

STATE OF WISCONSIN
TAX APPEALS COMMISSION

JASON K. SANDBERG,

DOCKET NO. 08-W-143

Petitioner,

vs.

RULING AND ORDER

WISCONSIN DEPARTMENT OF REVENUE,

Respondent.

THOMAS J. MCADAMS, COMMISSIONER:

This case comes before the Commission on a motion for summary judgment by the Respondent, the Wisconsin Department of Revenue (“the Department”), supported by affidavit and briefs filed by the Department’s representative, Attorney John R. Evans. The Petitioner, Mr. Jason K. Sandberg, is represented by Attorney John C. Santee, of Mount Prospect, Illinois, and has filed a brief and an affidavit in opposition to the Department’s motion.

Having considered the record before it in its entirety, the Commission finds, rules, and orders as follows:

JURISDICTIONAL AND MATERIAL FACTS

A. Jurisdictional Facts

1. On May 24, 2007, the Department issued an assessment of \$45,297.99 against the Petitioner for failure to pay over withholding taxes as an officer, employee, or other responsible person of Ken Sandberg Drywall, Inc., for the periods

ending December 31, 2004; January 31 through December 31, 2005; and January 15, 2006 through June 30, 2006. March 24, 2009 Affidavit of Attorney John R. Evans (“Evans Affidavit”), Exhibit 1.

2. On July 23, 2007, the Petitioner filed a timely Petition for Redetermination of the assessment. Evans Affidavit, Exhibit 2.

3. On July 21, 2008, the Department denied the Petition for Redetermination. Evans Affidavit, Exhibit 3.

4. The Petitioner appealed the denial to the Wisconsin Tax Appeals Commission on or about September 22, 2008. Evans Affidavit, Exhibit 4.

B. Material Facts¹

5. During the periods at issue, the Petitioner was a Vice-President of the corporation. Evans Affidavit, Exhibit 5.

6. The Petitioner’s primary responsibility was project management, which he describes as in-office supervision of drywall projects. The Petitioner also stated that he was responsible for payroll by inputting work information from employees into a computer software program which would also produce withholding reports, including the Wisconsin Quarterly Contribution Reports and Federal Form 941’s. Evans Affidavit, Exhibit 5.

7. The Petitioner stated that he was a signatory on the corporate checking account, but that he was given such authority only as a matter of convenience

¹ Most of the material facts in this matter come from a 2-page interview form with 3 pages of explanations the Petitioner submitted to the Department. To the best of our knowledge, there have not been depositions.

to the business, so that someone in the office would be available to sign checks in the absence of his father, Mr. Ken Sandberg. All decisions regarding who got paid were made by Mr. Ken Sandberg. Evans Affidavit, Exhibit 5.

8. The corporation began business as a sole proprietorship by Mr. Ken Sandberg and later was incorporated. The Petitioner's father was the corporation's sole shareholder and director, as well as its President, Secretary, and Treasurer throughout the periods that are the subject of the assessments. Evans Affidavit, Exhibit 5.

9. The Petitioner was never a shareholder and went to work for his father in October, 2002, as an employee. Shortly after the Petitioner joined the company, his father made him a Vice-President because the company's bank required the company to have someone else in the office available to sign checks when Ken Sandberg was out of the office installing drywall. Evans Affidavit, Exhibit 5.

10. The Petitioner was also responsible for opening the business' mail. While doing this, the Petitioner saw notices of unpaid tax withholdings and passed these on to his father. The Petitioner's father told him he shouldn't worry because he was taking care of it and that he was working with the IRS and the Department to resolve these issues. Evans Affidavit, Exhibit 5, explanation to 12 and 12(a) of Report of Interview.

11. The Petitioner stated to the Department that he never had independent authority over day-to-day operations or finances and that all decisions were made by the owner, Mr. Ken Sandberg. Evans Affidavit, Exhibit 5.

WISCONSIN STATUTES INVOLVED

Section 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, ... 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.

