

STATE OF MAINE
KENNEBEC, ss.

MAINE BOARD OF TAX APPEALS
DOCKET NO. BTA-2013-4

[INDIVIDUAL TAXPAYER],

Petitioner

v.

DECISION

MAINE REVENUE SERVICES,

Respondent

I. Background

[Individual Taxpayer (the “Person”)] appeals from Maine Revenue Services’ (“MRS”) decision on reconsideration dated [date], which adjusted an assessment of sales tax, interest, and penalties against him, and upheld it as adjusted in the total amount of \$[amount]. The Appeals Office held an appeals conference on [date], with [the Person], [the Person’s] representative, MRS’s representative, and [the BTA] Appeals Officer. Also attending the appeals conference [was the Person’s Relative (“Relative”)].

The issue raised by [the Person] on appeal is whether MRS erred in issuing an assessment against him pursuant to 36 M.R.S. § 177 as a person responsible for the unpaid sales tax debt of [the “Company”] for the [“audit period”]. [The Person] has the burden of proof to show that it is more likely than not that MRS erred in assessing him for [the Company]’s unpaid sales tax debt. 36 M.R.S. § 151-D(10)(F).¹

II. Facts

[The Person] first began working in [the retail sales business] about [date], when [Relative] started his own [retail sales business] called [Business #1]. Prior to that time, [the

¹ [Footnote omitted.]

Person] had worked as a [medical professional] and later managed [two small retail] stores in [Town]. For the first year or so that [Relative] operated [Business #1], [the Person] and [Relative] were the only ones who worked there. [The Person] made sales and also worked in the office preparing and filing sales and use tax returns as well as preparing [other] paperwork. [Business #1] failed after about [number] years of operation, and [Relative]’s domestic partner started a [second retail sales business] called [Business #2] in [year]. [The Person] worked in the office at [Business #2], preparing and filing sales and use tax returns and [other] paperwork, just as he had at [Business #1], while [Relative] again worked as a manager. While working for [Business #1] and [Business #2], [the Person] attended a number of the sales and use tax seminars presented by MRS.

On [date], after the failure of [Business #2], [the Person] started his own [retail sales business, Business #3], under the assumed name of [the Company]. [The Person] signed a “Sole Proprietorship Resolution of Authority” for [Bank] on the fourth of that month as the sole owner of [the Company], which authorized both [the Person] and [Relative] to sign checks drawn on [the Company]’s business checking account. Then, on the seventh, [the Person] filed an Application for Tax Registration with MRS as a sole proprietor doing business under the assumed name of [“the Company”]. [The Person] applied for, and received, [the appropriate permits to operate the Company] in his own name. Later, [on date], [the Person] timely filed [the Company]’s June sales tax return and paid the tax by a check, signed by [the Person] and drawn on [the Company]’s business checking account.

On [date], Articles of Incorporation creating [the Company] were filed with the Maine Bureau of Corporations, Elections, and Commissions. [The Company] was created with only two corporate officer positions, President and Treasurer. Throughout the audit period, [the

Person] was not only [the Company]’s sole shareholder, but also its sole officer, serving as both its President and Treasurer. In addition, [the Company]’s Articles of Incorporation provided that there would be no corporate directors, rather “the business of the corporation will be managed by the shareholders,” of which [the Person] was the only one. (Resp’t Ex. B2.) [The Company] also elected, pursuant to Subchapter S of the Internal Revenue Code, to have all its income treated as the income of its sole shareholder, i.e., [the Person].

[The Person] stated at the appeals conference, that although he initially worked in the office for [the Company] performing the same functions he had for [Business #1] and [Business #2], he shortly thereafter began reducing his hours so that he could care for his infant grandchild and later for his terminally ill spouse. [The Person] further stated that by [year] he no longer went into work at [the Company], leaving the operation of its business entirely in the hands of [Relative].

