

IN THE OREGON TAX COURT
MAGISTRATE DIVISION
Withholding Tax

WILSON ZEHR,)	
)	
Plaintiff,)	TC-MD 060711E
)	
v.)	
)	
DEPARTMENT OF REVENUE,)	
State of Oregon,)	
)	
Defendant.)	DECISION

Plaintiff appeals Defendant’s determination that Plaintiff is personally responsible for underpaid fourth quarter 2003 withholding taxes of Launchpoint, Inc. (Launchpoint).¹ A trial was held in the courtroom of the Oregon Tax Court May 9, 2007. Wilson Zehr appeared on his own behalf. Sean Barnhart (Barnhart), Auditor, appeared on behalf of Defendant.

I. STATEMENT OF FACTS

In 1999, Defendant started a company called Zairmail, a venture-backed company that provided automated direct mail services for small business. It eventually grew to approximately 40 employees. In 2003, iPost, Inc. (iPost) acquired the assets of Zairmail. Timberline Venture Partners (TVP), a limited partnership investment group, created iPost and filed Articles of Incorporation August 20, 2003. (Def’s Ex A.) Two of TVP’s general members, William R. Kallman (Kallman) and Jeffrey C. Tung (Tung), served as the original Directors of iPost and held all officer positions. (Def’s Exs A-14, B-1.) Subsequently, on September 8, 2003, Kallman and Tung held a board meeting where they resigned from their officer positions and appointed Plaintiff to serve as President and Chief Executive Officer (CEO), Vice President, Secretary, and

¹ Plaintiff’s Complaint states he is appealing third quarter 2003 withholding taxes. After further clarification by Defendant, Plaintiff now understands the liability is for the fourth quarter of 2003.

Treasurer. (Def's Ex B-1, 2.) In addition, they voted to increase the Board of Directors to three directors and appointed Plaintiff to fill the third vacancy. (*Id.* at B-2.)

On September 24, 2003, Plaintiff filed a Combined Employer's Registration for iPost with Defendant. On that registration form, Plaintiff lists himself as being responsible for filing tax returns, paying taxes, hiring and firing employees, and determining which creditors to pay first. (Def's Ex C.) One of the first actions taken by Plaintiff as CEO was to hire a company called Paychex to prepare iPost's payroll. Plaintiff was familiar with Paychex because it had prepared payroll for Zairmail. On September 24, 2003, Plaintiff signed a Power of Attorney and Declaration of Representative naming Diane Rambo of Paychex as iPost's Attorney-in-fact for tax matters and filed that document with Defendant. (Def's Ex D.) Later, Plaintiff decided to hire a new payroll service to create separation between iPost and Zairmail. In the fourth quarter 2003, he engaged ADP to handle iPost's payroll. Although engaged in 2003, ADP did not start processing payroll until the first quarter of 2004. Plaintiff explained that Paychex and ADP would prepare payroll checks and use a stamp with his signature to sign the checks. The company would then send the checks to Plaintiff in a large envelope with a summary for verification.

Soon after iPost's creation, it came to the attention of Plaintiff that the company's name had a conflict with a California company. As a result, on October 22, 2003, Plaintiff, as President, filed Amended Articles of Incorporation with the Secretary of State changing the name of the company to Launchpoint.² (Def's Ex E.)

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² Plaintiff, as President, filed Restated Articles of Incorporation with the Secretary of State June 8, 2004. (Def's Ex I.)

On December 24, 2003, Plaintiff handwrote a check for \$5,592.72 payable to the Oregon Department of Revenue. (Def's Ex G.) Attached to the check was a payment coupon directing Defendant to apply the funds to fourth quarter "State Withholding" tax. (Def's Ex H.) Plaintiff does not recall the details of the payment. Barnhart testified that, typically, withholding taxes are paid to Defendant when each payroll is issued. For reasons not clear to Plaintiff, Paychex did not pay withholdings in advance. In July 2004, Defendant received a Form OQ and Schedule B for fourth quarter 2003 taxes from Plaintiff. (Def's Exs J-1, 2.) Plaintiff signed and dated the Form OQ July 20, 2004. (*Id.* at J-1.) On the form, it states that the fourth quarter 2003 withholding tax liability was \$6,819.19. It further states that a prepayment of \$6,819.19 had been applied to that liability. (*Id.*) Because Defendant had record of only \$5,592.72 being paid, it determined a deficiency existed and sent notice of the liability in August 2004.