Section 77.60 Interest and penalties.

* * *

(9) Any person who is required to collect, account for or pay the amount of tax imposed under this subchapter and who willfully fails to collect, account for or pay to the department shall be personally liable for such amounts, including interest and penalties thereon, if that person's principal is unable to pay such amounts to the department. The personal liability of such person as provided in this subsection shall survive the dissolution of the corporation or other form of business association. Personal liability may be assessed by the department against such person under this subchapter for the making of sales tax determinations against retailers and shall be subject to the provisions for review of sales tax determinations against retailers, but the time for making such determinations shall not be limited by s. 77.59 (3). "Person", in this subsection, 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 . . .

CONCLUSION OF LAW

The motion for summary judgment is denied because there are genuine issues of material fact remaining and the Respondent has not shown that it is entitled to judgment as a matter of law.

OPINION

In this case, the Department issued a \$45,297.99 assessment against Mr. Jason Sandberg, the Petitioner, for unpaid withholding taxes, alleging that Mr. Sandberg was a “responsible party” under Wis. Stat. § 71.83(1)(b)2. In 2002, Mr. Sandberg went to work for his father’s drywall business. According to the Petitioner, his job was to manage drywall projects from the office and he also did the payroll, paying bills as directed by his father, Mr. Ken Sandberg, who was the President of the Company as well as its Treasurer. In support of its motion, the Department points to the fact that the Petitioner was a Vice-President of the company and a signatory on the business account used to pay the employees and the taxes. The Department also points to the fact that the Petitioner knew the withholding was not paid over to the State because he opened the mail and saw the overdue notices from the Department. In response, the Petitioner denies being a person responsible for the unpaid taxes, claiming that his role in the business was “ministerial,”² and that he acted only when directed by the owner. The first part of this opinion will summarize the law that applies to this

² The term “ministerial” appears without definition in numerous responsible person cases. *Dictionary.com* defines “ministerial” in the secular context as “...pertaining to or invested with delegated executive authority” and “...serving as an instrument or means.”

motion and the second part of the opinion will discuss why the Department is not entitled to judgment at this point in the litigation.

A. SUMMARY JUDGMENT STANDARDS

Summary judgment is warranted where “the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.” Wis. Stat. § 802.08(2). Summary judgment procedure imposes on the moving party the burden of demonstrating both the absence of any genuine factual disputes and entitlement to judgment as a matter of law under the legal standards applicable to the claim. Wis. Stat. §§ 802.08(2) and (3). A factual issue is genuine if the evidence is such that this Commission could reasonably find in favor of the Petitioner. *Keneflick v. Hitchcock*, 187 Wis. 2d 218, 224, 522 N.W.2d 261 (Ct. App. 1994). The court must view the evidence, and the inferences from it, in the light most favorable to the party opposing the motion. *Kraemer Bros. v. United States Fire Ins. Co.*, 89 Wis. 2d 115, 129, 278 N.W.2d 208 (1979).

As to the burden of proof, summary judgment is generally inappropriate when matters of complex factual proof need to be resolved before legal issues can be decided. *See, e.g., Peters v. Holiday Inns, Inc.*, 89 Wis. 2d 115, 129, 278 N.W.2d 208 (1979). Summary judgment is not a matter of right, and the trial court may deny summary judgment if it determines that the opposite side is entitled to trial. *Wozniak v. Local No. 1111 of United Elec., Radio, and Mach. Workers of America (UE)*, 45 Wis. 2d 588, 173 N.W.2d 596 (1970). A summary judgment should not be granted unless the moving party

demonstrates a right to a judgment with such clarity as to leave no room for controversy. *Kraemer*, 89 Wis. 2d at 566. Summary judgment is a drastic remedy and should not be granted unless the material facts are not in dispute, no competing inferences can arise, and the law that resolves the issue is clear. *Lecus v. American Mut. Ins. Co. of Boston*, 81 Wis. 2d 183, 260 N.W.2d 241 (1977). Summary judgment should not be granted if reasonable persons could reach reasonable, but differing inferences and results from the facts that are undisputed. *Maynard v. Port Publ'ns, Inc.*, 98 Wis. 2d 555, 297 N.W.2d 500 (1980). Any reasonable doubt as to existence of a genuine issue of material fact must be resolved against the moving party. *Heck & Paetow Claim Service, Inc. v. Heck*, 93 Wis. 2d 349, 356, 286 N.W.2d 831 (1980).

