



Room. Petitioner did not know Mr. Turrentine prior to being hired to manage the Old Vinings Inn. (Tr. 131-32, 136.)

2.

Mr. Selsor had opened other restaurants 1999 and 2000 with partners other than Mr. Turrentine. In 2000 and early 2001, Mr. Selsor began having problems with these other restaurants. Petitioner recalls Mr. Selsor coming into the Old Vinings Inn and writing checks totaling \$50,000.00 out the restaurant's checking account. Although Petitioner had known Mr. Selsor for sometime, he knew what Mr. Selsor was doing was wrong. Petitioner brought Mr. Selsor's actions to Mr. Turrentine's attention. (Tr. 132-35.)

3.

Thereafter a battle ensued. Mr. Turrentine went about removing Mr. Selsor from the operations of the Old Vinings Inn and buying out his interest. Around August of 2001, Mr. Turrentine approached Petitioner with an opportunity to buy into the Old Vinings Inn. Additionally, Mr. Turrentine sought to gain control of The River Room. At the time, he only owned 20% interest in The River Room. To facilitate gaining control of The River Room, Mr. Turrentine offered Roger Brandes, the manager of The River Room, an opportunity to buy into the restaurant. However, prior to the closing, there was a verbal altercation between Mr. Turrentine and Mr. Brandes. (Tr. 135-38.)

4.

On August 7, 2001, Petitioner purchased 25% of OVIP, Inc., d/b/a Old Vinings Inn and Pub and 15% of KTK Restaurant, LLC, d/b/a The River Room. (Tr. 191-93, 195, 196; Exhibits R-24, R-25, R-26.<sup>1</sup>) At the close of the transaction, The River Room was owned 56% by Mr. Turrentine, 15% by Petitioner, 14.5% by Jay Pollack, and 14.5% by Roger Brandes. (Tr. 133-36, 138, 145, 200-

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<sup>1</sup> At the hearing, Respondent's exhibits were labeled as Defendant's Exhibits. For the sake of clarity, Respondent's

01.) The Old Vinings Inn was owned 75% by Mr. Turrentine and 25% by Petitioner. (Tr. 134-35, 138, 158.) Before he would agree to sign the paperwork, Mr. Turrentine required Mr. Selsor to fire Roger Brandes, the manager of The River Room. Thereafter, Jay Pollack, the chef, became the manager of The River Room. (Tr. 138, 141-42.)

5.

Mr. Turrentine purchased his additional interest in the restaurants with promissory notes and proceeds from a loan. (Exhibit R-24.) Petitioner purchased his interest in the restaurants with the proceeds from a \$250,000.00 loan and an additional \$50,000.00 in cash. (Tr. 191-93, 195, 196; Exhibits R-24, R-25, R-26.) Petitioner's loan was secured by his home and by Mr. Turrentine's guarantee. (Tr. 193-94.) Initially, Petitioner was only planning to purchase the 25% interest in the Old Vinings Inn. However, just prior to the closing, the 15% in The River Room was added. Petitioner believes that Mr. Turrentine did this because he needed someone to oversee both restaurants, as Mr. Brandes was no longer going to be involved in managing The River Room. (Tr. 138-39, 195-96.)

6.

In October of 2001, Mr. Brandes sued Mr. Turrentine and Mr. Selsor over his interest in The River Room. Thereafter, Mr. Turrentine began shifting expenses from the Old Vinings Inn to The River Room in an effort to devalue The River Room. (Tr. 143-144; Exhibit P-12.) In January 2002, Mr. Turrentine bought Mr. Pollack's interest in The River Room and ousted him from the restaurant approximately four months later. (Tr. 144-145.) As Mr. Brandes was no longer involved in the management of the restaurants, the only involved owners after January 2002 were Mr. Turrentine and Petitioner. (Tr. 144-46.)

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Exhibits will be referred to as R-# and Petitioner's exhibits will be referred to as P-#.

7.

The payments on Petitioner's and Mr. Turrentine's purchase money loans were made by the restaurants. (Tr. 221-23; Exhibit R-35.) The payments on Petitioner's purchase money loan were in the amount of \$3,974.69. (Exhibit R-35.) The payments on Mr. Turrentine's loan were approximately \$6,000.00. (Tr. 221.) In addition to the loan payments, Petitioner received a salary in the amount of \$100,000.00 per year.<sup>2</sup>

8.

