

IN THE SUPREME COURT OF THE STATE OF NEVADA

ROBERT BIGELOW,
Appellant,
vs.
STATE OF NEVADA EX REL. NEVADA
DEPARTMENT OF TAXATION,
Respondent.

No. 48833

FILED

SEP 09 2008

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY S. Young
DEPUTY CLERK

ORDER AFFIRMING IN PART, REVERSING IN PART AND
REMANDING

Appeal from a district court order denying a petition for judicial review in a sales and use tax matter. Eighth Judicial District Court, Clark County; David Wall, Judge.

Silver State Electrical Supply Company ("Silver State") was incorporated in 1997. The company was owned by appellant Robert Bigelow, Neal Winard, and Robert Panero. Bigelow owned 30 percent of the shares in the company, and was the corporation's secretary. However, his role was primarily financial: he contributed \$250,000 of start up capital to the corporation, and personally guaranteed a corporate line of credit with U.S. Bank, but did not participate in the day-to-day workings of the company, which were overseen by Winard.

Silver State went out of business in December of 1999. At that point, Winard began the process of liquidating business inventory, while Bigelow "came in" to oversee the collection of nearly \$6.1 million in accounts receivable. At Bigelow's suggestion and direction, Silver State also temporarily hired Debbie DeVita, a bookkeeper with whom Bigelow had previously worked, to help recover the accounts receivable. Bigelow

and DeVita completed the vast majority of this collection work by June of 2000. During this period, Bigelow also ensured that any monies collected were deposited into Silver State's U.S. Bank account to pay down Silver State's original line of credit, as well as several other outstanding loans. Silver State eventually filed for bankruptcy on July 27, 2001.

In June of 2001, the Nevada Department of Taxation sent Silver State several notices indicating that Silver State owed in excess of \$400,000 in past due sales tax for the periods between December 1999 and June 2000. On June 24, 2004, the Tax Department sent Bigelow a "Notice of Determination" informing him that it had determined that Bigelow was personally liable for payment of Silver State's outstanding tax liability pursuant to former NRS 372.398, which provided that a "responsible person" who willfully fails to pay sales taxes is jointly and severally liable for the tax, interest, and penalties. Bigelow appealed, and a hearing officer, and later the Nevada Tax Commission, affirmed the determination. The district court denied Bigelow's petition for judicial review. Bigelow appeals, arguing that the hearing officer and NTC's determination that he was a "responsible person" who "willfully" failed to pay taxes was not supported by substantial evidence. For the reasons stated below, we agree that the determination that Bigelow was a responsible person is supported by substantial evidence, but remand this case for further fact finding regarding whether Bigelow "willfully" failed to pay taxes.

Standard of Review

When reviewing a decision of an administrative agency, this court's role "is identical to that of the district court: to review the evidence presented to the agency in order to determine whether the agency's

decision was arbitrary or capricious and was thus an abuse of the agency's discretion."¹ A decision is not arbitrary or capricious if it is supported by substantial evidence.² Substantial evidence is evidence that a reasonable person would accept as adequate to support a conclusion.³ In examining the evidence presented to the administrative agency, this court may not look beyond the administrative record, and must defer to the administrative agency regarding the weight and credibility of evidence.⁴ However, this court reviews issues of law, such as interpretation of NRS 372.398, de novo.⁵

Whether Bigelow was a "responsible person" under NRS 372.398

As indicated above, former NRS 372.398 provided that a "responsible person" who willfully fails to collect or pay taxes to the Tax Department is jointly and severally liable for all tax owed, in addition to interest and penalties.⁶ The section specifically provided that

1. A responsible person who willfully fails to collect or pay to the department the tax imposed

¹United Exposition Service Co. v. SIIS, 109 Nev. 421, 423, 851 P.2d 423, 424 (1993).

²Id.

³Id. at 423, 851 P.2d at 425.

⁴Id. at 423, 851 P.2d at 424.

⁵Nevada Serv. Employees Union v. Orr, 121 Nev. 675, 678, 119 P.3d 1259, 1261 (2005).