[The Person] also stated that he allowed [the Company] and everything related to it to be placed in [the Person’s] name, over his spouse’s objections, because when [Business #2] failed, [Relative] was unable to create or operate [the Company] in [Relative’s] own name as [Relative] had “tax problems” resulting from [Relative’s] previous business failures. [The Person] said that he believed he had no power or authority to make any decisions regarding [the Company], and that his only function during the audit period was to sign documents presented to him by [Relative] for signature.² In addition, [the Person] stated that he paid nothing to [the Company] to acquire its shares. [The Person] also asserted that he did not receive any corporate profits

² Among the documents [the Person] signed, in addition to those noted above, were: (1) Request for Reconsideration; (2) Business Loan Applications; (3) Promissory Notes; (4) Corporate Resolutions to Borrow/Grant Collateral; (5) Commercial Security Agreements; (6) Personal Financial Statements in support of [the Company]’s applications for a Line of Credit; (7) Agreement for Line of Credit; (8) Addendum to Commitment Letter for Line of Credit; (9) Commercial Guaranty; (10) Commercial Security Agreement; (11) [Financing] Agreement; (12) [omitted]; and (13) [The Company]’s Maine Income Tax Information Returns for [the audit period]. [The Person] also agreed to personally guarantee [the Company]’s Line of Credit.

from [the Company], and was only paid a minor weekly salary when he did work for [the Company]. [The Person] did, however, report significant income from [the Company] on his Maine income tax returns for [the audit period], [whereas the Company's] election under Subchapter S of the Internal Revenue Code meant that all corporate income was reported and taxed as [the Person's] personal income. [The Person] signed [the Company]'s Maine corporate information returns [during the audit period], stating under penalties of perjury that he was its sole owner, and reporting [the amount of income that that the Company received during those years].³ Finally, [the Person] stated that he agreed to start [the Company] and to have everything placed in his own name because he trusted [Relative] not to place him in harm's way, and [the Person] believed that [the Company]'s corporate status would shelter him from personal liability for its debts. On cross-examination by MRS, [the Person] stated that [Relative] also did not contribute money to [the Company]. No evidence was presented that [Relative] possessed any legal or equitable interest in [the Company].

In [year], MRS [issued a sales and use tax assessment against the Company, which the Company appealed to the Superior Court.]

In [conflict with the Person]'s unsworn statements at the informal conference [in the present case], [Relative] testified under oath, in a deposition taken [in the] Superior Court appeal, that: (1) it was [the Person]'s idea to start [the Company]; (2) [the Person] was responsible for [the Company]'s finances in [year]; (3) either [Relative] or [the Person] were responsible for hiring and firing of sales staff in [year]; (4) [the Person] was responsible for [the Company]'s payroll in [year]; (5) either [Relative] or [the Person] were responsible for determining the salaries sales staff were paid in [year]; (6) during the audit period, [the Person] was in charge of

³ [The Person] reported these same amounts on his own Maine tax returns for the corresponding years.

[the Company]’s business operations whenever [the Person] was in the office; (7) [the Person] was in the office full-time for some part of the audit period; (8) [Relative] was not involved in the day-to-day management of [the Company]’s business during some part of the audit period; (9) [the Person] sometimes was responsible for preparing [the Company]’s sales and use tax returns during the audit period; and (10) [the Person] wanted [the Company] structured so that [the Person] was the sole shareholder and corporate officer.

Also [conflicting], in part, with [the Person]’s unsworn testimony in [the present] proceeding is [the Person’s] sworn testimony in a deposition taken as part of [the Company]’s Superior Court appeal. [There, the Person] testified that: (1) he did not remember whose idea it was to start [the Company]; (2) he did not remember whose idea it was to incorporate [the Company]; (3) he did not know why he was made sole shareholder of [the Company]; (4) he was the only officer of [the Company] because another was unnecessary; and (5) during the audit period, [Relative] made the day-to-day management decisions even though [the Person] never authorized [Relative] to do so, because [the Company] was a family business and “[Relative] pretty much was the only family member there when I had to leave . . . [Relative] had the authority by implication.” ([Person’s] Dep. 36:5-11 [date].) [The Person] did not testify in his deposition that [the Company] was [Relative]’s business, nor did he testify that he did not have authority to make decisions for the business.

On [date], MRS assessed [the Person] as a “responsible person” for [the Company]’s unpaid sales tax liability pursuant to 36 M.R.S. § 177.⁴ [The Person] timely requested reconsideration, and when MRS upheld its assessment on reconsideration, [the Person] timely appealed to the Board.

⁴ The assessment against [the Person] was for the total amount of \$[amount], which was reduced by MRS’ decision on reconsideration to \$[amount].

