

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

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|---------------------------|---|-----------------------|
| JENNIFER BOS, |) | |
| |) | |
| Appellant, |) | DOCKET NO.: IT-2009-3 |
| |) | |
| -v- |) | FACTUAL BACKGROUND, |
| |) | CONCLUSIONS OF LAW, |
| THE DEPARTMENT OF REVENUE |) | ORDER AND OPPORTUNITY |
| OF THE STATE OF MONTANA |) | FOR JUDICIAL REVIEW |
| |) | |
| Respondent. |) | |

Statement of the Case

The Montana Department of Revenue (DOR) submitted a notice of individual liability to Jennifer Bos on June 5, 2008, stating that it had determined that she was individually liable, along with Total Excavation, Inc., for its failure to remit Montana withholding taxes for 2007. The Appellant pursued the appeal procedures available within the DOR: an informal review and a proceeding before the Office of Dispute Resolution. The audit results were affirmed at each of these steps. On August 7, 2009, the Appellant appealed the DOR's final determination to this Board which heard this matter on December 3, 2009 in Helena. The taxpayer was represented by attorney Thomas Karem. The DOR was represented by tax counsels Teresa Whitney and Courtney Jenkins.

Issue

The issue is whether Jennifer Bos, as an officer of Total Excavation, Inc., is individually liable, along with Total Excavation, for its 2007 withholding tax liability, penalty, and interest, pursuant to § 15-30-203, MCA (2007).

Summary of Decision

Based on the evidence submitted, the Board affirms the decision of the Department of Revenue.

Findings of Fact

The following facts were stipulated by the parties in the pre-trial Order.

1. The Montana Department of Revenue (Department) submitted a notice of individual liability to Jennifer Bos on June 5, 2008, stating that it had determined that she was individually liable, along with Total Excavation, Inc. for its failure to remit Montana withholding taxes for 2007.

2. Ms. Bos timely filed a request for informal review on June 24, 2008.

3. The Department upheld its initial determination and notified Ms. Bos on June 26, 2008.

4. Ms. Bos filed a Notice of Referral to the Department's Office of Dispute Resolution (ODR) on September 4, 2008.

5. This case proceeded to hearing before ODR Hearing Examiner Howard R. Heffelfinger on March 6, 2009. Mr. Heffelfinger issued Findings of Fact, Conclusions of Law, and Order on July 9, 2009, and upheld the Department's determination of Ms. Bos' individual liability for Total Excavation's 2007 withholding tax liability. Ms. Bos timely appealed to this Board.

6. Craig Kinnaman, deceased, operated Total Excavation as a sole proprietorship until 2007. Mr. Kinnaman's accountant, Ms. Laura Thomas, advised Mr. Kinnaman to incorporate to save money on Medicare, social security, and payroll taxes.

7. James Kommers, attorney for Mr. Kinnaman, prepared Articles of Incorporation for Total Excavation. Ms. Bos, Craig Kinnaman's daughter, signed the Articles on December 21, 2006. The Articles list Ms. Bos and Mr. Kinnaman as Total

Excavation's directors. The Articles further list Ms. Bos as the incorporator and registered agent. Mr. Kommers caused the Articles to be filed with the Montana Secretary of State on January 23, 2007.

8. As of the date of this filing, Total Excavation's 2007 withholding tax liability, plus penalty and interest is \$31,111.80.

9. Previously, Mr. Kinnaman operated Interwest Parts and Equipment as a sole proprietorship until he filed for bankruptcy and ceased its operation. In 2001, Mr. Kinnaman started another business, CK Design and Construction, a residential construction company, as a sole proprietorship, which was still in operation at the time of his death. In 2005, he began operating Total Excavation, an excavation business, as a sole proprietorship.

10. After Mr. Kinnaman incorporated Total Excavation, he never held an initial meeting, therefore, no by-laws were adopted and no officers were formally appointed. No shares were issued.

11. Ms. Bos was first employed by her father when she was thirteen years of age as a bookkeeper for Interwest Parts & Equipment and eventually for CK Design and Construction. Mr. Kinnaman assigned her some personnel management duties for CK. Ultimately, he employed Ms. Bos as Total Excavation's bookkeeper both before and after its incorporation. Her duties were the same after incorporation and she continued to receive wages.

12. Tracy Flikkema, Ms. Bos' sister's husband, possessed no first-hand knowledge of Total Excavation's daily operations.

13. James Kommers, attorney for Mr. Kinnaman, had no first-hand knowledge of Total Excavation's daily operations and no personal knowledge regarding whether Ms. Bos had been appointed as an officer for Total Excavation.

