

STATE OF WISCONSIN
TAX APPEALS COMMISSION

STEVEN PETERS,

DOCKET NOS. 09-W-180,
09-W-181, 10-W-48-SC,
10-W-58 AND 10-W-59

RONALD VAN DEN HEUVEL,

DOCKET NOS. 09-W-169
AND 10-W-66

and

ARTLEY SKENANDORE,

DOCKET NO. 10-W-60

Petitioners,

vs.

WISCONSIN DEPARTMENT OF REVENUE,

Respondent.

DECISION AND ORDER

THOMAS J. McADAMS, COMMISSIONER:

This case comes before the Commission for decision after the parties tried the case in Green Bay on February 27 and 28, 2012. Petitioner Ronald Van Den Heuvel is represented by Attorney Brian R. Mudd of Nelson & Schmeling, which is located in Green Bay, Wisconsin. Attorney Mudd also represents Petitioner Artley Skenandore.¹ Attorney Douglas H. Frazer of DeWitt, Ross & Stevens, which has its headquarters in Madison, Wisconsin, represents Petitioner Steven Peters. The Department of Revenue

¹ Petitioners Skenandore and Van Den Heuvel waived any conflicts on the record.

("the Department") is represented by Attorney John R. Evans. The issue in this case is the individual responsibility of the three Petitioners for unpaid payroll withholding taxes for several corporations during various periods between 2006 and 2009. All three Petitioners and the Department of Revenue have filed post-trial briefs. For the reasons stated below, we hold the following:

Petitioner	Responsible	Not Responsible
1. Mr. Van Den Heuvel	Oconto Falls	Nature's Way
2. Mr. Peters	Nature's Way (to 01/09)	Oconto Falls
		PCDI
		Eco Fibre
		TPTC
3. Mr. Skenandore	Nature's Way	

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

FINDINGS OF FACT²

A. Jurisdictional Facts

1. The Department issued its assessments in these 8 cases on various dates between January 14, 2009 and July 20, 2009. (Department's Exhibits 1-4.)

² After the trial, each party submitted proposed facts. We have made edits, mostly for form and punctuation. We have also added quotes from the transcript.

2. The Petitioners filed petitions for redetermination with the Department between February 27, 2009, and August 14, 2009. (*Id.*)

3. The Department denied the petitions for redetermination on various dates between July 6, 2009, and January 21, 2010. (*Id.*)

4. The Petitioners timely filed petitions to the Tax Appeals Commission on various dates between September 21, 2009, and March 23, 2010. (Commission files.)

B. Material Facts

As to Mr. Van Den Heuvel

1. The assessments for Oconto Falls Tissue, Inc., are for withholding tax periods beginning September 1, 2006, and ending February 28, 2007. (Department's Exhibits 1-4.)

2. The entities involved herein are principally owned and run by Mr. Van Den Heuvel. He owned the majority of Partners Concepts Development, Inc. ("PCDI."). PCDI owned 100% of Tissue Products Technology Corp. ("TPTC"), which in turn owned 100% of Oconto Falls Tissue, Inc. ("Oconto Falls."). PCDI also owned a majority interest in Custom Tissue LLC ("Custom Tissue"), which, in turn, owned 49% of Nature's Way Tissue Corp. ("Nature's Way"). Nature's Way was 51% owned by Native American interests but had an operating agreement with TPTC whereby TPTC performed management of Nature's Way. Eco Fibre, Inc. ("Eco Fibre"), was another member of the group (collectively "Entities or "Group"). (Department's Brief at 4.)

3. The business of the Group was making and converting paper into tissue. Eco Fibre made pulp. The paper rolls were made by Oconto Falls or purchased

from other outside entities. The paper was converted into tissue by TPTC or Nature's Way. (*Id.*)

4. In early 2006, Oconto Falls got into financial difficulty and was forced into involuntary bankruptcy. The bankruptcy was dismissed in mid-2006 prior to the accrual of the withholding delinquencies involved herein. However, the financial difficulties continued. The Group entered into an asset sale agreement ("Asset Sale Agreement") with ST Paper, LLC. The original agreement was dated September 19, 2006, and included Oconto Falls, TPTC, and PCDI. The agreement was extended numerous times until finally closed on April 16, 2007. Under the terms of the Asset Sale Agreement, the seller, that is the Group, had the obligation to make all payments in the ordinary course of business. (Petitioner Van Den Heuvel's Exhibits 2 through 21.)

5. Mr. Van Den Heuvel was an officer and director and had signature authority over Oconto Falls, but he had turned some control of that entity over to the buyer, per the Agreement. (Transcript, pp. 6-7.)

6. At closing, the buyer paid all the bills except for the withholding. (Transcript, pp. 21, 185, 190, 194, and 334-336.)

7. When the buyer took over, he changed the Operating Agreement so that there was more exposure and potentially more profit to Oconto Falls. (Transcript, p. 221.)