III. Law

Maine law imposes a tax “on the value of all tangible personal property . . . sold at retail in this State.” 36 M.R.S. § 1811. Retail sellers of tangible personal property are required to collect the tax and remit it to MRS. Should the retailer fail to remit the tax, MRS may collect it from the retailer or any person deemed to be a “responsible person” connected with that retailer, as provided in 36 M.R.S. § 177(1), which states that:

[s]ales and use taxes collected by a person pursuant to [the sales tax law] . . . constitute a special fund in trust for the State Tax Assessor. The liability for the taxes or fees and the interest or penalty on taxes or fees is enforceable by assessment and collection . . . against the person and against any officer, director, member, agent or employee of that person who, in that capacity, is responsible for the control or management of the funds or finances of that person or is responsible for the payment of that person’s taxes.

36 M.R.S. § 177(1).

The only time the Law Court has interpreted section 177 was in *Prescott v. State Tax Assessor*, 1998 ME 250, 721 A.2d 169.⁵ In that case, it adopted a number of principles used to determine who qualifies as a “responsible person,” which it drew from Federal case law interpreting a similar federal statutory provision.⁶ Those principles are: (1) the burden is on the taxpayer to prove that he or she is not a person responsible for a corporation’s trust fund tax debt; (2) the term “responsible” is given a broad interpretation; (3) responsibility is imposed on all persons possessing responsibility and authority for avoiding default; (4) responsibility is based

⁵ *Prescott* concerned an individual who was employed as CEO of the taxpayer corporation, in which he owned no shares. He was hired as a project specialist to run corporate operations only, and did not concern himself with corporate finances, which were handled by the corporation’s CFO. Although a signatory on the corporate checking account, he asserted that he had no authority to decide which bills were or were not paid, but in some instances, he did direct payment of part of the corporation’s withholding taxes. The Law Court found that he was a “responsible person” as a matter of law, and that the limited scope of his agreed upon duties did “not relieve him of liability as a responsible person.” *Prescott* at ¶ 17.

⁶ I.R.C. § 6672(a). The major difference between section 177 and section 6672(a) is that liability under the federal law requires that the taxpayer be both a “responsible person” and that the failure to pay the trust fund taxes was

upon function not high position; and (5) when “uncontroverted evidence establishing an individual’s ‘precise responsibility’ to pay . . . taxes, or of specific acts of management or financial decision-making that would manifest the level of control necessary for responsibility [is absent], various indicia may establish responsibility” *Vinick v. Commissioner of Internal Revenue*, 110 F.3d 168, 172 (1st Cir. 1997) (citation omitted) (hereinafter *Vinick I*). The Law Court then enumerated those indicia as follows: (1) holding corporate office; (2) authority to disburse corporate funds; (3) stock ownership; (4) ability to hire and fire employees; (5) check signing authority; and (6) management of day-to-day business operations. *Id.*

IV. Analysis

[The Person] contends, based upon *Vinick I*, *Godfrey v. United States*, 748 F.2d 1568 (Fed. Cir. 1984), *Geiger v. United States*, 583 F. Supp. 1166 (D. Ariz. 1984),⁷ and the other cases unsuccessfully cited by the taxpayer in *Prescott*,⁸ that passive investors in corporations or a family member with a title who received nominal or no pay or had little actual corporate

willful. Section 177 is a strict liability statute that imposes liability on every person who is a “responsible person” and does not require a willful failure to pay over trust fund taxes.

⁷ *Vinick I* and *Vinick v. United States*, 205 F.3d 1 (1st Cir. 2000) (hereinafter *Vinick II*) concerned a full-time partner in an accounting firm who purchased one-third of the corporate taxpayer’s shares, who then, together with another shareholder, bought out the third shareholder resulting in his owning half of the shares. He was corporate treasurer, signatory on the corporate checking account, and prepared the corporate quarterly withholding tax returns, but never signed a company check and never participated in the day-to-day management of the corporation’s business. *Vinick I* reversed the district court’s summary judgment against him, and *Vinick II* reversed the District Court’s finding, after trial on remand, that Mr. Vinick was a “responsible person.” *Godfrey* concerned a full-time partner in a law firm who was elected Chairman of the Board, for no pay, of a publicly traded corporation in which he owned no shares. The Federal Circuit found that Mr. Godfrey was not a “responsible person.” *Geiger* concerned a consultant who was given check-signing authority and who assigned corporate debt as “Acting President,” but who had no other connection to the corporate taxpayer and took directions from the sole shareholder. The District Court found that he was not a “responsible person.”

