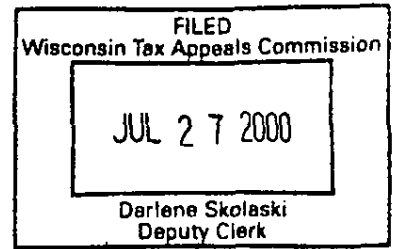


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ZOLLICOFFER ESSIE L 99W125 072700 TAC

STATE OF WISCONSIN
TAX APPEALS COMMISSION



ESSIE L. ZOLLIFFER
4166 North 45th Street
Milwaukee, WI 53216

Petitioner,

vs.

WISCONSIN DEPARTMENT OF REVENUE
P.O. Box 8933
Madison, WI 53708

Respondent.

- 2038
7/15/00
7/19/00
- *
* DOCKET NO. 99-W-125
*
* **RULING AND ORDER**
* **AWARDING**
* **SUMMARY JUDGMENT**
*
-

MARK E. MUSOLF, CHAIRPERSON:

This matter is before us on cross-motions for summary judgment. Both parties have filed briefs with supporting affidavits. Attorney Peter J. Zwiefelhofer represents the petitioner. Attorney Michael J. Buchanan represents the respondent.

Having considered the entire record, the Commission hereby finds, rules, and orders as follows, awarding summary judgment to the petitioner:

UNDISPUTED MATERIAL FACTS

1. Petitioner ("Ms. Zollicoffer") was assessed \$7,004.65 by the Department, pursuant to Wis. Stat. § 71.83(1)(b)2 as a responsible person of Inner City Council on Alcoholism, Inc. ("the corporation"), who intentionally failed to withhold, account for or pay over the corporation's withholding taxes

for the period January through September 1996 ("the period under review")¹

2. Ms. Zollicoffer petitioned the Department for redetermination, which was denied, whereupon she timely appealed to this commission.

3. Ms. Zollicoffer was employed by the corporation as "interim executive director" from August 1995 until February 1996, when the corporation hired an executive director. At that point Ms. Zollicoffer returned to her former position of "director of business and personnel."

4. With the assistance of others, including a bookkeeping firm, Ms. Zollicoffer maintained the corporation's books and records between January 1 and July 30, 1996. Other duties included personnel administration and payroll.

5. Between January 1 and July 30, 1996 Ms. Zollicoffer was an authorized co-signatory on the corporation's checking account. Each check required two signatures. Four other individuals were also authorized to sign checks. During that period she co-signed payroll checks to pay net wages to employees of the corporation. During that period she knew that taxes withheld from the wages were not being paid to the Department.

6. Ms. Zollicoffer was laid off as a paid employee of the corporation on June 30, 1996, but she continued to provide her services without pay until December 1996. Her compensation for 1996 was \$16,819.

¹ All facts pertain to the period under review unless otherwise stated.

7. Ms. Zollicoffer did not have the authority to order, direct or prioritize the payment of taxes due to the Department, or of other obligations of the corporation.

APPLICABLE STATUTES

71.83 Penalties.

(1) CIVIL.

* * *

(b) *Intent to defeat or evade.*

* * *

2. 'Personal liability.' ...

Any person required to withhold, account for or pay over any tax imposed by this chapter, whether exempt under s. 71.05(1) to (3), 71.26(1) or 71.45 or not, who intentionally fails to withhold such tax, or account for or pay over such tax, shall be liable to a penalty equal to the total amount of the tax, plus interest and penalties on that tax, that is not withheld, collected, accounted for or paid over. The personal liability of such person as provided in this subdivision shall survive the dissolution of the corporation or other form of business association. "Person", in this subdivision, includes an officer, employe or other responsible person of a corporation or other form of business association or a member, employe or other responsible person of a partnership, limited liability company or sole proprietorship who, as such officer, employe, member or other responsible person, is under a duty to perform the act in respect to which the violation occurs.