8. The buyer and his people began to run the company. Unfortunately, that left a shortfall. Because of how things were operated, after paying the banks and other lenders, there was not enough money to pay all the remaining bills that the Van

Den Heuvel companies had left unpaid. (Transcript, pp. 333-36.) The buyer and his companies then did not pay for all of the items the sellers thought the Sales & Marketing Agreement called for them to pay (Exhibits 32 and 33), nor did they pay any of the Seller Notes (Exhibits 30 and 31) as they became due. The actions of the buyer under both of those arrangements caused the seller subsequent to the sale to be unable to meet its tax obligations. (Transcript, pp. 228-33.)

9. PCDI could not pay its tax liabilities because Johnson Bank took the \$11,800,000 to pay off the buyer's note that PCDI had guaranteed as part of the sale. (Transcript, pp. 196-200 and Petitioner Van Den Heuvel's Exhibit 48.)

10. TPTC could not pay its taxes because the Sales & Marketing Agreement with ST Paper was never paid. Because TPTC was not getting paid, all of the money had been pulled out of PCDI and Oconto Falls was gone. (Petitioner Van Den Heuvel's Exhibits 32 and 33.)

11. The buyer was purchasing wastepaper from Eco Fibre and was using it in the mill, but then he defaulted on those payments to Eco Fibre, so that Eco Fibre was then unable to pay its obligations. (Transcript, p. 224.) The buyer had also intended to buy Eco Fibre, but that never came to fruition. (Transcript, pp. 205-6.)

12. For a very short period of time, Mr. Van Den Heuvel was a director of Nature's Way. At no time during the period in which the tax obligations for Nature's Way were owing was Mr. Van Den Heuvel an officer, director, or signatory on any bank accounts for Nature's Way. (Transcript, p. 334.)

13. PCDI, a holding company of which Mr. Van Den Heuvel was one of the owners, in turn owned part of Custom Tissue, which in turn owned a 49% interest in Nature's Way. The ownership percentage was too small to have any real direction as to what the company was doing and what it was paying and not paying. (Transcript, p. 345.)

14. While there was an Operating Agreement between TPTC and Nature's Way that covered a small part of the time frame in question, that Operating Agreement was conditioned on a purchase taking place. In fact, that purchase never happened. The Operating Agreement, while it was executed, never came into effect. (Transcript, p. 34.)

15. Mr. Van Den Heuvel testified verbatim as follows below:

Mr. Peters, [the accountant], they had nothing to do with it. Not on them four companies, nobody paid a bill without me telling them to. There's nothing there that these guys had any responsibility. I know the State is going to say they were signers on the checkbooks and whatever. They didn't buy a can of soda without saying can I.

(Transcript, p. 243.)

16. Mr. Van Den Heuvel also testified as follows:

Had [the buyer] paid the whole \$4 million and the taxes, we wouldn't be sitting here today. But we are and it's my fault, it's no one else's.

(Transcript, p. 337.)

17. As to Nature's Way, Mr. Van Den Heuvel testified as follows:

I did not have check writing authority and I did not have – I was not on the board, I wasn't an officer of Nature's Way.

(Transcript, p. 141.)

18. Mr. Van Den Heuvel also admitted the following:

... nobody here under any way, shape or form had any intention whatsoever to not pay these taxes. **Not one time today am I going to say any way, shape or form that I'm not liable for every single one of these taxes...**

Yes, I intended to help [Nature's Way] get them paid, no doubt in my mind. ... I intended when that sale and this thing came in, that money would move up to that company and we would use it to pay [Mr. Peters'] obligations through here....

(Transcript, p.141 (emphasis added).)

As to Mr. Skenandore

1. The assessments for Nature's Way are for withholding tax periods beginning December 1, 2006, and ending March 31, 2009. (Department's Exhibits 1-4.)

2. Mr. Skenandore was involved with Nature's Way beginning in December of 2003. When Nature's Way first entered into business, Nature's Way entered into a Marketing Agreement with Georgia Pacific, as a minority business enterprise. (Transcript, p. 344.)

3. Of the ownership, only 11 percent (11%) was owned by Artley Skenandore (individually through Swakweko, LLC), 20 percent (20%) was owned by Seventh Generation Corporation, and 20 percent (20%) by Spirit Lake Corporation. The other 49 percent (49%) was held by Custom Tissue. One of the shareholders of Custom Tissue was Steven Peters. A percentage of Custom Tissue was also owned by PCDI, one of the Van Den Heuvel companies. (Petitioner Skenandore's Brief at 2.)

4. Mr. Skenandore had no expertise in the paper industry. Nevertheless, he was made president. He was primarily in charge of sales. (Transcript, p. 346.)

5. Similar to the agreement that Oconto Falls had with SCA Tissue North America, there was an agreement between Nature's Way and TPTC. (Petitioner Skenandore's Exhibit 2.) Because there was never enough money passed down to Nature's Way as a result of the tolling agreement, Nature's Way was never able to pay taxes. All of the checks that Nature's Way issued to pay its expenses and payroll were issued with Mr. Skenandore's signature stamp. (Petitioner Skenandore's Brief at 2.)

6. Lacking any experience, Mr. Skenandore deferred to the experience and expertise of Mr. Peters regarding this situation. Mr. Skenandore was told that when Phase II took place and the assets of Eco Fibre were purchased by ST Paper, all of the obligations would be made current. Unfortunately, none of that ever happened. (Transcript, pp 346-47 and Petitioner Skenandore's Exhibits 1-3.)

