

THE SUPERIOR COURT OF THE STATE OF ARIZONA
IN THE ARIZONA TAX COURT

TX 2016-000365

02/27/2018

HONORABLE CHRISTOPHER WHITTEN

CLERK OF THE COURT

C. Fisher

Deputy

STATE OF ARIZONA DEPARTMENT OF
REVENUE

PENNY TAYLOR MOORE

v.

INVISION SYSTEMS L L C, et al.

NETA J MAGNUSSEN
16831 N 58TH ST UNIT 132
SCOTTSDALE AZ 85254
TYLER Q SWENSEN

MINUTE ENTRY

Courtroom 201 – OCH

10:05 a.m. This is the time set for Oral Argument on Plaintiff's Motion for Summary Judgment Against Defendants John D'Angelo and Francine D'Angelo, filed February 3, 2017. Plaintiff, State of Arizona Department of Revenue is represented by counsel, Penny Taylor Moore. Defendants, John D'Angelo and Francine D'Angelo are represented by counsel, Tyler Q. Swensen.

A record of the proceedings is made digitally in lieu of a court reporter.

Argument is heard.

IT IS ORDERED taking this matter under advisement.

10:40 a.m. Matter concludes.

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LATER:

Still pending is “Plaintiff’s Motion for Summary Judgment Against Defendants John D’Angelo and Francine D’Angelo,” filed more than a year ago, on February 3, 2017, Defendants’ response, filed March 31, 2017, and Plaintiff’s reply, filed May 30, 2017. The matter was originally set for oral argument on July 14, 2017 but continued to February 27, 2018.

Defendant John D’Angelo is a member of Defendant Invision. In fact he was named as the President in Invision’s tax returns and in its Operating Agreement, which provides that he is “responsible for the day-to-day management of the business and affairs of the Company, including keeping all necessary books, records and bank accounts.” Invision filed tax returns for the tax periods of the 4th quarter of 2008 and the 1st, 2nd and 4th quarters of 2009, but failed to pay the reported taxes due of \$25,141.65.

A.R.S. § 43-435 states, “Any person required to collect, truthfully account for and pay over any tax imposed by this title who fails to do so is, in addition to other penalties provided by law, personally liable for the total amount of the tax not collected or accounted for and paid over.” The appellate courts have not yet issued a decision addressing this particular statute. However, the Court is mindful of the Supreme Court’s instruction from more than fifty years ago: “the various provisions of our taxing statutes are to be read together and ordinarily construed as a whole. Accordingly, if there were a definition of general applicability set forth in one provision, it would be given weight as indicating the appropriate definition of the same word or phrase in another provision.” *Arizona State Tax Comm. v. Staggs Realty Corp.*, 85 Ariz. 294, 297-98 (1959). The Supreme Court has issued an opinion definitively interpreting the analogous language in the transaction privilege tax statutes. The Court therefore turns to *Arizona Dept. of Revenue v. Action Marine, Inc.*, 218 Ariz. 141 (2008), for guidance.

The statute at issue in that case, A.R.S. § 42-5028, imposes responsible person liability for unremitted transaction privilege taxes on “a person who fails to remit any additional charge made to cover the tax or truthfully account for and pay over any such amount.” The Supreme Court held that “by enacting § 42-5028, the legislature meant to bring Arizona within the national trend of imposing personal liability on those individuals who fail to remit [transaction privilege] taxes.” *Id.* at 144-45 ¶ 18.

Defendant points to no material difference in the language of the two statutes that would justify placing a different interpretation on what is required of whom. If anything, because the court’s interpretation of the TPT statute was colored by the language of § 43-435, *id.* at 144 ¶ 15-16, reading the statutes *in pari materia* is even more appropriate.

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As for Mr. D'Angelo's personal responsibility, the Court again turns to *Action Marine*. “[A] ‘person’ liable under § 42–5028 must have a duty to remit the taxes. Other jurisdictions require the officer, director, or responsible person to have had control over, responsibility for, or supervision of the money collected to pay the tax. Such tests assist in determining whether the person was responsible for remitting or had assumed a duty to remit monies collected to pay TPTs.” *Supra* at 147 ¶ 29 (internal citations omitted). There is no reason to believe the legislature intended a different test here.

Mr. D'Angelo offers evidence that he was not allowed to independently use “proceeds that are generated by the Company” and that, in times after the tax periods at issue in this case, his obligations at Invision changed. The amendment to the Operating Agreement, however, did not change Mr. D'Angelo's explicitly stated responsibilities. Nor did any other document prepared at the time these taxes were to be paid change his responsibilities.

For the tax periods at issue in this case, the buck stops with the person who acknowledged responsibility under the Operating Agreement and the joint tax application, Mr. D'Angelo, unless and until that responsibility was transferred to someone else. Mr. D'Angelo has not shown that, although president, he was unable to comply with the requirements of the law. He in fact signed tax returns indicating that he was not responsible for paying taxes is not supported by the admissible evidence.

ACCORDINGLY, Plaintiff's Motion for Summary Judgment Against Defendants John D'Angelo and Francine D'Angelo is granted.