From August 2001 through September 2003, both Petitioner and Mr. Turrentine were involved in the management of the restaurants. (Tr. 86, 96-98, 148-50, 157-58, 203.) Mr. Turrentine was the majority partner and Petitioner was the minority partner who handled the day-to-day operations. (Tr. 98-99, 103-04, 110-11, 116, 121-22, 155, 202-07.) While Petitioner's primary responsibility was at the Old Vinings Inn, he often went to The River Room in a management capacity. (Tr. 155.)

9.

Neither Petitioner nor Mr. Turrentine had official titles, although Petitioner sometimes signed documents as "General Manager" or "Partner." (Tr. 202; Exhibits R-16 through R-19.) The other employees in the restaurants considered Mr. Turrentine and Petitioner as their superiors. (Tr. 98, 105, 106, 113, 122-23.)

10.

Petitioner and Mr. Turrentine would often have partner meetings. Petitioner kept Mr. Turrentine informed about the operations of the restaurants, including the lack of money to pay taxes. (Tr. 104, 122, 148, 150, 157, 206.) Petitioner and Mr. Turrentine talked about the restaurants every day when Mr. Turrentine was in town. (Tr. 206.)

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<sup>2</sup> Petitioner received this salary for 2 years. When his relationship ended with Mr. Turrentine, he was owed

11.

In the early 2000s, at a time when the restaurants were struggling and there was a shortage of cash, Mr. Turrentine spent \$100,000.00 to renovate the Old Vinings Inn and charged it to the business. (Tr. 157-158.) In 2002 and 2003, Mr. Turrentine was at The River Room on almost a daily basis. During that time, he ran up a food and beverage tab of approximately \$62,000.00. (Tr. 120, 147.)

12.

Petitioner had the authority to hire and fire employees, sign checks, and borrow money on behalf of the restaurants. (Tr. 158, 203, 207-08, 219-20; Exhibits R-15 through R-21, R-35, R-37, R-38, R-42, R-43.) He had the responsibility to make sure that the purchase money loan payments were made. (Tr. 221-23; Exhibit R-35.) Petitioner also had the responsibility to pay the vendors and employees. In an effort to keep the business going, he loaned his own money to The River Room and borrowed money on behalf of the restaurant. (Tr. 112, 158, 213-15; Exhibit R-40.)

13.

Former employees and at least one customer believed that Mr. Turrentine was the person in charge or the controlling manager. (Tr. 88, 94, 116.) Petitioner believed he had to do what Mr. Turrentine told him to do. After seeing Mr. Turrentine fire and push out previous partner, Petitioner believed his only option was to do what Mr. Turrentine told him to do or quit. If he quit, he would have lost his home, as it was collateral for his purchase money loan. (Tr. 145-46.) Petitioner describes Mr. Turrentine as the "puppeteer" and the "total authority." (Tr. 155.)

14.

In general, Mr. Turrentine did not sign checks. Rather, he left that duty to Petitioner. (Tr. 147; Exhibit R-27.) Petitioner opened and was a signatory on the bank accounts. He signed payroll

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approximately one year's salary, which he never received. (Tr. 164, 223.)

checks, rent checks, and tax checks. (Tr. 207-08, 210, 212-14, 215-16, 218; Exhibits R-35, R-37, R-38 through R-42.) Although other employees could sign checks, they did not have the same authority as Petitioner, and could not, for example, sign a tax check. (Tr. 95-96, 208-09.)

15.

According to Petitioner, he could not sign checks for more than \$5,000.00 without consulting Mr. Turrentine. (Tr. 204-05.) However, Petitioner did write checks, without consulting Mr. Turrentine, for more than \$5,000.00, when Mr. Turrentine was out of town. He took his chances on those occasions. (Tr. 166, 208-09.)

16.

Petitioner signed and filed the sales and use tax returns and the accompanying checks, usually after consulting with Mr. Turrentine. In other words, he paid what Mr. Turrentine told him to pay. (Tr. 227.) However, Petitioner admits that if Mr. Turrentine was out of town and there was money in the bank, he would pay the sales and use taxes, even if it was against Mr. Turrentine's will. (Tr. 166, 208.) On one occasion, Petitioner filed and paid a sales and use tax return against Mr. Turrentine's instructions. (Tr. 208-09.) When he discovered that Petitioner had filed the sales and use tax return, Mr. Turrentine threatened to fire Petitioner. (Tr. 208-09.)

17.

Between January 2002 and February 2004, Petitioner filed the returns and paid the sales and use taxes for The River Room for the periods of October 2001, November 2001, December 2001, September 2002, April 2003, October 2003, and November 2003. (Exhibits R-15 through R-21.)