⁸ Those cases are: *Campbell v. Nixon*, 207 F. Supp. 826 (E. D. Mich. 1962) (partner in CPA firm whose connection to the corporate taxpayer was as corporate Vice-President the duties of which was like that of the Vice-President of the United States, that is, to act as President when the President is unable to act, held not a “responsible person”); *In Re Brahm*, 52 B.R. 606 (Bankr. M. D. Fla. 1985) (elderly retiree 50% shareholder and President of taxpayer corporation who did not participate in management of corporation run by her son and his wife found not a “responsible person”); and *Ghandour v. United States*, 36 Fed. Cl. 53 (1996) (Edmond and Anna Ghandour, husband and wife, were shareholders and officers of the corporate taxpayer. Edmond, who initially owned 61% and later 90% of the corporate shares, was found to be a “responsible person,” but Anna, who initially owned 12% and later 0.7% of the corporate shares, was found not a “responsible person.”).

authority are not persons responsible for the corporation's unpaid trust fund tax debts. Looking to the Law Court's decision in *Prescott*, [the Person] adds that "[t]he statute 'is not meant to ensnare those who have merely technical authority or titular designation,' but instead encompasses those close enough to the business to prevent the default." *Prescott* at ¶ 12 (quoting *Vinick I*, 110 F.3d at 172). Consequently, [the Person] argues that: (1) since [the Company] was actually [Relative]'s business and not his own; (2) he received nominal pay; and (3) he possessed mere technical authority and titular designation as [the Company]'s President and Treasurer; then (4) he is not a "responsible person" pursuant to 36 M.R.S. § 177.

We need not determine the truth or falsity of [the Person]'s assertions that he agreed to create [the Company] only so that [Relative] could continue to operate a [retail business] despite [Relative's] unpaid creditors and "tax problems," or [the Person's] assertion that [the Company] was actually [Relative's] business and that [the Person] had nothing to do with the day-to-day management of the corporation. Whatever the reason [the Person] created [the Company] and whatever the extent of his involvement in its day-to-day operations, [the Person] was at all times its sole shareholder and officer. By virtue of [the Person's] ownership of 100% of its shares, holding all its corporate offices, and the explicit grant of power to manage its business contained in its Articles of Incorporation, [the Person] possessed full legal power and control over [the Company]. In contrast, [Relative], whom [the Person] asserts possessed all power and authority over the corporation, owned no corporate shares, held no corporate office, and was not granted the power to manage the corporation's affairs by any written document.

In *Prescott*, the Law Court held that the existence of certain facts establishes personal responsibility for a corporation's tax debt as a matter of law. *Prescott* at ¶ 7 (citing *Barnett v.*

Internal Revenue Serv., 988 F.2d 1449, 1454 (5th Cir. 1993)). Those facts were summarized by the Fifth Circuit in *Barnett* as follows:

We ask whether such a person: (i) is an officer or member of the board of directors; (ii) owns a substantial amount of stock in the company; (iii) manages the day-to-day operations of the business; (iv) has the authority to hire or fire employees; (v) makes decisions as to the disbursement of funds and payment of creditors; and (vi) possesses the authority to sign company checks. [citations omitted.] No single factor is dispositive.

Barnett at 1455.

Considering each of these factors, we find as fact that [the Person] (i) was [the Company]’s sole officer; (ii) was [the Company]’s sole shareholder; (iii) was vested by [the Company]’s Articles of Incorporation with the authority to manage the day-to-day operations of its business; (iv) possessed the authority, by virtue of those same Articles of Incorporation, to hire or fire [the Company]’s employees, including [Relative]; (v) was authorized to make decisions as to the disbursement of [the Company]’s funds and payment of creditors; and (vi) possessed the authority to sign [the Company]’s checks.

With respect to the cases [that the Person] cited above,⁹ the Law Court in *Prescott* distinguished each of them, stating that “[u]nlike the facts in the cases he relies on, Prescott was not an outside director, consultant, passive investor or family member with a title, who received nominal or no pay or had *little actual corporate authority*.” *Prescott* at ¶ 18 (emphasis added). Among the factual distinctions between the cited cases and this one, are: (1) [the Company]’s Articles of Incorporation specifically vest authority for managing the corporation’s business in its shareholders; (2) [the Person] was [the Company]’s sole shareholder; (3) as [its] sole shareholder, by virtue of its subchapter S election, all of [the Company]’s income was [the Person]’s personal income; and (4) [the Person] was [the Company]’s sole corporate officer.

