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Eighth Circuit Addresses Issue of Company Owner's Responsibility for Payment of Employee Social Security, and Medicare Taxes

On January 25, 2011 the U.S. Court of Appeals for the Eighth Circuit (which includes Minnesota) released its opinion in *Charles A. Colosimo, Sr. v. United States* [No. 10-1593] which offers a brief but direct statement of the responsibility of a business owner to collect and remit federal employment taxes.

Under federal law employers are required to withhold Social Security taxes, and Medicare taxes from employees' wages at the time those wages are paid. These are to be held in trust by the employer and remitted at designated intervals to the IRS and may not be used for any other purpose. The federal government, through the IRS, can pursue a company's owners individually for any unpaid taxes, penalties and interest. The relevant statute says, in part:

> 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. [26 U.S.C. 6672(a)].

A "person" within the meaning of that section includes an officer or employee of a corporation who is under a duty to perform the collection, accounting, or pay over of the tax. In *Ferguson v. United States,* 484 F.3d 1068,1072 (8th Cir. 2007) the Eighth Circuit Court of Appeals said "To incur liability under 26 U.S.C. 6672, an individual must be a *responsible person* (emphasis added here) and must *willfully* (emphasis added here) fail to pay over the taxes in question;" and, further, "A responsible person is someone who has the duty, status, and authority to avoid the corporation's default in collection or payment of the taxes."

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Charles Colosimo, Sr. was the president and treasurer of C&C Distribution. He and his wife Carolyn each owned fifty percent of the stock in the company which had approximately thirty employees and whose day-to-day management was in the hands of Charles, Carolyn, their son, and bookkeeper Andrew Gillaspey.

In 2003 Colosimo received notices from the IRS that the company had not filed federal unemployment and employment tax returns for parts of tax years 2000, 2001, and 2002. Colosimo forwarded the notices to the company's outside accountant, Wendy Wiedner, who – after initially thinking there was an error with federal tax identification numbers – confirmed to Colosimo and Gillaspey in June 2004 that the company had a large debt for these unpaid taxes.

The company ceased operations at the end of 2004 but continued to disburse funds to creditors until the end of 2005. In 2008 Colosimo sued the IRS seeking a refund of a $700 penalty resulting from an IRS assessment in excess of $700,000 in unpaid federal employment taxes and penalties arising from the company's operations. The IRS counterclaimed against Colosimo, his wife Carolyn, and Gillaspey for all the unpaid balances and assessments. All parties moved for summary judgment which the district court granted for Carolyn but not for Colosimo (The United States voluntarily dismissed against Gillaspey) giving summary judgment for the United States, finding that Colosimo was a "responsible person" who had acted "willfully" in non-payment of taxes.

In this appeal, the 8th Circuit held that the district court was not in error in finding Colosimo to be a responsible person based on the facts that he was president and treasurer, a member of the board of directors, had and exercised check signing authority, decided which creditors to pay, had authority to hire and fire workers, signed federal tax returns, had authority to borrow money and make expenditures on the company's behalf, and had discussed unpaid tax liabilities with outside accountant Wiedner.

The court also noted that whether Gillaspey, the bookkeeper, may have also been a responsible person was "immaterial to Colosimo's liability" and, further, that it was irrelevant to his status as a responsible person whether he knew or did not know about unpaid liabilities before June 2004 [citing *Barton v. U.S.* 988 F.2d 58, 60 (8th Cir. 1993)] noting that knowledge is irrelevant to the issue of whether an individual is a "responsible person" within the meaning of section 6672.

As regards the issue of willfulness, the court noted that the term "willfully" does not connote a bad or evil motive, but rather a voluntary, conscious, and intentional act such as payment of other creditors in preference to the United States [citing *Honey v. United States,* 963 F.2d 1083,1087 (8th Cir. 1992)].

The district court had found that Colosimo, for purposes of summary judgment, did not know of the unpaid tax liability prior to June 2004 and that his acts then were not willful, but that he did have knowledge after June 2004 (when he met with the outside accountant) and after that date "undisputedly knew of funds paid to other creditors at that time," and that his actions were, therefore, willful. Here the 8th Circuit concurred.

