

**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 December )  
31, 2000; June 30 and September 30, 2001 )  
March 31, 2002; and the months of April )  
May, June, and August 2002 through )  
October 2003, by the Secretary of Revenue )  
of North Carolina )  
)  
)  
vs. )  
)  
[Taxpayer] )

**FINAL DECISION**  
Docket No. 2004-45

This matter was heard before the Assistant Secretary for Administrative Tax Hearings, Eugene J. Cella, in the city of Raleigh on March 31, 2004, upon an application for a hearing by [Taxpayer], wherein he protested the assessments of withholding tax, penalties, and interest proposed against him as responsible officer of [a church], hereinafter referred to as "Corporation" for the periods listed above. The hearing was held by the Assistant Secretary under the provisions of G.S. 105-260.1 and was attended by [Taxpayer], [Taxpayer's wife]; and [attorneys for Taxpayer]; [Assistant Director of the Personal Taxes Division]; and Gail H. Beamon, Administrative Officer in the Personal Taxes Division.

**ISSUE**

The issue to be decided in this matter is as follows:

1. 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, 2000; June 30 and September 30, 2001; March 31, 2002; the months of April, May, June, and August 2002 through October 2003?

**EVIDENCE**

The evidence presented by W. Edward Finch, Jr., Assistant Director of the Personal Taxes Division, consisted of the following:

1. Memorandum from E. Norris Tolson, Secretary of Revenue, to Eugene J. Cella, Assistant Secretary for Administrative Tax Hearings, dated May 16, 2001, a copy of which is designated as Exhibit PT-1.
2. Corporation's North Carolina Withholding Returns for the quarters ending December 31, 2000; June 30 and September 30, 2001; March 31, 2002; and for the months of April, May, June and July, 2002; and Annual Withholding Reconciliation for the tax years 2000 and 2001, copies of which are collectively designated as Exhibit PT-2.
3. Notices of Withholding Tax Assessment to Corporation for the quarters ended December 31, 2000; June 30 and September 30, 2001; March 31, 2002; and for the months of April, May, June, and August 2002 through October 2003, copies of which are collectively designated as Exhibit PT-3.
4. Notice of Withholding-Immediate Jeopardy Tax Assessment to Taxpayer for the quarter ended December 31, 2000, dated December 2, 2003, a copy of which is designated as Exhibit PT-4.
5. Notice of Withholding-Immediate Jeopardy Tax Assessment to Taxpayer for the quarter ended June 30, 2001, dated December 2, 2003, a copy of which is designated as Exhibit PT-5.
6. Notice of Withholding-Immediate Jeopardy Tax Assessment to Taxpayer for the quarter ended September 30, 2001, dated December 2, 2003, a copy of which is designated as Exhibit PT-6.
7. Notice of Withholding-Immediate Jeopardy Tax Assessment to Taxpayer for the quarter ended March 31, 2002, dated December 2, 2003, a copy of which is designated as Exhibit PT-7.
8. Notice of Withholding-Immediate Jeopardy Tax Assessment to Taxpayer for the month of April 2002, dated December 2, 2003, a copy of which is designated as Exhibit PT-8.
9. Notice of Withholding-Immediate Jeopardy Tax Assessment to Taxpayer for the month of May 2002, dated December 2, 2003, a copy of which is designated as Exhibit PT-9.
10. Notice of Withholding-Immediate Jeopardy Tax Assessment to Taxpayer for the month of June 2002, dated December 2, 2003, a copy of which is designated as Exhibit PT-10.
11. Notice of Withholding-Immediate Jeopardy Tax Assessment to Taxpayer for the month of August 2002, dated December 2, 2003, a copy of which is designated as Exhibit PT-11.
12. Notice of Withholding-Immediate Jeopardy Tax Assessment to Taxpayer for the month of September 2002, dated December 2, 2003, a copy of which is designated as Exhibit PT-12.
13. Notice of Withholding-Immediate Jeopardy Tax Assessment to Taxpayer for the month of October 2002, dated December 2, 2003, a copy of which is designated as Exhibit PT-13.
14. Notice of Withholding-Immediate Jeopardy Tax Assessment to Taxpayer for the month of November 2002, dated December 2, 2003, a copy of which is designated as Exhibit PT-14.

