

MARC A. MAIN  
109 Ellinor Street  
Mobile, AL 36606,  
DIVISION

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STATE OF ALABAMA  
DEPARTMENT OF REVENUE  
ADMINISTRATIVE LAW

Taxpayer,

§

DOCKET NO. P. 01-372

v.

§

STATE OF ALABAMA  
DEPARTMENT OF REVENUE.

§

### **FINAL ORDER**

The Revenue Department assessed a 100 percent penalty against Marc A. Main ("Taxpayer"), as a person responsible for paying the withholding tax liability of MarCorMic, Inc., for the quarters ending December 1993 and June and September 1994, and the sales tax liability of the corporation for September 1994, December 1994 through April 1995, and June, July, and August 1995. The Taxpayer paid the tax in issue and applied for a refund. The Department denied the refund. The Taxpayer timely appealed to the Administrative Law Division pursuant to Code of Ala. 1975, §40-2A-7(c)(5)a. A hearing was conducted on January 10, 2002. Jim Green and Andy Smith represented the Taxpayer. Assistant Counsel Duncan Crow represented the Department.

### **ISSUE**

The issue in this case is whether the Taxpayer is personally liable for the unpaid withholding and sales taxes of MarCorMic, Inc. pursuant to Alabama's 100 percent penalty statutes, Code of Ala. 1975, §§40-29-72 and 40-29-73. That issue turns on whether the Taxpayer was a person responsible for paying the taxes of the corporation, and in that capacity willfully failed to do so.

### **FACTS**

The Taxpayer and three other individuals, Courtlandt Inge, Michelle Manzer, and Donnie McGregor, formed MarCorMic, Inc. in 1993. They each owned 25 percent of the corporation.

The corporation opened an upscale restaurant, The Bakery, in Mobile, Alabama in 1993. All four owners worked at the restaurant. Manzer was primarily responsible for the administrative office work, which included doing the payroll, paying the utilities, taxes, and other monthly bills, etc. She also managed the wait staff. McGregor ran the bar and helped Manzer manage the wait staff. The Taxpayer was responsible for the kitchen. Inge helped the Taxpayer in the kitchen and also assisted Manzer with the administrative duties.

The Taxpayer had check signing authority on the corporation's checking account, and was listed as a corporate officer on the checking account signature card. The other owners also had check signing authority. The Taxpayer was also named as an officer on the corporation's application to the Department for a combined sales and withholding tax license.

In late 1993, the four owners formed a partnership for the purpose of operating a restaurant, The Grill, in Baldwin County, Alabama. The Grill opened in May 1994, and was operated full-time by the Taxpayer and McGregor. Those individuals stopped working at and receiving a salary from The Bakery at that time, and instead began receiving a salary from The Grill. The Taxpayer and McGregor continued to work full-time at The Grill through at least the end of 1995.

The Taxpayer resided in Mobile near The Bakery in 1994 and 1995. He stopped by The Bakery most mornings on his way to The Grill to pick up bread and pastries to be used at The Grill. While at The Bakery, the Taxpayer occasionally signed checks on The Bakery account. He left the checks with an employee so that vendors that delivered goods during the day could be paid.

The employee filled out the vendor's name and the amount of the check when the vendors arrived later in the day.

The corporation began suffering financially in late 1993, and consequently failed to pay its State sales and withholding tax liabilities in full. Manzer claims she constantly told the Taxpayer and the other owners about the unpaid taxes. The Taxpayer acknowledges that he was vaguely aware of some unpaid taxes, but that he thought the problem was being handled. The Taxpayer received a delinquent notice from the Department in mid-1995 concerning the corporation's taxes, which he immediately brought to Inge's attention. According to the Taxpayer, Inge told him that the problem was being taken care of. Manzer also testified that Inge told both her and the Taxpayer that the corporation's delinquent taxes were being handled.

The Taxpayer argues that even before he left to open the Baldwin County restaurant in May 1994, his sole responsibility at The Bakery was to manage the kitchen. He concedes he signed some checks as necessary to pay the food vendors, but that he otherwise had no control over the corporation's checkbook and made no decisions about which other creditors to pay. He contends he had nothing to do with paying the corporation's taxes, which he claims were handled by Manzer and Inge. He admits that he went by The Bakery on occasion after May 1994 to visit and see how business was in general, but that he had nothing to do with managing the business after The Grill opened in May 1994.

