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Gunter on *Guenther*:

Tennessee DOR Attempts To Hold Independent Accountant Liable For Unremitted Sales Taxes

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In an effort to reach beyond the “typical” employees and company officers often liable for unremitted taxes under state “responsible person” statutes, the Tennessee Department of Revenue (“Department”) recently attempted to dip into the pockets of a corporate taxpayer’s independent accountant to collect unremitted sales tax.¹ While the Department’s attempt in *Guenther* failed, the Tennessee Court of Appeal’s observation that the analysis was “fact intensive” has left open the possibility that under a different set of facts the outcome may be different.

Background

In December 1997, the independent accountant began performing services for Crossville Foods, Inc. (“Crossville”), the owner of a Ponderosa restaurant in Tennessee. The services included bill payment, preparation of tax returns and “clerical types” of bookkeeping functions. The accountant was not an employee or stockholder of the corporation, and was not involved in the restaurant’s daily operations. The corporation’s owner was an individual who also had no active role in its operation.

The daily operation of the restaurant was the responsibility of a restaurant manager. Each week, the manager would forward bills to the accountant for payment. Because some bills required cash on delivery, the accountant would sign some checks, but leave the amount blank. The manager would then complete the amount due on the check and pay the vendor.

For purposes of paying sales tax, the manager would provide the accountant with a weekly report of sales and the sales tax collected from its customers. The accountant would then prepare the monthly sales tax returns, sign the checks for the amounts owed, sign the return, and forward it to the state by the due date on the twentieth of each month. The accountant signed some returns as an officer of the corporation to avoid mailing them to the manager for signature.

¹ *Guenther v. Tenn. Dept. of Rev.*, No. M2005-00638-COA-R3-CV, 2006 Tenn. App. LEXIS 774 (Tenn. Ct. App. Dec. 6, 2006).

Initially, bills were paid as they became due, but over time the restaurant developed cash flow problems. The accountant sought advice from the owner on which bills to pay immediately and which ones could be delayed. The amounts to be paid immediately were payroll, payroll tax, sales tax and invoices from any vendor which required immediate payment. Food vendors, royalties and advertising bills could be delayed. At some point during the restaurant's operation, ownership was purportedly transferred to the manager, but the extent of the accountant's authority and duties did not change.

On March 24, 2001, without advance notice to the accountant, the manager closed the restaurant and distributed payroll checks. The accountant transferred money into a bank account to cover the checks. The manager had issued at least two other checks to vendors that the accountant did not know about at the time. The accountant became aware of the closure of the restaurant on March 25, 2001, the day after it closed. Between March 26 and March 30, 2001, over \$14,000 was deposited into the restaurant's banking account, although the accountant had no role in making the deposits. These funds were not used to pay March sales tax due in April. The funds were applied to pay other outstanding checks and to pay the accountant his monthly fee. The Department then sought to hold the accountant liable for the March, 2001 unpaid sales tax.

Analysis

Tennessee law requires that any

person required to collect, truthfully account for, and pay over any tax collected from customers of any taxpayer, who *willfully* fails to truthfully account for and pay over any such tax collected, or who *willfully* attempts in any manner to evade or defeat any such tax or the payment of those taxes, shall, in addition to other penalties provided by law, be liable for the total amount of the tax evaded, or not accounted for and paid over, along with penalties and interest.²

The term *person* "includes an officer or employee of a corporation, who, as such officer or employee, is under a duty to perform the act with respect to which the violation occurs."³ The term *willfully* is "limited to material and informed participation in the diversion of such collected funds to a source other than to the state."⁴

The Chancery Court for Davidson County ruled that the Department had not proven that the accountant "willfully" failed to pay the sales tax to the state, and the appellate court affirmed on that basis. According to the Court of Appeals, the

² TENN. CODE ANN. § 67-1-1443(a) (emphasis added).

³ *Id.* § 67-1-1443(b)(1).

⁴ *Id.* § 67-1-1443(b)(2).

key determination is whether [the accountant] acted “willfully” . . . *i.e.*, did [the accountant] participate in a material way and with knowledge to divert the funds. . . . [W]e cannot find that the evidence preponderates against the trial court’s finding that [the accountant’s] participation was not informed. [The manager] knew the business was closing, knew the amounts that were to be deposited and disbursed the payroll checks. [The accountant] did not have this information. For these reasons we believe the facts as found by the trial court support the finding that [the accountant’s] participation was neither material or willful.⁵

While the accountant may have been responsible for filing tax returns and remitting sales tax, he simply “did not know that there would be insufficient funds to pay the March sales tax.”⁶ As the Court of Appeals summarized, when the accountant

signed checks to pay the bills due at or about the date the business closed, he did not know the business would close and he did not know how much [the manager] would be depositing. [The manager] chose to disburse the employee payroll checks the day before she closed the business. Furthermore, [the manager] had issued at least two other checks that [the accountant] did not know about to pay vendors on delivery.⁷

The accountant’s lack of knowledge of so many pertinent facts mitigated against finding that he acted “willfully” to evade payment of sales tax to the State.

While the Department did not prevail, the *Guenther* decision lays the groundwork for the Department to hold independent accountants and other third parties integrally involved in their client’s tax matters liable for unremitted tax. Notably, the Tennessee Court of Appeals did not address whether a “person” under the Tennessee “responsible person” statute should be interpreted to include individuals, such as accountants, that are not employees or company officers of the taxpayer. That issue remains to be decided in a future case.■

⁵ *Guenther v. Tenn. Dept. of Rev.*, No. M2005-00638-COA-R3-CV, 2006 Tenn. App. LEXIS 774, at *9-*10 (Tenn. Ct. App. Dec. 6, 2006).

⁶ *Id.* at *9.

⁷ *Id.* at *9-*10.



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