B. THE ARGUMENTS OF THE PARTIES

1. The Respondent's Arguments

The Department argues that the Petitioner is a "responsible person" for several reasons. First, the Petitioner was a Vice-President of the company. Second, during the periods under review, the Petitioner did the business' payroll, including the Wisconsin Quarterly Contribution Reports and the Federal Form 941's. Third, the Petitioner had check signing authority on the business's checking account, and signed numerous checks that are in the record. Some of these checks are written out to "Cash" and some are written out to the Department for the taxes that were, in fact, paid. Finally, the Petitioner saw an overdue notice from the State of Wisconsin and, therefore in the State's view, knew that the taxes were going unpaid and other creditors were being paid instead.

2. The Petitioner's Arguments

The Petitioner has two responses to the Department's motion. First, the Petitioner states that the facts are in dispute and that summary judgment, therefore, is inappropriate. Specifically, the Petitioner points to the fact that his acts were "ministerial" in nature and nothing was done independent of specific directions from his father. Second, the Petitioner posits that the Department is not entitled to judgment as a matter of law as he was not a "responsible person." In brief, the Petitioner contends that the three-part test is not met and argues that the facts here are like those in *McGlaughlin*,³ a federal district court case where the taxpayer was found not to be a responsible person because the taxpayer there merely acted at the direction of another.

APPLICABLE LAW AND ANALYSIS

The legal issue in this case is whether the Petitioner is personally liable for the sales and withholding tax deficiencies of his father's business. Procedurally, in order to show that an officer or employee is a responsible person, the Respondent has the initial burden of going forward with evidence. The Respondent must produce clear and satisfactory evidence that the Petitioner had the authority to pay the company's taxes, had the duty to pay them, and had intentionally breached that duty. To prove the element of intent, the Respondent need only show that the Petitioner made decisions to use corporate funds to pay other creditors, with knowledge of taxes being due. *William Drilias v. Dep't. of Revenue*, Wis. Tax Rptr (CCH) ¶400-222 (WTAC 1996). Once the Respondent produces the required evidence, the burden normally shifts, and then the Petitioner must overcome the Respondent's case by clear and satisfactory

³ The cite is *McLaughlin v. United States*, 2001-USTC (U.S. Dist. Ct. Md. 2000).

evidence. *David J. Ruppel v. Dep't. of Revenue*, Wis Tax Rptr. (CCH) ¶400-313 (WTAC 1997).

In this case, the Department has moved for summary judgment. Thus, its burden of going forward must be integrated with the burden of a party which has moved for summary judgment. *John R. Whitney, Jr. v. Dep't. of Revenue*, Wis. Tax Rptr. (CCH) ¶400-330 (WTAC 1997). The moving party must show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. Wis. Stat. § 802.08(2). As mentioned above, any doubt as to the existence of a genuine issue of material fact must be resolved against the moving party. *Gouger v. Hardtke*, 167 Wis. 2d 504, 511, 482 N.W.2d 84 (1992).

