

**BEFORE THE STATE TAX APPEAL BOARD  
OF THE STATE OF MONTANA**

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|--------------------------|---|----------------------------|
| MARY DAVIDENE TAIT,      | ) |                            |
|                          | ) |                            |
| Appellant,               | ) | DOCKET NO.: MT-2010-1      |
|                          | ) |                            |
| -v-                      | ) | FACTUAL BACKGROUND,        |
|                          | ) | CONCLUSIONS OF LAW,        |
| DEPARTMENT OF REVENUE    | ) | ORDER AND OPPORTUNITY      |
| OF THE STATE OF MONTANA, | ) | <u>FOR JUDICIAL REVIEW</u> |
|                          | ) |                            |
| Respondent.              | ) |                            |

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**Statement of the Case**

This matter comes before the State Tax Appeal Board (Board) for administrative review of the Final Agency Decision and Order entered by the Montana Department of Revenue (DOR) pursuant to §15-2-301, MCA. The Taxpayer, Mary Davidene Tait, challenges the DOR holding finding her liable for failing to remit income taxes withheld from the paychecks of the employees of a Great Falls motel. A hearing was held in Helena on January 4, 2011 at which Ms. Tait represented herself. The DOR was represented by Attorneys Theresa Whitney and Michele Johnson, Paralegal Linda Dahl, Unit Manager Lee Keller, Auditor Emily Hollow and Legal Collector Jamie Clayton. Post hearing submissions were made by both the DOR and Ms. Tait.

## Evidence Presented

M. Davidene Tait testified that she was hired to be the general manager of the Triple Crown Motor Inn on December 24, 2005. The motel was owned by Bob Cook, a resident of Idaho, who did not manage the property. Since that time, and during the entire time for which taxes are at issue in this case, she continued to be the general manager. She testified that, as general manager, she hired, fired and scheduled employees, kept track of employees' hours and issued paychecks, opened mail, and paid such bills as the utilities, mortgage and maintenance. She was added as a check signor to the motel's checking account and was also authorized on the company's savings account. (DOR Exh. E.) She testified that she also reported income and occupancy rates to the owner and forwarded any tax correspondence to him.

Ms. Tait testified that it was always her intention to buy the motel from Mr. Cook and that from time to time they entered into negotiations. A handwritten letter from Mr. Cook, dated November 23, 2007, stated that he offered to sell the property to her for \$645,000. (Tait Exhibit 7.)

On August 25, 2006 Ms. Tait filed a Montana Unemployment Insurance Employer Registration form for the Triple Crown Motor Inn on which she described herself as President of MDT Enterprises, Inc., a corporation that she claimed owned the motel. (DOR Exhibit F.) Her claim to be president appears in two different places in her own handwriting. She also indicated that she was the person who prepares records and reports. Ms. Tait also filed, on January 1, 2007, a Registration and Application for Permit form with the DOR, registering for the lodging facility tax and the withholding tax on behalf of Motels Inc. of Great Falls, doing business as the Triple Crown Motor Inn. (DOR Exhibit A.) On this form, in her own handwriting, she described herself as the contact person and the president or partner of the corporation that owned the motel.

When she failed to file the annual withholding tax reconciliation for 2007, the DOR wrote to her at MDT Enterprises on February 24 and March 25, 2009, requesting that she do so and pay an estimated \$10,711.14 then due and owing. (DOR Post Hearing Submission, Tait-DOR pp.000015 -17.) Ms. Tait responded on March 27, 2009, acknowledged the DOR letter but stated that MDT Enterprises never actually was registered as a corporation or partnership in any state and, therefore, was not used. She did not refer to the withholding reconciliation or to the taxes due nor did she suggest to whom the DOR should properly look for payment of the tax. (DOR Post Hearing Submission, p. 000018.)

In July of 2009, the DOR sent a notice of a warrant of distraint and another statement of account. (DOR Post Hearing Submission, p. 000019 – 21.) On July 31, 2009, Ms. Tait sent the DOR a check for \$288 drawn on the Triple Crown Motor Inn checking account. (DOR Post Hearing Submission, p. 000022.) According to the Statement of Account sent by the DOR on August 3, 2009, from the beginning of Ms. Tait's management of the motel in January of 2006 through the three years ending in December, 2008, only one payment of \$288 was received for withholding taxes. (DOR Post Hearing Submission, p. 000023 – 24.)

On August 10, 2009, Ms. Tait's attorney, Joseph Schumacher, wrote to the DOR explaining that Mountain West bank, the mortgagee on the motel, had foreclosed and obtained a *lis pendens* on the property in August of 2008. (DOR Post Hearing Submission, p. 000028.) Mr. Schumacher explained that Mountain West Bank wanted to transfer the property to Ms. Tait rather than complete the foreclosure and sale of the property, ("with the likely result that the interest of the Department of Revenue will get lost in the foreclosure") but would not do so if the warrant of distraint was still in place. Further, the letter asserted that Ms. Tait was not personally liable for the

taxes owed as she was an employee of the motel and not an officer or shareholder of the business.