7. Although it is clear that, while the Tribe had the financial control in terms of investment in the company, the Tribe was assisted in the actual operations by Mr. Peters and through Mr. Peters by the various Van Den Heuvel companies. (Petitioner Skenandore's Brief at 3.)

8. Mr. Skenandore testified that he and Mr. Peters determined which bills to pay as follows:

Q: And who was in charge of Nature's Way while you were on the road?

A: Mr. Peters was looked on as the general manager of the day-to-day operations.

Q: So if one of these conferences came up concerning the payment of pooling of money or paying of accounts payable, Mr. Peters would have taken that in your absence?

A: No, we would talk about it, there was no decisions made in the absence of anybody.

(Transcript, p. 362.)

9. Mr. Skenandore testified as follows regarding the events of 2006 through 2009:

Q: So even though your company was in a deficit position as respects accounts payable and including the withholding, you would agree that monies would be able to be pooled and used for other of the Ron entities, is that correct?

A. Yes, we did.

Q. And the whole idea was to keep everybody going, isn't that correct?

A. Correct.

(Transcript, p. 357.)

10. As to the procedure for paying the corporate bills, Mr. Skenandore testified as follows:

Q: So did the receivables [come] in and were they pooled with receivables?

A: Correct.

Q: Of the other companies within the group?

A: What we would do is we would meet with our CFO, [...] we would meet with Mr. Peters on a weekly basis. We had a spread sheet that was basically all of our expenses and on

that spread sheet, we carried forward all the taxes, Federal as well as State and all of our expenses, including payroll.

Q: And when the receivables came in, were they used exclusively to pay those expenses that were on the spread sheet?

A: They weren't adequate to pay all the expenses.

Q: So did you have to decide which expenses to pay and which not to?

A: We would go over that spread sheet. When I was a part of those meetings, we would go over that spread sheet and then we would get, you know, at the end towards when it was payroll, that we'd get the amount to cover our payroll.

Q: And so was the decision then to pay the payroll and other expenses rather than the withholding?

A: We always had it - as I said, we had it recorded, that that was an expense going forward.

Q: Was it paid?

A: Not to my knowledge.

Q: So other things were paid instead of that?

A: At that time.

Q: And which time was that, before 12/31/07 or after 12/31/07?

A: Actually it was during both periods of time.

(Transcript, pp. 55-6.)

As to Mr. Peters

1. The periods and entities for Mr. Peters include Oconto Falls, September 1, 2006, through February 28, 2007 (Department's Exhibit 19); Eco Fibre, September 1,

2007, through September 30, 2008 (Department's Exhibit 22); PCDI, September 30, 2007, through October 31, 2007 (Department's Exhibit 16); TPTC, July 1, 2008, through March 31, 2009 (Department's Exhibit 13); and Nature's Way, December 1, 2006, through March 31, 2009 (Department's Exhibit 10).

2. The trial testimony and exhibits underscored that most facts in this case were not in dispute. Mr. Van Den Heuvel, directly or indirectly, owned, operated, and controlled a number of interrelated companies all involved in different aspects of the paper manufacturing business. (Petitioner Peters' Brief at 2.)

3. Tissue Technology, LLC ("TTL"), was one of the parent companies. TTL controlled PCDI, TPTC and its subsidiary Oconto Falls, and Eco Fibre. (*Id.*)

4. Customer Tissue was the other Van Den Heuvel controlled parent company. It, together with Native American shareholders, owned Nature's Way. (*Id.*)

5. For each of these firms, Mr. Peters was secretary and general manager. Mr. Peters, with others, had check signing authority for each of the firms. Mr. Peters did not, however, sign any checks. (*Id.*)

6. Nicolet National Bank and Johnson Bank were the principal lenders for these firms. Each bank communicated directly with Mr. Van Den Heuvel concerning all material matters. (Transcript, p. 93 and Department's Exhibit 25.)

7. All of the companies were operated out of one suite of offices. Mr. Van Den Heuvel pooled accounts receivables and payable among these firms through intercompany transfers. Mr. Van Den Heuvel alone made these decisions. (Transcript, pp. 260-61.)

8. By a document dated and executed on January 1, 2009, and countersigned by Mr. Van Den Heuvel, Mr. Peters resigned from his positions of officer or director in the "Ron" group of firms. (Transcript, pp. 306-09). He also resigned from Nature's Way at the same time. (Transcript, p. 309).

9. The accountant for Nature's Way testified as follows:

A. There was an accounting staff... if they had payables, I would give those to Mr. Skenandore.

Q. Did you give it to Mr. Peters?

A. Yes.

Q. And then would you get direction on what payables to pay?

A. Yes, they would give me direction to pay.

Q. And who would give you that direction?

A. Mr. Skenandore and Mr. Peters.

(Transcript, p. 264.)

10. Mr. Peters testified as follows:

Q. [Commissioner McAdams]: Did you have check writing authority?

A: Yes.

Q: How many checks did you write?

A: I can't say that I recall ever writing one....

