

IN THE OREGON TAX COURT
MAGISTRATE DIVISION
Income Tax

SCORES ENTERTAINMENT, INC. and)	
MICHAEL SPIOTTI,)	
)	
Plaintiffs,)	TC-MD 011279D
)	
v.)	
)	
DEPARTMENT OF REVENUE,)	
STATE OF OREGON,)	
)	
Defendant.)	DECISION

Plaintiffs¹ appeal Defendant's Notice of Tax Assessment, alleging Mr. Michael Spiotti on behalf of Scores Entertainment, Inc. failed to remit state income tax withholdings for all quarters of calendar year 1998. A telephone trial was held on Wednesday, February 5, 2003. Mr. Kevin Lafky, Attorney at Law, appeared on behalf of Plaintiffs. Ms. Mary Beth Pike, Conference Officer, appeared on behalf of Defendant. Mr. Michael Spiotti testified.

In a preliminary matter, Plaintiffs moved to exclude Defendant's evidence. Both the court and Plaintiffs were faxed a document on February 4, 2003, at approximately 4:56 p.m. The fax cover sheet stated that 23 pages were faxed. The court received 13 pages; Plaintiffs received 14 pages. Plaintiffs objected to the evidence because it was not submitted 10 days before the date set for trial; it was incomplete; and it was not authenticated or certified as a true copy of a report of the Oregon Liquor Control Commission. The court granted Plaintiffs' motion and the evidence was excluded.

After the court excluded its evidence, Defendant requested that the trial be

¹ At the time set for trial, Plaintiff (Scores Entertainment, Inc.) orally amended its Complaint to include Michael Spiotti, managing member, Sports Entertainment, LLC. Defendant did not object.

continued. Plaintiffs' objected to Defendant's request because Mr. Spiotti resides outside of the United States and made a special trip to Oregon for the trial. Plaintiffs argued that the additional expense of another airplane ticket or international telephone call when Plaintiffs were prepared for trial was unreasonable. In addition, the court noted that the trial date was set during a case management conference held on November 5, 2002. Ms. Pike was present at the conference.

A pre-trial conference was held on January 16, 2003. Defendant failed to appear. After receiving a voice mail message from the court, Ms. Pike called Ms. Graffenberger, court operations specialist. At that time, Ms. Graffenberger confirmed the trial date and reviewed the court's rules for submitting evidence with Ms. Pike. After careful consideration, the court denied Defendant's request.

STATEMENT OF FACTS

Plaintiff, Mr. Michael Spiotti, is the managing member of Sports Entertainment, LLC. On October 15, 1998, Sports Entertainment, LLC purchased the assets of Scores Entertainment, Inc. At some unknown date, Defendant assessed Mr. Spiotti "as the liable officer" for Scores Entertainment, Inc. "for non-payment of withholding taxes from 1st quarter of 1998 through 4th quarter of 1998." (Def's letter dated December 4, 2001, to Mr. Michael Spiotti.) Mr. Spiotti testified that Scores Entertainment, Inc. was owned by his uncle, Patrick Johnson, and another individual, Brian Lovick. The Articles of Incorporation of Scores Entertainment, Inc. stated that Brian Lovick was a director of the corporation. (Ptf's Ex 4 at 1.) Mr. Johnson was not listed as a director.

In reference to the Oregon Administrative Rule (OAR) 150-316.162(3) entitled Personal Liability of Responsible Officers or Employees (sic) for Taxes Withheld and his association with Scores Entertainment, Inc., Mr. Spiotti responded "no" when asked if

among other duties he had:

- “(a) the power or authority to see that the withholding taxes are paid when due;
- “(b) power or authority to prefer one creditor over another;
- “(c) authority to hire and fire employees;
- “(d) authority to set working conditions and schedules;
- “(e) authority to sign or co-sign checks;
- “(f) authority to compute and sign payroll tax reports;
- “(g) authority to make fiscal decisions of the corporation;
- “(h) authority to incur debt on behalf of the corporation;
- “(i) knowledge of the nonpayment of the withholding taxes;
- “(j) exercised authority on behalf of the corporation at or after the time the duty arose to collect and hold the taxes.”

With respect to his knowledge of nonpayment of the withholding taxes, Ms. Pike asked if Mr. Spiotti met with an Oregon revenue agent on November 10, 1998, and was he informed that the taxes had not been paid. Mr. Spiotti testified that he could not remember the exact date, but he learned sometime after he purchased the assets of Scores Entertainment, Inc. that the taxes had not been paid. He testified that Section 2.12, Tax Matters, of the Asset Purchase Agreement (Agreement) represented that all tax returns and taxes had been filed and paid on a timely basis. (Ptf’s Ex 2 at 5-6.) Specifically, the Agreement states as follows: “Seller has withheld from employee wages and paid over to the proper governmental authorities all amounts required to be so withheld and paid over.” (*Id.* at 6.) Mr. Spiotti testified that he had no knowledge at the time the Agreement was signed that the Seller was not in compliance with Section 2.12 of the Agreement.