14. Laura Thomas, accountant for Total Excavation, had no first-hand knowledge of Total Excavation's daily operations and no personal knowledge regarding whether Ms. Bos had been appointed as an officer for Total Excavation.

At the hearing, additional facts and evidence were brought to the Board. The parties introduced 11 stipulated exhibits into the record. Testimony was taken from Jennifer Bos, Jared Bos, Cathryn Flikkema, Tracy Flikkema, and James Kommers on behalf of the appellant. On the behalf of the Department, Jamie Clayton and Jerry Lee Keller testified.

Testimony demonstrated that for the entire period of the incorporation of the business, Ms. Bos actively managed the day-to-day financial affairs of Total Excavation. Ms. Bos was authorized as a signatory and wrote and signed the majority of the checks for the company. During that time, Ms. Bos managed and paid unemployment insurance and workers' compensation for the employees of the company. Ms. Bos also withheld and tracked withholding tax. She did not remit any of the withholding tax to the state, although she did file the required quarterly reports.

Ms. Bos made significant loans to the company through cash advances on her credit card. She testified that she made those loans to cover payroll. Ms. Bos, holding herself out as an officer of the corporation, also applied for and received a corporate credit card. At all times of the year, Ms. Bos received either an hourly wage or a salary. She testified that she always received her salary, though sometimes she held her check for a few days while her father transferred funds from other accounts. During July of 2007, she testified that she quit entering the transfers and checks for Total Excavation because her father began to increasingly move money between the Total Excavation account and the CK Designs account. Her father took his life in September 2007. Ms. Bos continued to pay her sister and herself after the death of

her father. She withheld taxes from those paychecks and also failed to remit those taxes to the state.

In determining that Ms. Bos, as an officer, was liable for payment of the withholding taxes, the Department of Revenue reviewed the Unemployment Registration form where Ms. Bos listed herself as a corporate officer. *Exh. 2*. The Department also reviewed the unemployment quarterly reports (*UI -5, Exh. 3*), and the 2007 Montana Withholding form. *Exh. 4*. Further, Ms. Bos was listed as an officer of the corporation on the Secretary of State's website of registered principles (*Exh. 9*) and the articles of incorporation. *Exh. 1*.

Board Discussion and Conclusions of Law

The issue to be decided in this matter is whether Jennifer Bos, as an officer of Total Excavation, Inc., is individually liable, along with Total Excavation, for its 2007 withholding tax liability, penalty, and interest.

Appellant Ms. Bos claims that she was not an officer of Total Excavation, Inc., that she did not possess the authority to pay withholding taxes on behalf of the corporation, and that the corporation was not properly formalized and completed.

The Department of Revenue contends that it correctly determined that Ms. Bos was an officer of Total Excavation and was individually liable, along with Total Excavation, for its 2007 withholding tax liability, penalty, and interest, pursuant to § 15-30-203, MCA (2007).

Requirements for Liability

Employers making wage payments to employees are required to withhold certain taxes from employee paychecks. *See* § 15-30-202, MCA. Under § 15-30-208, MCA, taxes withheld by an employer are considered to be held in trust for the State. The employer is considered to be the taxpayer and is liable for payment of the tax. Specifically, "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." Section 15-30-203(2), MCA. Each officer of the corporation is individually liable within the corporation. We now examine whether Ms. Bos was an officer of the corporation and had the relevant authority to be held responsible for withholding liability.

Bos as Corporate Officer

Ms. Bos claims that neither she nor her family knew that she was a corporate officer. Family members Tracy Flikkema, Cathryn Flikkema and Jerod Bos testified at the hearing that they knew Ms. Bos did the accounting for Total Excavation but were never aware of her status as a corporate officer. It has never been a requirement of corporate law that the family of the officer be aware of the officer's status. Indeed, the requirements set out by Montana statutes, § 35-1-220, MCA, are simple and they have clearly been met. Articles of incorporation meeting the requirements of § 35-1-216 and 217, MCA were filed with the secretary of state and were accepted and acknowledged by the secretary of state. *Exh 1*. Ms. Bos signed the Articles of Incorporation which listed her as both a director and an incorporator of Total Excavation, Inc. Her family's lack of knowledge cannot negate the official filing she signed.

Furthermore, Ms. Bos was clearly aware of her status though she stated that she merely signed the incorporation papers where she was told to sign. She filled out, in her own handwriting, and signed several official documents as an officer of the corporation, including the Montana Unemployment Insurance Employer Registration on which she listed her name as a corporate officer, as well as the person who prepares records and reports. *Exh 2*. She signed and dated the document with the title "Secretary."