(Transcript, p. 74.)

11. Mr. Peters also testified as follows:

Q. [Commissioner McAdams]: When you received notices [from the State of Wisconsin that the withholding taxes had not been paid], what did you do with them?

A: They would be forwarded to Ron...

Q: Who made the decision not to pay the taxes?

A: Ron would

(Transcript, p. 76.)

12. Regarding his relationship with Mr. Peters, Mr. Van Den Heuvel stated the following:

Q. [Attorney Evans]: Let's go earlier in your direct exam, you declared that Steve Peters is not liable, now...

A: Are you talking for PCDI, TPTC, OFTI and -

Q. Well, your explanation seemed to cover the waterfront, is that true?

A: It shouldn't have covered Nature's Way, but it didn't - but the statement was made and it is correct. He's not responsible for any of those other four...

Q: First you say that [Mr. Peters is] not liable on this document, but on this [other] document you said he was liable...and today you're saying no, he's not liable?

A: He is authorized to make the payments. You asked the word today responsible, I said I'm responsible, he was authorized. If I was out of town for a month, which a lot of time I was working, the man could make the payment without me.

Q: Thank you.

A: I said I'm responsible.

Q: Thank you. Now -

A: Two different statements.

Q: Well, we can debate that.

A: No, we can't... he was on every checkbook, but I will tell you this, the man didn't write a check without asking me from those four companies.

Q: And he also on that [document] identified you as being responsible?

A: I know I'm responsible.

(Transcript, pp. 200-01.)

13. Mr. Van Den Heuvel also testified:

We are a victim here of something that happened to us, all of the assets taken that should have been used to pay the taxes.... You got to make sure the essentials are paid and the company stays open, which is exactly what Mr. Peters and I did, until it's here.

Now, we're all standing here. I'm not going to say this for Nature's Way. He didn't have nothing to do with any of the other bills.... Steve Peters couldn't pay a bill in OFTI, TPTC, PCDI or EcoFibre without me telling him to. He has no authority, but when I was out of town, I trusted him he'd do what he had to do there. You got the wrong guy there.

(Transcript, p. 147.)

RELEVANT STATUTE

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. 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, employee or other responsible person of a corporation . . . who, as such officer, employee . . . or other responsible person, is under a duty to perform the act in respect to which the violation occurs.

DECISION

These eight appeals concern the responsibility of three separate individuals for the unpaid withholding taxes for five related companies during various periods from 2006 to 2009. The matters are complicated by the fact that the allegations only partially overlap as to companies and as to time periods.

With respect to Mr. Van Den Heuvel, the entities and periods are Oconto Falls for September 1, 2006, through February 28, 2007 (Department's Exhibit 1.) and Nature's Way for December 1, 2006, through March 31, 2009 (Department's Exhibit 4).

The periods and entities for Mr. Skenandore include only Nature's Way, December 1, 2006, through March 31, 2009 (Department's Exhibit 7).

The Department assessed Mr. Peters for Oconto Falls, September 1, 2006, through February 28, 2007 (Department's Exhibit 19); Eco Fibre, September 1, 2007, through September 30, 2008 (Department's Exhibit 22); PCDI, September 30, 2007, through October 31, 2007 (Department's Exhibit 16); TPTC, July 1, 2008, through March 31, 2009 (Department's Exhibit 13); and Nature's Way, December 1, 2006, through March 31, 2009 (Department's Exhibit 10).

The first part of this decision will briefly summarize the relevant law. Then, we will discuss the burdens of proof. The last section will analyze the evidence.

A. Applicable Law

1. Trust Fund Taxes

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. 26 U.S.C. §§ 3102 (FICA) and 3402(a) (2000) (income tax). Under Section 7501 of the Internal Revenue Code, such amounts are held in trust for the United States and thus are commonly referred to as "trust fund taxes." *Slodov v. U.S.*, 436 U.S. 238, 243 (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. *U.S. v. Sotelo*, 436 U.S. 268, 277 (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; *U.S. v. Huckabee Auto Co.*, 783 F.2d 1546, 1548 (11th Cir.1986). As a consequence, the 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. U.S.*, 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.

2. Burdens and Procedure

In order to show that an officer or employee is a responsible person, the Department has the initial burden of going forward with evidence. The Department must produce clear and satisfactory evidence that the Petitioners had the authority to pay the respective company's taxes and the duty to pay them, and that there was an intentional breach of that duty.³ To prove the element of intent, the Department need only show that the Petitioners made decisions to use corporate funds to pay creditors, with knowledge of taxes being due. *Drilias v. Dep't of Revenue*, Wis. Tax Rptr. (CCH) ¶400-222 (WTAC 1996). Once the Department produces the required evidence, the burden normally shifts, and then the Petitioners must overcome the Department's case by clear and satisfactory evidence. *Ruppel v. Dep't of Revenue*, Wis. Tax Rptr. (CCH) ¶400-313 (WTAC 1997).