15. Notice of Withholding-Immediate Jeopardy Tax Assessment to Taxpayer for the month of December 2002, dated December 2, 2003, a copy of which is designated as Exhibit PT-15.
16. Notice of Withholding-Immediate Jeopardy Tax Assessment to Taxpayer for the month of January 2003, dated December 2, 2003, a copy of which is designated as Exhibit PT-16.
17. Notice of Withholding-Immediate Jeopardy Tax Assessment to Taxpayer for the month of February 2003, dated December 2, 2003, a copy of which is designated as Exhibit PT-17.
18. Notice of Withholding-Immediate Jeopardy Tax Assessment to Taxpayer for the month of March 2003, dated December 2, 2003, a copy of which is designated as Exhibit PT-18.
19. Notice of Withholding-Immediate Jeopardy Tax Assessment to Taxpayer for the month of April 2003, dated December 2, 2003, a copy of which is designated as Exhibit PT-19.
20. Notice of Withholding-Immediate Jeopardy Tax Assessment to Taxpayer for the month of May 2003, dated December 2, 2003, a copy of which is designated as Exhibit PT-20.
21. Notice of Withholding-Immediate Jeopardy Tax Assessment to Taxpayer for the month of June 2003, dated December 2, 2003, a copy of which is designated as Exhibit PT-21.
22. Notice of Withholding-Immediate Jeopardy Tax Assessment to Taxpayer for the month of July 2003, dated December 2, 2003, a copy of which is designated as Exhibit PT-22.
23. Notice of Withholding-Immediate Jeopardy Tax Assessment to Taxpayer for the month of August 2003, dated December 2, 2003, a copy of which is designated as Exhibit PT-23.
24. Notice of Withholding-Immediate Jeopardy Tax Assessment to Taxpayer for the month of September 2003, dated December 2, 2003, a copy of which is designated as Exhibit PT-24.
25. Notice of Withholding-Immediate Jeopardy Tax Assessment to Taxpayer for the month of October 2003, dated December 2, 2003, a copy of which is designated as Exhibit PT-25.
26. Corporation's checks bearing Taxpayer's signature dated August 9, 2002 (unnumbered), and check numbers 8890, 9449, 9452, 9478, and 9522 dated December 1, 2000; April 15, 2002; April 22, 2002; May 3, 2002; and May 15, 2002, respectively, made payable to the Department of Revenue in payment of income tax withheld for various periods, copies of which are collectively designated as Exhibit PT-26.
27. Corporation's Banking Commercial Customer Profile along with several of Corporation's Banks' signature cards for various bank accounts, copies of which are collectively designated as Exhibit PT-27.
28. Letter and related attachments from CPA to Charlie Helms, Assistant Director of the Collection Division, dated December 18, 2003, copies of which are collectively designated as Exhibit PT-28.
29. Letter from Gail H. Beamon, Administrative Officer in the Personal Taxes Division, to CPA dated January 16, 2004, a copy of which is designated as Exhibit PT-29.

30. Letter from Eugene J. Cella, Assistant Secretary of Revenue, to CPA dated January 22, 2004, a copy of which is designated as Exhibit PT-30.

At the hearing, Taxpayer presented the following evidence:

1. Sections 5, 6, and 7 of Corporation's by-laws, a copy of which is designated as Exhibit TP-1.
2. Notebook containing various information regarding Corporation's banking transactions, a copy of which is designated as Exhibit TP-2.

### **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 periods at issue through June 20, 2002, an officer in a corporation doing business in North Carolina.
2. Corporation operates a church. The church employed a pastor and other staff during the periods at issue.
3. Corporation filed returns of North Carolina income tax withheld for the quarters ended December 31, 2000; June 30 and September 30, 2001; and March 31, 2002 reporting income tax withheld of \$6,928.89, \$4,607.09, \$5,747.07, and \$8,195.00, respectively. Corporation also filed returns of North Carolina income tax withheld for the months of April, May, June, and July 2002 reporting income tax withheld of \$2,669.00 each for the months of April and May, \$1,045 for the month of June, and \$293.00 for the month of July, 2002. These returns include two returns filed for the month of June 2002, one reporting pre-Chapter 11 withholding of \$980.00 and the other for the post-Chapter 11 withholding of \$65.00. The only payments included with the returns was a payment of \$65.00 submitted with the June 2002 post-Chapter 11 return and a payment of \$293.00 for the tax shown due on the July 2002 return. All other returns were submitted without payment for the tax withheld shown due. Although requested to do so, Corporation did not file returns of North Carolina income tax withheld for the months of August 2002 through October 2003. The Department prepared returns estimating \$500.00 per month as the amount of income tax withheld based on the Corporation's withholding returns filed for June and July 2002.
4. Notices of Tax Assessment were mailed to Corporation for the quarter ended December 31, 2000, on February 21, 2001, and March 19, 2002. Notices of Tax Assessment were mailed to Corporation for quarters ended June 30 and September 30, 2001; and March 31, 2002, on October 26, 2001; February 26, 2002; and, September 30, 2003, respectively. Notices of Tax Assessment were mailed to Corporation for the months of April and May 2002 on September 30, 2003. A Notice of Tax Assessment was mailed to Corporation for the month of June 2002 on November 26, 2002. Notices of Tax Assessment were mailed to Corporation for the months of August through November 2002 on September 30, 2003. Notices of Tax Assessment were mailed to Corporation for the months of December 2002 through October 2003 on January 6, 2004. Corporation did not pay the assessments.

