

**IN THE OFFICE OF STATE ADMINISTRATIVE HEARINGS  
STATE OF GEORGIA**

,

**Petitioner,**

v.

**DEPARTMENT OF REVENUE,**

**Respondent.**

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\* **Docket NO.**  
\* **OSAH-REV-S&UTA-**                      **Beaudrot**  
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**INITIAL DECISION**

**I. INTRODUCTION**

In this appeal brought pursuant to O.C.G.A. § 50-13-12, the Petitioner, challenges Official Assessment and Demand for Payment No. L0131042400. The Official Assessment was issued pursuant to O.C.G.A. § 48-2-52 and sought from Mr. payment of the outstanding sales and use tax liabilities of , Inc. for the periods of November 2010, February 2011, and March 2011. The parties provided sworn testimony and documentary evidence at a hearing on April 9, 2013.

For the reasons indicated below, Mr. is liable for the unpaid sales and use tax liability of , Inc. Accordingly, the Official Assessment and Demand for Payment issued by the Respondent is AFFIRMED.

## II. FINDINGS OF FACT

The Court has considered the entire evidence in this case, and based upon a preponderance of the credible evidence, makes the following specific findings of fact:<sup>1</sup>

1.

Mr. [redacted] and Mr. [redacted] formed [redacted], Inc. in Florida in 1996. T. 92; R-21. Initially, Mr. [redacted] was the Vice President and registered agent, and owned 45% of the company. T. 89, 92-3, 95; R-21, 22. Mr. [redacted] owned the other 55%. T. 89. As majority shareholder, Mr. [redacted] had the authority to fire Mr. [redacted], and when Mr. [redacted] quit the business, Mr. Ison removed him as registered agent. T. 172-4; P-3; R-24.

2.

By 2010, [redacted] had three separate locations, Lake City, Florida; Lake Park, Georgia; and Augusta, Georgia. T. 99. Mr. [redacted] had become President of [redacted] and manager of the Lake City, Florida location. T. 90-1, 94-5; R-23. Mr. [redacted]'s responsibilities in Lake City included hiring and firing. T. 31, 90-1; P-52. During a 2007 restructuring, the real estate of [redacted] was placed in a holding company, [redacted] Holdings, LLC, of which Mr. [redacted] and Mr. [redacted] each owned 50%. T. 96-8, 109, 170; R-25, 26. [redacted] Holdings collected rent from [redacted] and distributed the profits equally to Mr. [redacted] and Mr. [redacted]. T. 106-9; R-30.

3.

Mr. [redacted] was the "point person" in discussions with the floor plan lender and personally guaranteed those loans. T. 115, 123; R-32. Mr. [redacted] worked out the terms

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<sup>1</sup>Citations to Exhibits will hereinafter be referred to as: R-# for Respondent's exhibits and P-# for Petitioner's exhibits. Citations to the hearing transcript will hereinafter be referred to as: T. #.

of the floor plan financing with the lenders, including negotiating what percentage of used will be floored, the length of the terms, and what kind of rate. T. 119. When the financing ran into problems, Mr. attempted to renegotiate the financing terms and asked the lenders to accept less than the full amount owed. T. 120-2; R-34, Exs. N, O, T, U.

4.

The finances, including the payment of sales taxes, for all three locations were principally handled from the main operating account in Lake City, Florida, although the Augusta, Georgia location had a separate Regions Bank account and the payroll for all three locations was handled from a separate payroll account. T. 17, 56, 99, 102, 104-6, 111; R-1, 27, 29. The payroll account was funded from the main operating account. T. 104-5, 128; P-36; R-27, 29, 36, 38. When necessary, funds were transferred from the Regions Bank account in Augusta to the main operating account via checks signed by Mr. . T. 56, 111, 129-30; P-14, 16, 43; R-27, 36. TCRV Holdings had its own bank account into which paid rent and from which distributions were made to Mr. and Mr. . T. 106-9; R-27, 30.

5.

The checks from the main operating account and the Holdings account required two signatures, but the checks from the Regions Bank account and the payroll account only required one signature. T. 105, 111; R-27, 28, 29, 30. The majority of the checks from the main operating account and the Holdings account were signed by Mr. and the comptroller, Mr. , whereas alone signed

checks from the payroll and Regions Bank accounts. T. 105, 110-11, 128-31, 141; R-27, 29, 30, 36, 37, 38, 39, 40.

6.

Mr. \_\_\_\_\_, the comptroller, worked out of the Lake City, Florida location and handled the day to day finances of \_\_\_\_\_ . T. 51-4, 91-2, 99, 101, 141, 162.

Mr. \_\_\_\_\_ was the person authorized to submit the electronic sales tax returns and payments on

\_\_\_\_\_ with the State of Florida to remit past due sales taxes. T. 17-8, 88-9, 106; R-1, 27, 35.

7.

