

STATE OF NORTH CAROLINA
COUNTY OF WAKE

BEFORE THE
SECRETARY OF REVENUE

IN THE MATTER OF:

The Proposed Assessments of Income Tax)
Withheld or Required to have been)
Withheld for the Quarters Ended)
June 30, 1996, September 30, 1996,)
December 31, 1996, and March 31, 1997,)
by the Secretary of Revenue of)
North Carolina)
)
vs.)
)
[Taxpayer])

FINAL DECISION
Docket No. 2000-70

This matter was heard before the Assistant Secretary of Revenue, Michael A. Hannah, in the city of Raleigh on February 29, 2000, upon an application for a hearing by [Taxpayer]. The hearing was held by the Assistant Secretary under the provisions of G.S. 105-260.1 and was attended by Taxpayer and W. Edward Finch, Jr., Administrative Officer in the Personal Taxes Division.

[Corporation] filed reports of North Carolina income tax withheld for the quarters ended June 30, 1996, and September 30, 1996. The reports were received without payment for the tax withheld. Although requested to do so, Corporation did not file reports of North Carolina income tax withheld for the quarters ended December 31, 1996, or March 31, 1997. Consequently, the Department prepared reports estimating the amount of income tax withheld based on Corporation's filing history.

Notices of Tax Assessment for the income tax withheld or required to have been withheld for the quarters ended June 30, 1996, September 30, 1996, December 31, 1996, and March 31, 1997, plus penalties and interest, were mailed to Corporation on October 24, 1996, March 30, 1997, and July 18, 1998, respectively.

Notices of Tax Assessment for the income tax withheld but not paid by Corporation for the quarters ended June 30, 1996, and September 30, 1996, plus penalties and interest, were mailed to Taxpayer on May 17, 1998. Taxpayer did not timely request a hearing on these assessments.

Notices of Tax Assessment for the income tax withheld but not paid by Corporation for the quarters ended December 31, 1996, and March 31, 1997, plus penalties and interest, were mailed to Taxpayer on July 18, 1999. Taxpayer objected to these proposed assessments and filed a timely request for a hearing before the Secretary of Revenue.

ISSUE

The issue to be decided in this matter is:

Is Taxpayer responsible for deducting, accounting for, or paying the income tax withheld or required to have been withheld from wages paid to employees by Corporation for the quarters ended December 31, 1996, and March 31, 1997, and personally and individually liable for payment of the tax withheld or required to have been withheld but not paid to the Secretary of Revenue for those quarters?

EVIDENCE

Evidence presented by W. Edward Finch, Jr., Administrative Officer in the Personal Taxes Division, consisted of the following:

1. Memorandum from Muriel K. Offerman, Secretary of Revenue, to Michael A. Hannah, Assistant Secretary of Revenue, dated April 18, 1996, a copy of which is designated as Exhibit PT-1.
2. Notice of Tax Assessment to Corporation for the quarter ended June 30, 1996, dated October 24, 1996, a copy of which is designated as Exhibit PT-2.
3. Notice of Tax Assessment to Corporation for the quarter ended September 30, 1996, dated March 30, 1997, a copy of which is designated as Exhibit PT-3.
4. Notice of Tax Assessment to Corporation for the quarter ended December 31, 1996, dated July 18, 1998, a copy of which is designated as Exhibit PT-4.
5. Notice of Tax Assessment to Corporation for the quarter ended March 31, 1997, dated July 18, 1998, a copy of which is designated as Exhibit PT-5.
6. Notice of Tax Assessment to Taxpayer for the quarter ended June 30, 1996, dated May 17, 1998, a copy of which is designated as Exhibit PT-6.
7. Notice of Tax Assessment to Taxpayer for the quarter ended September 30, 1996, dated May 17, 1998, a copy of which is designated as Exhibit PT-7.
8. Notice of Tax Assessment to Taxpayer for the quarter ended December 31, 1996, dated July 18, 1999, a copy of which is designated as Exhibit PT-8.