A. Background and History

Every employer is required under federal law to deduct and withhold federal income tax and Federal Insurance Contributions Act (FICA) tax from employees' wages as and when they are paid. See 26 U.S.C. §§ 3102 (FICA) and 3402(a) (2000) (income tax). Under Section 7501 of the Internal Revenue Code (the "Code"), such amounts are held in trust for the United States and thus are commonly referred to as "trust fund taxes." See *Slodov v. United States*, 436 U.S. 238, 243, 98 S.Ct. 1778, 56 L.Ed.2d 251 (1978). In imposing the obligation to collect these taxes on other than the actual taxpayer, Congress recognized that businesses might fail to set aside and pay over the taxes to the government. See *United States v. Sotelo*, 436 U.S. 268, 277 n. 10, 98 S.Ct. 1795, 56 L.Ed.2d 275 (1978). Where a business fails to remit the withheld taxes, the government must still credit each employee-taxpayer as if the funds had actually been

paid over to the government. *See, e.g.*, 26 C.F.R. § 1.31-1(a) (2004); *see also Slodov*, 436 U.S. at 243, 98 S.Ct. 1778; *United States v. Huckabee Auto Co.*, 783 F.2d 1546, 1548 (11th Cir.1986). As a consequence, the federal government obligates itself to pay benefits such as income tax refunds and social security, for which there might be no corresponding revenue. *See, Emshwiller v. United States*, 565 F.2d 1042, 1044 (8th Cir.1977) (“any failure by the employer to pay withheld taxes results in a loss to the government in that amount”). Wis. Stat. § 71.83 was enacted in 1987 and is virtually identical to the federal law.

To protect against such losses, the persons responsible for ensuring that the trust fund taxes are paid, who willfully fail to do so, may be held personally liable under Section 6672 of the Code. *See* 26 U.S.C. § 6672 (2000); *see also United States v. Bisbee*, 245 F.3d 1001, 1005 (8th Cir.2001). Section 6672(a) states in relevant part:

Any person required to collect, truthfully account for, and pay over any tax imposed by this title who willfully fails to collect such tax, or truthfully account for and pay over such tax, or willfully attempts in any manner to evade or defeat any such tax or the payment thereof, shall, in addition to other penalties provided by law, be liable to a penalty equal to the total amount of the tax evaded, or not collected, or not accounted for and paid over.

26 U.S.C. § 6672(a). Liability under Section 6672 results from three factors: “(1) there must be a ‘person’ who (2) is required to collect, truthfully account for, and pay over taxes, but who (3) ‘willfully’ fails to do so.” *Emshwiller*, 565 F.2d at 1045; *see also Vinick v. United States*, 205 F.3d 1, 3-4 (1st Cir.2000); *Cook v. United States*, 52 Fed.Cl. 62, 68 (2002); *United States v. Landau*, 155 F.3d 93, 101 (2d Cir.1998), *cert. denied*, 526 U.S. 1130 (1999).

Section 6672 has an interesting history. Section 6672 originated as section 1308(c) of the Revenue Act of 1918, 40 Stat. 1143, which established a three-tiered scale of penalties for failing to comply with federal excise taxes. *See Slodov*, 436 U.S. at 250, 98 S.Ct. 1778. The most severe of these prongs imposed a criminal sanction, equal to 100 percent of the evaded or unpaid tax, on any person who “willfully refuses to pay, collect, or truly account for and pay over” certain specified excise taxes. This criminal provision later evolved first to cover Social Security taxes, (*see* Social Security Act of Aug. 14, 1935, Pub.L. No. 74-271, ch. 531, § 807(c), 49 Stat. 620, 638), and, ultimately, to reach the failure to pay over the withholding portion of income taxes (*see* Current Tax Payment Act of 1943, Pub.L. No. 68, ch. 120, 57 Stat. 126, 138). In enacting the 1954 Code, Congress severed this provision from the other criminal penalties, because it did not provide for imprisonment, and instead grouped it with other assessable noncriminal penalties, renumbering it as Section 6672 of the Code. Although both the House and Senate reports commented on this shift, neither otherwise described the purpose of what effectively became a civil penalty. *See* S.Rep. No., 1622, 83d Cong., 2d Sess. 5245 (1954); H.R.Rep. No. 1377, 83d Cong., 2d Sess. 4568 (1954) ⁴