On Sept 4, 2009, Ms. Tait, through her attorney, filed a request for an informal review, reiterating her contention that she is not liable for these types of taxes and lacked the authority to make payment of the taxes. (DOR Post Hearing Submission, p. 000085-87, form APLS101F.) The DOR responded on September 17, 2009 that after review of the situation, it had been concluded that Ms. Tait was responsible for the withholding tax debt, citing §15-30-203(2) and §15-30-203(3)(a)(i)(ii) and (b) MCA.<sup>1</sup>

The DOR letter further requested that Ms. Tait supply the names of any other individual who would be responsible to file statements and pay taxes, which she did not do. Dissatisfied with the DOR conclusion, Ms. Tait requested reconsideration from the Office of Dispute Resolution on October 14, 2009. (DOR Post Hearing Submission, p. 000090.) A hearing was held on March 4, 2010, the result of which was to uphold the DOR assessment of liability against Ms. Tait. (Findings of Fact, Conclusions of Law, and Order, DOR Office of Dispute Resolution, May 28, 2010.) Ms. Tait argued that she was an employee, not an officer of the corporation, and that

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<sup>1</sup> Now numbered §15-30-2503(2) and (3)(a)(i)(ii) and (b):

(2) “The officer of a corporation whose responsibility it is to collect, truthfully account for, and pay to the state the amounts withheld from the corporation’s employees and who fails to pay the withholdings is liable to the state for the amounts withheld and the penalty and interest due on the amounts.

(3) (a) Each officer of the corporation is individually liable along with the corporation for filing statements to the extent that the officer has access to the requisite records and for unpaid taxes, penalties, and interest upon a determination that the officer:

(i) possessed the responsibility to file statements and pay taxes on behalf of the corporation and

(ii) possessed the responsibility on behalf of the corporation for directing the filing of tax statements or the payment of other corporate obligations and exercised that responsibility, resulting in the corporation’s failure to file statements required by this part or pay taxes due as required by this part.

(b) In determining which corporate officer is liable, the department is not limited to considering the elements set forth in subsection (3)(a) to establish individual liability and may consider any other information available.

the DOR had ample notice of that through her contacts with them as the general manager of the Triple Crown Motel. Ms. Tait also argued that equitable estoppel should not be used to bar her denial of liability as a corporate officer because the DOR did not rely to its detriment nor did she benefit from the deception.

The Hearing Examiner concluded, however, that her representation of herself as a corporate officer and as the contact person responsible for records and reports supported the personal liability imposed on her by the DOR. In doing so, the Hearing Examiner relied on the Montana statute that imposes liability on “ostensible corporations.”<sup>2</sup>

Ms. Tait filed a timely appeal with this Board and a hearing was held on January 4, 2011 in Helena.

Following the hearing before this Board, Ms. Tait submitted copies of five Lodging Facility Sales and Use Tax returns, each signed by her with the title General Manager as proof that the DOR should have known that was her title. (Tait Post Hearing Submission, Exhs. 1 – 5.) She also submitted a copy of a cancelled check made out by her on July 4, 2009 to the DOR for \$684.60 in payment of that tax. (Tait Post Hearing Submission, Exh. 6.)

Her post hearing submission letter further argues that any obligations should have been removed by the sheriff’s sale and that the corporate form provides a limit to liabilities and should protect her from tax liability.

Ms. Tait provided no explanation of her motive for filing false statements with the Montana government. In both filings, she claimed to be the president of a

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<sup>2</sup> Section 35-1-119, MCA, states that “All persons who assume to act as a corporation without authority so to do shall be jointly and severally liable for all debts and liabilities incurred or arising as a result thereof.”

corporation which owned the Triple Crown Motel, a position she did not hold in companies that did not exist.<sup>3</sup>

Montana statute imposes primary liability for withholding taxes and statements on employers. Section 15-30-2503, MCA, states that “(1) Each employer is liable for the payments required by 15-30-2504, the amounts required to be deducted and withheld under this part, and the annual statements required by 15-30-2506 and 15-30-2507. The payments required by 15-30-2504 and the amounts required to be deducted and withheld, plus interest due, are a tax. With respect to the tax, the employer is the taxpayer.” An employer is defined in §15-30-2501 as “the person for whom an individual performs or performed any service, of whatever nature, as an employee of the person or, if the person for whom the individual performs or performed the services does not have control of the payment of wages for the services, the person having control of the payment of wages[.]” Further, §15-30-2508 states that “Every employer who deducts and withholds any amounts under the provisions of 15-30-2501 through 15-30-2509 shall hold the amounts in trust for the state of Montana.” Thus, by law, the person who directs the employees and controls the payment of wages and, therefore, the withholding of taxes, is liable for the payment of those taxes.

The Triple Crown Motel was sold at a sheriff’s sale on April 15, 2010 to Josco Corp. for \$478,248.89. Ms. Tait testified that she is the president of Josco and one of the owners of the motel, now called the Greystone Inn.