Colosimo also argued that contractual obligations to pay a bank creditor in preference to the United States kept his actions from being willful. The court here noted (again citing *Honey*) that when funds are encumbered by an entity holding a security interest that restricts the taxpayer from using funds to pay trust fund taxes, the taxpayer does not act willfully by failing to use those funds to pay the taxes. But, the court found, there was no such encumbered funds situation present here based on the testimony the bank. The court concluded: "More pertinently, C&C Distribution's bank records reflect that numerous creditors were paid after June 2004 and Colosimo does not attempt to argue, nor could he argue, that each of these creditors encumbered his ability to pay the government. Accordingly, Colosimo's actions were willful.

U.S. Supreme Court Expands Scope of Discrimination Statute, Allows Third-Party Retaliation Claims

In its January 24, 2011 holding in *Eric Thompson v. North American Stainless, LP* (No. 09-291) the U.S. Supreme Court expanded the scope of the Civil Rights Act's Title VII prohibition against employer retaliation by allowing a Title VII retaliation claim by a discharged employee who claimed that he was discharged because his fiancé had filed a sex discrimination charge against their employer.

Thompson was an employee of North American Stainless who met and later married another employee of the firm. While they were engaged, Thompson's fiancé filed a sex discrimination charge against the company. Approximately one month later North American discharged Thompson who sued claiming he was discharged in retaliation for his fiancé's suit. At both the trial court level and appellate level, courts held that Thompson could not advance his claim since he did not allege that he himself had engaged in activity protected by Title VII.

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The Court found that "we have little difficulty concluding that if the facts alleged by Thompson are true, then [North American Stainless] violated Title VII." Quoting from its decision in *Burlington Northern v. White* [548 U.S. 53 (2006)] the Court noted Title VII's anti-retaliation provision prohibits any employer action that "might well have dissuaded a reasonable worker from making or supporting a charge of discrimination". "We think it obvious," the Court continued, that a reasonable worker might be dissuaded from engaging in protected activity if she knew that her fiancé would be fired."

In addressing whether Thompson could sue, the Court found that an employee like Thompson fell within the "zone of interest" protected by Title VII. He was not, the Court continued, "an accidental victim of the retaliation—collateral damage, so to speak, of the employer's unlawful act. To the contrary, injuring him was his employer's intended means of harming [his fiancé]. Hurting him was the unlawful act by which the employer punished her. In those circumstances, we think Thompson well within the zone of interests sought to be protected by Title VII. He is a person aggrieved with standing to sue."

Congress Announces 2011 Oversight of SBA

On January 25th U.S. Senators Mary Landrieu and Olympia Snow (respectively the Chair and Ranking Member of the Senate Committee on Small Business and Entrepreneurship) sent a letter to Karen Mills the Administrator of the U.S. Small Business Administration. The letter indicated that the Senate Committee would begin the current session by "…examining and assessing the need, efficiency, and effectiveness of programs within the Small Business Administration (SBA)." Stressing that the Committee takes seriously its responsibility "to evaluate and determine when spending is necessary to meet current needs and demands while identifying and eliminating needless spending" the letter asked Administrator Mills to prepare and submit to the Committee by February 10th recommendations for programs within the SBA that could be eliminated or substantially reduced without undermining the SBA's ability to serve the needs of small business owners.

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Concurrently, on January 28th, Representative Sam Graves, Chairman of the House Committee on Small Business sent a letter to Representative Darrell Issa, Chairman of the House Committee on Oversight and Government Reform, transmitting the oversight plan of the Small Business Committee for the one hundred twelfth Congress. Included in that plan were efforts at oversight of SBA entrepreneurial development programs (including "Examining the effectiveness of SBA entrepreneurial development programs in creating jobs"); oversight of federal government contracting (including "Effectiveness of SBA contracting programs to increase participation by small businesses in federal procurement"); and oversight of SBA management (including "Capabilities of SBA employees to provide proper assistance to small business owners").

Significantly, the plan indicated that the Committee would look at programs including – but not limited to – the following to determine which ones might be cut "to reduce the federal deficit" :

- Small Business Lending Fund operated by the Department of Treasury;
- State Small Business Credit Initiative operated by the Department of Treasury;
- SBA Patriot Express Loan Program;
- SBA Express Loan Program;
- SBA Office of Policy;
- SBA Regional Administrators;
- SBA Regional Advocates;
- SBA Deputy District Directors;
- SBA Office of International Trade;
- SBA Office of Native American Affairs.

In particular, the plan noted, the Committee "…will assess whether reorganization and reassignment of employees to more critical functions at the SBA, such as positions as procurement center representatives, will provide a more effective agency at assisting small businesses generate growth."

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