B. Judgment as a Matter of Law

Federal law, which Wisconsin follows, treats the person with effective power to pay the tax as the “responsible person.” *Howard v. United States*, 711 F.2d 729, 734 (5th Cir.1983). Courts read the term “responsible person” expansively. *O'Callaghan*

⁴ James E. Hungerford, *Note*, “*Howard v. United States: Who Should be Responsible for the 100 Percent Penalty?*,” 12 U. Puget Sound L.Rev. 451, 454-56 (1989) (discussing this history).

v. United States, 943 F.Supp. 320, 324 (S.D.N.Y.1996). An “employee with the power and authority ... to direct the payment of the taxes is a responsible person within the meaning of section 6672.” *Feist v. United States*, 221 Ct.Cl. 531, 607 F.2d 954, 960 (1979).

In the responsible person analysis, the answer often turns on whether the person had the power to make tax payments in light of the business’ financial organization and decision-making structure. *O’Connor v. United States*, 956 F.2d 48, 51 (4th Cir.1992). This is a fact-intensive inquiry; in some instances, employees who perform the clerical functions of collecting and paying taxes are not responsible persons. *Feist*, 607 F.2d at 957, 960. Nonetheless, responsibility does not turn on one’s role as an officer or employer but rather on “knowledge of the tax delinquency and authority over the decision to pay or not to pay the taxes which is at issue.” *Mueller v. Nixon*, 470 F.2d 1348, 1350 (6th Cir. 1972). Thus, one can be a responsible person if he or she is in a position within the business to prevent the default from occurring. *United States v. Kim*, 111 F.3d 1351, 1362 (7th Cir. 1997) (quoting *Bowlen v. United States*, 956 F.2d 723, 728 (7th Cir. 1992)).

Furthermore, an individual who is otherwise a responsible person will not avoid liability if he or she only follows a supervisor’s instructions. *Howard*, 711 F.2d at 733-34. An employee will be liable for the tax even if his or her superior demands noncompliance with the tax laws as a contingency for not being terminated. *Id.* Also, responsibility cannot be delegated away. *Thomsen, Jr. v. U.S.*, 887 F.2d 12 (1st Cir. 1989). More than one party can be held responsible in a given case. *Whitney*, at ¶400-330. Also, in order to be a “responsible person,” one does not have to be the person most at

fault in a given situation. *Kenneth Higgs and Richard F. Wagner v. Dep't. of Revenue*, Wis. Tax Rptr. (CCH) ¶400-356 (WTAC 1998).

Wisconsin, like the federal courts, reads the term “responsible person” broadly. *Strozinsky v. School District of Brown Deer*, 2000 WI 97, ¶59, 273 Wis. 2d 19, 614 N.W.2d 443 (2000). The person need not be an officer or other key employee because Wisconsin’s penalty provision, Wis. Stat. § 71.83(1)(b)2, refers expansively to officers, employees, and “other responsible person[s].” Although the Wisconsin Legislature has not defined “other responsible person,” the Tax Appeals Commission gauges responsibility by examining whether the person had the actual or *de facto* authority to withhold, account for, or pay the taxes, the duty to pay the taxes, and whether the person intentionally breached that duty. *Noard v. Dep't. of Revenue*, Wis. Tax. Rptr. (CCH) ¶400-401 (WTAC 1998). Thus, an office manager who filed tax returns and made some payments could be held personally liable because she was fully apprised of the company's tax problems. *Green v. Dep't. of Revenue*, Wis. Tax Rptr. (CCH) ¶400-378 (WTAC 1998). We have also found a restaurant owner’s father to be a responsible person where the father was never an officer or an employee, but a self-titled consultant who got involved only when the son’s business began to fail. *Noard v. Dep't. of Revenue*, Wis. Tax Rptr (CCH) ¶400-401 (WTAC 1998). We have even found responsible a former company president who lost the ability to carry out an installment agreement after his wife fired and divorced him. *Whitney*, at ¶400-330. Finally, in another case, we found a restaurant owner did not do enough to extricate himself from the affairs of the

corporation after a heart attack left him with diminished mental capacity. *Ceille v. Dep't. of Revenue*, Wis. Tax Rptr. (CCH) ¶400-473 (WTAC 2000).

