

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

IN THE MATTER OF THE PROTEST OF
PETE SISNEROS, as Corporate Officer of
COMFORT AIR SYSTEMS, INC.
ID. NO. 01-828841-00 3
PROTEST TO DEMAND FOR PAYMENT
OF UNPAID WITHHOLDING TAXES

98-25

DECISION AND ORDER

This matter came on for formal hearing on April 16, 1998, before Margaret B. Alcock, Hearing Officer. Pete Sisneros was represented by John Williams, his attorney. The Taxation and Revenue Department ("Department") was represented by Bridget A. Jacober, Special Assistant Attorney General. Based on the evidence in the record and the arguments presented, IT IS DECIDED AND ORDERED AS FOLLOWS:

FINDINGS OF FACT

1. Pete Sisneros was the president of Comfort Air Systems, Inc. ("Comfort Air"), a company that manufactured sheet metal products which it sold throughout the Southwest. Until 1988, the company also acted as a subcontractor on certain construction projects.
2. Mr. Sisneros worked out of an office in Albuquerque, New Mexico. The only other person working in the office was an office manager/bookkeeper.
3. Prior to June 1987, Mr. Sisneros' daughter acted as the office manager and handled Comfort Air's bookkeeping and tax reporting.
4. In June 1987, Terry Solano was hired as the new office manager/bookkeeper. Ms. Solano received 4 to 5 weeks of training from Mr. Sisneros' daughter.

5. Under the procedures established by Mr. Sisneros' daughter, the person acting as office manager/bookkeeper would prepare, sign and file the monthly CRS-1 returns used to report Comfort Air's gross receipts, compensating and withholding taxes.

6. The office manager was not given authority to sign checks on behalf of Comfort Air, but would make out the check for payment of the company's monthly CRS taxes and take it to Mr. Sisneros for signature.

7. During the period July 1987 through July 1990, Ms. Solano prepared and filed monthly CRS-1 returns reporting Comfort Air's gross receipts and withholding taxes.

8. For unknown reasons, Ms. Solano either failed to make out monthly checks to pay the CRS taxes reported or failed to include the check with the return, simply filing the monthly CRS-1 returns without payment.

9. During the period at issue, Comfort Air was solvent and had sufficient funds to pay the CRS taxes.

10. During the period at issue, Comfort Air deducted and withheld New Mexico withholding tax from its employees' paychecks, although the taxes were never paid over to the Department.

11. In June 1988, the Department issued 14 assessments to Comfort Air for unpaid CRS taxes. Additional assessments were issued in September 1988, August 1989, January 1990, February 1990, March 1990, April 1990, May 1990, June 1990, August 1990 and June 1991. *See*, Department Exhibit 2, Lien/Levy Tax Schedule.

12. Mr. Sisneros never saw the assessments and was unaware that the company's CRS taxes were not being paid.

13. Ms. Solano would typically prepare 120 to 150 checks for Mr. Sisneros to sign each month, including the company's weekly payroll checks. Mr. Sisneros did not notice whether the checks he signed each month included a check to pay the company's monthly CRS taxes.

14. Mr. Sisneros regularly reviewed the company's accounts payable ledger but did not review the company's checkbook or bank statements.

15. In July 1990, Comfort Air filed for bankruptcy as a result of a stockholder suit. The company was still able to pay its ongoing bills and was allowed to continue to operate during the course of the bankruptcy proceeding.

16. Comfort Air's assets were liquidated during the bankruptcy and were purchased by Mr. Sisneros and two partners in order to establish a new business.

17. At the time the bankruptcy proceeding was closed in August 1992, Mr. Sisneros was still unaware of Comfort Air's outstanding liability for unpaid withholding taxes due to the State of New Mexico for the period July 1987 through July 1990.

18. Mr. Sisneros subsequently sold his interest in the new business. Mr. Sisneros no longer has access to the company's records, nor does he know whether records pertaining to the withholding tax periods at issue still exist.

19. On February 25, 1995, the Department sent Mr. Sisneros a letter notifying him that as an employer under the New Mexico Withholding Tax Act, he was responsible for payment of Comfort Air's unpaid withholding taxes in the amount of \$18,603.04.