CONCLUSIONS OF LAW

1. There is no genuine issue as to any material fact, and summary judgment is therefore appropriate under Wis. Stat. § 802.08.

2. Ms. Zollicoffer has shown that she was not a person responsible for the payment of withholding taxes of the corporation within the

meaning of Wis. Stat. § 71.83(1)(b)2, because she did not have the authority to pay or direct payment of the taxes to the Department.

RULING

We first reject the Department's contention that Ms. Zollicoffer's summary judgment motion was not timely. In accordance with § 802.08(1), the commission sanctioned Ms. Zollicoffer's summary judgment motion in its February 28, 2000 scheduling order. Accordingly, she is entitled to file the final reply brief in this matter.²

The record discloses no disputed material facts. The legal question boils down to whether Ms. Zollicoffer may be held responsible under § 71.83(1)(b)2 because she was a paid employee who was authorized to co-sign corporate checks and did so to creditors other than the Department while knowing that withholding taxes were unpaid.

For personal liability to be established for withholding taxes under § 71.83(1)(b)2, the respondent must show the petitioner's authority to pay or direct payment of the corporation's taxes, a duty to pay them, and an intentional breach of that duty. See, *Gerth and Kelly v. WDOR*, Wis. Tax Rep. (CCH) ¶ 203-367 (WTAC 1992).

The undisputed facts show that Ms. Zollicoffer did not have the authority to prioritize, order or direct the payment of taxes or other obligations.

² The Department acknowledges that we could award summary judgment to Ms. Zollicoffer pursuant to § 802.08(6). Therefore, the only dispute is whether Ms. Zollicoffer's final reply brief is proper.

She was never an officer or director of the corporation. The positions she held during the period under review were interim executive director and director of business and personnel.

Her uncontradicted affidavit states that she never had "the authority or power to prioritize bills for payment and/or to determine what bills would be paid and when, and what bills would be deferred." Her affidavit clearly identifies those individuals who did have such authority during the period under review. This was confirmed by the uncontradicted affidavit of Osbee Sampson, who served on the board of directors throughout the period under review.

The Department maintains, however, that Ms. Zollicoffer had the requisite authority and attendant duty to pay taxes because she was a well-paid high-level employe who, among other duties, co-signed payroll checks to pay net wages to employees even though she knew that the withheld taxes were not being paid to the Department.

The key element in determining authority is control over financial decisions, including the payment of taxes. *Werner v. WDOR*, 2000 Wisc. Tax LEXIS 19, 11 (WTAC 2000). *Pharo v. WDOR*, 1997 Wisc. Tax LEXIS 31, 8 (WTAC 1997). A "responsible person" is one who has the ultimate authority over the expenditure of funds. *Godfrey, Jr. v. U. S.*, 84-2 USTC ¶ 9974, 85,983 (7th Cir. 1984). The mechanical duties of signing checks and preparing tax returns are not determinative; what is determinative is whether the person has

the final word as to what bills should or should not be paid, and when. *Id.*

The record shows that Ms. Zollicoffer did not have that authority. Moreover, even though she was one of five authorized check signatories, she needed prior approval to exercise that authority. She did not have “the power to control the decision-making process by which the employer corporation allocates funds.” See, *Bowlen v. United States*, 92-1 USTC ¶ 50,098, 956 F. 2d 723, 728 (7th Cir. 1992). Because she did not have the authority to see to the payment of withholding taxes, Ms. Zollicoffer cannot be held liable as a responsible party.

The respondent cites several cases to support its position that Ms. Zollicoffer should be held liable. All are inapposite.

In *Ruppel v. WDOR*,³ the petitioner, unlike Ms. Zollicoffer, was vice president and general manager, with *full check-signing authority and control of the day-to-day operations of the company*. In *Matz v. WDOR*,⁴ the petitioner, unlike Ms. Zollicoffer, was a shareholder, director and president, also with full check-signing authority. And in *Callen v. WDOR*,⁵ the petitioner was a stockholder, director and president as well as a co-signatory on the corporate checking account. None of these cases is precedent for finding Ms. Zollicoffer, a modestly compensated non-officer with limited control over financial decisions, liable as a responsible party.