While we have construed “responsible person” broadly, it is not without its limits. As the Fourth Circuit has stated, the responsible person determination is pragmatic and based on considerations of substance, rather than form. It boils down to the fact that 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.” *Plett v. United States*, 185 F.3d 216, 219 (4th Cir. 1999). The *Plett* case identified a number of criteria which serve as indicia of the requisite authority, including whether the employee (1) served as an officer of the company or as a member of its board of directors; (2) controlled the company’s payroll; (3) determined which creditors to pay and when to pay them; (4) participated in day-to-day management of the corporation; (5) possessed the power to write checks; and (6) had the ability to hire and fire employees. Simply signing checks and tax reports as a bookkeeper does not establish such authority. *Sabaska v. Dep't. of Revenue*, Wis. Tax Rptr. CCH ¶400-538 (WTAC 2001). The authority to sign checks might establish the authority to direct the payment of taxes, but such authority must be real, not illusory. *Ceille*, at ¶400-473.

There is a line of federal cases that has absolved individuals from liability where, apart from any instructions, they were in no real position to ensure that funds would actually pass from the business to the IRS. These cases stress that while an individual's title or authority to sign checks may suggest a theoretical authority to

effectuate such a payment, those features are not controlling if, based on the record as a whole, it preponderates that a given individual actually lacked the effective ability to pay taxes over to the IRS. *See, e.g., Barrett v. U.S.*, 580 F.2d 449, 453 (1978)(despite having authority to sign checks, corporate director not “responsible officer” where corporate president controlled which creditors would be paid, including the IRS); *Bauer v. United States*, 543 F.2d 142, 149 (1976). (“Mere office holding of and by itself does not render one responsible for the collection and paying over of employee withholding taxes.”); *DeAlto v. U.S.*, 40 Fed.Cl. 868, 878 (1998)(“While the existence of another responsible person would not excuse plaintiff, [plaintiff's superior] retained such exclusive authority that plaintiff effectively had none when dealing with creditors”); *Heimark v. United States*, 18 Cl.Ct. 15, 21-23(1989) (treasurer not responsible person where responsibilities were ministerial and president of company was “autocratic” in the control of funds); *United States v. Rem*, 38 F.3d 634, 647(2d Cir.1994) (the power to sign checks and the holding of corporate office “can exist in circumstances where the individual in reality does not possess significant control over corporate finances”); *Williams v. United States*, 25 Cl.Ct. 682, 684 (1992) (officer that had written checks to creditors other than the IRS held not responsible where “though plaintiff had check writing authority and seemingly important titles, he lacked any independent authority within [the company].”); *U.S. v. Carrigan*, 31 F.3d at 134 (concluding that employee with check-signing authority may not have been a “responsible person” insofar as his control over the affairs of the company was “significantly circumscribed” by others). As noted by a leading author, these cases hold that the concept of responsibility connotes more

than “corporate title” or a “theoretical authority” to pay over taxes, but rather “arises out of control actually exercised over the financial operations of the business.” Michael I. Saltzman, *IRS Practice and Procedure* ¶ 17.07 (2005).

The Petitioner in this case relies heavily on a federal case like those above where the taxpayer successfully showed he did not have effective control over the disbursements of the corporation and, therefore, was not a “responsible person.” *McGlaughlin v. United States*, 2001-USTC (U.S. Dist. Ct. Md. 2000). In that case, the taxpayer was a director of the corporation and had some control over the payroll, with the power to write checks at the direction of the company president, Mr. Burek. The taxpayer did make deposits and tax payments, but they were always authorized by Mr. Burek. The taxpayer was aware of the tax delinquencies, but had no decision-making authority in deciding who got paid. The court stated that the business was a “one man show,” and McGlaughlin was “not that man.” *Id.* at 2. What we understand the thrust of *McGlaughlin* to be is that regardless of titles, actual authority does not exist in the taxpayer where it resides exclusively within someone else.