COURT'S ANALYSIS

ORS 316.167² imposes an obligation upon every employer to withhold income taxes from wages and salary paid to employees. Oregon’s income tax withholding law provides that an individual officer or employee of a corporation may under certain

²All references to the Oregon Revised Statutes (ORS) are to 1997.

circumstances be personally responsible for payment of withholding taxes on the wages of corporate employees. Personal responsibility was imposed through a 1961 amendment to the withholding law and arises through the following definition of “employer” in ORS 316.162(4):

“(a) A person who is in such relation to another person that the person may control the work of that other person and direct the manner in which it is to be done; or

“(b) An officer or employee of a corporation, or a member or employee of a partnership, who as such officer, employee or member is under a duty to perform the acts required of employers by ORS 316.167, 316.182, 316.197, 316.202 and 316.207.”

The intent of the statute is to impose liability on those individuals who have the ability to control or the authority to direct payment of withheld taxes. *Sayles v. Dept. of Rev.*, 13 OTR 324, 326 (1995). In this case, Mr. Spiotti was not an officer of Scores Entertainment Inc., Mr. Spiotti was an employee or consultant to Scores Entertainment, Inc.

Defendant has promulgated a rule, OAR 150-316.162(3), to aid in assessing the liability of an employee for unpaid withholding taxes. Using the OAR as a framework, Mr. Spiotti was asked questions about his duties while employed by Scores Entertainment, Inc. He denied that he had responsibility for any of the duties listed in the OAR. Defendant did not submit any evidence to refute Mr. Spiotti’s testimony.

Defendant expressed an opinion that at the time Mr. Spiotti purchased the assets of Scores Entertainment, Inc. he had knowledge that the withholding taxes had not been paid. Under the terms of the Agreement dated October 15, 1998, the seller represented that all tax returns had been filed and taxes paid. (Ptf’s Ex 2 at 5-6.) Defendant testified that Mr. Spiotti was notified on November 10, 1998, that the withholding taxes had not been paid.

Mr. Spiotti could not remember the exact date he learned that the withholding taxes had not been paid by Scores Entertainment, Inc. If the date of notification was November 10, 1998, then the notification occurred after Mr. Spiotti through his corporation Sports Entertainment, LLC purchased the assets of Scores Entertainment, Inc. Because the notification date occurred after the purchase date, there does not appear to be any evidence to support a conclusion that at the time Mr. Spiotti signed the Agreement he knew withholding taxes were unpaid and the representation in the Agreement relating to taxes was not correct. In addition, the court notes that Sports Entertainment, LLC purchased the “assets” of Scores Entertainment, Inc. and assumed some liabilities. (Ptf’s Ex 2 at 2.) The Agreement at Section 2.7 represented the absence of any undisclosed liabilities. There was no evidence that Mr. Spiotti knew of any undisclosed liabilities at the time the Agreement was signed.

Defendant raised an additional concern about an agreement permitting Scores Entertainment, Inc. to continue using the assets purchased by Sports Entertainment, LLC until November 15, 1998. (Ptf’s Ex 3.) Defendant suggested to the court that because this agreement was signed after the alleged date of notification (November 10, 1998) Mr. Spiotti should be personally liable for the unpaid withholding taxes. Defendant did not submit any evidence to support its conclusion. The court does not agree that the subsequent agreement can attribute knowledge to Mr. Spiotti concerning the unpaid withholding taxes at the time of the asset purchase.

CONCLUSION

Now, therefore,

IT IS THE DECISION OF THIS COURT that Plaintiff (Mr. Michael Spiotti) is not personally liable for the unpaid state income tax withholdings of Scores Entertainment,

///

Inc. for all quarters of calendar year 1998.

Dated this _____ day of March, 2003.

JILL A. TANNER
PRESIDING MAGISTRATE

IF YOU WANT TO APPEAL THIS DECISION, FILE A COMPLAINT IN THE REGULAR DIVISION OF THE OREGON TAX COURT, FOURTH FLOOR, 1241 STATE ST., SALEM, OR 97301-2563. YOUR COMPLAINT MUST BE SUBMITTED WITHIN 60 DAYS AFTER THE DATE OF THE DECISION OR THIS DECISION BECOMES FINAL AND CANNOT BE CHANGED.

THIS DOCUMENT WAS SIGNED BY MAGISTRATE JILL A. TANNER ON MARCH 25, 2003. THE COURT FILED THIS DOCUMENT ON MARCH 25, 2003.