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U.S. Supreme Court Denies Review of Decision of 8th U.S. Circuit Court of Appeals on Definition of “Responsible Person” and “Willfulness” in Case Involving Federal Unemployment Taxes

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▶ U.S. Supreme Court Denies Review of Decision of 8th U.S. Circuit Court of Appeals on Definition of “Responsible Person” and “Willfulness” in Case Involving Federal Unemployment Taxes

The U.S. Supreme Court has denied *certiorari* review of the 8th U.S. Circuit Court of Appeals decision in the case of *Oppliger v. United States* (8th Cir., 637 F. 3d. 889), a case centering around the definition of “responsible person” for the withholding of federal employment taxes, and the definition of “willfulness” in failing to pay over such taxes to the federal government.

26 U.S. C. 3101, 3102(a) and (b) 3402, and 3403 require an employer to withhold federal income, Social Security, and Medicare taxes from employees’ wages. 26 U.S. C. 7501 requires the employer to hold those taxes in trust for the federal government and remit them to the Internal Revenue Service at required intervals. If an employer fails to remit those taxes, 26 U.S. C. 6672 imposes liability on any person who is a “responsible person” and who “willfully fails to pay over withholding taxes to the United States.” [See *Keller v. United States*, 46 F. 3d, 851. 853 (8th Cir. 1995)]

James and Gayle Oppliger were the founders, sole owners, and principal officers of Double O trucking and the sole members of LFC a payroll services company whose only client was Double O. The Oppligers hired Mary Kerkman to perform accounting and bookkeeping services for both companies, those services to include withholding employee taxes and sending those taxes to the IRS. After six years with the company, Kerkman committed suicide and was later discovered to have embezzled \$10,000 from the company. The day after Kerkman’s death the IRS informed the Oppligers that LFC’s employment taxes had not been paid for thirteen consecutive quarters and Double O’s not paid for seventeen quarters. The Oppliger’s claimed ignorance of any failure to pay the taxes and, within five months, sold the assets of Double O. Between the time of the IRS notifying the Oppligers of the delinquent payments and the time of sale of Double O, LFC paid out more than \$2 million to its employees and more than \$3 million to third party creditors.

The IRS assessed penalties against the Oppligers for \$2,363,704.25 for LFC’s unpaid taxes and \$27,013.21 for Double O’s unpaid taxes under section 6672.

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The Oppliger's made a modest partial payment (\$15,015) toward LFC's tax obligation then filed claims for a refund arguing that they were not liable for the unpaid taxes. When the IRS denied these claims, the Oppligers sued. At the district court level the court gave summary judgment to the United States, finding that there were no material issues of fact as to whether the Oppligers were responsible persons under section 6672. The court also determined that the Oppligers willfully failed to pay the employment taxes since they admitted that after they IRS informed them of their tax liabilities they still went ahead and paid employees and third parties.

On appeal to the 8th Circuit the Oppligers argued that there was a material issue of fact as to their responsibility given Kerkman's substantial role in the company and the fact that her misconduct deprived the Oppligers of the chance to make informed decision about the company. The court rejected these arguments noting that "when determining responsible person status under section 6672 courts often consider a non-exhaustive list of factors, including whether the individual serves as an officer or director; owns substantial stock in the company; manages day-to-day operations; possesses authority to hire and fire employees; makes decisions as to disbursement of funds and payment of creditors; controls bank accounts and financial records; possesses check signing authority." The court concluded that the district court had correctly applied these factor tests and relied on the undisputed facts that the Oppligers had formed the companies, held offices, and managed the day-to-day business...had authority to hire and fire employees...had authority to sign tax returns...signed payroll checks...and signed bank notes and on security agreements and served as personal guarantors. The court also noted that "...whether Kerkman may have been a responsible person under section 6672 is immaterial to the Oppligers' liability." [Citing *Colosimo v. United States* 630 F.3d 749 (8th Cir. 2011)]

On the issue of willfulness the Oppligers argument relied on *Slodov v. United States* where a party who assumed control of corporations with tax liability was determined not to be a responsible party when, at the time the party assumed control, there were no funds to pay the taxes. The court noted that the Oppligers reliance on that case was misplaced, "As we have already addressed, the Oppligers were responsible persons during each of the quarters in which they failed to pay employment taxes. Therefore, the Oppligers decision to pay employees and other creditors in lieu of the United states constituted a willful failure to pay taxes as a matter of law."

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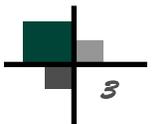
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In denying *certiorari* the Supreme Court declined to address the arguments made in the Oppligers' petition for *certiorari* that the 8th Circuit's application of a factor test failed to consider the "totality of circumstances" which are considered by other circuits, and that other circuits allow a "reasonable cause" defense to the issue of willfulness in cases like the Oppligers'.

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