20. On March 16, 1995, Mr. Sisneros filed a letter protesting the Department's demand for payment.

DISCUSSION

Mr. Sisneros makes three arguments in support of his protest to the Department's demand for payment of Comfort Air's unpaid withholding taxes: (1) Mr. Sisneros had reasonable cause for not knowing that the withholding taxes were unpaid and comes within the exception to liability provided in Subsection B of Section 7-3-5 NMSA 1978; (2) Some of the CRS reports on which the Department's assessments were based were incorrect and overstated the tax due; and (3) the Department failed to notify Mr. Sisneros of his liability in a timely manner.

I. REASONABLE CAUSE EXCEPTION UNDER SECTION 7-3-5(B).

This protest is governed by the version of the Withholding Tax Act in effect between July 1987 and July 1990. Sections 7-3-1 through 7-3-10 NMSA 1978 (1988 Repl. Pamph.)¹ Section 7-3-5 is the specific statute relied upon by the Department to hold Mr. Sisneros responsible for Comfort Air's unpaid withholding taxes. It provides as follows:

Every employer 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 employer fails to deduct and withhold the required amounts and if the tax against which the required amounts would have been credited is paid, the employer shall not be liable for those amounts not deducted and withheld; or

B. if the employer's failure to deduct and withhold the required amounts was due to reasonable cause he shall not be liable for amounts not deducted and withheld.

The statute imposes liability upon "every employer". The term "employer" is defined in Section 7-3-2(B) as follows:

B. "employer" means a person doing business in or deriving income from sources within the state who has control of the payment of wages to an individual for services performed for him by that individual *or a person who is*

¹ All statutory references are to the version of the Withholding Tax Act found in the 1988 replacement pamphlet.

the officer, agent or employee of the person having control of the payment of wages. (Emphasis added.)

In this case, Mr. Sisneros does not dispute that he is an “employer” liable for payment of Comfort Air’s unpaid withholding taxes. Mr. Sisneros maintains, however, that he comes within the scope of Subsection B of Section 7-3-5, which provides that “if the employer’s failure to deduct and withhold the required amounts was due to reasonable cause he shall not be liable for amounts not deducted and withheld.” The problem with Mr. Sisneros’ argument is that taxes *were* deducted and withheld from the paychecks of Comfort Air’s employees. Because there was no failure to deduct and withhold, but simply a failure to pay the withheld taxes to the Department, the exception in Section 7-3-5(B) does not apply.

There is a logical reason for not extending the exception in Section 7-3-5(B) to an employer’s failure to pay over taxes actually withheld from employee paychecks. An employee whose employer has failed to withhold tax from the employee’s paycheck remains personally liable for any tax due on his income. In contrast, an employee whose employer has withheld tax receives a credit of this amount against any tax the employee owes to the state. Section 7-3-9. By statute, the withheld amount is treated as a collected tax. Section 7-3-4. The Department cannot collect the tax from the employee a second time, even when the employer has failed to pay over the amount of tax withheld. Applying the “reasonable cause” provision in Section 7-3-5(B) to excuse Mr. Sisneros, as the person in control of the payment of wages, from liability for the taxes withheld by Comfort Air would foreclose the Department’s ability to collect tax revenues legitimately due to the state. There is nothing to indicate that the legislature intended this result or intended to extend the exception provided for an employer’s “failure to deduct and withhold” to an employer’s failure to pay over collected taxes actually withheld from its employees’ paychecks.

II. ACCURACY OF THE ASSESSMENTS.

Mr. Sisneros testified that some of the CRS reports on which the Department's assessments were based overstated the amount of withholding tax due to New Mexico. Mr. Sisneros testified that between July 1987 and September 1988, Comfort Air was working as a subcontractor on a project in Arizona. Based on the amounts reported, Mr. Sisneros believes that his office manager incorrectly included the payroll for the company's Arizona employees in the wage base used to calculate New Mexico withholding tax.

