

**BEFORE THE HEARING OFFICER
OF THE TAXATION AND REVENUE DEPARTMENT
OF THE STATE OF NEW MEXICO**

IN THE MATTER OF THE CONSOLIDATED
PROTESTS OF **JERRY M. POTTS**
AND **JOHN DE LA ROSA**, AS CORPORATE
OFFICERS OF **ASSOCIATED COURT REPORTERS, INC.** NO. 97-45
ID. NO. 01-898678-00 1, PROTEST TO DEMAND
FOR PAYMENT OF UNPAID WITHHOLDING TAX

DECISION AND ORDER

This matter came on for hearing on September 11, 1997, before Gerald B. Richardson, Hearing Officer. Mr. John De La Rosa was represented by Anthony B. Jeffries, Esq. Mr. Jerry M. Potts was represented by Karen J. Meyers, Esq. The Taxation and Revenue Department, hereinafter, "Department", was represented by Gail MacQuesten, Special Assistant Attorney General. At the close of the hearing a briefing schedule was established. The final brief was received on November 5, 1997, and the matter was considered submitted for determination at that time. The parties granted the Hearing Officer additional time, until December 12, 1997, to render his decision.

Based upon the evidence and the arguments presented, IT IS DECIDED AND ORDERED AS FOLLOWS:

FINDINGS OF FACT

1. Associated Court Reporters, Inc., hereinafter, "ACR" is a New Mexico corporation which was formed in 1980. The three original directors of the corporation were Michael Mahan, John De La Rosa and Jerry Potts. All three directors are certified court reporters.

2. Originally, Michael Mahan held the office of Secretary-Treasurer of ACR. In that capacity he took care of day to day bookkeeping matters and oversaw an assistant bookkeeper. He also made decisions as to which bills and creditors were paid and when those payments were made. Eventually, an office manager was hired who took over those functions but Mr. Mahan retained oversight over the financial affairs of ACR until he left the corporation. Mr. Mahan withdrew as a director and shareholder of ACR in 1990.

3. Jerry Potts served as President of ACR from its formation until April of 1991. Thereafter he served as Treasurer until he left the corporation. In addition to performing court reporting services he oversaw the staff doing production work on ACR's court reporting jobs to ensure that the jobs were performed in a timely manner. Mr. Potts resigned as a director and officer of ACR effective October 8, 1993 and surrendered his stock to the corporation at that time.

4. John De La Rosa was originally vice-president of ACR and took over the duties of President from Mr. Potts in 1991. In addition to performing court reporting services himself, Mr. De La Rosa oversaw the assignment of court reporting jobs among the staff of court reporters.

5. Meyners + Company, Certified Public Accountants provided certain accounting services to ACR until 1995, such as occasional preparation of state and federal corporate income tax returns. Bruce Malott, Senior Partner of Meyners + Company recommended to ACR that it hire an office manager to run all aspects of the day to day non-court reporting aspects of its business based upon his opinion that the directors of ACR had limited business financial acumen and needed a great deal of assistance with such day to day aspects of running a business as contacts with creditors, paying creditors, paying and reporting taxes, making out payroll, etc.

6. As a result of the recommendation to hire an office manager, in 1988, ACR hired Celina Salazar as office manager. In June, 1989, Ms. Salazar hired Teresa Langwell to work as a bookkeeper under Ms. Salazar's supervision.

7. The office manager was responsible for keeping the financial and business records of ACR, the preparation and maintenance of tax return information and tax returns, except for corporation income tax returns, preparation of payroll, payment of taxes and payment of creditors. The office manager was given signature authority upon checks drawn upon ACR's account in amounts up to \$500. Checks over that amount required the signature of a corporate officer as well.

8. During the late 1980s ACR went through a period of rapid growth and expansion. At that time it was the largest court reporting firm in Albuquerque, employing approximately fifteen court reporters.

9. In May of 1990, ACR took on a large bank loan to purchase computer equipment to support its growing business.

10. By the Fall of 1990 ACR began experiencing financial problems, in part due to the large indebtedness it was carrying and also because revenues were declining.

Michael Mahan was asked to leave the company in September of 1990.

11. For the 1990 tax year ACR reported to the Internal Revenue Service gross income in excess of \$ 1 million.

12. In October of 1990 ACR was contemplating filing bankruptcy. Mr. Potts, Mr. De La Rosa and Ms. Salazar met with an attorney to discuss the situation ACR was in. During that meeting Ms. Salazar revealed that she had not been making payments of withholding or payroll tax to the taxing authorities.

