

**BOARD OF TAX APPEALS  
STATE OF LOUISIANA**

**JUDITH A. FAVALORA**

**DOCKET NO. C06645D**

**Petitioner**

**VS.**

**DEPARTMENT OF REVENUE,  
STATE OF LOUISIANA,**

**Respondent**

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**INTERIM ORDER AND WRITTEN REASONS**

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On November 29, 2023, this matter came before the Board for hearing on a Trial on the Merits on the Petition filed by Petitioner Judith A. Favalora ("Taxpayer"), with Francis J. Lobrano, Chairman, presiding, and Board Member Judge Lisa Woodruff White (ret.) present. Present before the Board were Ms. Judith A. Favalora, representing herself pro se, and Miranda Scroggins, attorney for Kevin Richard, Secretary, Department of Revenue, State of Louisiana ("Respondent" or "Department"). After the hearing, the Board took the matter under advisement. The Board now renders the following Judgment in accordance with the attached written reasons:

**IT IS ORDERED** that the Taxpayer's prayer for relief be and is hereby granted in part and denied in part, with the Department's assessment of withholding taxes for the periods 6/30/2014 through

12/31/2018 upheld, and the Department's assessment of withholding taxes for the periods 1/1/2019 through 6/30/2019 vacated;

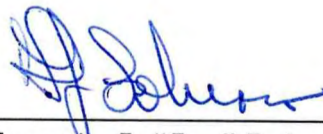
**IT IS FURTHER ORDERED** that on or before March 8, 2024, the parties shall submit a proposed Judgment conforming to this Interim Order and the Written Reasons attached herewith, and that this proposed Judgment shall contain and state the correct dollar amounts in accordance with this Interim Order and the Written Reasons attached herewith.

**IT IS FURTHER ORDERED** that if the Parties cannot agree on the form of a proposed Judgment, then each party shall submit a proposed Judgment together with a Memorandum in support thereof on or before March 22, 2024. Each party shall be permitted to reply to the other party's proposed judgment and accompanying memorandum or before March 29, 2024.

**IT IS FURTHER ORDERED** that is not a final judgment and does not constitute an appealable Judgment as contemplated by La. R.S. 47:1410 and La. R.S. 47:1434.

JUDGMENT RENDERED AND SIGNED at Baton Rouge, Louisiana, this 7<sup>th</sup> day of February, 2024.

FOR THE BOARD:



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Francis J. "Jay" Lobrano, Chairman  
Louisiana Board of Tax Appeals

BOARD OF TAX APPEALS  
STATE OF LOUISIANA

JUDITH A. FAVALORA

DOCKET NO. C06645D

**Petitioner**

VS.

DEPARTMENT OF REVENUE,  
STATE OF LOUISIANA,

**Respondent**

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WRITTEN REASONS FOR JUDGMENT

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On November 29, 2023, this matter came before the Board for a hearing on the merits on the Department's assessment against the Petitioner Judith A. Favalora ("Taxpayer"), with Francis J. Lobrano, Chairman, presiding, and Board Member Judge Lisa Woodruff White (ret.) present. Present before the Board were Ms. Judith A. Favalora, representing herself pro se, and Miranda Scroggins, attorney for Kevin Richard, Secretary, Department of Revenue, State of Louisiana ("Respondent" or "Department"). After the hearing, the Board took the matter under advisement. The Board now renders Judgment upholding in part and vacating in part the Department's assessment against the Taxpayer in accordance with the following written reasons.

**Facts:**

At trial, the following facts were developed through the testimony of the witnesses and the introduction of various exhibits. Favalora Constructors, Inc. (the "Company") was a small contracting business

owned by the Taxpayer and her former husband Laurence Favalora formed by them during their marriage. Taxpayer testified that her husband ran the day to day operations of the Company and handled the oversight of the construction projects, and she handled the administration and accounting functions in the office. Taxpayer owned 51% of the Company and was the Secretary-Treasurer of the Company. Taxpayer testified that she worked regularly for the Company until her resignation as Secretary-Treasurer in January, 2019. Although Taxpayer and her husband divorced in April of 2009, she continued her ownership and her position with the Company until her resignation. After her resignation as the Secretary-Treasurer of the Company, Taxpayer was employed full time with the City of Kenner.