9. Notice of Tax Assessment to Taxpayer for the quarter ended March 31, 1997, dated July 18, 2000, a copy of which is designated as Exhibit PT-9.
10. Employer's Reports of North Carolina Income Tax Withheld for the quarters ended March 31, 1996, and June 30, 1996, copies of which are designated as Exhibit PT-10.
11. Employer's Reports of North Carolina Income Tax Withheld for the quarters ended September 30, 1996, and December 31, 1996, copies of which are designated as Exhibit PT-11.
12. Employer's Report of North Carolina Income Tax Withheld for the quarter ended March 31, 1997, a copy of which is designated as Exhibit PT-12.
13. Bank signature card for Corporation's account with [Bank # 1] dated November 25, 1994, a copy of which is designated as Exhibit PT-13.
14. Bank signature card and Certificate of Corporate Resolution Authorizing the Opening of Deposit Accounts for Corporation's account with [Bank # 2] dated November 7, 1995, copies of which are collectively designated as Exhibit PT-14.
15. Corporation's [check] dated November 1, 1996, and made payable to the Department of Revenue in payment of income tax withheld, plus penalty and interest for the quarter ended March 31, 1996, a copy of which is designated as Exhibit PT-15.
16. Corporation's annual report to the Secretary of State of North Carolina dated April 30, 1994, a copy of which is designated as Exhibit PT-16.
17. Corporation's North Carolina S Corporation Franchise and Income Tax Return and United States Income Tax Return for an S Corporation for the fiscal year ended March 31, 1995, copies of which are collectively designated as Exhibit PT-17.
18. Faxed message and related attachments from Taxpayer to Gerry F. Finnen, Administrative Officer in the Office Services Division, dated March 29, 1999, copies of which are collectively designated as Exhibit PT-18.
19. Letter and related attachments from Taxpayer to Gerry F. Finnen dated May 19, 1999, copies of which are collectively designated as Exhibit PT-19.
20. Letter from Gerry F. Finnen to Taxpayer dated November 5, 1999, a copy of which is designated as Exhibit PT-20.
21. Letter and related attachment from Gerry F. Finnen to Taxpayer dated November 9, 1999, copies of which are collectively designated as Exhibit PT-21.
22. Letter from Taxpayer to the Department of Revenue dated December 5, 1999, a copy of which is designated as Exhibit PT-22.

23. Letter from Michael A. Hannah to Taxpayer dated January 20, 2000, a copy of which is designated as Exhibit PT-23.
24. Letter from Michael A. Hannah to Taxpayer dated January 31, 2000, a copy of which is designated as Exhibit PT-24.

At the conclusion of the hearing, the Assistant Secretary allowed Taxpayer time to submit additional information. Taxpayer subsequently furnished additional information, which is entered into the evidence as follows:

1. Corporate bylaws, minutes and various stock certificates of Corporation, copies of which are collectively designated as Exhibit TP-1.
2. Various documents of Corporation, copies of which are collectively designated as Exhibit TP-2.
3. Taxpayer's copies of North Carolina individual income tax returns for taxable years 1995 through 1998 and federal income tax returns for taxable years 1994, 1995, and 1996, copies of which are collectively designated as Exhibit TP-3.

Subsequent to the hearing the Assistant Secretary entered into the evidence the following:

1. Letter from Michael A. Hannah to Taxpayer dated March 1, 2000, a copy of which is designated as Exhibit S-1.
2. Letter from Michael A. Hannah to Taxpayer dated March 6, 2000, a copy of which is designated as Exhibit S-2.
3. Letter and related attachment from Michael A. Hannah to Taxpayer dated June 12, 2000, copies of which are collectively designated as Exhibit S-3.