18.

The River Room's sales and use tax returns were not filed for August 2001, November 2002 through March 2003, and May 2003 through September 2003. (Tr. 30-34; Exhibits R-1, R-5.) Petitioner was

aware in 2002 that sales and use taxes for The River Room had not been paid. (Tr. 150.) During this time, Petitioner continued to receive his salary and his loan payments continued to be paid by the restaurant. (Tr. 223, 246, 252.)

19.

On September 23, 2003, the Department sent a Notice to Produce Records to KTK Restaurant, LLC, d/b/a The River Room, seeking the unfiled sales and use tax returns. (Tr. 29; Exhibit R-1.) Shortly thereafter, OVIP, Inc. took over ownership of The River Room, and KTK Restaurant, LLC ceased to exist. (Tr. 152-54, 177, 224-26.) This increased Petitioner's interest in The River Room restaurant from 15% to 25%, as he owned 25% of OVIP, Inc., and he had owned only 15% of KTK Restaurant, LLC. (Tr. 160.)

20.

The sales and use tax returns for the Old Vinings Inn were not filed for January 2002, February 2002, May 2002 through August 2002, and October 2002 through September 2003. (Exhibit R-22.)

21.

In October 2003, the Department sought the unpaid sales and use taxes for the Old Vinings Inn and moved against the restaurant's liquor license. (Exhibit R-22, R-23.) Mr. Turrentine entered into an agreement to pay the sales and use taxes of the Old Vinings Inn and Pub to preserve its liquor license. (Tr. 151-52, 234; Exhibit R-23.) Mr. Turrentine asked Petitioner to sign the initial check for that payment plan, but Petitioner refused, because it was a very large check. (Tr. 180-81; Exhibit P-9.) According to Petitioner, it was not until October 2003 that Mr. Turrentine instructed Petitioner to pay taxes and allowed him to do so. (Tr. 151-52.)

22.

In late 2003 or early 2004, Mr. Turrentine and Petitioner reached an arrangement whereby Petitioner

took over management of The River Room and Mr. Turrentine took over management of the Old Vinings Inn. At that time, Petitioner ceased to draw a salary for his general manager position and began to pay the sales and use taxes for OVIP, Inc., which owned both restaurants. (Tr. 105-06, 152-53, 247-48.)

23.

On November 17, 2003, shortly after KTK Restaurant, LLC ceased to exist, the Department received KTK Restaurant, LLC's unfiled sales and use tax returns for periods between July 2000 and July 2003. (Tr. 30-31; Exhibit R-2.) Based upon these returns, on October 24, 2004, the Department issued an Official Assessment and Demand for Payment against The River Room. (Exhibit R-4; Tr. 32.) This assessment was not appealed. (Tr. 32.)

24.

On February 20, 2004, the Department sought returns from The River Room for tax periods between August 2003 and January 2004. (Exhibit R-5.) The Department received returns for those periods and was informed that the ownership of The River Room had changed effective October 2003. (Exhibit R-6; Tr. 34.) The Department then issued an assessment to the River Room for August and September 2003. (Exhibit R-7.)

25.

In 2005, Petitioner and Mr. Turrentine sold The River Room to Amin Rahme. (Tr. 20, 159-61, 174; Exhibit R-48.) Because Petitioner was a partner, his consent to the transaction was required. (Tr. 159-160, 182, 223, 234. The transaction required Petitioner to give up his interest in both The River Room and the Old Vinings Inn.<sup>3</sup> (Tr. 161-62, 164.) Petitioner only agreed to the transaction based upon Mr. Turrentine's agreement to pay the back taxes. (Tr. 181-82.)

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<sup>3</sup> Petitioner subsequently reacquired an interest in both The River Room and the Old Vinings Inn. (Tr. 130-131.)



26.

On November 1, 2006, the Department issued an Official Assessment and Demand for Payment against Petitioner asserting personal liability for The River Room taxes for tax periods between August 2001 and September 2003. (Exhibit R-10.) The amount demanded was \$187,221.50. (*Id.*) Petitioner appealed the assessment. (Exhibits R-11, R-13.)

27.