3. Substantive Law

Federal law, which Wisconsin follows, treats the person with effective power to pay the tax as the "responsible person." *Howard v. U.S.*, 711 F.2d 729, 734 (5th Cir. 1983). Courts read the term "responsible person" expansively. *O'Callaghan v. U.S.*, 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. U.S.*, 221 Ct. Cl. 531, 607 F.2d 954, 960 (1979). In the responsible person

³ The Commission held that the Department has the initial burden of proof where personal liability is imposed upon an officer or employee in *Menzel v. Dep't of Revenue*, Wis. Tax Rptr. ¶202-416 (WTAC 1984). The Commission's ruling was based upon two considerations. First, such cases involve the transfer of one taxpayer's liability to another taxpayer and the Department's authority to so transfer liability must be exercised with care. Second, the standard for imposition of this type of liability is whether the taxpayer's conduct was 'willful' in failing to file returns or remit taxes due.

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. U.S.*, 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 the responsible person. *Feist*, 607 F.2d at 957, 960.

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 this state'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).

While we have construed "responsible party" broadly, it is not without its limits. This Commission has noted that 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." *Sandberg v. Dep't of Revenue*, Wis. Tax Rptr. (CCH) ¶401-491 (WTAC 2011), citing *Plett v. U.S.*, 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. The authority to sign checks might establish the authority to direct the payment of taxes, but such authority must be real, not illusory. *John D. Ceille and Charlene Ceille v. Dep't. of Revenue*, Wis. Tax Rptr. (CCH) ¶400-473 (WTAC 2000).

There is a long line of federal cases where the courts absolved individuals who were in no real position to ensure that funds would actually pass 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); *Bauer v. U.S.*, 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. U.S.*, 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); *U.S. 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. U.S.*, 25 Cl. Ct. 682, 684 (1992) (officer who 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]”). As noted by a leading tax 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).

B. Analysis

1. Brief Summary of Trial

This case concerns the responsibility of the three Petitioners for the unpaid withholdings for five interrelated businesses between 2006 and 2009. The evidence showed that Mr. Van Den Heuvel attempted to sell his paper business in 2006. He negotiated an agreement with a buyer and a preliminary agreement was signed in mid-2006 and extended on a monthly basis until the closing in the spring of 2007. The agreement called for certain operating expenses to be paid during the interim period by the buying group. Disputes arose, and the buyer eventually paid all of the expenses

except for the withholding taxes. To this day, Mr. Van Den Heuvel is pursuing litigation against the buyer.

Mr. Van Den Heuvel was the president of four of the corporations involved here (Oconto Falls, Eco Fibre, PCDI, and TPTC). Mr. Peters served as the secretary/general manager of all of the corporations. Mr. Skenandore was the President of Nature's Way but was not involved in the management of the other corporations. Nature's Way was a subsidiary, owned 51% by Mr. Skenandore and his Tribe and 49% by Mr. Van Den Heuvel. The companies ran into further financial problems during the period Mr. Van Den Heuvel was selling the businesses and fell behind on the taxes. The Petitioners did not pay over the withholding taxes in an effort to keep the businesses going until the sale was completed.

2. Evidence on the Department's Initial Burden

The Department introduced evidence as to each of the Petitioners to meet the initial burden. We will review the evidence as to each Petitioner separately.

a. Mr. Van Den Heuvel

As to Mr. Van Den Heuvel, the Department argued at the initial phase of the trial that Mr. Van Den Heuvel admitted in his interview⁴ that he and Mr. Peters were responsible for the payment of the taxes for Oconto Falls. (Department's Exhibit 32.) Further, the Department argued that Mr. Van Den Heuvel was an authorized signatory on the Oconto Falls checking account and his name appeared on the checks.

⁴ The interview appears to be a P-650 form each of the Petitioners filled out in their own handwriting at the Department's request.

(Department's Exhibits 33 and 34.) Mr. Van Den Heuvel admitted in his interview that he and Mr. Peters authorized the payment of the taxes of TPTC. (Department's Exhibit 46.) Mr. Van Den Heuvel was on the TPTC checking account and his signature was on the checks issued. (Department's Exhibits 48 and 62.) Mr. Van Den Heuvel admitted during his interview that he and Mr. Peters authorized the payment of taxes of PCDI. (Department's Exhibit 59.) Mr. Van Den Heuvel was on the checking account and his name appeared on the checks written on that account. (Department's Exhibit 62.) Mr. Van Den Heuvel was on the Eco Fibre checking account and his name appeared on the checks written on that account. (Department's Exhibits 56 and 64.) Mr. Van Den Heuvel was an officer, in fact, the lead officer in these entities. Mr. Skenandore testified that the money was forwarded to Mr. Van Den Heuvel for use where it was needed in the group of companies and Mr. Van Den Heuvel was in on that decision making. (Transcript, p. 358.) Mr. Skenandore looked to Mr. Van Den Heuvel for his experience in the paper industry. (Transcript, p. 346.)

b. Mr. Peters

As to Mr. Peters, the Department argued that Mr. Peters admitted in his interview that he was authorized to pay the taxes of Oconto Falls (Department's Exhibit 69.) The Department showed that Mr. Peters was listed on the Oconto Falls checking account. (Department's Exhibit 34.) Mr. Peters admitted during his interview that he was authorized to pay the taxes of TPTC. (Department's Exhibit 49.) Mr. Peters is on the TPTC checking account. (Department's Exhibit 48.) Mr. Peters admitted during his interview that he was authorized to pay the taxes of Eco Fibre. (Department's Exhibit