13. In either late 1990 or early 1991 Mr. Potts, Mr. De La Rosa and Ms. Salazar met with Mr. Malott, ACR's CPA to discuss the financial condition of ACR. The fact that Ms. Salazar had not been making payroll tax payments to the tax authorities was discussed. Ms. Salazar explained her actions by saying that she thought that she had the authority to determine which creditors to pay and she thought she was helping the business by paying the business creditors first. Ms. Salazar had not informed Mr. Potts or Mr. De La Rosa that she was not making payroll tax payments, nor had she been instructed to pay other creditors first. Mr. Malott informed Ms. Salazar that this was not an appropriate practice and that it left Mr. Potts, Mr. De La Rosa and herself exposed to personal liability for those taxes. Ms. Salazar was instructed to pay payroll taxes on a timely basis before other creditors were paid and that she was not to pay payroll unless there were sufficient funds to pay the payroll taxes as well.

14. As part of a management plan presented to and approved by Mr. Potts and Mr. De La Rosa for ACR for the period of January through June, 1991, they approved a

provision stating that, “[A]ll expenses will be held to a minimum in order to show a profit, and efforts will be made to catch up all payables as soon as possible, including the IRS and New Mexico Tax & Revenue Dept.” Although Mr. Potts and Mr. De La Rosa approved this plan, they did not review the company records to examine expenses which could be cut, nor did they cut their own salaries or car allowances. Instead, they left it to the discretion of the office manager to find ways to cut expenses.

15. Withholding taxes are reported and paid along with gross receipts and compensating taxes under New Mexico’s Combined Reporting System (“CRS system”). Taxes reported under the CRS system are due on the twenty-fifth day of the month following the month in which the taxable event occurs. Because ACR was a monthly filer under the CRS system, withholding taxes would be due and owing on the twenty-fifth day of the month following the month in which payroll was paid.

16. At the approximate time of the meeting with Mr. Malott concerning payroll taxes, ACR had not reported or paid withholding taxes for the months of July, August, September, October, November or December of 1990. According to the returns later filed by ACR, the amounts of withholding tax reported to be due for these months amounted to \$7,822.47. Although Mr. De La Rosa and Mr. Potts were aware that ACR had not made payment of withholding taxes during this period of time, these amounts have never been paid by ACR.

17. Apparently, as a result of the discussions involving Mr. Malott, Mr. Potts and Mr. De La Rosa, Celina Salazar, on behalf of ACR, reported and paid New Mexico withholding taxes on a timely basis for the months of January, February and March of 1991.

18. In May of 1991, Ms. Salazar left ACR to start her own court reporting business.

19. When Ms. Salazar resigned as officer manager, her former assistant, Teresa Langwell was promoted to the office manager position. Ms. Langwell also had signature authority on checks up to \$500, with larger checks requiring an additional signature of a corporate officer.

20. Ms. Langwell was also instructed that payroll should not be paid unless payroll taxes could be paid. When payroll checks were presented to Mr. De La Rosa for signature, he questioned Ms. Langwell before payroll was paid if there was enough money to cover the payment of taxes. If there was not enough to cover payroll for all employees, Mr. De La Rosa would instruct who should be paid. Those with the smallest salaries were paid first and Mr. Potts and Mr. De La Rosa were the last to be paid. This often resulted in late paychecks for Mr. De La Rosa and Mr. Potts.

21. Except for those times when Mr. De La Rosa's and Mr. Pott's paychecks were held, Ms. Langwell represented to Mr. De La Rosa that there were sufficient funds for payroll taxes and that she would report and pay the taxes in a timely manner.

22. Ms. Langwell resigned on May 31, 1994. She left a resignation note to that effect and simply failed to show up for work on June 1st. The officers of ACR then learned that Ms. Langwell had destroyed or stolen many of the business records of ACR. She took the canceled checks for several years and deleted all financial information from the company's computers.

23. Meyners + Company was brought in to reconstruct the business records of ACR. The check book ledger revealed many questionable checks under the \$500

signature authority held by Ms. Langwell. It was discovered that she had embezzled nearly \$10,000 between January and the end of May, 1994. ACR did not attempt to determine the full extent of Ms. Langwell's embezzlement because of the cost of reconstructing its records for prior years.

24. With the exception of the month of August, 1991, New Mexico withholding taxes were neither reported or paid by ACR for the reporting periods of April, 1991 through May of 1994, during Ms. Langwell's tenure as office manager.