5. Corporation filed bankruptcy under Chapter 11 of the bankruptcy code on June 5, 2002, and converted from a Chapter 11 to a Chapter 7 with assets on June 12, 2003.
6. The Internal Revenue Service proposed an assessment against Taxpayer on October 3, 2003, for the Trust Fund Recovery Penalty under section 6672 of the Internal Revenue Code for the federal employment or excise taxes due from Corporation for the quarters ended September 30, 1997 through December 31, 2002.
7. Taxpayer acknowledged in response to the proposed assessment from the Internal Revenue Service that he served as the volunteer treasurer of Corporation during all periods at issue with the Internal Revenue Service except for the quarter ended June 30, 1999, when he had temporarily resigned as treasurer. Taxpayer further acknowledged that he resumed the position of treasurer of Corporation in September of 1999 and remained in that capacity until his resignation in June 2002.
8. Notices of Withholding-Immediate Jeopardy Tax Assessment assessing Taxpayer, as a person responsible for deducting, accounting for, or paying the taxes required to be withheld by Corporation, but not paid, plus applicable penalties and interest for the quarters ended December 31, 2000; June 30 and September 30, 2001; March 31, 2002; the months of April, May, June, and August through December 2002; and the months of January through October 2003 were mailed to Taxpayer on December 2, 2003. Taxpayer objected to the proposed jeopardy assessments and timely requested a hearing before the Secretary of Revenue.
9. Taxpayer had signature authority on all Corporation bank accounts. [a bank in NC] Commercial Customer Profile opened by Corporation on January 2, 1983, listed Taxpayer as a contact person. Taxpayer's status as a contact person remained unchanged through at least the date the Department received this banking information on November 28, 2003. Corporation's [ bank account] lists Taxpayer as "treasurer" and identifies him as an authorized signatory on behalf of Corporation.
10. Taxpayer signed two checks dated August 9, 2002, in the amounts of \$65.00 and \$293.00 for payment of Corporation's withholding tax for the post-Chapter 11 filing period ending June 30, 2002, and the month of July 2002, respectively. Prior to Corporation filing bankruptcy, Taxpayer submitted payment for withholding tax of Corporation with checks also bearing his signature. Payment for withholding tax of Corporation for quarter ended June 30, 2000, was made with check number 8890 dated December 1, 2000; and for quarters ended September 30, 2001, and December 31, 2001, with check numbers 9449, 9452, 9478, and 9522 dated April 15, April 22, May 3, and May 15, 2002, respectively, all bearing Taxpayer's signature.
11. Because Corporation did not timely file the withholding returns or pay the tax when due, the late filing and late payment penalties were properly asserted for the periods at issue. Because of restrictions in the amount of penalties that may be imposed pursuant to federal bankruptcy law, certain penalties asserted against Corporation are less than the penalties normally required under G.S. 105-236. Although Taxpayer is subject to the full amount of penalties prescribed under G.S. 105-236, the Department, in error, asserted penalty amounts against Taxpayer equal to the penalty amounts asserted against Corporation. However, the Department does not seek to increase the penalty amounts assessed against Taxpayer.

## **CONCLUSIONS OF LAW**

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

1. An employer is required to deduct and withhold from the wages of each employee the State income taxes payable by the employee on the wages. The amount of State income tax withheld by an employer is deemed to be held in trust for the Secretary of Revenue.
2. G.S. 105-253(b)(4) 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.
3. G.S. 105-253 makes no distinction between volunteers and paid individuals or between non-profit or for-profit organizations.
4. The failure to deduct, account for, or pay withheld taxes need not 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 regarding the withheld taxes.
6. A penalty of five percent of the tax withheld (maximum 25 percent/minimum \$5.00) is required for each tax period or part of that period that a return is late. A penalty of ten percent of the tax withheld is required for failure to pay a tax when due. Because Corporation did not timely file the withholding returns or pay the tax, the late filing and late payment penalties are applicable for the periods at issue.
7. The Secretary of Revenue is authorized to waive or reduce penalties for good cause.
8. A proposed assessment must be based on the best information available and such assessment is presumed to be correct. The burden of proof is on the taxpayer to show otherwise.

## **DECISION**

Taxpayer argues that although he served as the volunteer treasurer of Corporation, he resigned as treasurer June 1, 2002, and another individual assumed that position. In support, Taxpayer offered Corporate Authorization Resolution issued by [a NC bank] dated June 20, 2002, listing Taxpayer as an elder of the church operated by Corporation, and listing another individual as treasurer of Corporation.