On or about February 27, 2007, Thomas Turrentine paid the Department of Revenue \$267,174.67 in back taxes. (Exhibit P-11.) He did this so he could sell the Old Vinings Inn. (Tr. 162-64.) Mr. Turrentine's payment satisfied the assessment against Petitioner, as well as some other back taxes. In other words, the back taxes assessed against Petitioner had been paid in full. (Tr. 72-75.) Thereafter, Amin Rahme, Petitioner, and two other individuals purchased the Old Vinings Inn business and real estate. (Tr. 162-64.) Mr. Turrentine subsequently filed suit in the Superior Court of Cobb County, seeking a refund of some or all of the \$267,174.67 in back taxes that he paid. (Tr. 75; *see also* Exhibits P-11, P-13, P-14, P-15.) The Department and Mr. Turrentine settled the refund suit. As a result, the Department refunded Mr. Turrentine \$67,500.00. (Exhibit P-11.)

28.

Because a portion of the money paid by Mr. Turrentine satisfies some of the tax periods contained in the Official Assessment and Demand for Payment against Petitioner, the Department is not seeking the full \$187,221.50. Rather, the Department seeks \$72,225.00. (Tr. 47-48.)

### **Conclusions of Law**

1.

Petitioner appeals Official Assessment and Demand for Payment No. 015370560. The Department asserts that Petitioner is liable for the sales and use tax periods listed in the Official Assessment as a

responsible corporate officer pursuant to Georgia Code section 48-2-52.

2.

This tax appeal is a de novo proceeding. Ga. Comp. R. & Regs. r. 616-1-2-.21(3); *see also Mead Corp. v. Blackmon*, 129 Ga. App. 526, 529 (1973). Therefore, the evidence was not limited to the evidence presented to or considered by the Department.

3.

Tax assessments are deemed to be prima facie correct. *Hawes v. LeCraw*, 121 Ga. App. 532, 533 (1970). Thus, the burden of persuasion in an appeal is on the taxpayer to show errors or unreasonableness in the assessment. *Undercofler v. White*, 113 Ga. App. 853, 855 (1966); *see also Hawes*, 121 Ga. App. at 533.

#### ***Responsible Corporate Officer or Employee Liability***

4.

Georgia Code section 48-2-52 provides, as follows:

- (a) Any officer or employee of any corporation, any member, manager, or employee of any limited liability company, or any partner or employee of any limited liability partnership who has control or supervision of collecting from purchasers or other 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. Section 48-2-52 is similar in language and purpose, and patterned after Internal Revenue Code ("IRC") § 6672. Thus, Georgia courts look to federal cases in construing section 48-2-52. *See Blackmon v. Mazo*, 125 Ga. App. 193, 194 (1971).

5.

Section 48-2-52 imposes liability upon (1) a responsible officer, employee, member, manager, or partner who has (2) willfully failed to perform a duty to collect, account, or pay over taxes. O.C.G.A. § 48-2-52; see *Thibodeau v. United States*, 828 F.2d 1499, 1503 (11<sup>th</sup> Cir. 1987); *Mazo v. United States*, 591 F.2d 1151, 1153 (5<sup>th</sup> Cir. 1979); *Thosteson v. United States*, 331 F.3d 1294, 1298 (11<sup>th</sup> Cir. 2003).

6.

Companies may have more than one responsible corporate officer, partner, or employee. See *Thibodeau*, 828 F.2d at 1503. Each responsible person is jointly and severally liable for the unpaid taxes. See *Mazo*, 591 F.2d at 1157.

#### ***Responsible Person***

7.

A responsible person is one who is under a duty to collect, account for, or pay over taxes. “Responsibility is a ‘matter of status, duty and authority, not knowledge.’” *Thibodeau*, 828 F.2d at 1503 (quoting *Mazo*, 591 F.2d at 1153). 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.” *Thibodeau*, 828 F.2d at 1503; see also *Harris v. United States*, 175 F.3d 1318, 1321 (11<sup>th</sup> Cir. 1999). Authority to pay taxes has been interpreted to mean the “effective power” to pay or, in other words, the “ability” to pay the taxes. See *Howard v. United States*, 711 F.2d 729, 734 (1983); *Harris*, 175 F.3d at 321. Furthermore, it is not necessary that the responsible person have the “final word” on what checks are to be written, to whom, and in what amount. *Brown v. United States*, 464 F.2d 590, n.1 (5<sup>th</sup> Cir. 1972); *Howard*, 711 F.2d at 734.

8.

Orders or instructions from a superior to not pay the taxes do not relieve an otherwise responsible person of liability. *Thosteson*, 331 F.3d at 1300; *Brounstein v. United States*, 979 F.2d 952, 955 (3<sup>rd</sup> Cir. 1992). Similarly, the threat of being fired does not relieve a responsible person of liability. *Howard*, 711 F.2d at 734.

9.