25. After Ms. Langwell's departure, Mr. De La Rosa's wife assumed the duties of office manager. She reported and paid New Mexico withholding taxes for the months of June, July, August, and December 1994 and January, February, March and April, 1995, although some months were reported and paid late. Payroll taxes for the months of September, October and November of 1994 and the month of May of 1995 were reported late and remain unpaid.

26. Mr. De La Rosa never checked with his wife to see if New Mexico payroll taxes were being paid.

27. ACR went out of business on May 24, 1995.

28. During the time that ACR was experiencing financial difficulties, Mr. De La Rosa's approach to ACR's financial difficulties was to try to produce more work and more revenue. Mr. De La Rosa never looked at the books of the company, never looked at bank statements, the check book or check book ledger, never asked to look at the tax returns which were supposed to be filed with the Department on a monthly basis and never questioned why there were no checks to the Department over \$500 for the payment of monthly taxes. Instead, these matters were entrusted to ACR's office manager.

29. During the time that ACR was experiencing financial difficulties and payroll taxes were not being reported or paid to the Department, ACR was making payments to other creditors, such as the bank which held the loan for the computer equipment.

30. During the time that ACR was experiencing financial difficulties, no audit was conducted of ACR.

31. As officers of ACR, both Mr. De La Rosa and Mr. Potts had the authority to direct the activities of the office manager.

32. After the time that Mr. De La Rosa became President of ACR and while Teresa Langwell was office manager, Mr. Potts never oversaw the activities of the office manager and never reviewed the financial books, bank statements or check ledger of ACR. He assumed that payroll taxes were being paid and that Mr. De La Rosa and Ms. Langwell were tending to the financial affairs of ACR.

33. As directors and corporate officers of ACR, both Mr. De La Rosa and Mr. Potts were periodically provided with financial reports on ACR which were prepared by the office manager.

34. Mr. Potts and Mr. De La Rosa assumed that the financial reports and other financial information about ACR were being provided to Meyners + Company.

35. In addition to failing to timely report and pay withholding taxes for most periods from mid-1990 forward, ACR also failed to timely report and pay gross receipts taxes on its receipts from performing court reporting services. For instance, for 1993, no gross receipts were reported. For 1994, although gross receipts were reported, no gross receipts tax was paid on those receipts.

36. ACR filed New Mexico corporate income tax returns for years 1989, 1990, and 1991. The return for 1991 was prepared by Meyners + Company. No corporate income tax returns were filed for tax years 1992 and 1993. For tax years 1994, 1995 and 1996, corporate income tax returns were filed. Those returns were prepared by Empire Accounting Service.

37. ACR did deduct and withhold New Mexico withholding taxes from its employees' paychecks, even though those taxes were not paid over to the Department.

DISCUSSION

The issue to be determined herein is whether Mr. De La Rosa and Mr. Potts, as corporate officers and directors of ACR may be held personally liable for the unpaid income withholding taxes which the corporation failed to pay.

The law which governs this determination is the Withholding Tax Act, §§ 7-3-1 through 7-3-11 NMSA 1978.¹ Section 7-3-5 is the provision relied upon by the Department to impose the liability at issue herein upon the corporate officers and directors who are parties to this proceeding. It provides as follows:

Every withholder shall be liable for amounts required to be deducted and withheld by the Withholding Tax Act regardless of whether or not the amounts were in fact deducted and withheld, except that:

A. if the withholder fails to deduct and withhold the required amounts and if the tax against which the required

¹ All citations to the Withholding Tax Act are to the version which appears in the 1995 Replacement Pamphlet for ease of reference. This is because the pertinent statutory provisions in the 1995 Replacement Provisions are unchanged from those in effect during the periods relevant to the liabilities at issue herein.

amounts would have been credited is paid, the withholder shall not be liable for those amounts not deducted and withheld; or

B. if the withholder's failure to deduct and withhold the required amounts was due to reasonable cause, the withholder shall not be liable for amounts not deducted and withheld. (emphasis added).

The statute imposes liability upon "every withholder". "Withholder" is defined at § 7-3-2(J), which provides that "withholder" means a payor or an employer"²

"Employer" is defined at § 7-3-2(C) as follows:

"employer" means a person, or an officer, agent or employee of that person *having control of the payment of wages*, doing business in or deriving income from sources within the state for whom an individual performs or performed any services as the employee of that person except that if the person for whom the individual performs or performed the services does not have control of the payment of the wages for such services, "employer" means the person having control of the payment of wages. (emphasis added).