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<sup>3</sup> In fact, neither of these corporations existed at the time. One of them, called MDT Enterprises using the Taxpayer’s initials, never existed in any state in any form. The other, Motels Inc. of Great Falls, also never existed although a corporation called Motels of Great Falls, LLC, did, but ceased to exist in 2000 for failure to file corporate reports. Decision of the Hearing Examiner, pp. 5 and 13, citing Montana Secretary of State’s Certificates of Fact.

## Findings of Fact and Conclusions of Law

The issue before this Board is whether Mary Davidene Tait incurred personal liability for withholding taxes deducted from employee's paychecks but not remitted to the Montana Department of Revenue.

After considering the record and the testimony at hearing, this Board upholds the decision of the DOR imposing liability on Ms. Tait.

We conclude that the statutes make clear that Ms. Tait's representation of herself as an officer of the corporation which owned the Triple Crown Motel supports her responsibility for the taxes. We find, also, that she meets the definition of "employer" in the Montana code<sup>4</sup> by virtue of her role as the manager who hired, fired, directed and paid employees, as well as preparing the withholding tax. She kept track of all employee hours and prepared their paychecks and withheld the amounts required by law for Montana income tax. She filled out and filed tax forms with the Montana state government and actually wrote the checks on the only occasions when withholding taxes and lodging taxes were paid. There was no evidence that any other individual or entity paid any taxes on behalf of the Triple Crown Motel. The evidence demonstrates that she was (and is) the sole person paying any liabilities, including tax liabilities, during the relevant time frame. She was a signatory on all of the business accounts and paid all of the bills.

Ms. Tait argued that she was only an employee, that she more often signed herself as general manager of the motel, and thus cannot be an employer or officer who may be held responsible for withholding liability. We note, however, that even now that she is actually president of the corporation that owns the motel, she still represents herself as the general manager on her business card. The titles are not

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<sup>4</sup> Section 15-30-2501(2)

mutually exclusive. In fact §15-30-2501(1)(a)(iii), MCA, includes “an officer of a corporation” as one definition of employee.

We have held in the past that a person with the ostensible authority as well as the actual responsibility of handling payroll and records can be held liable despite an internal arrangement that allocated the tax-paying responsibility to another. Further, we have determined that an incomplete corporation may not prevent liability from being imposed. (*Bos v. Montana Department of Revenue*, IT-2009-3, State Tax Appeal Board, December 29, 2009: “even if the directors’ failure to complete the organization were fatal to the corporate existence, Ms. Bos would have incurred liability by presenting herself as a corporate officer to the government agencies with which she dealt. The government, like any other debtor, does have the right to rely on such representations.”)

In this case, Ms. Tait offered no explanation for her misrepresentations to the Montana government although in her post-hearing submission she argued that we should not pierce the corporate veil. Certainly, creating fictitious corporate entities cannot shield her from liability. Even if she had truthfully represented herself, however, we find there is ample evidence of her status as the employer due to her control of the checking account, the payroll records and the tax filings, and the fact that she had the funds to pay (and did pay) the other bills of the motel, such as payment of the mortgage which directly benefitted Tait in subsequently purchasing the hotel property. It appears that Ms. Tait has continued to refuse to pay the tax, even now as owner, in the hope that the foreclosure on the real property would remove the DOR claim for withheld income taxes. These taxes are considered to be held in trust for the state, and are now a personal obligation owed by Ms. Tait. Withholding taxes do not attach to real estate, and cannot be discharged in the foreclosure of the property. Rather, the Montana statutes make clear that an

employer, such as Ms. Tait, is the taxpayer subject to the requirement to pay those withheld taxes.

**ORDER**

**IT IS THEREFORE ORDERED** by the State Tax Appeal Board of the State of Montana that decision of the Department of Revenue establishing M. Davidene Tait as individually liable for withholding taxes not paid to the Department for the filing periods at issue is affirmed.

Dated this 22nd day of February, 2011.

BY ORDER OF THE  
STATE TAX APPEAL BOARD

/s/ \_\_\_\_\_  
KAREN E. POWELL, Chairwoman

/s/ \_\_\_\_\_  
DOUGLAS A. KAERCHER, Board Member

/s/ \_\_\_\_\_  
SAMANTHA SANCHEZ, Board Member

NOTICE: You are entitled to judicial review of this Order in accordance with Section 15-2-303(2), MCA. Judicial review may be obtained by filing a petition in district court within 60 days following the service of this Order.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this 22nd day of February, 2011, a true and correct copy of the foregoing has been served on the parties hereto by depositing a copy thereof in the U.S. Mails, postage prepaid, addressed to the parties as follows:

M. Davidene Tait  
c/o Greystone Inn  
621 Central Avenue  
Great Falls, Montana 59401

U.S. Mail  
 Hand delivered  
 E-Mail  
 Telecopy

Teresa Whitney  
Tax Counsel  
Office of Legal Affairs  
Department of Revenue  
Mitchell Building  
PO Box 7701  
Helena, Montana 59604-7701

U.S. Mail  
 Hand delivered  
 Interoffice delivery  
 E-Mail  
 Telecopy

/s/ \_\_\_\_\_  
DONNA EUBANK  
Paralegal