A hostess that worked at The Bakery in 1994 and 1995 confirmed the general responsibilities of each owner as stated above. She testified that after The Grill opened in mid-1994, the Taxpayer came into The Bakery periodically to pick up supplies, but that he no longer worked there and was not involved in its day-to-day operations.

The bakery chef that has worked at The Bakery since it opened testified that even after The Grill opened, the Taxpayer was still at The Bakery on a regular basis. However, she did not know to what extent he was involved in running the business. She did state that when one of her paychecks was returned for insufficient funds in 1995, the Taxpayer paid her the amount of the check in cash. The bakery chef is still working at The Bakery under the supervision of Manzer.

The CPA that handled the corporation's business during the period in question testified that he dealt exclusively with Manzer and Inge concerning The Bakery's taxes. He did work with the Taxpayer concerning The Grill's taxes.

Manzer adamantly claims that the Taxpayer was well aware that the corporation's taxes were not being paid. She also argues that the Taxpayer was at The Bakery on a regular basis after The Grill opened in May 1994, as evidenced by the numerous bookings he made in The Bakery's reservation book in 1995.

The Department was unable to collect the sales and withholding taxes in issue from the corporation, which has ceased operating. The Department assessed Manzer for a portion of the corporation's unpaid trust fund taxes, which she has paid. There is no indication whether the Department has assessed or intends to assess Inge and/or McGregor for any part of the unpaid taxes, or whether it intends to again assess Manzer for any of the remaining tax due.

### **ANALYSIS**

Section 40-29-73 provides that any person required to collect, account for, or pay any sales, use, withholding, or other trust fund tax administered by the Department who willfully fails to do so is personally liable for such tax. That Alabama statute is modeled after 26 U.S.C. §6672. Consequently, federal case

law construing §6672 should also apply for Alabama purposes. *Best v. State, Dept. of Revenue*, 417 So.2d 197 (Ala.Civ.App. 1981).

An individual is personally liable for the unpaid trust fund taxes of a corporation only if (1) the person was responsible for collecting, accounting for, or paying over the taxes, and (2) as a responsible person, the individual willfully failed to do so. *U.S. v. Rem*, 38 F.3d 634 (2nd Cir. 1994); *Morgan v. U.S.*, 937 F.2d 281 (5th Cir. 1991).

The criteria for determining if an individual was “responsible” for paying a trust fund tax under §6672 (and thus §40-29-73) was articulately set out in *Vinick v. U.S.*, 205 F.3d 1 (1st Cir. 2000), as follows:

A responsible person under §6672 is anyone within a company who has a duty to collect, account for, or pay the withheld taxes. See *Vinick I*, 110 F.3d at 172. In determining who falls within the category of responsible person, the courts have identified seven typically used, but nonexclusive, indicia. The inquiry focuses on whether the individual (1) is an officer or member of the board of directors, (2) owns shares or possesses an entrepreneurial stake in the company, (3) is active in the management of day-to-day affairs of the company, (4) has the ability to hire and fire employees, (5) makes decisions regarding which, when and in what order outstanding debts or taxes will be paid, (6) exercises control over daily bank accounts and disbursement records, and (7) has check-signing authority.

*Fiataruolo v. United States*, 8 F.3d 930, 939 (2d Cir. 1993); accord *Barnett v. IRS*, 988 F.2d 1449, 1455 (5th Cir. 1993); *Denbo v. United States*, 988 F.2d 1029, 1032 (10th Cir. 1993); *Brounstein v. United States*, 979 F.2d 952, 954-55 (3d Cir. 1992); *Thomsen v. United States*, 887 F.2d 12, 16 (1st Cir. 1989); *Gephart v. United States*, 818 F.2d 469, 473 (6th Cir. 1987). No single factor is determinative of responsibility. See *Barnett*, 988 F.2d at 1455. The deciding court must look at the “totality of the circumstances” when making the determination of responsibility. *Fiataruolo*, 8 F.3d at 939 (“The question of control over the employer’s finances must be answered in light of the totality of the circumstances; no one factor is determinative.”).