The Withholding Tax Act defines a "person" as follows:

"person" includes individuals, corporations, partnerships, associations, the state and its political subdivisions and the federal government, its agencies and instrumentalities.

Section 7-3-2(A). In this case, ACR. is the person who did business in the state, and was clearly an employer. Both Mr. De La Rosa and Mr. Potts were officers and employees of ACR, and also meet the definition of an employer who can be held liable, pursuant to Section 7-3-5 for ACR's unpaid withholding tax liability provided that they also meet the

² Mr. De La Rosa's counsel argued that his client was not a "withholder" because of an alleged ambiguity in the definition of withholder due to the definition including "any person required to deduct and withhold from winnings that are subject to withholding". This language, however, was added to the definition by Laws 1996, ch. 16, § 1, which was not effective during any of the periods at issue herein, nor does this decision maker consider it to have made the definition ambiguous. It merely added a new category of persons considered to be withholders.

condition that they have “control of the payment of wages.” It is upon this inquiry that the determination of liability for the parties to this dispute turns.

In this regard, all of the parties have argued that even if this condition is met, that Subsection B of § 7-3-5 provides a second hurdle to imposing liability upon these corporate officers. Specifically, they argue that Subsection B provides an exception to liability if the non-payment of taxes was due to “reasonable cause.” The parties have misread Subsection B, however. While it does provide a reasonable cause exception, that exception does not apply under the facts of this case. This is because by its very wording, the exception applies only “if the withholder’s failure *to deduct and withhold* the required amounts was due to reasonable cause”. In this case, there was no failure to deduct and withhold the withholding tax from employees paychecks.³ Thus, this exception does not apply. Presumably, it was intended to provide an exception to liability in such instances where an employer didn’t withhold and deduct because it had reasonable cause to believe that no withholding was required, such as where it had reasonable cause to believe that the person was not an employee, or that the employee was a native american whose income would be exempt from state income taxation.

Both Mr. De La Rosa and Mr. Potts dispute that they were employers who had "control of the payment of wages" under the facts of this case. Because the facts upon which they each rely in support of their position are somewhat different, they will be discussed separately.

³ While there was no specific testimony given as to whether the withholding tax was actually deducted and withheld from employee paychecks, since the arguments of Mr. De La Rosa and Mr. Potts are premised upon the fact that they had no personal knowledge that withholding taxes were not being paid, and since they were employees of ACR receiving the payment of wages, themselves, it can fairly be inferred that taxes were being deducted and withheld from their paychecks.

Mr. Potts was a director and shareholder of ACR during all relevant periods until he resigned and turned over his shares of the corporation in October of 1993. He held the position of President until April, 1991 and thereafter, until his resignation, held the office of Treasurer. The Department has stipulated that Mr. Potts should not be held responsible for ACR's failure to pay withholding taxes after the date of his resignation.

Mr. De La Rosa was a director and shareholder of ACR during all periods for which tax liability is asserted. He held the position of Vice-President until April, 1991 and thereafter held the office of President until the corporation ceased to do business.

Whether couched as a lack of "control in fact", or as reasonable cause for failure to withhold, both Mr. Potts and Mr. De La Rosa argue that they should not be held liable for unpaid withholding taxes. With respect to the unpaid taxes which occurred during Celina Salazar's tenure as office manager, they argue that they were unaware that she was not paying the taxes at first, that when they did become aware of the problem, that they directed her to always pay payroll taxes in the future, and Mr. Potts testified that he thought that arrangements to pay the unpaid taxes had been made. Mr. De La Rosa offered no testimony to explain why the taxes which Ms. Salazar failed to pay were never paid after the problem was revealed.

With respect to the unpaid taxes which were not paid during Theresa Langwell's tenure as office manager, Mr. De La Rosa argues that he should not be held liable because he was relying upon Ms. Langwell to pay the taxes, she was instructed not to pay payroll to employees if there wasn't enough money to pay both the payroll and the taxes, that the litany of inquiry as to whether sufficient funds existed to pay the taxes was made with respect to each payroll, that Mr. De La Rosa was lied to and deceived by Ms. Langwell

during the three years that she was the office manager concerning the payment of payroll taxes and that Ms. Langwell apparently embezzled the tax moneys.

Mr. Potts argues with respect to the portion of his tenure as a director and officer during Ms. Langwell's tenure as office manager that he relied upon Mr. De La Rosa to be handling the oversight of the business affairs of ACR when Mr. Potts assumed the duties of treasurer and Mr. De La Rosa took over as corporate president. Additionally, although he was not involved in the oversight of Ms. Langwell's activities, he assumed that she was handling the payment of payroll taxes.