Plaintiff testified that TVP used a drip funding model for Launchpoint. Instead of providing funds outright, and thereby allowing Launchpoint to run its operations, TVP attempted to reduce its risk by funding Launchpoint on a weekly or biweekly basis. Plaintiff testified that, every week or two, he would send a list of expenses that needed to be paid to Kallman and Tung, Launchpoint's two other directors and partners in TVP, which they would either approve or deny. If approved, they would wire the money to Launchpoint's account for payment. Plaintiff explained that payroll was the biggest expense and he would provide the men with the numbers provided by Paychex (or ADP). Plaintiff testified that, although he could sign checks, his discretionary authority was limited to approximately \$1,000.

TVP was not the only funding source for Plaintiff. The Portland Development Commission (PDC) also provided Launchpoint with a loan. At the directive of the PDC, John Griffith (Griffith) served as a "part-time" Chief Financial Officer (CFO) for Launchpoint.

According to Plaintiff, Griffith was a partner in Tatum Partners, which “rented out” CFOs to companies in need. Plaintiff testified that Griffith would help prepare expense sheets to submit to Kallman and Tung. Plaintiff submitted an email he sent to Kallman, Tung, and Griffith on August 6, 2004, explaining the financial status and needs of Launchpoint. (Ptf’s Ex 3.)

The court questioned Plaintiff about where receipts from transactions were placed. Plaintiff testified that most of the money came from credit card receipts and that those receipts went to Launchpoint’s “production partners.” Plaintiff explained that Launchpoint built the software for the direct mail campaigns, and businesses wanting direct mailing would go to their site, upload a document, and upload a mailing list or buy a mailing list from the company. Launchpoint would then take the document to a commercial printing company, *i.e.*, their production partners, for preparation. Plaintiff testified that “the production guys were so nervous about getting paid” that “all the credit card funds went to their merchant accounts.” Plaintiff explained that the production partners would then send any excess monies to Launchpoint. Launchpoint’s main production partner was a business named Best Strategy.

Plaintiff testified that, by August 2004, Kallman and Tung were not adequately funding Launchpoint’s operations. Frustrated, Plaintiff resigned that month. Kallman and Tung appointed a new president who handled the wind up and shut down of Launchpoint. Plaintiff testified that Launchpoint ceased operations in September or October of 2004. Because the PDC was in first position on Launchpoint’s assets, it foreclosed on the assets and sold them to Best Strategy.

After investigating Launchpoint and the nature of its organization, Defendant determined that Plaintiff, as the President and CEO, Vice President, Secretary, and Treasurer, was responsible for ensuring withholding taxes were paid. As a result, Defendant pursued Plaintiff

individually for collection of the unpaid withholding tax. Plaintiff claims he should not be held responsible because Kallman and Tung controlled Launchpoint's cash flow. Plaintiff also argues that he had no idea a deficiency existed and that he only paid what Paychex and ADP told him to pay.

II. ANALYSIS

ORS 316.167³ requires employers to “deduct and retain” withholding taxes from employee wages. The money deducted is held by the employer in trust for the State of Oregon. ORS 316.207(1). Employers are required to file quarterly tax reports with Defendant and, with the reports, shall pay any tax due. ORS 316.168(1), (2)(a). “Recognizing that corporations must act through people, the legislature has imposed personal liability on the people who have the duty to perform the corporate obligation to withhold and pay income taxes.” *Sayles v. Dept. of Rev.*, 13 OTR 324, 326 (1995). ORS 316.162(3)(b) defines an employer as:

“An officer or employee of a corporation * * * who as such officer, employee or member is under a duty to perform the acts required of employers by [statutes for withholding and paying withholding taxes].”