Ms. Bos also signed two subsequent Unemployment Insurance Quarterly Reports as Treasurer. *Exh. 3*. Furthermore, she testified at the hearing that she signed an application for a corporate credit card as an officer of Total Excavation, Inc. and personally guaranteed the credit card debt. She said this was done because her father could not obtain credit because of his prior bankruptcy. However, after the bankruptcy he obtained \$482,400 credit for the financing of heavy equipment purchased for the excavation business. *Exh. 11*. Whatever her reason, Ms. Bos exploited her corporate officer status to obtain the credit card.

Authority to Pay Withheld Taxes

There is no disagreement that Ms. Bos had signatory authority on all of the company's bank accounts and paid, or directed the payment by her sister, of all the bills. *Exh. 7 generally*. In fact, Ms. Bos received a steady salary for her services as an accountant throughout the year in question and her sister was also paid for assisting with the bookkeeping. Craig Kinnaman, the other corporate officer, moved funds from one account to another but did not pay bills. Therefore, the payroll checks and all the bills were under the control of Ms. Bos and no other person. If she did not pay the withholding tax debt, she could not reasonably believe anyone else would do it in her stead. Ms. Bos testified that she asked her father which bills to pay and he directed her not to pay the withholding taxes. Mr. Kinnaman, however, did not have the authority to order her to violate the law. Both Ms. Bos and Mr. Kinnaman were fully aware of the illegality of retaining the taxes they withheld from employees, as Mr. Kinnaman had also done that in a previous company that went bankrupt, a company for which Ms. Bos had also done the accounting. She testified that her family's personal bank accounts were attached by the IRS to satisfy the withholding tax debt. Ms. Bos also has a degree in accounting and admitted at the hearing that she had been taught that her responsibility in just such a situation as this was to leave the employ of

the company. Because Mr. Kinnaman was her father, she chose to defer to his wishes and continued to assist him, but she did so knowingly.

During her testimony, Ms. Bos repeatedly asserted that there was not enough money to pay the withholding tax, but she also testified that the company was profitable and that bonuses were paid to employees. In fact, she testified that \$20,000 was paid to the general manager as a bonus in 2007 which is equivalent to the amount owed in withheld taxes. Bonuses are not binding salary obligations, but she and Mr. Kinnaman chose to pay extra funds to workers rather than remit their withheld taxes.

After her father's death in September of 2007 and the subsequent cessation of the excavating business, Ms. Bos continued to fail to remit the withheld taxes. She filed two more Unemployment Insurance Quarterly reports for the last quarter of 2007 and the first quarter of 2008 reporting wages of \$31,593 paid. She still did not pay withholding taxes when she clearly had sole authority to make payments from the corporation's accounts and there were sufficient funds to pay the taxes. In 2008, four months after her father's death, she also paid herself and her sister a total of \$19,356 for one month's services according to the Unemployment Insurance form she signed and filed for that quarter. *Exh. 3*. At no time did she submit any withheld taxes.

As an officer of Total Excavation, Inc., its accountant, and the person self-designated to produce and file reports with the government, Ms. Bos had both the authority and the responsibility to pay the withholding taxes.

Formalizing The Corporation

Appellant introduced the testimony of James Kommers, attorney for Craig Kinnaman, who filed the incorporation papers for Total Excavation and testified that he had tried unsuccessfully to get Mr. Kinnaman to "formalize" the corporation by having a meeting, electing officers and adopting by-laws. Appellant claims that as a

result she was never appointed an officer of the corporation and therefore bears no responsibility for the debts of the corporation.

It is true that the statutes governing incorporation require that after incorporation, the directors hold an organizational meeting “to complete the organization of the corporation by appointing officers, adopting bylaws, and carrying on any other business brought before the meeting.” Section 35-1-222(a), MCA. However, the basic section on incorporation, § 35-1-220, MCA, states that “The secretary of state’s filing of the articles of incorporation is conclusive proof that the incorporators have satisfied all conditions precedent to incorporation...” In fact, as discussed above, the secretary of state had filed the articles of incorporation and Jennifer Bos was clearly named in them as an officer and signed them. *Exh. 1*.

It is also true that Mr. Kinnaman and Ms. Bos acted as if the corporation were complete, filing documents with the state under that title and obtaining a corporate credit card. In common law, liability could attach to *de facto* corporations so that those who reasonably relied on the appearance of corporate authority were protected even if the corporation did not exist. Under the Revised Model Business Corporations Act, adopted in Montana in 1981, those rules were replaced by § 35-1-119, MCA, which states, in its entirety: “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.” Thus, 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.

ORDER

It is therefore ordered by the State Tax Appeal Board of the State of Montana that the tax assessed by the Department is due and owing.

Dated this 29th day of December, 2009.

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 29th day of December, 2009, 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:

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