Both Mr. Potts and Mr. De La Rosa also argue that they believed that their accountant was reviewing periodic financial statements prepared by Ms. Langwell, and since their accountant did not raise any concerns, that they had no way of knowing that the taxes were not being paid.

In response to these arguments, the Department has argued that both Mr. De La Rosa and Mr. Potts had control over the payment of wages for purposes of imposing liability because they had the actual power to control the payment of wages, and whether they chose to actually exercise that power themselves or to delegate the power to another, such as the office manager, is irrelevant to the determination of liability.

Control is not defined in § 7-3-2(C), the Department has promulgated no regulations which provide any guidance on this issue and there are no cases in New Mexico interpreting "control of the payment of wages" for purposes of the Withholding Tax Act. While the Internal Revenue Code also imposes liability on persons who fail to pay over withheld income tax, it does so by a different mechanism, the imposition of a penalty. Under §6672 of the Code, a 100% of tax penalty is imposed when withholding taxes are not paid for

willful failure to collect, account for and pay over tax or willful attempts to evade or defeat tax or its payment. New Mexico's statute makes no such reference to willfulness. It imposes liability on any person with control over the payment of wages. Thus, it appears that New Mexico's standard for imposing liability for failure to pay withholding taxes is a far lower than the standard under the Internal Revenue Code. Additionally, there are a number of instances in New Mexico's tax statutes where provisions of the Internal Revenue Code are referenced and incorporated into the law. For instance, both the Income Tax Act and the Corporate Income and Franchise Tax Act adopt and incorporate definitions from the Internal Revenue Code with respect to taxable income, net operating losses, etc. Thus, the legislature is familiar with adopting or referencing federal tax law, yet it chose not to do so with respect to the failure to pay withholding taxes. For these reasons, I find that the Internal Revenue Code and the cases decided under the code are not applicable to the determination of the issue in this case.

In the absence of a statutory or regulatory definition of control, the term will be given its plain and ordinary meaning. Control is defined in Webster's Third New International Dictionary as "the act or fact of controlling: power or authority to guide or manage: directing or restraining domination". Thus, the power to control is the power or authority to guide, manage or direct an activity.

Using this definition of control, both Mr. De La Rosa and Mr. Potts had control over the payment of wages. Both were directors of the corporation at all relevant times with respect to the liability at issue.⁴ The corporate bylaws provide that the Board of Directors have "control and management of the affairs and business of the Corporation."

They were also officers. Both held the office of President during portions of the time that taxes were unpaid. The bylaws vest the president with the “general and active management and control of the business and affairs of the Corporation, subject to the control of the Board of Directors.” Even during the times that each held a different office, they still had the power to oversee the activities of the officer manager. When Mr. Mahan held the office of Treasurer, an office later held by Mr. Potts, he directed the office manager with respect to the financial affairs of the corporation, including which creditors to pay. Mr. Potts acknowledged in his testimony that all three directors had the power to supervise the office manager. This testimony was not rebutted by Mr. De La Rosa. It was apparent from the testimony, that ACR’s office was primarily managed by the office manager, but that any director and officer could give directions to the office manager, whoever she was. After all, these were the individuals who owned and directed the corporation.

Admittedly, imposing liability for unpaid withholding taxes based upon authority to control or technical control under circumstances such as this case where the person to whom the responsibility for paying withholding taxes was delegated was dishonest in both her words and actions makes for a difficult case in which to impose liability. While I have no doubt as to the dishonest and deceitful behavior of Ms. Langwell, however, a number of other factors make me question whether the parties should have known more or done more than they claim should be expected with respect to the payment of these taxes.

⁴ As noted earlier, the Department has stipulated that Mr. Potts should not be held responsible for withholding taxes which were unpaid after he resigned as a director and officer of the corporation and

Foremost is the fact that even with respect to the unpaid withholding taxes which the parties had actual knowledge of, those which Celina Salazar revealed had not been paid, the corporation continued to exist, do business, pay other creditors, etc. for over four more years without ever paying those taxes. This occurred even after their CPA told the officers that they were personally liable for those taxes. Mr. De La Rosa offered no testimony as to why that liability was never paid. Mr. Potts acknowledged that he knew there was a problem with unpaid withholding taxes, but could only say that he thought it was being taken care of. Neither offered any testimony as to what actions they took with regard to the taxes which Celina Salazar failed to pay to assure that they were paid.