Taxpayer also argues that although he was a corporate officer and did in fact sign checks in payment of withholding tax as well as checks for other amounts due by Corporation, he did so under the direction of the pastor. Taxpayer offered a portion of Corporation's by-laws including section 7 that refers to the functions of treasurer and states "he shall make all disbursements at the direction of the Pastor."

N.C.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. N.C.G.S. 105-253(b)(4) 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.

The liability required under G.S. 105-253 attaches to any "responsible officer." The central question in determining whether an individual was a responsible person is whether he had the power to pay the unpaid taxes. The term "responsible officer" includes any person who is in a position to control the finances of the employer or has the authority or ability to determine which obligations should or should not be paid. "Responsibility" is a matter of status, duty and authority. As treasurer of the Corporation, by the very nature of that position, Taxpayer is responsible for managing the financial affairs of Corporation. A volunteer treasurer of a not-for-profit community health clinic was a responsible person who willfully failed to pay over withheld employment taxes, notwithstanding that he had no time to review financial statements and followed the directions of the clinic's president, because he had check-signing authority and had the opportunity to attend meetings at which financial matters were discussed. Having significant control does not mean having exclusive control over the disbursement of funds or the final say over

whether taxes or bills are paid. *L. Thomas, CA-7, 94-2 USTC 50,607.* “Responsible person” is any person with “significant control” (as opposed to exclusive or final control) over the corporation’s disbursement of funds.” *H. Wright, DC N.Y., 96-1 USTC 50,114.*

Based upon the Taxpayer’s role as treasurer of the Corporation and the duties that he performed in that role, the Department contends that the Taxpayer is responsible for the remittance of the withheld taxes to the State under N.C.G.S. 105-253. In support of this contention the Department cites several facts. The Taxpayer had signature authority on all Corporation bank accounts. [A NC bank] Commercial Customer Profile dated January 2, 1983, listed Taxpayer as a contact person for Corporation. [A NC bank] account lists Taxpayer as “treasurer” and identifies him as an authorized signatory on behalf of Corporation. Checks dated August 9, 2002, were received by the Department from Corporation in payment of State withholding taxes for the months of June and July 2002 bearing Taxpayer’s signature. Prior to Corporation filing bankruptcy, Taxpayer submitted payment for withholding tax of Corporation for the quarter ended June 30, 2000, by check number 8890 dated December 1, 2000; and for the quarters ended September 30, 2001, and December 31, 2001, by check numbers 9449, 9452, 9478, 9522 dated April 15, April 22, May 3, and May 15, 2002, respectively, all bearing Taxpayer’s signature.

It is apparent from the facts presented that the Taxpayer willingly and actively participated in the financial affairs of the Corporation as its treasurer, signing numerous Corporate checks over a period of years, including but not limited to checks for Corporate withholding tax. The office of treasurer, by its nature invokes a certain level of responsibility for the financial affairs of a corporation. In his role as corporate treasurer, Taxpayer was responsible for ensuring that the tax withheld or required to have been withheld for the various periods at issue were set aside, retained in trust until due, and paid to the Secretary of Revenue. He had sufficient authority to decide what financial obligations of Corporation were paid. Taxpayer may not avoid liability as a matter of law under the tent of the pastor’s authority.

Taxpayer had the authority, whether he exercised it or not, to make payments to the Department of Revenue for outstanding Withholding taxes due by Corporation. For instance, Corporation's banking authority allowed Taxpayer to sign Corporate checks and did not require pastor to co-sign the checks. The fact that other individuals may have also been responsible in this respect would not relieve Taxpayer of liability as responsible corporate officer under N.C.G.S. 105-253. Therefore, the Assistant Secretary finds that Taxpayer is personally liable for payment of the tax withheld, or required to have been withheld but not paid to the Secretary of Revenue. The Assistant Secretary further finds that Taxpayer has sufficiently proven that he no longer held the office of treasurer of Corporation after June 20, 2002. Consequently, the assessments proposed against him for the periods ending June 30, 2002, through October 31, 2003, are withdrawn.

The Assistant Secretary finds reasonable cause for waiver of the penalties for the quarters ended December 31, 2000; June 30 and September 30, 2001; March 31, 2002; and the months of April and May 2002. The proposed withholding-immediate jeopardy tax assessments for the quarters ended December 31, 2000; June 30 and September 30, 2001; March 31, 2002; and the months of April and May 2002, modified to waive the penalties, are lawful and proper in every respect and are hereby determined to be immediately due and collectible as allowed by law.

Made and entered this 25<sup>th</sup> day of June, 2004.

Signature \_\_\_\_\_

Eugene J. Cella

Assistant Secretary for Administrative Tax Hearings  
North Carolina Department of Revenue