Mr. \_\_\_\_\_ answered to both Mr. \_\_\_\_\_ and Mr. \_\_\_\_\_, and Mr. \_\_\_\_\_ often directed Mr. \_\_\_\_\_ to make payments on behalf of \_\_\_\_\_ . T. 68-9, 88-9,

112, 125, 137-8; P-32; R-31, R-34, Ex. AA. Mr. \_\_\_\_\_ had no specific limit on the amount of funds he could authorize. T. 88, 137.

8.

Mr. \_\_\_\_\_ prepared daily cash flow reports and e-mailed them to both Mr. \_\_\_\_\_ and Mr. \_\_\_\_\_ . T. 51-2, 106, 145-6; P-13 through 24, 26 through 29, 31, 33

through 47; R-31, 35. The reports were often accompanied by an e-mail which summarized the financial status of the company and sometimes requested specific

direction. P-14, 16, 18, 20, 23, 26, 31, 33, 36, 39, 40, 41, 43; R-31, 35. These e-mails often discussed the payment status of the Georgia and Florida sales tax. P-14, 16, 20, 23,

31, 33, 36, 39, 40, 41; R-31.

9.

began to run into financial difficulties and by the fall of 2010, Mr. [redacted] and Mr. [redacted] were discussing ways to cut costs. P-52, 53.

[redacted]'s November 2010 sales tax return was due on Monday, December 20, 2010, and Mr. [redacted]

[redacted]'s Friday, December 17, 2010 cash flow report indicated that the sales taxes would be paid. T. 19; P-23. Nevertheless, on December 20<sup>th</sup>, the November 2010 return was not filed. T. 20; R-5. Mr. [redacted] testified that he was not made aware in advance that the Georgia sales taxes would not be paid, but acknowledges that Mr. [redacted]'s December 20, 2010 cash flow report reflected the taxes as past due. T. 58, 60, 62; P-27.

10.

Mr. [redacted] immediately began discussing the past due sales taxes with Mr. [redacted] and Mr. [redacted], and two days later, on December 22, Mr. [redacted] asked Mr. [redacted] to loan the company money, which he did. T. 63-4, 77-8, 150-3, 185; P-30. Despite Mr. [redacted]'s assertion that "we need to get [the sales taxes paid]" the proceeds of this loan were not used to pay the back taxes, and as of December 28, 2010, Mr. [redacted] noted in the e-mail accompanying his cash flow report that interest had begun to accrue on the unpaid Georgia sales tax. T. 64, 153; P-31. The sales taxes remained unpaid, and Mr. [redacted] continued to reflect the past due amounts on his cash flow reports. P-34, 35, 37, 38, 39.

11.

The November 2010 Georgia sales tax return was finally filed on March 18, 2011 along with the February 2011 sales tax return. T. 20-2; R-6, 7. Neither return included payment, a fact that both Mr. [redacted] and Mr. [redacted] were aware of since Mr. [redacted] specifically asked whether he should default on the sales taxes in his cash flow report.

Id.; T. 73-4; P-41. The next month, the March 2011 sales tax return was also filed without payment. T. 23; R-9. Mr. continued to reflect all of the past due sales taxes on the cash flow reports. P-42 through 47; R- 35.

12.

The Department accepted the November 2010, February 2011, and March 2011 sales tax returns as accurately reflecting the sales tax liability of , and issued proposed and official assessments for each of those periods. T. 21, 23-9; R-11 through 16. Those official assessments were not appealed, and the Department issued a tax execution against on July 25, 2012. T. 23-30; R-17. This tax execution remains unpaid. T. 29-30.

13.

Although 's sales taxes remained unpaid, Mr. continued to remit money to other creditors. T. 126-9; R-36, 37. In July 2011, Mr. signed, along with Mr. , numerous checks paying other creditors, including Columbia Bank. Id. Mr. was the sole signatory on both the July 2011 payroll and a July 21, 2011 check written from the Regions bank account for \$100,000. T. 128, 130; R-36, 38.

14.

On July 16, 2012, the Georgia Department of Revenue issued a Notice of Proposed Assessment against as a responsible officer of . T. 30-1; R-18. He did not formally protest the Notice of Proposed Assessment, and on September 12, 2012, the Department issued Official Assessment and Demand for Payment No. L0131042400, which Mr. has appealed. T. 31-2; R-19, 20.

### III. CONCLUSIONS OF LAW

Based on the foregoing findings of fact, this Tribunal concludes as a matter of law that:

#### A. STANDARD OF REVIEW

1.

Tax appeals before OSAH are *de novo* proceedings and the standard of proof is the preponderance of the evidence. See OSAH Rule 616-1-2-.21.

2.

Although OSAH Rule 616-1-2-.07 states that the “Referring Agency shall bear the burdens of persuasion and going forward with the evidence in all matters,” a tax assessment by the Department of Revenue is deemed prima facie correct, and the burden of persuasion in an appeal thereof is put on the taxpayer to show errors or unreasonableness in the assessment. See Blackmon v. Ross, 123 Ga. App. 89 (1970); Hawes v. LeCraw, 121 Ga. App. 532 (1970); Hawes v. Foster, 118 Ga. App. 296 (1968) Accord Brosnan v. Undercofler, 111 Ga. App. 95, 97 (1965); Head v. Edgar Bros. Co., 60 Ga. App. 482, 487 (1939).