⁹ *Vinick I, Godfrey, Geiger, Campbell, Brahm, and Ghandour*.

[The Person] has not cited any case in which a court found an individual [owning] all shares of a corporation, as well as holding all corporate offices, was not a “responsible person” with respect to that corporation’s tax debt.

Even if we assume, *arguendo*, that [the Person] allowed [Relative] to conduct the day-to-day management of [the Company]’s business, to hire and fire employees, decide how to disburse [the Company]’s funds, and determine which creditors would be paid, those assumed facts do not relieve [the Person] of his duty, as the person charged with management of the corporation’s business affairs, to ensure that its sales and use taxes were paid. Nor does assuming, *arguendo*, that [the Person] did not actually exercise his legal authority to manage [the Company]’s day-to-day activities, to hire and fire employees, or to make decisions regarding disbursement of funds and payment of creditors, relieve him from liability for [the Company]’s unpaid taxes pursuant to section 177. As the Law Court held in *Prescott*, “delegating the responsibility for financial matters does not relieve the person of liability . . . See *Thomsen v. United States*, 887 F.2d 12, 16 (1st Cir. 1989) . . . [and] the existence of authority in the general management and fiscal decisionmaking of the company, *regardless of whether the authority is actually exercised*, is determinative.” *Prescott* at ¶ 14 (emphasis added) (citing *Muck v. United States*, 3 F.3d 1378, 1381 (10th Cir. 1993)). The court in *Muck* held him to be a “responsible person,” as a matter of law, even though he delegated day-to-day operations to a general manager, because he “was the sole shareholder of the corporation, authorized by the bylaws to manage the business and affairs of the corporation[,] . . . had the power to borrow money for the corporation, . . . had check signing authority, . . . and he had the authority to order the business be suspended if the taxes could not be paid.” *Muck* at 1381. All the factors cited in *Muck* apply [to the Person in the present case], and, in addition, [the Person] was the sole corporate officer.

Finally, the First Circuit, in its decision in *Moulton v. United States*, 429 F.3d 352 (1st Cir. 2005), rejected the argument that its opinions in *Vinick I* and *Vinick II* established the principle that actual exercise of authority is a prerequisite to finding a corporate shareholder or officer is a “responsible person.” The court explained 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,” [*Vinick II*] at 8 (emphasis added) (quoting *Barnett v. IRS*, 988 F.2d 1449, 1454 (5th Cir. 1993)), and the decision set forth a multi-factor test which *did not require actual exercise of authority* as a *sine qua non*.

Id. at 356-57 (emphasis added) (footnote omitted). Here, [the Person] clearly had the “effective power” to pay [the Company]’s taxes as he had actual authority over all aspects of the corporation due to his status as sole shareholder and sole officer.

We conclude, in light of the facts set forth above, that [the Person] was not merely a family member with a corporate title who had little actual corporate authority, but rather, he possessed *all* corporate authority—unlike the individuals in the cases he cites.

V. Summary of Decision

We find that [the Person] is a “responsible person,” as a matter of law, with respect to [the Company]’s sales and use tax debt. Consequently, we uphold the assessment in full.

The Board may, in limited circumstances, reconsider its decision on any appeal. If either party wishes to request reconsideration, that party must file a written request with the Board within 20 days of receiving this decision. Contact the Appeals Office at 207-287-2864 or see the Board’s rules, available at <http://www.maine.gov/boardoftaxappeals/lawsrules/>, for more information on when the Board may grant reconsideration. If no motion for reconsideration is filed within 20 days of the date of this proposed decision, it will become the Board’s final administrative action. If either party wishes to appeal the Board’s decision in this matter to the

Maine Superior Court, that party must do so within 60 days of receiving this decision. During the 60 day period in which an appeal may be filed with the Superior Court, [the Person] may contact Maine Revenue Services at 207-624-9725 for the amount of tax that is currently due, together with any interest or penalties owed. After that 60 day period has expired, Maine Revenue Services will contact [the Person] with an updated amount of tax and any interest or penalties due at that time.

Issued by the Board: December 6, 2013