⁶The Legislature repealed NRS 372.398 in 2005, and enacted NRS 360.297, which contains virtually identical language, except it omits the term "willfully."

by this chapter or who willfully attempts to evade the payment of the tax is jointly and severally liable with the retailer for the tax owed plus interest and all applicable penalties. The responsible person shall pay the tax upon notice from the department that it is due.

2. As used in this section, "responsible person" includes:

- (a) An officer or employee of a corporation; and
- (b) A member or employee of a partnership or limited-liability company, whose job or duty it is to collect, account for or pay to the department the tax imposed by this chapter.⁷

There does not appear to be any applicable case law interpreting either NRS 372.398, or its successor statute, NRS 360.297. However, NRS 372.398 is very similar to 26 U.S.C. § 6672(a), which provides that

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. . . .

Recently, in International Game Technology v. District Court, this court noted that "[w]hen the Legislature adopts a statute substantially similar to a federal statute, a presumption arises that the legislature knew and intended to adopt the construction placed on the

⁷NRS 372.398 (2000).

federal statute by federal courts.”⁸ Therefore, we look to federal case law in interpreting NRS 372.398.

Although the term “responsible person” does not appear in 26 U.S.C. § 6672(a), federal courts have established that only a “responsible person” may be liable for a failure to pay taxes.⁹ Generally, a responsible person is someone “who ‘had the final word as to what bills should or should not be paid, and when.’”¹⁰ In analyzing whether a party is a responsible person, federal courts look to a number of factors, including whether the person

“(1) is an officer or member of the board of directors, (2) owns or shares or possesses an entrepreneurial stake in the company, (3) is active in the management of the day-to-day affairs of the company, (4) has the ability to hire and fire employees, (5) makes decisions regarding which, when and in what order outstanding debts or taxes will be paid, (6) exercises control over daily bank accounts and disbursement records, and (7) has check signing authority.”¹¹

Generally, titular authority and shareholder status alone are insufficient to establish responsible person liability.¹² Even so, a person’s lack of

⁸122 Nev. 132, ___, 127 P.3d 1088, 1103 (2006) (internal quotations omitted).

⁹See, e.g. Purcell v. U.S., 1 F.3d 932, 936 (1993).

¹⁰Id. at 936 (quoting Wilson v. United States, 250 F.2d 312, 316 (9th Cir. 1958)).

¹¹Vinick v. U.S., 205 F.3d 1, 7 (1st Cir. 2000) (quoting Fiataruolo v. United States, 8 F.3d 930, 939 (2d Cir. 1993)).

¹²Id. at 8.

involvement in the day-to-day operations of a company will not shield him from liability if he had the ultimate authority to pay or to order the payment of delinquent taxes.¹³ As noted in Vinick v. United States, the strongest evidence of authority to pay or order payment of taxes is established by the last three factors listed, including the ability to decide what taxes will be paid and when, control over bank accounts, and check signing authority.¹⁴

Both parties provide a lengthy analysis disputing the extent of Bigelow's involvement in day-to-day operations of Silver State, as well as each of the enumerated factors established by the federal courts. However, despite this disagreement as to the full extent of Bigelow's involvement and decision making authority, we conclude that the hearing officer and NTC's determination that Bigelow was a responsible person is clearly supported by substantial evidence.

Bigelow was a member of Silver State's board of directors, and a shareholder and investor in the corporation. Prior to Silver State's closing, Bigelow was not active in the corporation. However, once Silver State went out of business, it was Bigelow who suggested that DeVita be brought on to help collect accounts receivable. Although Bigelow contends that he did not hire DeVita, when asked "who made the decision that [DeVita]'s a lead person and she should stay on?" Bigelow responded "me." Bigelow also stated that he was "over" DeVita in terms of authority, and that he occasionally signed DeVita's paychecks when Winard was out of

¹³Purcell, 1 F.3d at 937.

¹⁴205 F.3d at 9.

the office. Silver State's own brief to the NTC indicated that Bigelow was involved in the collection of accounts receivable, and worked with DeVita to collect all outstanding accounts.