In this case, Petitioner was a minority shareholder in KTK Restaurant, LLC, d/b/a The River Room. Although he asserts that his primary duty was to manage the Old Vinings Inn, Petitioner admits that he did often act in a management capacity over The River Room. He signed the sales and use tax returns for The River Room as “general manager” or “partner.” He signed payroll checks, rent checks, and tax checks on behalf of The River Room. He had the authority to hire and fire employees. Furthermore, he had the authority to write checks of up to \$5,000.00 without consulting Mr. Turrentine, and on some occasions, when Mr. Turrentine was out of town, he wrote checks in excess of \$5,000.00 without consulting Mr. Turrentine.

10.

Petitioner argues that he was not a responsible person under section 48-2-52, because he did not have the decision-making authority to determine which creditors, including the government, the restaurant should have paid. However, Petitioner’s actions belie that argument. Petitioner did make decisions on which creditors to pay. He wrote payroll checks, he paid vendors; he made sure that the payments on his and Mr. Turrentine’s purchase money loans were made, and on occasion he paid the Department. In particular, when Mr. Turrentine was out of town, Petitioner “took his chances” and paid the Department. *See Howard*, 711 F. 2d at 734 (noting that the taxpayer’s authority was demonstrated by the fact that he did issue small check’s without his superior’s approval on a number

of occasions); *see also Harris*, 175 F.3d at 1321 (finding the fact that a taxpayer has paid the taxes on behalf of the company in the past suggests that the taxpayer had the ability to pay the taxes). Moreover, Mr. Turrentine's directions to not pay the taxes and his threats to fire Petitioner, if he did so, do not relieve Petitioner of his responsibility to pay the taxes. *Howard*, 711 F.2d at 735 (noting that the taxpayer could have paid the taxes, accepted the consequences, and avoided the penalty); *Thibodeau*, 828 F.2d at 1504; *Brounstein*, 979 F.2d at 955.

11.

Petitioner impliedly argues that Mr. Turrentine was the most responsible person. While this Tribunal appreciates the difficulty of Petitioner's position and to some extent agrees with Petitioner that much of the fiscal problems associated with the restaurants were due to Mr. Turrentine's actions, it cannot condone Petitioner's failure to pay the taxes, despite the consequences. *See Howard*, 711 F.2d at 734-35. Furthermore, as noted *supra*, there can be more than one responsible person, and the law does not require the Department to go after the "most responsible person." *Howard*, 711 F.2d at 737; *see also Gens*, 222 Ct. Cl. at 415-16 (noting that the government "is entitled to 'choose the liable parties from whom it will collect'") (*quoting Abrams v. United States*, 333 F. Supp. 1134, 1147 (S.D. W. Va. 1971)). Accordingly, this Tribunal finds that Petitioner was a responsible person pursuant to section 48-2-52.

*Willfulness*

12.

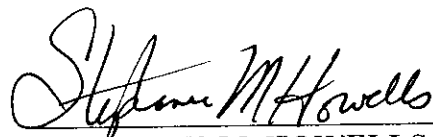
Willfulness has been defined as "a voluntary, conscious and intentional act." *Thibodeau*, 828 F.2d at 1505; *Mazo*, 591 F.2d at 1154. A finding of willfulness does not require a bad motive or evil intent. *Mazo*, 591 F.2d at 1154. Rather, the willfulness requirement is met if there is evidence that the responsible person had knowledge of or made payments to other creditors after he was aware of the

failure to pay taxes. *Thibodeau*, 828 F. 2d at 1505; *Mazo*, 591 F.2d at 1157; *Howard*, 711 F.2d at 735.

13.

In 2002, Petitioner knew the taxes had not been paid. Nevertheless, he continued to draw a salary, make loan payments and pay other creditors. Accordingly, Petitioner willfully failed to pay over the taxes within the meaning of section 48-2-52.<sup>4</sup>

**SO ORDERED, this 23rd day of February, 2010.**

  
STEPHANIE M. HOWELLS  
Administrative Law Judge

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<sup>4</sup> Petitioner argues that he lacked the decision-making authority and, in essence, his failure to pay the taxes was not voluntary, rather it was at the direction and control of Mr. Turrentine. This “Nuremburg” defense has been rejected by a number of courts. See *Brounstein*, 979 F.2d at 956; see also *Roth v. United States*, 779 F.2d 1567, 1571-72 (11<sup>th</sup> Cir. 1986); *Howard*, 711 F.2d at 735-36. As noted above, Petitioner’s failure to pay the taxes because he was following the directions of his superior does not relieve him of liability.