55.) Mr. Peters was on the Eco Fibre checking account. (Department's Exhibit 56.) Mr. Peters admitted during his interview that he was authorized to pay for the taxes of PCDI. (Department's Exhibit 58.) Mr. Peters admitted during his interview that he was authorized to pay the taxes of Nature's Way. (Department's Exhibit 47.) He was an officer and General Manager. Mr. Peters was in on the collective decision making on whom to pay. (Transcript, p. 358.) Mr. Peters was listed on the checking account. (Department's Exhibits 38 and 39.) The accountant testified she was given instructions from Mr. Peters and Mr. Skenandore on whom to pay. (Transcript, p. 264.)

c. Mr. Skenandore

As to Mr. Skenandore, the Department's evidence was that Mr. Skenandore was the Chief Executive Officer of Nature's Way. He was listed on the signature card of the checking accounts of Nature's Way and signed all of the checks. He agreed with Mr. Van Den Heuvel and Mr. Peters to pool all of the funds coming in for use at whatever entity needed it most. He made the recommendations with the controller on what and whom to pay. He admitted that he allowed the monies to be pooled and used for other purposes than paying the withholding taxes.

3. Ruling on Initial Burden

The Department met its initial burden as to each of the three Petitioners. The documents and the testimony showed that the Petitioners clearly had the authority to pay the respective company's taxes and the duty to pay them, and there was an intentional breach of that duty during the periods the businesses ran into financial

difficulties during the transition period. The Petitioners admittedly made decisions to use corporate funds to pay other creditors, with knowledge of taxes being due.

4. Evidence of Petitioners

Once the Department produces the required evidence, the burden normally shifts, and then the Petitioners must overcome the Department's case by clear and satisfactory evidence. *Ruppel*. We will examine and analyze the evidence each of the Petitioners put forth below.

a. Mr. Peters

At trial, Mr. Peters contended that he was not responsible for the withholdings for the various companies. In brief, he contended that Mr. Van Den Heuvel actually made the decisions on whom to pay and he only exercised decision-making authority during brief and isolated periods when Mr. Van Den Heuvel was out of town. The Department, on the other hand, argues that Mr. Peters exercised control in concert with Mr. Van Den Heuvel. After listening to the testimony of the witnesses and examining the exhibits, we see the evidence as to Mr. Peters falling into two categories. We will discuss each separately.⁵

First, as to what the parties (including the Department)⁶ aptly characterized as the "Ron" companies (Oconto Falls, Eco Fibre, PCDI, TPTC), the

⁵ Again, we note that the cases are not symmetrical here in the sense that Mr. Peters and Mr. Van Den Heuvel are assessed for different entities. The Department has assessed Mr. Van Den Heuvel for the deficiencies of only Oconto Falls and Nature's Way; Mr. Van Den Heuvel is not assessed for Eco Fibre, PCDI, or TPTC. Mr. Peters, however, is assessed for Oconto Falls, Eco Fibre, PCDI, and TPTC.

⁶ See fact paragraph 9 as to Mr. Skenandore.

evidence showed that Mr. Van Den Heuvel controlled the finances of those companies.

As stated above, Mr. Van Den Heuvel testified verbatim as follows:

Mr. Peters, [and the accountant], they had nothing to do with it. Not on them four companies, nobody paid a bill without me telling them to. There's nothing there that these guys had any responsibility. I know the State is going to say they were signers on the checkbooks and whatever. They didn't buy a can of soda without saying can I.

(Transcript, p. 243.)

While case law shows that more than one person can be legally responsible, in this case the credible testimony repeatedly showed that financial control and practical authority clearly resided in Mr. Van Den Heuvel alone as to these four companies. We see the credible evidence here that Mr. Van Den Heuvel was a "one man show" as to these four companies as the Commission saw in *Sandberg*, referenced above. In that case, the Petitioner proved at trial that, despite the fact that he signed some of the business' smaller checks and managed some aspects of the office, his father actually made the decisions on whom to pay and his authority in relation to his father was merely "ministerial." Mr. Peters' role as to these four corporations was similar to that of Mr. Sandberg in his father's business.

Analyzing the *Plett* criteria here, we note that Mr. Peters was not an owner, although at times he owned small amounts of stock. Further, while he served as an officer of the company and as a member of its board of directors; in fact, his title was secretary/general manager. He played a role, but certainly not a leading role. As to control of the company's payroll, Mr. Peters clearly did not control the payroll. Further,

the undisputed evidence was that Mr. Van Den Heuvel determined which creditors to pay and when to pay them. Mr. Peters did not exercise control over the financial operations of the businesses, except for brief and isolated periods where Mr. Van Den Heuvel was absent. Mr. Peters did, however, participate in day-to-day management of the corporation. He did play a role here, but a supporting role to Mr. Van Den Heuvel. As to check writing authority, Mr. Peters possessed the power to write checks. He possessed the technical authority, but the uncontroverted evidence was that he *never* did write a check. While he had a role in hiring, we do not view that as significant to this case. In sum, based on the credible testimony, perhaps two of the six criteria inure to the Department's favor.