Plaintiff claims he should not be held personally responsible for the withholding taxes because he lacked the requisite authority and control in the company to see that taxes were paid. The documents submitted by Defendant, however, suggest otherwise. Plaintiff's signature appeared on payroll checks, he paid the bills of the company, he managed the employees, he engaged Paychex and ADP to perform the payroll duties of Launchpoint, he filed documents with Defendant and the Secretary of State, and he held every officer position. From the information submitted, Plaintiff had the most day-to-day control over the corporation.

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³ All references to the Oregon Revised Statutes (ORS) are to 2003.

Plaintiff argues that he simply paid whatever amount Paychex or ADP told him to pay and that, if Launchpoint underpaid a quarter, it was due to a mistake on Paychex's part. That may be true, but as President and CEO, Vice President, Secretary, and Treasurer, Plaintiff had a *responsibility* to ensure the accuracy of those reports. The court certainly does not blame Plaintiff for not "redoing" the reports, but he cannot complain when those reports prove to be inaccurate. The applicable Oregon Administrative Rule states that "[a]n employer cannot avoid personal liability by delegating their responsibilities to another." OAR 150-316.162(3)(1).⁴ In *Gagon v. Department of Revenue*, 13 OTR 41, 43 (1993), the Tax Court held:

"Officers of corporations may not abdicate their responsibility to others. If they have a duty to see that withholding taxes are paid, they are obligated to carry out that duty."

Further, not knowing of the underpayment does not excuse an officer from personal liability for withholding taxes because the state statute on withholding is mandatory and does not require "willfulness" on the part of a responsible officer. *See Robblee v. Dept. of Rev.*, 13 OTR 505, 510 (1996) (contrasting the federal statute on personal liability, which requires an element of willfulness, with the state statute, which does not).

Plaintiff spent considerable time testifying as to the nature of the funding system in place. He argues that TVP controlled the funds of the corporation and that Kallman and Tung provided funds for only those bills they intended to pay. It is important to observe, however, that Kallman and Tung never refused to pay withholding taxes. In fact, the only missed payment was the underpayment for the fourth quarter of 2003. If the mistake had been discovered more timely by Plaintiff, it is possible, if not probable, TVP would have funded the shortage.

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⁴ All references to the Oregon Administrative Rules are to 2003.

Further, in *Robblee*, the taxpayer made a similar argument that its cash flow was controlled and restricted by its lender. The Tax Court rejected the taxpayer's argument as follows:

“ORS 316.167(1) imposes a duty on the employer to withhold taxes. From the text and context of the statute, no amount of control by a lender relieves the employer of that duty. The mandatory ‘shall’ admits no excuse.”

Robblee, 13 OTR at 511.

Plaintiff also points out that he was part of a three-member board and that Kallman and Tung, the two other board members, held most of the authority on the board. As a result, he argues, he had no real control. In *Gagon*, the taxpayer made a similar argument, which the Tax Court rejected. The court stated:

“Plaintiff views himself as outvoted and, therefore not in control. He believes this absolves him from responsibility. However, the statute does not require the officer or employee to be in control.”

Gagon, 13 OTR at 43.

Finally, at the end of trial, Plaintiff testified that he filed for personal bankruptcy and wondered whether the subject debt should have been resolved in bankruptcy. He further questioned whether paying the liability is even permissible at this point. In *Sayles*, the taxpayer argued that assessed penalties and interest should have been discharged in bankruptcy. The court responded that whether a debt is discharged in bankruptcy “is an issue for the Bankruptcy Court, not the Tax Court.” *Sayles*, 13 OTR at 328. The court here similarly finds that it is without authority to consider the nature of debts that should or should not have been discharged in Plaintiff's bankruptcy.

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III. CONCLUSION

After considering all the evidence and testimony, the court finds Plaintiff was responsible for payment of the withholding tax and is, therefore, personally liable for the debt. Now, therefore,

IT IS THE DECISION OF THIS COURT that Plaintiff's appeal is denied.

Dated this _____ day of August 2007.

COYREEN R. WEIDNER
MAGISTRATE

If you want to appeal this Decision, file a complaint in the Regular Division of the Oregon Tax Court, by mailing to: 1163 State Street, Salem, OR 97301-2563; or by hand delivery to: Fourth Floor, 1241 State Street, Salem, OR.

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 Coyreen R. Weidner on August 9, 2007. The Court filed and entered this document on August 9, 2007.