During the periods at issue, the Company had employees, and among the Taxpayer's duties was the filing of the Company's quarterly Returns of Louisiana Withholding Tax Form L1 (the "Returns"), and the accompanying payment of tax due with each return. Taxpayer testified that during the periods at issue, she worked full time and received a salary "when the Company had money". Taxpayer further testified that she would write and sign Company checks to pay the bills of the Company. Taxpayer further testified that she would pay bills when her husband "told her to pay the bills", and that she no longer signed the checks after her resignation as Secretary-Treasurer.

Mr. Laurence Favalora's testimony corroborated the Taxpayer's testimony. He testified that she was the Secretary-Treasurer of the

Company and was in charge of the accounting duties for the Company. He clarified that she owned 51% of the Company until her resignation from the Company in January 2019, when she transferred her ownership interest to him contemporaneous with her resignation.

Beginning with the 2<sup>nd</sup> quarter of 2014, Taxpayer prepared the Returns and signed as the Secretary-Treasurer of the Company, but failed to remit the withholding taxes (the "Taxes") reported on the Returns. Ultimately, the Company ceased operations sometime in late 2019/early 2020, and was administratively dissolved by the Louisiana Secretary of State in 2021. In January of 2019, Taxpayer officially resigned as Secretary/Treasurer of the Company, and further testified that her role with the Company at this point was simply the preparation of 1<sup>st</sup> and 2<sup>nd</sup> quarter Returns for 2019, which apparently were the last Returns filed by the Company.

As the Company was insolvent, on November 21, 2019, the Department assessed the Taxpayer with the Taxes under the authority of La. R.S. 47:1561.1 as an officer or director of the corporation having direct control and supervision of such taxes. Taxpayer timely appealed the assessment to this Board.

### **Law and Analysis**

The sole issue presented for our review is whether the Taxpayer is personally liable under La. R.S. 47:1561.1(A) for the reported but unremitted withholding taxes reported by the Company on its Returns for the period 6/30/2014 through 6/30/2019. La. R.S. 47:1561.1(A) provides:

Notwithstanding any other provision of law to the contrary, if any corporation, limited liability company, or limited partnership fails to file returns or to remit the income taxes withheld from the wages of its employees under Chapter 1 of Subtitle II of this Title, or if any corporation, limited liability company, or limited partnership fails to file returns or to remit the sales and use taxes collected from purchasers or consumers under Chapters 2, 2- A, and 2-B of Subtitle II of this Title, the secretary is authorized, as an alternative means of enforcing collection, to hold those officers or directors, or those managers or members as defined in R.S. 12:1301(12) and (13), having direct control or supervision of such taxes or charged with the responsibility of filing such returns and remitting such taxes and who willfully fail to remit or account for such taxes withheld or collected, personally liable for the total amount of such taxes withheld or collected, and not accounted for or not remitted, together with any interest, penalties, and fees accruing thereon. Collection of the total amount due may be made from any one or any combination of such officers or directors, or managers or members as defined in R.S. 12:1301(12) and (13), who willfully fail to remit or account for such taxes withheld or collected, by use of any of the alternative remedies for the collection of taxes as provided in R.S. 47:1561.

Louisiana jurisprudence analyzing an individual's liability as an officer or director of an entity is all but non-existent. In *State v. DeJesus*, 642 So. 2d 854 (La. 1994)<sup>1</sup>, the court, recognizing the lack of Louisiana jurisprudence on the issue, resorted to an analysis of 26 U.S.C. 6672 (hereafter, Title 26 of the United States Code will be referred to as the "Internal Revenue Code", or "IRC"), which is the federal counterpart to La. R.S. 47:1561.1. IRC §6672(a) provides:

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

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<sup>1</sup> In *DeJesus*, the issue before the court was whether the lower court improperly quashed criminal indictments on a taxpayer's failure to file and remit sales taxes.

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.