FINDINGS OF FACT

Based on the foregoing evidence of record, the Assistant Secretary makes the following findings of fact:

1. Taxpayer is and at all material times was a natural person, sui juris, and during the months at issue, an officer in a corporation doing business in North Carolina.
2. Corporation filed reports of North Carolina income tax withheld for the quarters ended June 30, 1996, and September 30, 1996. The reports were received without payment for the tax withheld. Although requested to do so, Corporation did not file reports of North Carolina income tax withheld for the quarters ended December 31, 1996, or March 31,

1997. Consequently, the Department prepared reports estimating the amount of income tax withheld based on Corporation's filing history.

3. Notices of Tax Assessment for the income tax withheld or required to have been withheld by Corporation for the quarters ended June 30, 1996, and September 30, 1996, plus penalties and interest were mailed to Corporation on October 24, 1996, and March 30, 1997, respectively. Notices of Tax Assessment for the income tax withheld or required to have been withheld by Corporation for the quarters ended December 31, 1996, and March 31, 1997, plus penalties and interest were mailed to Corporation on July 18, 1998. Corporation did not pay the assessments.
4. Notices of Tax Assessment assessing Taxpayer as a responsible person for the income tax withheld but not paid by Corporation for the quarters ended June 30, 1996, and September 30, 1996, plus penalties and interest, were mailed to Taxpayer on May 17, 1998. Taxpayer did not timely request a hearing on these assessments; therefore, they are not subject to an administrative tax hearing. However, the issues surrounding these two periods are the same as the issues in other periods for which Taxpayer timely requested the hearing. Taxpayer paid the liability for the quarter ended June 30, 1996, and has paid \$2,046.90 towards the liability for the quarter ended September 30, 1996.
5. Notices of Tax Assessment assessing Taxpayer as a responsible person for the income tax withheld but not paid by Corporation for the quarters ended December 31, 1996, and March 31, 1997, plus penalties and interest, were mailed to Taxpayer on July 18, 1999. Taxpayer objected to these proposed assessments and filed a timely request for a hearing before the Secretary of Revenue.
6. Taxpayer had signatory authority on Corporation's checking accounts with [Bank # 1 and Bank # 2] as evidenced by the bank signature cards. Taxpayer signed, as president, the Certificate of Corporate Resolution Authorizing the Opening of Deposit Accounts with [Bank # 2] dated November 7, 1995.
7. Taxpayer signed the check dated November 1, 1996, in the amount of \$1,511.64, sent by Corporation in payment of the State income tax withheld, plus penalty and interest for the quarter ended March 31, 1996. Taxpayer also signed, as president, the report of North Carolina income tax withheld filed by Corporation for that period.
8. Taxpayer signed, as president, the annual report dated April 3, 1994, filed by Corporation with the Secretary of State of North Carolina.
9. Taxpayer signed, as president, the State franchise and income tax return and the United States income tax return filed by Corporation for the fiscal year ended March 31, 1995.
10. Taxpayer signed, as president, the reports of North Carolina income tax withheld filed by Corporation for the quarters ended June 30, 1996, and September 30, 1996.

CONCLUSIONS OF LAW

Based on the foregoing findings of fact, the Assistant Secretary makes the following conclusions of law:

1. The amount of State income tax withheld by an employer is deemed to be held in trust for the Secretary of Revenue.
2. For assessments proposed before January 1, 1999, G.S. 105-163.8(b) provides that a person who has a duty to deduct, account for, or pay taxes required to be withheld and who fails to do so is liable for the amount not deducted, not accounted for, or not paid. The word “person” for withholding tax purposes means an individual, a fiduciary, a partnership, or a corporation and includes an officer or employee of a corporation or a member or employee of a partnership who is under a duty to perform an act in meeting the requirements of the individual income tax laws.
3. Effective for assessments proposed on or after January 1, 1999, subsection (b) of G.S. 105-163.8 was deleted and recodified as G.S. 105-253(b)(4). This section provides that a responsible officer is personally and individually liable for all income taxes required to be withheld from the wages of a corporation or limited liability company. The term “responsible officer” means the president and the treasurer of a corporation, the manager of a limited liability company, and any officer of a corporation or member of a limited liability company who has a duty to deduct, account for, or pay income taxes required to be withheld.
4. Unlike federal law, State law does not require that the failure to deduct, account for, or pay withheld taxes be willful in order for the responsible officer to be liable.
5. More than one person may be liable as a responsible officer for the payment of income tax withheld. Existence of this liability as to one person does not affect the liability of another person having the same duty in relation to the withheld taxes.
6. To obtain a hearing, a taxpayer must file a written request within thirty days after the assessment notice was mailed. Otherwise, a taxpayer must pay the tax in full and request the hearing within three years after the date set by statute for filing the return or within six months after the payment of the tax, whichever is later.
7. A proposed assessment must be based on the best information available and such assessment is presumed to be correct.
8. The assessments proposed against Taxpayer for the tax withheld or required to have been withheld but not paid for the quarters at issue were made without error under the law.

DECISION

Corporation filed reports of North Carolina income tax withheld for the quarters ended June 30, 1996 and September 30, 1996. The reports were received without payment for the tax withheld. Although requested to do so, the Corporation did not file reports of North Carolina income tax withheld for the quarters ended December 31, 1996, or March 31, 1997.

Consequently, the Department prepared reports estimating the amount of income tax withheld based upon the best information available, the Corporation's filing history, as permitted by statute.

Pursuant to the requirements of G.S. 105-241.1, Notices of Tax Assessment for the income tax withheld or required to have been withheld for the quarters ended June 30, 1996, September 30, 1996, December 31, 1996, and March 31, 1997, plus penalties and interest, were mailed to the Corporation on October 24, 1996, March 30, 1997, and July 18, 1998, respectively.

On May 17, 1998, the Taxpayer was assessed for the income tax withheld but not paid by the Corporation for the quarters ended June 30, 1996 and September 30, 1996, plus penalties and interest pursuant to G.S. 105-163.8(b). The Taxpayer did not request a hearing on these proposed assessments and instead paid the liability for the quarter ended June 30, 1996, in full and paid \$2,046.90 towards the liability for the quarter ended September 30, 1996.

Pursuant to G.S. 105-253(b)(4), the Taxpayer was assessed for the income tax withheld but not paid by the Corporation for the quarters ended December 31, 1996, and March 31, 1997, plus penalties and interest on July 18, 1999. The Taxpayer objected to these proposed assessments and filed a timely request for a hearing before the Secretary of Revenue.

G.S. 105-241.1(c) specifically requires that a request for an administrative tax hearing be made in writing by a taxpayer within thirty days of the date it was mailed. Because the Taxpayer

did not file a request for a hearing regarding the proposed assessments for the quarters ended June 30, 1996, and September 30, 1996, the requirements set forth in the statute preclude a hearing with regard to those two quarters even though the same issues are involved.

The Taxpayer argues that, although she was a corporate officer and did in fact sign checks for withholding tax deposits as well as the associated tax returns, she did so only at the request of another corporate officer and without understanding the legal consequences of her signature on those documents. She claims that although her signature appears on various tax returns, remittance checks and other official corporate documents, she did not actually control the payroll process, did not willfully fail to pay the withheld but unpaid taxes and should not be held accountable for them as a responsible corporate officer.

G.S. 105-163.2 provides that the amount of State income tax withheld by an employer is deemed to be held in trust for the Secretary of Revenue. For assessments proposed before January 1, 1999, G.S. 105-163.8(b) provides that a person who has a duty to deduct, account for, or pay taxes required to be withheld and who fails to do so is liable for the amount not deducted, not accounted for, or not paid. The word “person,” for withholding tax purposes, means an individual, a fiduciary, a partnership, or a corporation and includes an officer or employee of a corporation or a member or employee of a partnership who is under a duty to perform an act in meeting the requirements of the individual income tax laws.

