

STATE OF WISCONSIN
TAX APPEALS COMMISSION

LORI ANN LITTLE SOLDIER,

DOCKET NO. 09-W-17

Petitioner,

vs.

DECISION AND ORDER

WISCONSIN DEPARTMENT OF REVENUE,

Respondent.

ROGER W. LEGRAND, COMMISSIONER:

This matter comes before the Commission following a hearing held on August 26, 2009 before Commissioner Roger W. LeGrand. Petitioner Lori Ann Little Soldier represented herself in this matter. Attorney Lisa Ann Gilmore represented Respondent, the Wisconsin Department of Revenue (the "Department"). At the hearing, the Commission received and entered into evidence the Department's Exhibits 1 through 32, and the Petitioner's Exhibits A through F and 16. Petitioner, Jon Little Soldier and Department Resolution Officer Ruth Abrams provided sworn testimony.

Following the hearing, both parties elected not to file post-hearing briefs. Having considered the entire record, the sworn testimony and the parties' exhibits, the Commission finds, decides and orders as follows:

FINDINGS OF FACT

1. On April 3, 2007, the Department issued a Notice of Assessment of tax to Petitioner in the total amount of \$17,640.22 for the unpaid withholding taxes (plus related interest and penalty) of Procrete, LLC for the year 2005. (Dept. Ex. 1.)

2. Petitioner filed a timely petition for redetermination of the assessment with the Department. (Dept. Ex. 2.)

3. On November 24, 2008, the Department denied the petition for redetermination. (Dept. Ex. 4.)

4. On January 22, 2009, Petitioner filed a petition for review with the Commission.

5. On February 9, 2009, the Department filed an Answer to the Petition for Review.

6. Procrete, LLC, a Wisconsin limited liability company ("Procrete"), engaged in business and paid employees in Wisconsin during 2005. (Dept. Ex.'s 3, 21 and 22.)

7. Jon W. Little Soldier was the organizer and initial registered agent of Procrete. (Dept. Ex. 14.)

8. Petitioner was a member/owner and employee of Procrete and served as office manager of Procrete during the year 2005. (Dept. Ex.'s 22 and 29.)

9. Petitioner's duties as office manager included handling the payroll, which entailed writing checks to employees and ensuring that withholding taxes were taken out of employee paychecks. (Dept. Ex.'s 2, 5 and 22.)

10. Petitioner had blanket authorization, as office manager, to write checks for payroll and to pay creditors. (Dept. Ex.'s 2 and 15.)

11. Petitioner maintained the books and records of Procrete as office manager. (Dept. Ex.'s 2 and 15.)

12. Petitioner understood the payment of taxes was mandatory. (Dept.

Ex.'s 2 and 22.)

13. As office manager, she had the responsibility to ensure that withholding taxes were taken out of employee paychecks. (Dept. Ex. 22.)

14. Petitioner had check writing authority for Procrete. As office manager, she wrote checks to creditors for payroll, leases, insurance, materials and loans. (Dept. Ex. 18.)

15. Petitioner prepared and signed Procrete's 2005 Form WT-7 Wisconsin Employers Annual Reconciliation of Wisconsin Income Tax Withheld on January 30, 2006. (Dept. Ex. 20.)

16. On several occasions, Petitioner advised Jon Little Soldier that the withholding payments due to the State of Wisconsin were mandatory. (Dept. Ex. 22.)

17. Jon Little Soldier advised Petitioner to prepare and send withholding tax forms for the year 2005. (Dept. Ex. 22.)

18. Petitioner understood the importance of paying the withholding taxes for the 2005 tax period. (Dept. Ex. 2.)

19. Petitioner signed or prepared documents on behalf of Procrete in which she was described as an "owner," including a non-compete agreement (Dept. Ex. 24), a commercial credit application (Dept. Ex. 25), and a group insurance application (Dept. Ex. 26).

20. Petitioner signed applications for credit dated April 7, 2005 and April 27, 2005 as an authorized representative of Procrete. (Dept. Ex. 27 and Ex. 28.)

21. In 2006, Petitioner, along with Henry Little Soldier, Jr. and Jon Little Soldier, were investigated by the Wisconsin Department of Agriculture, Trade

and Consumer Protection (DATCP) for allegedly violating standard home improvement practices, making untrue, deceptive or misleading representations, and engaging in unfair trade practices and theft. (Dept. Ex. 29.)

22. The DATCP Investigator concluded that although Jon Little Soldier was listed as the organizer of Procrete, it was managed by its member/owners and the member/owners also included Henry Little Soldier, Jr. and Petitioner. (Dept. Ex. 29.)

23. Petitioner was responsible for the finances of Procrete during 2005.

24. Petitioner was in possession of the company computer and the company records during the year 2005. (Dept. Ex. 29.)

25. Petitioner was charged with four counts of violating Wis. Stat. § 100.26(3) (Agriculture, Trade, and Consumer Protection provision) on February 2, 2007 in connection with her activities as office manager of Procrete. (Dept. Ex. 31.)

26. In a statement to Jeffrey Hole, DATCP Investigator, Petitioner admitted that she handled the books and accounting procedures of Procrete. (Dept. Ex. 32.)

27. Petitioner handled payroll, issued checks, paid creditors, withheld taxes from employees, gave loans to employees, gave blank checks to Jon Little Soldier, and signed checks to Henry Little Soldier, Jr. during the year 2005.

CONCLUSION OF LAW

Petitioner is personally liable for the unpaid withholding taxes of Procrete, LLC for 2005 as a responsible person under Wis. Stat. § 71.83(1)(b), as determined by the Department.