As to Nature's Way, the picture is different. Clearly, Mr. Peters was a responsible party as to this corporation up until his resignation on January 1, 2009. He had the title, and he also participated in management meetings with Mr. Skenandore where the two, and only the two, determined which bills to pay. The accountant for Nature's Way testified as follows:

A: There was an accounting staff... if they had payables, I would give those to Mr. Skenandore.

Q: Did you give it to Mr. Peters?

A: Yes.

Q: And then would you get direction on what payables to pay?

A: Yes, they would give me direction to pay.

Q: And who would give you that direction?

A: Mr. Skenandore and Mr. Peters.

(Transcript, p. 264) While the evidence showed that the Petitioners were desperately trying to keep Nature's Way afloat and they simply did not have the money to pay all of the bills, Mr. Peters and Mr. Skenandore (and not Mr. Van Den Heuvel) choose to pay other creditors of Nature's Way and not to turn over the trust fund taxes. This is the *sine qua non* of officer liability cases. And that is precisely what the law essentially prohibits corporate officers and employees from doing with trust fund taxes.

b. Mr. Skenandore

The evidence showed that Mr. Skenandore is a responsible person as to Nature's Way for two reasons. First, he was the President of Nature's Way. We have previously stated that a President necessarily has the requisite authority, and nothing in this case showed otherwise, the contractual arrangement with Mr. Van Den Heuvel notwithstanding. Second, as the quote from the accountant in the previous section shows, Mr. Peters and Mr. Skenandore had numerous meetings where the two decided to pay other obligations, and Mr. Skenandore admitted on the stand to "carrying over" the withholding tax liability.

Mr. Skenandore's defense was that he relied on the parent company for expertise in the paper business, but that is unconvincing and does not excuse paying other creditors first. The testimony was that Nature's Way had money coming in from the parent company, just not enough to pay all of the creditors. Clearly, he and Mr. Peters determined which bills to pay out of the money that was coming in.

c. Mr. Van Den Heuvel

Mr. Van Den Heuvel is charged with being a responsible person for Oconto Falls and for Nature's Way. We will analyze each allegation separately.

As to Oconto Falls, the evidence against Mr. Van den Heuvel is clear. First, he admitted being in charge as he was the President before 2006. He continued on after the agreement was signed with the buyer and was physically present throughout the transition period and, in fact, is still the president of Oconto Falls to this day. We have held that the president of a corporation necessarily has the authority to direct payment of taxes. *Gerth v. Dep't of Revenue*, Wis. Tax Rptr. (CCH) ¶203-367 (WTAC 1992). Second, Mr. Van Den Heuvel to his credit *repeatedly* took responsibility for the unpaid taxes during his testimony before the Commission.

The defense that Mr. Van Den Heuvel offers on appeal is that, after the date the sale agreement was signed in mid-2006, the buyer should have paid the withholding taxes. Undoubtedly, Mr. Van Den Heuvel was in an unenviable and frustrating position. But there are problems with this legal position that lead us to conclude that he must still be responsible. First, the memorandum of understanding to sell the assets that he relies on was admittedly not binding. (Transcript, p. 186). The following paragraph is at issue:

WHEREAS, ST Paper, the Companies and the Van Den Heuvel Entities have engaged in discussions about a business arrangement for operating, developing and constructing tissue mills in the United States. The parties now desire to set forth their understanding with respect to these discussions. This Memorandum of Understanding expresses basic intentions only. It is not a comprehensive list

of all material terms and conditions. **Except as otherwise provided, this Memorandum of Understanding is not binding.**

(Petitioner Van Den Heuvel's Exhibit 1 and Transcript, p. 186 (emphasis added).)

Second, even if it were binding, the asset purchase agreement does not specifically say that the buyer is responsible for these taxes. Third, Mr. Van Den Heuvel admits paying other bills first in an effort to keep the business going to the sale, something he referred to continually as "survival mode." Third, under our case law, a responsible person cannot delegate or contract away responsibility. We wrote the following in *Ceille*:

We also cannot conclude that the control exercised by the Bank affected Mr. Ceille's liability. While the Bank may have taken considerable control over the affairs of the corporation, it was Mr. Ceille who agreed, on behalf of the corporation, to grant such power to the Bank. When Mr. Ceille negotiated and executed the loan agreements with the Bank, he agreed to let the Bank exercise control if Ceille Industries defaulted on the loan. He cannot at a later date claim immunity from liability based on the control that he voluntarily conveyed to the Bank. *See, e.g., Kalb v. U.S.*, 74-2 USTC ¶ 9760 at 85,499 (2d Cir. 1974).