Other statements also indicated Bigelow had substantial authority to direct the payment of Silver State's debts, as Bigelow admitted that he directed that all deposits should be made into the U.S. Bank account, to help pay down the line of credit that he had guaranteed. While Bigelow testified that he did not sign any checks on Silver State's behalf, he admitted that he was likely authorized to sign checks drawn on the U.S. Bank account.

Given this evidence, as well as the NTC's conclusion that Bigelow's testimony regarding his lack of involvement and decision making authority was not credible, we conclude that the hearing officer and NTC's determination that Bigelow was a "responsible person" was supported by substantial evidence.

Whether Bigelow "willfully" failed to pay taxes under NRS 372.398

For the purpose of a tax liability determination, "willfulness" is defined as a "voluntary, conscious and intentional act to prefer other creditors over [the State]."¹⁵ "In establishing willfulness, the Government need not prove an intent to defraud or even the existence of a bad motive. But the Government must prove more than mere negligence."¹⁶ Specifically, for a failure to pay to be willful, there must be "knowledge of nonpayment or reckless disregard of whether the payments were being

¹⁵Klotz v. United States, 602 F.2d 920, 923 (9th Cir. 1979).

¹⁶Id. at 923-24 (internal citations omitted).

made.”¹⁷ Thus, if a party demonstrates “non-reckless ignorance of the failure to pay,” joint and several liability will not attach.¹⁸

In this case, the hearing officer relied upon Teel v. United States¹⁹ for the proposition that “[a] responsible person has a duty to investigate and see if the taxes are being paid and a breach of that duty to investigate will qualify for willingness[sic].” Because Bigelow did not make any investigation regarding whether taxes had been paid, the hearing officer concluded that Bigelow’s failure to pay taxes was “willful.” The hearing officer cited no other relevant authority in determining whether or not Bigelow acted willfully. As the NTC did not specifically address the “willfulness” requirement in its own findings of fact and conclusions of law, it appears that they approved of the hearing officer’s reasoning. Bigelow contends that this was an error. We agree.

As Bigelow argues, Teel actually rejected the proposition that a responsible person always has a duty to investigate whether taxes are due.²⁰ In fact, Teel clearly establishes that simple failure to investigate does not rise to the level of recklessness necessary to establish willfulness.²¹ Rather, as established in United States v. Vespe, reckless disregard is established if “the taxpayer ‘(1) clearly ought to have known

¹⁷Teel v. United States, 529 F.2d 903, 905 (9th Cir. 1976).

¹⁸Id.

¹⁹529 F.2d 903 (1976).

²⁰Id. at 905.

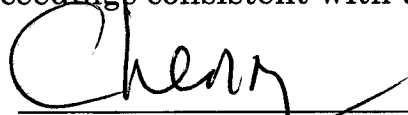
²¹Id.

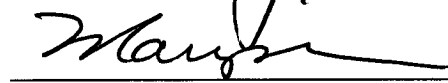
that (2) there was grave risk that . . . taxes were not being paid and if (3) he was in a position to find out for certain very easily.”²²

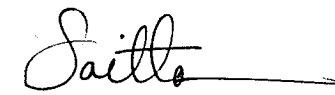
Because the hearing officer and NTC used an incorrect definition of “willfulness,” we conclude that the finding that Bigelow acted willfully is not supported by substantial evidence, and that additional fact-finding, using the appropriate standard set forth in Vespe, is necessary.

Therefore, for the reasons stated above, we

ORDER the judgment of the district court AFFIRMED IN PART AND REVERSED IN PART AND REMAND this matter to the district court. On remand, we instruct the district court to remand this matter to the NTC for further proceedings consistent with this order.


_____, J.
Cherry


_____, J.
Maupin


_____, J.
Saitta

cc: Hon. David Wall, District Judge
Howard Roitman, Settlement Judge
John S. Bartlett
Attorney General Catherine Cortez Masto/Las Vegas
Eighth District Court Clerk

²²868 F.2d 1328, 1335 (3d Cir. 1989) (quoting Sawyer v. United States, 831 F.2d 775, 758 (7th Cir. 1987)).