APPLICABLE STATUTE

Wis. Stat. § 71.83(1)(b)(2) states in relevant part:

. . . Any person required to withhold, account for or pay over any tax imposed by this chapter, . . ., 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. . . .
“Person”, in this subdivision, includes an officer, employee or other responsible person of a corporation or other form of business association or a member, employee or other responsible person of a partnership, limited liability company or sole proprietorship who, as such officer, employee, member or other responsible person, is under a duty to perform the act in respect to which the violation occurs.

Wis. Stat. § 71.83(1)(b)(2).

DISCUSSION

In this case, the Department issued an assessment of \$17,640.22 to Petitioner as a responsible person under Wis. Stat. § 71.83(1)(b) due to her alleged failure to pay certain taxes withheld from wages of employees of Procrete. To hold an individual personally responsible for a business entity’s failure to pay over withholding taxes, the Department must prove: (1) the individual had the authority to pay or direct payment of the taxes; (2) the individual had the duty to pay or direct payment of the taxes; and (3) the individual intentionally breached the duty. *Bice v. Wis. Dep’t of Revenue*, Wis. Tax Rptr. (CCH) ¶ 400-496 (WTAC 2000); *Senf v. Wis. Dep’t of Revenue*, Wis. Tax Rptr. (CCH) ¶ 400-441 (WTAC 1999); *Matz v. Wis. Dep’t of Revenue*, Wis. Tax Rptr. (CCH) ¶ 400-226 (WTAC 1996); *Esser v. Wis. Dep’t of Revenue*, Wis. Tax Rptr. (CCH) ¶400-011 (WTAC 1993).

An intentional breach of the duty to pay a business entity’s taxes may be

demonstrated by a showing that the petitioner made the decision to use business entity funds to pay other creditors of the entity with knowledge of taxes due to the Department. *Id.* In such cases, the Department has an initial burden of production with respect to the above elements of personal responsibility assessments of business entity tax obligations against individuals. *Drilias v. Wis. Dep't of Revenue*, Wis. Tax Rptr. (CCH) ¶ 400-222, 30738 (WTAC 1996). Once this burden of production has been met, the ultimate burden of proof rests with the petitioner in contested cases involving such assessments. *Id.*

At the hearing, the Department presented clear and convincing evidence that Petitioner had the authority and duty to pay over the unpaid withholding taxes. Although Petitioner was not the recorded organizer of Procrete, she generally acted as a member/owner of the limited liability company and was employed as the office manager of the business. As office manager, she kept the books and the financial records of the company. She had check writing authority and wrote numerous checks in 2005 to various creditors of Procrete. She was in charge of payroll and withheld taxes from the paychecks of Procrete's employees in 2005. She was aware of the obligation to pay over the taxes that were withheld and she prepared and signed Procrete's 2005 Form WT-7 Wisconsin Employers Annual Reconciliation of Wisconsin Income Tax Withheld from Wages.

As a defense, Petitioner claimed that Jon Little Soldier, the organizer and a member/owner of Procrete, told her not to pay the taxes and that he would take care of them. Petitioner's testimony was not credible, and even if true, would not absolve her of liability under the statute. Jon Little Soldier testified that he was not involved in the

day-to-day finances of Procrete. Petitioner handled Procrete's finances, had possession of the company computer, did the bookkeeping, prepared the payroll, and paid creditors of Procrete during 2005. Jon Little Soldier was the registered agent and a member/owner of Procrete, but the record shows that the entity was controlled by all three of its member/owners, which included Henry Little Soldier, Jr. and Petitioner. *See*, Dept. Ex. 29. Jon Little Soldier participated in few of the business decisions of Procrete. *Id.* Henry Little Soldier, Jr. made most of the business decisions. *Id.* Petitioner controlled Procrete's finances, including tax matters. Henry Little Soldier, Jr. was not permitted to be involved in Procrete's financial decisions because of his criminal probation status. The evidence is clear that Petitioner controlled the books, wrote the majority of checks, and generally decided what creditors should be paid and when, including the Department. Therefore, we conclude that Petitioner had the authority and duty to pay the disputed withholding taxes to the Department.

To prove the element of intentional breach, the Department is required to show that Petitioner made decisions to use corporate funds to pay other creditors with knowledge that taxes were due. *Drilias, supra*. The evidence is clear that Petitioner wrote checks to creditors on Procrete's account on numerous occasions in 2005. At the hearing, a number of these checks, including checks to Home Depot, Henry Little Soldier, Jr., BP Gas Station, Kwik Trip, Master Graphics, Weber Tires, and M&M Concrete, were admitted into evidence as checks written by Petitioner to creditors of Procrete during 2005 while Procrete's withholding taxes remained unpaid. Petitioner also admitted that she withheld taxes from employee paychecks, that she knew that these taxes had to be paid over to the Department and that she prepared and filed

Procrete's 2005 Form WT-7. With this evidence, the Department has met its burden of proving that Petitioner had the authority and duty to pay over the withholding taxes and that she intentionally breached that duty.

CONCLUSION

The Department has proved by clear and convincing evidence that Petitioner, as a member and the office manager of Procrete, LLC, had the authority and duty to pay over taxes withheld from the wages of Procrete's employees and that she intentionally breached that duty. Petitioner did not present credible evidence to rebut the Department's case. Therefore, we affirm the assessment of the Department at issue in this matter.

ORDER

The Department's action on the Petitioner's petition for redetermination in this matter is affirmed.

Dated at Madison, Wisconsin, this 22nd day of February, 2010.

WISCONSIN TAX APPEALS COMMISSION

David C. Swanson, Chairperson

Roger W. Le Grand, Commissioner

Thomas J. McAdams, Commissioner

ATTACHMENT: "NOTICE OF APPEAL INFORMATION"