Effective for assessments proposed on or after January 1, 1999, subsection (b) of G.S. 105-163.8 was deleted and recodified as G.S. 105-253(b)(4). This subsection provides that a responsible officer is personally and individually liable for all income taxes required to be withheld from the wages of a corporation or limited liability company. The term “responsible officer” means the president and the treasurer of a corporation, the manager of a limited liability

company and any officer of a corporation or member of a limited liability company who has a duty to deduct, account for, or pay income taxes required to be withheld. Unlike federal law, the North Carolina statute does not require that the failure to deduct, account for, or pay withheld taxes be willful in order for the responsible officer to be liable.

Based upon the Taxpayer's role as president of the Corporation and the duties that she performed in that role, the Department contends that the Taxpayer is responsible for the remittance of the withheld taxes to the State under G.S. 105-253(b). In support of this contention the Department cites several facts. The Taxpayer had signatory authority on the Corporation's checking accounts with [Bank # 1 and Bank # 2] as evidenced by the bank signature cards. The Taxpayer signed, as president, the Certificate of Corporate Resolution Authorizing the Opening of Deposit Accounts with [Bank # 2] dated November 7, 1995. (Department's Exhibits PT-13 & 14). The Taxpayer signed, as corporate president, the report of North Carolina income tax withheld that was filed by Corporation for the quarter ended March 31, 1996, as well as the check dated November 1, 1996, in the amount of \$1,511.64, sent by the Corporation in payment of the State income tax withheld, plus penalty and interest for that period. (Department's Exhibits PT-10 & 15)

The Taxpayer also signed the annual report dated April 30, 1994, filed by the Corporation with the Secretary of State of North Carolina and both the North Carolina Franchise and Income Tax Return and the United States Income Tax Return for the fiscal year ended March 31, 1995, specifically noting her title as president of the Corporation. (Department's Exhibit PT-17). In addition, the Taxpayer signed the reports of North Carolina income tax withheld filed by the Corporation for the quarters ended June 30, 1996 and September 30, 1996, once again noting her title as corporate president. (Department's Exhibit PT-10)

It is apparent from the facts presented that the Taxpayer willingly and actively participated in the financial affairs of the Corporation as its president, signing numerous documents over a period of several months, including withholding tax reports and checks. In her role as corporate president, she was responsible for ensuring that the tax withheld or required to have been withheld for the two quarters at issue was set aside, retained in trust until due, and paid to the Secretary of Revenue. Even if other individuals may have also been responsible in this respect, the fact remains that the Taxpayer has met the statutory definition of responsible corporate officer in G.S. 105-253(b).

Taxpayer failed to pay over the tax withheld, or required to have been withheld, for the quarters at issue to the Secretary of Revenue. Although the Taxpayer argues that she did not intentionally fail to remit the withheld income taxes, for her to be held responsible under G.S. 105-253(b)(4), it is not necessary that failure to pay the tax be willful. Therefore, Taxpayer is personally liable for payment of the tax withheld, or required to have been withheld, but not paid to the Secretary of Revenue. In spite of the Taxpayer's protestations that she was not a responsible corporate officer for the Corporation, the evidence submitted by the Department clearly shows otherwise. Although the Taxpayer did not file a request for hearing with regard to the assessments for the two quarters ending June 30 and September 30, 1996, the matter warrants further comment because the issues are the same. It is readily apparent from the record that the Taxpayer would be held personally responsible for the payment of those two assessments under G.S. 105-163.8(b). Her actions as corporate president described above clearly show that she had a duty to deduct, account for and pay the income taxes required to be withheld from the wages of the corporation's employees.

Therefore, the assessments of tax, penalty and interest proposed against Taxpayer are deemed to be correct under the law and the facts, are sustained in their entireties, are finally determined and are immediately due and collectible together with interest as allowed by law.

Made and entered this 10th day of October, 2000.

Signature_____

Michael A. Hannah
Assistant Secretary of Revenue