Further, in this case, Mr. Van Den Heuvel stayed on as president throughout the transition. Fourth, the case law is clear that more than one party can be held responsible in a given case. *Whitney*, at ¶400-330. It simply is not the case that either Mr. Van Den Heuvel is liable, or the buyer is. Finally, in order to be a "responsible person," one does not have to be the person *most* at fault in a given situation. *Higgs and Wagner v. Dep't. of Revenue*, Wis. Tax Rptr. (CCH) ¶400-356 (WTAC 1998). Based on the evidence, the Department prevails as to Oconto Falls, as Mr. Van Den Heuvel has failed to prove that he was not responsible for the unpaid taxes of that corporation.

As to the Nature's Way Corporation, there is a very different story. The testimony was that the parties who *de facto* made the day-to-day financial decisions for Nature's Way were Mr. Skenandore and Mr. Peters. They held the meetings where the decisions were made not to pay the taxes. The fact paragraphs above quote extensively from the testimony and it is clear (and seemingly uncontroverted) that when the decisions not to pay were made during the relevant period Mr. Van Den Heuvel was not present at the meetings. Mr. Van Den Heuvel is not responsible in the sense that he ever exercised actual control of the decision on which tax bills to pay for Nature's Way. Yes, as the Department points out, he *theoretically* could have paid the taxes, given the relationship of the corporations, but that argument seems speculative and remote, and not enough to say that he was in fact "responsible." The Department writes in its brief that its basic premise in this case is that the three Petitioners collectively decided to pay expenses to keep the mill going to the detriment of the Department's withholding taxes. The testimony, however, did not show that to be the case for Nature's Way. Mr. Van Den Heuvel did not forward enough for Nature's Way to pay all its bills, but the decisions to prefer other creditors from the money that was forwarded were made by Mr. Peters and Mr. Skenandore, not Mr. Van den Heuvel.

CONCLUSIONS OF LAW

Mr. Van Den Heuvel is the responsible person for the Oconto Falls. He is not responsible for Nature's Way.

Mr. Peters and Mr. Skenandore are both responsible persons for Nature's Way. Mr. Peters, however, is not responsible for Nature's Way after January 1, 2009.

Mr. Peters is not a responsible person for Oconto Falls, Eco Fibre, PCDI, or TPTC.

ORDER

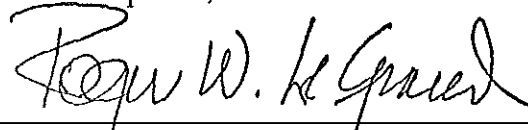
IT IS HEREBY ORDERED that the Department's assessment as to Mr. Van Den Heuvel is affirmed for Oconto Falls and reversed as to Nature's Way. The Department's assessment as to Mr. Skenandore is affirmed. As to Mr. Peters, the Department's assessment is affirmed in part (as to Nature's Way) and denied in part (as to Oconto Falls, Eco Fibre, PCDI, and TPTC) as described above.⁷

Dated at Madison, Wisconsin, this 7th day of January, 2013.

WISCONSIN TAX APPEALS COMMISSION



Lorna Hemp Boll, Chair



Roger W. LeGrand, Commissioner



Thomas J. McAdams, Commissioner

ATTACHMENT: NOTICE OF APPEAL INFORMATION

⁷ Again, the uncontroverted evidence is that Mr. Peters resigned on January 1, 2009. Thus, the assessment for Nature's Way will have to be adjusted to reflect that fact. The parties should notify the Commission if further proceedings are necessary.

WISCONSIN TAX APPEALS COMMISSION
5005 University Avenue - Suite 110
Madison, Wisconsin - 53705

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**

A taxpayer has two options after receiving a Commission final decision:

Option 1: PETITION FOR REHEARING BEFORE THE COMMISSION

The taxpayer has a right to petition for a rehearing of a final decision within 20 days of the service of this decision, as provided in Wis. Stat. § 227.49. The 20-day period commences the day after personal service on the taxpayer or on the date the Commission issued its original decision to the taxpayer. The petition for rehearing should be filed with the Tax Appeals Commission and served upon the other party (which usually is the Department of Revenue). The Petition for Rehearing can be served either in-person, by USPS, or by courier; however, the filing must arrive at the Commission within the 20-day timeframe of the order to be accepted. Alternatively, the taxpayer can appeal this decision directly to circuit court through the filing of a petition for judicial review. It is not necessary to petition for a rehearing first.

AND/OR

Option 2: PETITION FOR JUDICIAL REVIEW

Wis. Stat. § 227.53 provides for judicial review of a final decision. Several points about starting a case:

1. The petition must be filed in the appropriate county circuit court and served upon the Tax Appeals Commission either in-person, by certified mail, or by courier, and served upon the other party (which usually is the Department of Revenue) within 30 days of this decision if there has been no petition for rehearing, or within 30 days of service of the order that decides a timely petition for rehearing.
2. If a party files a late petition for rehearing, the 30-day period for judicial review starts on the date the Commission issued its original decision to the taxpayer.
3. The 30-day period starts the day after personal service or the day we mail the decision.
4. The petition for judicial review should name the other party (which is usually the Department of Revenue) as the Respondent, but not the Commission, which is not a party.

For more information about the other requirements for commencing an appeal to the circuit court, you may wish to contact the clerk of the appropriate circuit court or the Wisconsin Statutes. The website for the courts is <http://wicourts.gov>.

This notice is part of the decision and incorporated therein.