The Department's counsel objected to Mr. Sisneros' testimony, arguing that the accuracy of the assessments is not at issue in this protest. The Department's objection is valid. Section 7-1-24 NMSA 1978 provides that a taxpayer may dispute an assessment by filing a written protest within 30 days of the date of mailing of the notice of assessment. In certain circumstances, the period within which to file a protest may be extended by an additional 60 days. In this case, the Department's 37 assessments were mailed to Comfort Air over a period of three years: the first assessments were mailed in June 1988 and the last assessment was mailed in June 1991. No protest was filed within the period allowed by Section 7-1-24, and this hearing officer does not have jurisdiction to consider the validity of the assessments themselves. The only matter at issue in this protest is Mr. Sisneros' liability for payment of the assessments under Section 7-3-5.

I would note, nonetheless, that the information provided by Mr. Sisneros would not justify an adjustment to the assessments in any event. Although Mr. Sisneros believes that Ms. Solano incorrectly included the wages of Arizona employees when calculating New Mexico withholding tax, he is not able to establish the amount of the overreporting. There is a statutory presumption that the Department's assessment of gross receipts taxes is correct. Section 7-1-17(C) NMSA 1978. In order to overcome this presumption of correctness, Mr. Sisneros would have to produce his payroll records to establish the

amounts erroneously included in the New Mexico wage base. Without some documentary evidence to support the claim of overreporting, no adjustment could be made.

III. THE DEPARTMENT'S DELAY IN TAKING COLLECTION ACTION.

Mr. Sisneros argues that the Department should have notified him of Comfort Air's unpaid withholding taxes in a more timely manner. The Department sent notification of the unpaid taxes in the form of 37 separate assessments issued during the months of June 1988, September 1988, August 1989, January 1990, February 1990, March 1990, April 1990, May 1990, June 1990, August 1990 and June 1991. The fact that these assessments were apparently intercepted by the office manager and never brought to Mr. Sisneros' attention is not the fault of the Department.

The New Mexico Legislature has given the Department ten years after the date an assessment is issued to collect the taxes due. Section 7-1-19 NMSA 1978 provides:

No action or proceeding shall be brought to collect taxes administered under the provisions of the Tax Administration Act and due under an assessment or notice of the assessment of taxes after ten years from the date of such assessment or notice.

In this case, the Department's February 1995 letter notifying Mr. Sisneros of his liability for payment of the Department's assessments was sent seven years after the date of the first assessment and four years after the date of the last assessment. Mr. Sisneros has not cited to any authority that would preclude the Department from seeking to enforce payment of an assessment that is still within the ten-year period the legislature has provided for pursuing collection activities.²

CONCLUSIONS OF LAW

1. Mr. Sisneros filed a timely, written protest to the Department's demand for payment of the unpaid withholding taxes of Comfort Air. Accordingly, jurisdiction lies over the parties and

² It should be noted, however, that the time within which the Department can enforce collection of the 14 assessments issued on June 21, 1988 will expire June 21, 1998.

the subject matter of this protest, which is limited to Mr. Sisneros' liability for withholding taxes under Section 7-3-5(B) NMSA 1978 (1985 Repl. Pamp.).

2. The Department's hearing officer does not have jurisdiction to consider whether the withholding tax assessments issued to Comfort Air between July 1990 and July 1991 accurately reflected the company's withholding tax liability.

3. During all relevant times, Mr. Sisneros, as president of Comfort Air, had control over the company's payment of wages and came within the definition of an "employer" under Section 7-3-2(B) NMSA 1978 (1988 Repl. Pamp.).

4. As an employer, Mr. Sisneros is liable for Comfort Air's unpaid withholding taxes for the period July 1987 through July 1990.

5. The reasonable cause exception to liability provided in Section 7-3-5(B) NMSA 1978 (1985 Repl. Pamp.) does not apply to excuse Mr. Sisneros from liability for Comfort Air's unpaid withholding taxes.

6. The Department's delay in sending the demand letter to Mr. Sisneros does not excuse Mr. Sisneros from liability for Comfort Air's unpaid withholding taxes.

For the foregoing reasons, the Taxpayer's protest IS HEREBY DENIED.

DONE, this 24th day of April 1998.