There is a plethora of federal jurisprudence analyzing and applying IRC §6672(a) to individual officers and other persons in determining whether such individuals are personally responsible for federal withholding taxes that an entity failed to remit on behalf of their employees. In *United States v. Rem*, 38 F. 3d 634 (2d. Cir. 1994), the Court set forth the requirements of IRC §6672(a) and cited a number of standards and principles adopted by various federal courts:

The term "[a]ny person required to" perform the collection, accounting, or payment functions described in § 6672(a) has been construed to include any individual who is a "responsible person" for collection and payment of the employer's taxes." *Fiataruolo v. United States*, 8 F.3d 930, 938 (2d Cir.1993) ("*Fiataruolo*") (quoting *Godfrey v. United States*, 748 F.2d 1568, 1574 (Fed.Cir.1984)); see also *Slodov v. United States*, 436 U.S. 238, 246 n. 7, 98 S.Ct. 1778, 1784 n. 7, 56 L.Ed.2d 251 (1978). Because § 6672(a) is "a vital collection tool" intended to ensure the smooth flow of necessary revenues to the government, "courts generally take a broad view of who qualifies as a responsible person," *Fiataruolo*, 8 F.3d at 938.

More than one individual may be a responsible person within the meaning of § 6672(a). See, e.g., *Fiataruolo*, 8 F.3d at 939; *Kinnie v. United States*, 994 F.2d 279, 284 (6th Cir.1993); *Gephart v. United States*, 818 F.2d 469, 476 (6th Cir.1987) ("[w]hile it may be that [other corporate officials] were more responsible than plaintiff, and exercised greater authority, this does not affect a finding of liability against the plaintiff" (emphasis in original)). And it is not necessary that the individual in question "have the final word as to which creditors should be paid in order to be subject to liability under this section." *Hochstein v. United States*, 900 F.2d 543, 547 (2d Cir.1990) ("*Hochstein*") (quoting *Gephart v. United States*, 818 F.2d at 475), cert. denied, \_\_\_ U.S. \_\_\_,

112 S.Ct. 2967, 119 L.Ed.2d 587 (1992). The determinative question "is whether the individual has significant control over the enterprise's finances." *Fiataruolo*, 8 F.3d at 939 (quoting *Hochstein*, 900 F.2d at 547 (emphasis in *Fiataruolo*)). No single factor is dispositive in evaluating whether the individual had significant control; that determination must be made in light of "the totality of the circumstances," *Fiataruolo*, 8 F.3d at 939. Relevant considerations include whether the individual (1) is an officer or member of the board of directors, (2) owns shares or possesses an entrepreneurial stake in the company, (3) is active in the management of 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.

*Id.* at 939; see also *Hochstein*, 900 F.2d at 547; *Barnett v. IRS*, 988 F.2d 1449, 1455 (5th Cir.), cert. denied, \_\_\_ U.S. \_\_\_, 114 S.Ct. 546, 126 L.Ed.2d 448 (1993); *Bowlen v. United States*, 956 F.2d 723, 728 (7th Cir.1992). Thus, though § 6672(a) "is not meant to ensnare those who have merely technical authority or titular designation," *Fiataruolo*, 8 F.3d at 939, the section encompasses "all those connected closely enough with the business to prevent the [tax] default from occurring," *id.* (quoting *Bowlen v. United States*, 956 F.2d at 728).

Even if an individual is found to be a responsible person within the meaning of § 6672(a), the section imposes no liability on him unless his failure to collect, account for, or remit the withholding taxes was "willful[ ]." [\*643] To be willful, conduct need not stem from an "evil motive or intent to defraud," *Kalb v. United States*, 505 F.2d 506, 511 (2d Cir.1974), cert. denied, 421 U.S. 979, 95 S.Ct. 1981, 44 L.Ed.2d 471 (1975); but it must amount to more than negligence, see *id.* The principal component of willfulness is knowledge: a responsible person acted willfully within the meaning of § 6672(a) if he (a) knew of the company's obligation to pay withholding taxes, and (b) knew that company funds were being used for other purposes instead. See, e.g., *Hochstein*, 900 F.2d at 548; *United States v. Running*, 7 F.3d 1293, 1298 (7th Cir.1993) ("a responsible person acts willfully when he permits funds of the corporation to be paid to other creditors when he is aware that withholding taxes due to the government have not been paid"). Thus, failures were "willful[ ]" within the meaning of



§ 6672(a) if they were "voluntary, conscious and intentional--as opposed to accidental--decisions not to remit funds properly withheld to the Government." *Kalb v. United States*, 505 F.2d at 511 (quoting *Monday v. United States*, 421 F.2d 1210, 1216 (7th Cir.), cert. denied, 400 U.S. 821, 91 S.Ct. 38, 27 L.Ed.2d 48 (1970)).