Because the goal of the statute is to hold liable for the nonpayment of withholding taxes the party responsible for such payment, the

“crucial inquiry is whether the person had the ‘effective power’ to pay the taxes--that is, whether he had the actual authority or ability, in view of his status within the corporation to pay the taxes owed.” *Barnett*, 988 F.2d at 1454; see also *Raba v. United States*, 977 F.2d 941, 943 (5th Cir. 1992) (“The crucial examination is whether a person had the effective power to pay taxes.” (internal quotation marks and citation omitted)).

*Vinick*, 205 F.3d at 7.

The *Vinick* court divided the seven factors listed above into three categories. The first two factors involve the taxpayer’s status within the corporate structure. The court concluded that a person’s title or titular authority within the corporation is not controlling. Nor is the fact that the individual may have an ownership interest in the enterprise. *Vinick*, 205 F.3d at 8. That is, a person may be an officer and owner of a business, but not be a person responsible for paying the business’s taxes. Thus, while still relevant, the court seemed to indicate that factors (1) and (2) were of lesser importance than the other factors.

The next two factors relate to the taxpayer’s involvement in the ongoing activities of the business. Factor (3) requires that the person must be involved in the day-to-day running of the business. Factor (4) is related to factor (3) because the ability to hire and fire employees shows the person’s level of individual involvement in the business.

The last three factors were emphasized by the court as the most important because they show if the taxpayer had financial control over the business, i.e. did the taxpayer decide which and in what order the corporation’s debts and taxes would be paid, did the taxpayer control the corporation’s bank account and business records, and did the taxpayer have check signing authority.

Of the last three factors, factors (5) and (6) are the most critical because they go directly to the controlling issue of whether an individual had financial control and the “effective power to pay the taxes.” *Vinick*, 205 F.3d at 9, quoting *Morgan v. United States*, 937 F.2d at 284. Factor (7) is of less importance because check signing authority by itself is insufficient unless it is exercised “in the context of financial control.” *Vinick*, 205 F.3d at 10. The “authority to sign checks, without more, is a weak pillar on which to rest a liability determination that a person is properly subject to a 100 percent penalty under §6672.” *Vinick*, 205 F.3d at 10, quoting *Barrett v. United States*, 580 F.2d 449, 453 (Ct. Cl. 1978).

In this case, the Taxpayer was an officer and part-owner of the corporation. He initially managed the kitchen at The Bakery and hired and fired kitchen employees. However, his responsibilities in the kitchen ceased after he started managing The Grill in May 1994. There is evidence he continued to stop by The Bakery on a regular basis after May 1994, either to pick up supplies and food for The Grill or to visit and see how the restaurant was doing. However, other than making a few dinner reservations for customers, there is no evidence he was actively involved in the day-to-day running of the business after May 1994.

Concerning crucial factors (5), (6), and (7) set out in *Vinick*, other than signing blank checks to pay the food vendors, the Taxpayer was not involved in deciding which creditors to pay, or in what order. Importantly, he never signed a tax return concerning the periods in issue, and never wrote a check to pay the corporation’s taxes. Those administrative duties were handled by Inge and Manzer. The corporation’s CPA confirmed that he dealt exclusively with Inge and Manzer concerning The Bakery’s taxes, not the Taxpayer. The Taxpayer also was not involved in maintaining the corporation’s checking account or

business records. He did not make decisions outside of the kitchen or exercise financial control over the corporation's day-to-day business affairs. Viewing the facts in their totality, the Taxpayer was not a responsible person within the scope of the 100 percent penalty statute.<sup>1</sup>

In view of the above holding, the issue of whether the Taxpayer willfully failed to pay the taxes in issue is moot. The refund in issue should be granted, plus applicable interest.

This Final Order may be appealed to circuit court within 30 days pursuant to Code of Ala. 1975, §40-2A-9(g).

Entered May 31, 2002.

BILL THOMPSON  
Chief Administrative Law Judge

bt:dr

cc: Duncan R. Crow, Esq.  
James P. Green, Esq.  
Andrew L. Smith, Esq.  
Joan Crumbley

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<sup>1</sup>The Department cites *Malloy v. U.S.*, 17 F.3d 329 (11th Cir. 1994) in support of its position that the Taxpayer could not delegate his responsibility to pay the taxes to the other owners. But the taxpayer in *Malloy* conceded he was a "responsible person." The only issue was whether he had willfully failed to pay the tax. (The court ruled that he had.) In this case, however, the threshold issue is whether the Taxpayer was responsible for paying the taxes. As indicated, he was not within the scope of §40-29-73.