Even with regard to the unpaid taxes which Theresa Langwell lied to Mr. De La Rosa about, a number of things remain unexplained or unexplainable by any other explanation other than gross mismanagement, even given the limited business sophistication of the parties. It remains difficult to understand how Ms. Langwell's failure to pay not only withholding taxes, but also far more significant amounts of gross receipts taxes could have gone undetected for so many years. This was a business which at least in the early years for which liability is asserted grossed over \$1 million a year and Ms. Langwell's check signing authority did not exceed \$500. While Mr. De La Rosa explained that he thought that withholding taxes were reported and paid separately for each employee, and thus the \$500 limit would not have been exceeded, this explanation does not jibe with Mr. De La Rosa's claim of virtual ignorance of all matters relating to corporate finance and taxes, including his claim that he was so unaware of how gross receipts taxes were calculated that he never questioned why no checks over \$500 were needed to pay those taxes. It is also difficult to square the parties claim of reliance upon

Meyners + Company to alert them to any problems with the factual record which indicates that Meyners + Company was not really overseeing the corporate accounts and taxes during Ms. Langwell's tenure. Mr. De La Rosa and Mr. Potts claimed that that they assumed that Meyners + Company was regularly receiving and reviewing the financial reports of the company. Yet, the factual record indicates that the last year for which Meyners + Company prepared a corporation income tax return was 1991. Mr. De La Rosa testified that he was aware that corporate income tax returns were filed after the end of the year. Mr. Potts testified that as President, he signed the corporate income tax returns. If their accountant was not preparing corporate income tax returns as they had always done previously, shouldn't at least the President have noticed that those returns were not being prepared and doesn't it throw into question whether Meyners + Company was receiving financial information from which to prepare such returns? This discrepancy remains unexplained.

I also find it difficult to conceive that the corporate officers of a company which was in difficult financial condition for years, apparently, and whose own paychecks were delayed for extended periods of time would never ask to look at the corporate books, bank statements or the company checkbook. These same directors adopted a plan of action which included cutting corporate expenses, but they never examined the expenses to prioritize, reduce or eliminate them, leaving it solely to the discretion of the office manager to make those decisions. In essence, the record indicates that the corporate directors and officers delegated their entire corporate responsibility to manage the affairs of the corporation to a bookkeeper. Section 7-3-5 does not prohibit such a delegation of corporate duties. Because the corporate directors and officers had the power to control

the payment of wages and to otherwise direct the affairs of the corporation, however, it continues to hold liable those whose oversight of corporate activities fails to assure that payroll taxes which were withheld and deducted from employee paychecks and held by the corporation are not remitted to the taxing authority. For these reasons, the protests of Mr. Potts and Mr. De La Rosa are denied, except with respect to Mr. Potts for periods after he was no longer a corporate director or officer.

CONCLUSIONS OF LAW

1. Both Mr. Potts and Mr. De La Rosa filed timely, written protests to the Department's letters notifying them that they were being held responsible, as employers pursuant to § 7-3-2(C) NMSA 1978, for unpaid withholding taxes of Associated Court Reporters, Inc., ("ACR"), and jurisdiction lies over both the parties and the subject matter of this protest.

2. During all relevant times, Mr. John De La Rosa, as a corporate officer and director of ACR, had control over the payment of wages of the employees of ACR. He thus meets the definition of "employer" pursuant to § 7-3-2(C) NMSA 1978.

3. During all relevant times except for periods on or after October 8, 1993, Mr. Jerry Potts, as a corporate officer and director of ACR, had control over the payment of wages of the employees of ACR. He thus meets the definition of "employer" pursuant to § 7-3-2(C) NMSA 1978.

4. As "employers" under § 7-3-2(C) NMSA 1978, Mr. Potts and Mr. De La Rosa were also "withholders" pursuant to § 7-3-2(J) NMSA 1978.

5. As withholders under § 7-3-5 NMSA 1978, Mr. Potts and Mr. De La Rosa are liable for amounts deducted and withheld by ACR, but which amounts were not paid to the Department.

6. Because ACR deducted and withheld withholding taxes from the paychecks of its employees, the reasonable cause exception to liability pursuant to § 7-3-5(B) NMSA 1978 does not apply herein.

For the foregoing reasons, the protest of Mr. De La Rosa is denied. The protest of Mr. Potts is granted with respect to periods on or after October 8, 1993, and is otherwise denied.

Done, this 10th of December, 1997.