If the responsible person had the requisite knowledge, even the fact that he would have been discharged for paying the taxes is insufficient to make the failure to pay not willful. See, e.g., *Hochstein*, 900 F.2d at 548; *United States v. Running*, 7 F.3d at 1298.

On the other hand, a responsible person's failure to cause the withholding taxes to be paid is not willful if he believed that the taxes were in fact being paid, so long as that belief was, in the circumstances, a reasonable one. See *Kalb v. United States*, 505 F.2d at 511. If the belief was not reasonable, he will be liable under § 6672(a). Further, even if a responsible person did not know contemporaneously of the company's nonpayment of withholding taxes, he will be held liable for nonpayment with respect to any period during which he was a responsible person if, when he became aware of the delinquency, the company had liquid assets with which to pay the overdue taxes. See *Kinnie v. United States*, 994 F.2d at 285; *Honey v. United States*, 963 F.2d 1083, 1088-89 (8th Cir.), cert. denied, \_\_\_ U.S. \_\_\_, 113 S.Ct. 676, 121 L.Ed.2d 598 (1992); *Davis v. United States*, 961 F.2d 867, 871-78 (9th Cir.1992), cert. denied, \_\_\_ U.S. \_\_\_, 113 S.Ct. 969, 122 L.Ed.2d 124 (1993); see also *Kalb v. United States*, 505 F.2d at 511 ("Willful conduct also includes failure to investigate or to correct mismanagement after having notice that withholding taxes have not been remitted to the Government.").

The Taxpayer in the instant case was an owner and officer of the Company. Her testimony established that she was responsible for the preparation and filing of the Returns, and had full knowledge that the withholding taxes were not being remitted to the Department. Under the federal jurisprudence, the fact that an entity is financially unable to meet its tax obligations does not absolve an individual from personal

liability for the entity's withholding tax obligations. It is not necessary that the Taxpayer had the final word as to which creditors should be paid. See *Hochstein v. United States*, 900 F.2d 543 (2d Cir. 1990). Under the factors enumerated in *Fiataruolo v. United States*, 8 F.3d 930, 938 (2d Cir. 1993), Taxpayer was an officer and owner of the Company; was active in the management of the day to day affairs of the Company; and had check signing authority. Further, Taxpayer had knowledge that the taxes were not remitted with the Returns. Under the federal jurisprudence, willfulness is equated to knowledge - if an individual knew of the entity's obligation to pay withholding taxes and knew that the entity's funds were being used for other purposes instead, that individual is considered to have willfully failed to collect and pay over such tax, and is thus charged with personal liability for the failure to do so. The Taxpayer's testimony establishes that she knew that the taxes were not being paid and that instead the Company's funds were being used for other purposes. Considering the above factors, we find that the Taxpayer is personally obligated under La. R.S. 47:1561.1(A) for the withholding taxes for the period 6/30/2014 through 12/31/2018.

However, the Board also finds that upon the Taxpayer's resignation of her position with the Company in January of 2019, together with her relinquishment of her ownership interest in the Company and her much reduced responsibility and hours, that

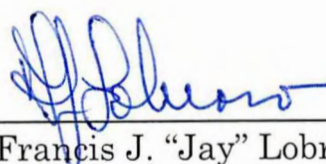
Taxpayer is not responsible for the Company's un-remitted withholding taxes for the 1<sup>st</sup> and 2<sup>nd</sup> quarter of 2019.

The Board notes the proposed assessment being appealed in this matter does not provide a breakdown of tax, penalty and interest by tax period. Therefore, on or before March 8, 2024, the parties shall submit a proposed Judgment conforming to this Interim Order and the Written Reasons attached herewith, and that this proposed Judgment shall contain and state the correct dollar amounts in accordance with this Interim Order and the Written Reasons attached herewith.

If the Parties cannot agree on the form of a proposed Judgment, then each party shall submit a proposed Judgment together with a Memorandum in support thereof on or before March 22 2024. Each party shall be permitted to reply to the other party's proposed judgment and accompanying memorandum on or before March 29, 2024.

Baton Rouge, Louisiana, this 7<sup>th</sup> day of February, 2024.

FOR THE BOARD:



Francis J. "Jay" Lobrano, Chairman  
Louisiana Board of Tax Appeals