The Tax Appeals Commission does not appear to have previously had occasion to consider a case like *McGlaughlin*.⁵ We have in dicta come close, though. In *Green*, this Commission stated that a person who has authority to act may not always have the duty to act if the person has been kept in the dark and lacks knowledge of what has been transpiring in the nonpayment of required taxes. Later in the same

⁵ A Westlaw key cite on the *McGlaughlin* case revealed that in the nine years since it was decided, no court or commission has cited to *McGlaughlin*. *McGlaughlin* is a district court opinion.

opinion, the Commission said that it could not embrace an “I was only following orders” defense on the facts present in the *Green* case. The case before us, however, squarely asks us to apply *McGlaughlin* where the facts are much more similar to those present in the *McGlaughlin* case and we find substantial reasons for doing so. First, Wisconsin has consistently followed federal case law in this area, as our personal liability statute is virtually identical to the federal personal liability statute. Respondent’s Brief, at 4. Second, the Department appears not to challenge the potential applicability of the defense outlined in *McGlaughlin* in its briefs.⁶ Third, a mechanistic approach to responsible person cases, particularly on summary judgment, could lead to inequitable results.⁷

Applying the reasoning of the *McGlaughlin* case leads to the conclusion that the Department is not entitled to summary judgment for several reasons. First, the law is not clear that the facts the Department relies on make it entitled to judgment. In brief, the Department in the case *sub judice* points to the ability to sign checks, the title of Vice-President, the preparation of the payroll and tax forms, and the awareness of taxes not being paid.⁸ However, as the above cases indicate, at least three of the four factors

⁶ The Department argues that *McGlaughlin* does not control here because that case was a taxpayer’s motion for summary judgment, meaning that the government did not effectively meet the averments of the plaintiff. Respondent’s Reply Brief at 3.

⁷ This possibility has produced substantial scholarly comment. See, Mary A. Bedikian, *The Pernicious Reach of 26 U.S.C. Section 6672*, 13 Va. Tax Review 225 (1993); Doreen McCall, Comment, *Who is a “Responsible Person”---The Overreaching Power of the Internal Revenue Service to Collect Employer Withholding Taxes*, 18 Ohio N.U. L. Rev. 905, (1992); Corrie Lynn Lyle, Comment, *The Wrath of I.R.C. § 6672: The Renewed Call for Change---Is Anyone Listening? If You Are A Corporate Official, You Had Better Be*, 74 S. Cal. L. Rev. 1133 (2001).

⁸ The Department posits several times in its briefs that the Petitioner had constructive ownership of his father’s business, but the significance of that assertion is not further explained.

the Department relies on have been held not to be determinative. As to the significance of a title, we have stated that a person who is the President and sole shareholder of the corporation has the inherent authority, but we have not said that about a Vice-President. *Ceille*, at ¶400-473.⁹ A party cannot be presumed to be a responsible person merely from titular authority. *O'Connor v. U.S.*, 956 F.2d 48 (1992). Likewise, signing checks and filling out tax forms do not by themselves make an employee personally responsible. *Heimark*, at 21-23. The power to sign checks and the holding of corporate office are indeed factors that courts have listed as helpful in deciding whether an individual possessed the necessary power, but they are only factors. *U.S. v. Rem*, 38 F.3d 634. The Department at one point points out that responsible person cases usually are not amenable to resolution on summary judgment because they are fact intensive and we agree. In our view, the facts before us on this motion are similar to those in *McGlaughlin*, a case in which the taxpayer successfully moved for summary judgment against the federal government. Thus, while the Department may very well ultimately prevail in this case should there be a trial, it has not at this point in the case demonstrated the right to judgment with the requisite clarity required for summary judgment. In sum, the Petitioner has done enough at this point in the litigation to escape summary judgment.

