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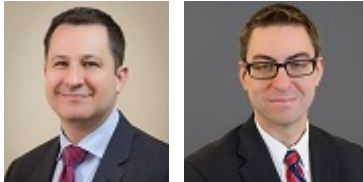
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Defending Business Executives Against Personal Sales Tax Liability in Pennsylvania

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By Kevin Sweeney and Adam Koelsch

For business owners and their representatives, a sales tax assessment against a business might be unsurprising. But many business owners – and even some tax representatives – may not realize that when businesses collect sales taxes, but do not actually remit them to the state, the Pennsylvania Department of Revenue (DOR) may impute those tax liabilities to the owners personally if considered to be “responsible parties.” This is the case even if the owners have limited liability by virtue of the company’s choice of legal entity. When the conduct is flagrant and the unremitted amounts are significant, owners deemed to be responsible parties can even become the targets of criminal investigations.

The DOR takes the position that, under Pennsylvania law, most active business owners and officers are de facto responsible parties.¹ However, a recent Commonwealth Court decision (*City of Philadelphia v. Righter*²) suggests this may not always be the case.

State statutes establish that the DOR may assess both businesses and their representatives for collected but unremitted sales tax, but they do not specifically identify which representatives may be held responsible. To answer this, at least one court has looked to the case law describing the concept known as *trustee ex maleficio* liability.³ With respect to taxes, a *trustee ex maleficio* is anyone “responsible for the performance of the duty to collect the taxes and in control of the [business’s] funds and tax accounts.”⁴ In establishing whether someone is personally liable for taxes as a *trustee ex maleficio*, courts have generally considered several factors: how often the person is on the business premises and whether the person has



exercised the authority to hire and fire employees, review and sign tax returns (including the return for the unremitted taxes), sign business and payroll checks, negotiate and execute contracts, obtain loans, consult and review company books and records, and act as an administrator or manager.⁵

City of Philadelphia v. Righter

In *Righter*, the Commonwealth Court seems to have altered the manner in which *trustee ex maleficio* factors are applied. There, Anthony D'Angelo had purchased a parking lot business in Philadelphia, intending that Robert Righter, the business's namesake, would operate the lots. Righter was president and D'Angelo was vice president and secretary. For 2000 through 2003, D'Angelo signed City Business Privilege Tax (BPT) returns and multiple leases and lease amendments on behalf of the business. For 2004 through 2006, D'Angelo also signed checks to pay the BPT owed by the business. By the end of 2006, the relationship had deteriorated and D'Angelo was no longer involved in the business.

In 2009, the City of Philadelphia audited the business for parking taxes for 2000 to 2008. The city mailed the audit bill to the business correspondence address in its files, which was D'Angelo's home address. D'Angelo's address was also the address used by the IRS. The city sued to collect the audited taxes from the business, Righter, and D'Angelo. The business and Righter settled before trial, but D'Angelo insisted that he was not a responsible party. Although the trial court concluded that D'Angelo was not a liable "operator" of the lot, it held that D'Angelo was liable for tax years 2000 through 2006 (when he left the business) as a *trustee ex maleficio*.

The Commonwealth Court disagreed. At trial, Righter testified that he was the day-to-day manager of the lot, that D'Angelo was not on the premises, and that Righter was responsible for submitting the parking tax coupons to the city. Righter also testified that he did not know until 2004 or 2006 that the business had not paid its parking taxes, even though he had signed a settlement agreement in 2003 for parking taxes for tax years 2000 through 2003, and had signed the settlement checks. Although Righter testified that D'Angelo was solely responsible for paying bills and taxes from 2004 to 2008, Righter had signed BPT returns for those years. Moreover, evidence showed that Righter hired the business's accountant, even though D'Angelo consented to the hiring. Finally, although D'Angelo admitted that he had access to cash from the lot and occasionally made deposits, he testified that he had only made deposits at Righter's request and that he had never possessed the daily business reports. Despite this evidence, the Commonwealth Court concluded there was insufficient evidence to show that D'Angelo had "responsibility or control over the collection of Righter Parking's taxes and disbursement of corporate funds that would make him liable for Righter Parking's parking taxes."

The decision seems inconsistent with prior cases applying the *trustee ex maleficio* factors to trust fund taxes. In *City of Philadelphia v. Petherbridge*,⁶ the Commonwealth Court found a business's president, who claimed not to be involved in day-to-day operations, liable for unpaid wage taxes solely because he had signed the tax returns. Moreover, in a footnote, the court noted that, because the officer possessed the authority to sign the company checks, a reasonable person could conclude that he was in control of the corporate funds and tax account. Just as in *Petherbridge*, D'Angelo had signed checks and tax returns. Accordingly, he had some power over the business's finances and accounts, and was in a position to know whether the collected taxes were being remitted and to pay them if they were not. Although not specifically mentioned in the *Righter* decision, the trial evidence also showed that D'Angelo owned half of the business. Nevertheless, he was not considered a responsible party.

In another case, *City of Philadelphia v. GoInternet Net Inc.*,⁷ the Commonwealth Court mentioned that, although courts are "reluctant to hold an individual responsible when there are more culpable individuals not before the court," they will "[n]evertheless ... assign liability on the less culpable defendant, who is before the court, if the person had the requisite control of the company's finances." Such control did not, however, compel the court in the *Righter* case to hold D'Angelo responsible.

Implications

Although not a sales tax case, it appears that *Righter* provides room for taxpayers to argue that, even if an owner/officer possesses general control over a business, he or she may still not be a responsible party where someone else possessed greater responsibility and control. Consequently, one should not assume that, simply because someone is an owner/officer that there is no way to contest a responsible party sales tax assessment. In *Righter*, the Commonwealth

Court addressed a real-world question: when one owner/officer is put in charge of handling a particular duty because that person is in the best position to do so, should other owners/officers be held personally liable? When faced with a high-dollar sales tax audit or criminal investigation, business owners/officers and their tax representatives should seek advice from a Pennsylvania sales tax controversy and litigation attorney about the likelihood of avoiding and/or reversing a DOR responsible-party determination.

¹ See generally *Pennsylvania Enterprise Registration Form and Instructions, Section 6*: “Under PA law, a proprietor, a general partner, a corporation’s chief operating officer(s), and/or a chief financial officer is responsible for ensuring that collected trust fund taxes are remitted on a timely basis and workers’ compensation coverage is maintained when required ... failure to remit these taxes in a timely manner or to maintain ongoing workers’ compensation coverage when required may result in the personal assessment of a responsible party, together with the possibility of criminal sanctions, if warranted.”

² 175 A.3d 1140 (Pa. Commw. Ct. Oct. 19, 2017).

³ *Brown v. Com.*, 670 A.2d 1222 (Pa. Commw. Ct. 1996).

⁴ *City of Philadelphia v. Penn Plastering Corp.*, 253 A.2d 247 (Pa. 1969).

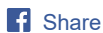
⁵ *City of Philadelphia v. B. Axe Co.*, 397 A. 2d 51 (Pa. Commw. Ct. 1979).

⁶ 781 A. 2d 263 (Pa. Commw. Ct. 2001).

⁷ 935 A.2d 586, 595 & n.13 (Pa. Commw. Ct. 2007).

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