes. Responsibility is a matter of the power and authority to make payment of taxes, and is not dispositively determined by title or position. Indicia of responsibility include the holding of office, control over financial affairs, authority to disburse funds, equity ownership, and the ability to hire and fire employees. Haysman v. Dep't. of Revenue, 432 BR 336, 339 (N.D. Ga. 2010). A company may have more than one responsible person. Thibodeau, 828 F.2d at 1503.

The presence of another potentially responsible person is no defense because “section 6672(a) looks only to ‘responsible persons,’ not to the ‘most responsible person,’ for satisfaction” and therefore, a taxpayer is not relieved of liability based upon the presence of another who is “even more responsible.” Howard v. United States, 711 F.2d 729, 737 (5th Cir. 1983).

Petitioner had a duty to collect, account for, or pay over the taxes. See Thibodeau, 828 F.2d at 1503. The Company is a member-managed Georgia limited liability company. As such, under O.C.G.A § 14-11-301, each of its members, including Petitioner, had the power to act for

⁴ Although the discussion in Moore generally uses corporate terminology and appropriately cites responsible person liability cases arising with respect to corporate entities in referring to Moore’s status with the company and the basis for holding Mr. Moore liable as a responsible person under O.C.G.A. § 48-2-52, a close reading of the prior decisions in that case indicates that the relevant entity was in fact a limited liability company. See Ga. Dep't of Revenue v. Moore, 317 Ga. App. 31 (2013) (“Moore and Thomas Turrentine each owned a partial interest in KTK Restaurant, LLC d/b/a The River Room;” and “the Department issued to ‘Richard T. Moore[,] KTK Restaurant LLC d/b/a The River Room[,] Personal Liability[,] Per O[.]C[.]G[.]A[.] [§] 48-2-52’ an Official Assessment and Demand for Payment, seeking \$187,221.50 for sales and use taxes which The River Room owed . . .”).

and bind the Company. He was a 50% owner of the Company, and was responsible for filing the Company's annual registration and online sales tax returns and payments as well as negotiating with the Department of Revenue regarding tax matters for the Company. He also wrote the vast majority of the checks for the Company, and had the authority to determine which creditors of the Company would be paid and in what amount. He was thus a responsible person for the Company pursuant to O.C.G.A. § 48-2-52.

2. Willfulness

In general, "willfulness" has been defined as "a voluntary, conscious and intentional act." Thibodeau, 828 F.2d at 1505; Mazo, 591 F.2d at 1154. The willfulness requirement is met if there is evidence that the responsible person had knowledge or made payments to other creditors after he was aware of the failure to remit taxes. Thibodeau, 828 F.2d at 1505; Howard, 711 F.2d at 735; Mazo, 591 F.2d at 1157.

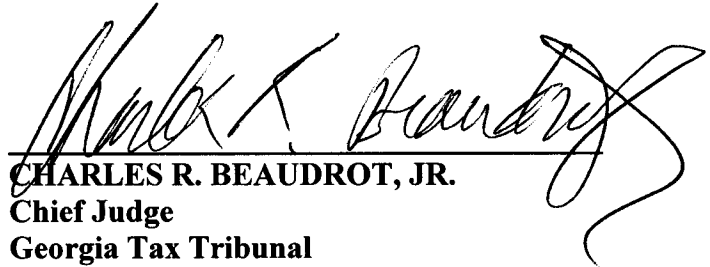
Petitioner in this case was responsible for the payment of taxes, and was therefore at all times aware of the failure to remit those taxes. He nevertheless continued to pay other creditors until the business closed in October 2011. Petitioner thus acted willfully within the meaning of O.C.G.A. § 48-2-52.

IV. CONCLUSION

Based on the foregoing, we must uphold Respondent's tax execution numbers REV 120163871 and REV 130272572, which reflect responsible person liability against Petitioner for the unpaid sales and use taxes for the Company. Judgment is therefore entered in favor of

Respondent and against Petitioner in this matter accordingly.

SO ORDERED this 27th day of August, 2014.



CHARLES R. BEAUDROT, JR.
Chief Judge
Georgia Tax Tribunal

THOMAS M. HERRING, *PRO SE*

PETITIONER

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