⁹ In *Ruppel*, the taxpayer who was found to be responsible was a Vice-President, but in that case the President lived in Florida and did not run the day-to-day business.

C. Genuine Issues of Material Fact.

In addition to the legal issues described above, there is the question here if the facts are in dispute. The Department has set forth various facts and the Petitioner has challenged that recitation. Specifically, the Petitioner invites a comparison between Respondent's Statement of Facts with the Petitioner's affidavit and Report of Interview, both of which are part of the record. In brief, the Petitioner makes three points. First, in response to Respondent's assertion that the Petitioner was a Vice-President, the Petitioner adds that the title was given to him only so that he could sign checks he was directed to sign by his father.¹⁰ Second, in response to the Respondent's contention that the Petitioner was responsible for payroll and tax forms, the Petitioner states that this overstates his actual authority because all of his actions were ministerial in nature and nothing was done independent of specific directions by his father. The third issue concerns the effect of the late notices that the Petitioner gave his father. While the Respondent posits that the Petitioner admits that he was aware that the withholding tax was not being forwarded, the Petitioner here points out that what he actually said was that "while opening the mail, [he] saw notices of unpaid tax withholdings and passed these on to [his] father, Ken Sandberg, and that his father told him he shouldn't worry because he was taking care of it, that he was working with the IRS and Wisconsin Department of Revenue to resolve these issues."¹¹

¹⁰ This Commission has held that while a person who is the president and sole shareholder of a corporation inherently has authority to direct the payment of taxes, other corporate officers must have an active role in the affairs of the corporation. *Ceille*, at ¶400-473.

¹¹ The timing of the notices is also unclear.

We agree with the Petitioner that the above is enough to establish that there are facts in dispute here such that summary judgment is inappropriate. First, the summary judgment bar is relatively high. As recited above, reasonable inferences at this point in the case go to the party opposing summary judgment. Further, we must view those inferences in the light most favorable to the party opposing summary judgment. Reviewing these items using these standards, one might reasonably conclude from the record before us today that the Petitioner did not have the *de facto* authority to be a responsible person, and that this was a “one-man show,” as the Petitioner claims. Second, in our view, the credibility of the various assertions is at issue and weighing evidence has no place on a motion for summary judgment. *See, e.g., Yahnke v. Carson*, 2000 WI 74, ¶27, 236 Wis. 2d 257, 613 N.W.2d 102; *Pomplun v. Rockwell Intern. Corp.*, 203 Wis. 2d 303, 552 N.W.2d 632 (Ct. App. 1996). Instead, that is a function best reserved for trial. Was the Petitioner a major player in this business such that he is a “responsible person,” or was he just a cabin boy on a sinking ship?¹² On the record before us, we cannot tell and thus the Department’s Motion for Summary Judgment must be denied.

CONCLUSION

We deny the motion for summary judgment for two reasons. First, the proof relied upon by the Respondent does not establish at this point in the case that the Petitioner was a “responsible person” within the meaning of Wis. Stat. § 71.83. None of the facts relied upon by the Department is dispositive, singly or taken as a whole.

¹² This colorful analogy was used by the court in *Unger v. United States*, 1994 WL 52574 (S.D.N.Y.)

Further, the facts appear to be in dispute and the Petitioner is, in our view, entitled to a hearing on his claim that he was not, in fact, a “responsible person.”

IT IS ORDERED

1. The Department’s motion for summary judgment is denied.
2. The Commission will contact the parties to arrange a status conference to discuss further proceedings in this matter.

Dated at Madison, Wisconsin, this 28th day of October, 2009.

WISCONSIN TAX APPEALS COMMISSION

David C. Swanson, Chairperson

Roger W. Le Grand, Commissioner

Thomas J. McAdams, Commissioner