³ 1997 Wisc. Tax LEXIS 18 (WTAC)

⁴ 1996 Wisc. Tax LEXIS 25 (WTAC)

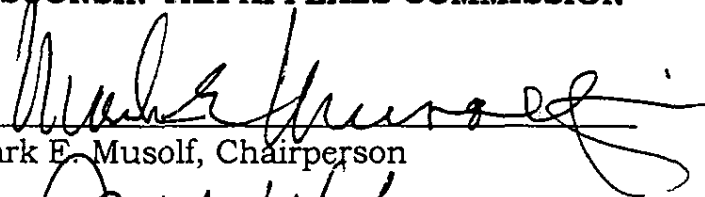
⁵ 1998 Wisc. Tax LEXIS 5 (WTAC)

ORDER

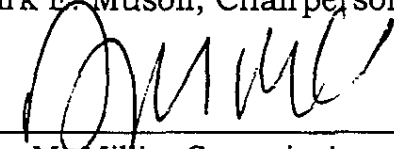
The petitioner is awarded summary judgment reversing the respondent's action on its petition for redetermination.

Dated at Madison, Wisconsin, this 27th day of July, 2000.

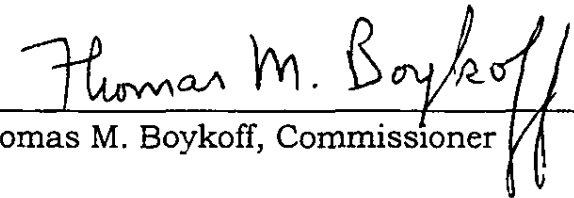
WISCONSIN TAX APPEALS COMMISSION



Mark E. Musolf, Chairperson



Don M. Millis, Commissioner



Thomas M. Boykoff, Commissioner

ATTACHMENT: "NOTICE OF APPEAL INFORMATION"

WISCONSIN TAX APPEALS COMMISSION

NOTICE OF APPEAL INFORMATION

NOTICE OF RIGHTS FOR REHEARING OR JUDICIAL REVIEW,
THE TIMES ALLOWED FOR EACH AND THE IDENTIFICATION
OF THE PARTY TO BE NAMED AS RESPONDENT

The following notice is served on you as part of the Commission's decision rendered:

Any party has a right to petition for a rehearing of this decision within 20 days of the service of this decision, as provided in section 227.49 of the Wisconsin Statutes. The 20 day period commences the day after personal service or mailing of this decision. (Decisions of the Tax Appeals Commission are mailed the day they are dated. In the case of an oral decision, personal service is the oral pronouncement of the decision at the hearing.) The petition for rehearing should be filed with the Wisconsin Tax Appeals Commission. Nevertheless, an appeal can be taken directly to circuit court through a petition for judicial review. It is not necessary to petition for a rehearing.

Any party has a right to petition for a judicial review of this decision as provided in section 227.53 of the Wisconsin Statutes. **The petition must be filed in circuit court and served upon the Wisconsin Tax Appeals Commission and the Department of Revenue** within 30 days of service of this decision if there has been no petition for rehearing, or within 30 days of service of the order finally disposing of the petition for rehearing, or within 30 days after the final disposition by operation of law of any petition for rehearing. The 30 day period commences the day after personal service or mailing of the decision or order, or the day after the final disposition by operation of law of any petition for rehearing. (Decisions of the Tax Appeals Commission are mailed the day they are dated. In the case of an oral decision, personal service is the oral pronouncement of the decision at the hearing.) **The petition for judicial review should name the Department of Revenue as respondent.**

This notice is part of the decision and incorporated therein.