#### B. ASSESSMENT AT ISSUE

3.

Mr.                    has appropriately appealed Official Assessment and Demand for Payment No. L0131042400, issued September 12, 2012, pursuant to O.C.G.A. § 50-13-12.

4.

Official Assessment and Demand for Payment No. L0131042400 assesses sales and use tax liability against \_\_\_\_\_ as a responsible corporate officer of \_\_\_\_\_, Inc. pursuant to O.C.G.A. § 48-2-52.

**C. RESPONSIBLE CORPORATE OFFICER OR EMPLOYEE**

5.

O.C.G.A. § 48-2-52 provides in relevant part:

- (a) Any officer or employee of any corporation. . . 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.

6.

Code section 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).

7.

Accordingly, O.C.G.A. § 48-2-52 imposes individual liability upon (1) a responsible officer or employee who has (2) willfully or recklessly failed to perform a duty to collect, account for, or pay over taxes. Thosteson v. United States, 331 F.3d 1294 (11th Cir. 2003); Thibodeau v. United States, 828 F.2d 1499, 1503 (11th Cir. 1987); Mazo v. United States, 591 F.2d 1151, 1153 (5th Cir. 1979).



8.

A corporation may have more than one responsible corporate officer and each responsible corporate officer is jointly and severally liable for the unpaid taxes. See Mazo, 591 F.2d at 1157.

### 1. RESPONSIBLE PERSON

9.

A person is responsible 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, which is not dispositively determined by corporate title or position. Indicia of responsibility include the holding of corporate office, control over financial affairs, the authority to disburse corporate funds, stock ownership, and the ability to hire and fire employees. A company may have more than one responsible person. Thibodeau v. United States, 828 F.2d 1499, 1503 (11th Cir. 1987).

10.

The presence of another potentially responsible corporate officer is no defense, since “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 737 (5<sup>th</sup> Cir. 1983).

11.

It is not required that the responsible corporate officer have the “final word” on what checks are to be prepared, for whom, and in what amount, and it is well established that a responsible person is not relieved of liability because another told him not to pay

the taxes. See Thosteson v. United States, 331 F.3d 1294, 1300 (11th Cir. 2003); Howard v. United States, 711 F.2d 729, 731 (5th Cir. 1983); Brown v. United States, 464 F.2d 590, n.1 (5th Cir. 1972).

12.

Mr. [redacted] had a duty to collect, account for, or pay over the taxes. See Thibodeau v. United States, 828 F.2d 1499, 1503 (11th Cir. 1987). Mr. [redacted] was a founder of the business, owning more than 40% of [redacted] and 50% of TCRV Holdings, and received an equal share of the distributions. During the periods at issue, Mr. [redacted] was President and registered agent, and managed the day-to-day operations of the Florida location, including hiring and firing. Mr. [redacted] was the “point person” in dealing with the floor plan lender, and had the authority to negotiate and renegotiate loan terms. Mr. [redacted] was also involved in other aspects of the company’s finances, and had multiple discussions with Mr. [redacted] about the sales taxes, how to cut costs, and whether Mr. [redacted] would be willing to make a personal loan to the business. Mr. [redacted] signed most of the checks on the [redacted] accounts, including payroll, and had the authority to direct the comptroller, [redacted], to make disbursements. Mr. [redacted] even negotiated with the State of Florida to remit [redacted] past due Florida sales taxes.

13.

The fact that Mr. [redacted] was the majority shareholder and had the authority to terminate Mr. [redacted] does not relieve Mr. [redacted] of liability because Mr. [redacted] had the effective power to pay. See Howard v. United States, 711 F.2d 729, 731 (5th Cir. 1983); Thibodeau v. United States, 828 F.2d 1499, 1503 (11th Cir. 1987). Moreover,

there is no evidence that Mr.            told Mr.            not to pay the taxes – indeed, Mr.            testified that when Mr.            told him that the sales taxes were due, he told Mr.            that “we need to get it paid”. T. 153.

14.

Therefore, this Court finds that Mr.            is a “responsible person” for           , Inc. pursuant to O.C.G.A. § 48-2-52.

## 2. WILLFULNESS

15.

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 officer had knowledge or made payments to other creditors after he was aware of the failure to remit taxes. Thibodeau, 828 F.2d at 1505; Mazo, 591 F.2d at 1157; Howard, 711 F.2d 729, 735 (5th Cir. 1983)

16.

Mr.            received daily cash flow reports showing the unpaid sales taxes and he testified that he immediately discussed this issue with both Mr.            and Mr.           . Indeed, he approached Mr.            to loan the company money. Nevertheless, the taxes remained unpaid and Mr.            continued to sign and co-sign checks to employees and other creditors. Accordingly, Mr.            was willful within the meaning of O.C.G.A. § 48-2-52.

