

IN THE COURT OF COMMON PLEAS FOR THE STATE OF DELAWARE
IN AND FOR KENT COUNTY

Cornelius Van Dijk, :
 : C.A. No. 05-07-0109
 Plaintiffs, :
 :
 v. :
 :
 Donald H. Lloyd and :
 James B. Lee, :
 :
 Defendants. :
 :

Decision after trial.

Submitted: December 13, 2006

Decided: January 2, 2007

**Judgment is entered in behalf of Plaintiff, Cornelius Van Dijk,
and against Defendants, James B. Lee and Donald H. Lloyd, Jr.**

**Stephen L. Nowak, Esquire, 22 South Market Street Plaza, Smyrna, Delaware,
19977, Attorney for Plaintiff.**

**Brad S. Eaby, Esquire, Barros, McNamara, Malkiewicz & Taylor, P.A., Post Office
Box 1298, Dover, Delaware 19903-1298, Attorney for Defendants.**

Trader, J.

In this civil action I hold that Cornelius Van Dijk (Van Dijk) is only entitled to recover from the defendants the proportionate share of the amount of federal income taxes, interest, and penalty he has paid to the Internal Revenue Service (IRS). The proportionate share is divided according to the culpability of the responsible persons. I determine that the responsibility of the defendants is 80% of the amount due the IRS.

The relevant facts are as follows: On May 31, 2003, Van Dijk, his wife, Nancy C. Van Dijk, James B. Lee, Patricia C. Lee (Lee), and Donald H. Lloyd, Jr. (Lloyd) formed a corporation known as Biztec, Inc. (Biztec) for the purpose of selling computer equipment, software and hardware. (Plaintiff's Exhibit 1). Pursuant to a stock agreement (Plaintiff's Exhibit 2) executed on the same day, Van Dijk held 52% of the stock of the corporation and Lee and Lloyd each held 24% of the stock.

Lee and Lloyd operated the business of the corporation in Rehoboth Beach, Delaware, and Van Dijk was the silent partner of the corporation. Lee and Lloyd were to pay the business expenses of the corporation, as well as the federal withholding taxes. Lee operated the financial end of the business and signed most of the checks. The business was not profitable and in April 2004, the corporation went out of business. After Biztec ceased to do business, Van Dijk met with Lee and Lloyd and observed a number of unopened notices from the internal revenue service. These notices were dated in 2003 and related to the assessment of delinquent withholding taxes due from Biztec. After the dissolution of the corporation Van Dijk collected some of the accounts receivables and he paid unsecured creditors prior to paying the delinquent taxes to the IRS. On August 30, 2004, Van Dijk received a notice of delinquent taxes due from Biztec during the period ending 6/30/03 as well as a notice of delinquent taxes due from

Biztec for the period ending 12/31/03. (Plaintiff's Exhibits 3 and 4). Van Dijk paid \$3,630.95 in taxes to the IRS on 11/01/04 (Plaintiff's Exhibit 5), and on 12/13/05 a tax lien was assessed against Biztec in the amount of \$7,085.14. (Plaintiff's Exhibit 6). On July 25, 2005, Van Dijk filed a civil action in this court against Lee and Lloyd for the amount that he will be required to pay to the IRS.

This is a civil action for contribution brought under Sec. 6672. Civil actions can be filed in state courts under federal statutes. 28 U.S.C. Sec. 6672 is used frequently for collection of taxes owed by defunct corporations and the IRS may attempt to collect the taxes from a responsible person. Several factors have been used by the courts to determine whether an individual is a responsible person including whether the person (1) is an officer or member of the board of directors; (2) owns substantial amount of stock in the company; (3) manages the day-to-day operations of the business; (4) has authority to hire and fire employees; (5) makes decisions as to disbursement of funds and payment of creditors; and (6) possesses authority to sign company checks. *Ferguson v. United States*, 317 F. Supp. 2d 945, 954 (S.D. Iowa 2004).

The IRS has told Van Dijk that he is a responsible party as president of the corporation and majority stockholder. At the dissolution of the corporation, he received all of the property of the corporation including the accounts receivables and he paid the creditors of the corporation prior to the payment of delinquent taxes. Although the IRS did not make an assessment of unpaid taxes against the plaintiff, it is clear that the IRS could have made such an assessment. The fact that the plaintiff was not assessed by the IRS under Sec. 6672 does not preclude me from making such a determination. *Esstman*

v. Boyd, 605 S.W.2d 237, 242 (Tenn. App. 1979). I conclude that he was a responsible person under Sec. 6672 and that he acted willfully.

The IRS's ability to assess does not preclude me from determining that the defendants are responsible parties. *Aardema v. Fitch*, 684 N.E.2d 884, 888 (Ill. App. 1997). In the case before me, Lee and Lloyd ran the day-to-day business of the corporation. Both of them were entrusted with the responsibility of paying the federal withholding taxes. Each of them had the power to write checks and pay the bills of the corporation. Therefore, I determine that Lee and Lloyd were responsible persons under 28 U.S.C. Sec. 6672.

Under the statute, it must be shown that the responsible persons willfully refused to remit funds properly to the federal government. Willfulness has been defined as a voluntary, conscious and intentional, as opposed to accidental, decision not to remit funds properly withheld to the government. *Monday v. United States*, 421 F.2d 1210, 1216 (7th Cir. 1970).

In this case, both Lee and Lloyd were aware that withholding taxes were due the government, and that those taxes were not paid to the federal government for several quarters. Additionally, the unopened notices from the IRS indicated that both defendants intentionally ignored notices from the IRS. Under these circumstances, I conclude the defendants conduct was willful.

In the case before me, the plaintiff is seeking recovery under Sec. 6672. The statute authorizes a right of contribution for an amount equal to the excess of the amount paid by such person over the person's proportionate share of the penalty. Proportional share does not mean equally distributing the burden. Sec. 6672 does not preclude an

analysis of the relative culpability of the responsible parties. Kenneth H. Ryesky, “*In Employers we Trust*”: *The Federal Right of Contribution Under Internal Revenue Code Section 6672*, 9 Fordham J. Corp. & Fin. L. 191, 216 (2003). Since the defendants managed the day by day operations of the corporation, I determine that they are primarily culpable. Van Dijk bears some culpability because of his failure to promptly pay the delinquent taxes when he was aware the taxes were delinquent. I assess the degree of responsibility 20% to Van Dijk and 80% to Lee and Lloyd. In the instant case, Van Dijk has paid \$3,630.95 in taxes and is entitled to recover 80% of that amount from the defendants. The plaintiff is entitled to recover from Lee and Lloyd the sum of \$2,904.76.

The plaintiff argues that he is entitled to recovery on the basis of a breach of contract. A fair reading of the plaintiff’s Complaint does not indicate a claim for relief on the basis of an express contract and he does not allege a cause of action on a *quantum meruit* basis.

Based on these findings of fact and conclusions of law, judgment is entered in behalf of Cornelius Van Dijk and against James B. Lee and Donald H. Lloyd, Jr. for \$2,904.76 plus interest from 1/11/04 at the legal rate and the costs of these proceedings.

IT IS SO ORDERED.

Merrill C. Trader
Judge