

IN THE COURT OF APPEALS OF TENNESSEE  
AT NASHVILLE  
May 25, 2006 Session

**DAVID P. GUENTHER v. TENNESSEE DEPARTMENT OF REVENUE**

**Appeal from the Chancery Court for Davidson County  
No. 02-1042-IV Richard Dinkins, Chancellor**

**No. M2005-00638-COA-R3-CV - Filed on December 6, 2006**

The trial court's finding that an independent accountant was not personally liable for sales taxes under Tenn. Code Ann. § 67-1-1443 is affirmed.

**Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Chancery Court  
Affirmed**

PATRICIA J. COTTRELL, J., delivered the opinion of the court, in which WILLIAM B. CAIN, and FRANK G. CLEMENT, JR., JJ., joined.

Paul G. Summers, Attorney General and Reporter, Michael E. Moore, Solicitor General, Jay C. Ballard, Assistant Attorney General, for the appellant, State of Tennessee, Commissioner of Revenue.

Chance H. Deason, Hendersonville, Tennessee, for the appellee, David P. Guenther.

**OPINION**

The Tennessee Department of Revenue seeks to hold an accountant, David Guenther, individually liable as a responsible person for unpaid sales taxes of his client Crossville Foods, Inc. under T.C.A. § 67-1-1443. The sales taxes in question total \$6,568 and are for the month of March 2001. After a hearing was held on Mr. Guenther's complaint challenging the Department's individual assessment against Mr. Guenther, the trial court held Mr. Guenther was not a responsible person who willfully attempted to evade or defeat payment of the sales taxes. The Department appealed.

## I. FACTS

Mr. Guenther began performing accounting services for Crossville Foods, Inc. in December of 1997. The corporation owned a Ponderosa restaurant in Crossville.<sup>1</sup> He performed various accounting services for the restaurant including bill payment, maintenance of the books, and preparation of tax returns. Mr. Guenther was not an employee or stockholder of the corporation and was not involved in the restaurant's day to day operations. While the business was owned by William Jones, he had no active role in its operation. During the period Mr. Guenther performed services for Crossville Foods, Inc., the business was managed by Rhonda Geer who was responsible for its day to day operations. At some unspecified point, Mr. Guenther understood that Mr. Jones had transferred his interest in the corporation to Ms. Geer, but Mr. Guenther never saw evidence of the sale. Mr. Jones testified that he and Ms. Geer had agreed that he would transfer the corporation to her but the paperwork effecting the transfer was never done.

Each week Ms. Geer would forward to Mr. Guenther bills received by the business. Mr. Guenther testified that if Ms. Geer forwarded the bills to Mr. Guenther then he presumed she had approved them for payment. He would then pay all the bills by their due date. The utility bills were sent directly to Mr. Guenther who was under instructions to pay them as they became due. Some of the vendors required cash on delivery. To meet this problem, Mr. Guenther signed checks made out to vendors with the amount left blank. Ms. Geer would then complete the amount when a delivery was made and give the check to the vendor. From the time Mr. Guenther started performing these services until the restaurant closed, Mr. Guenther's duties did not change. Mr. Guenther testified he was hired to perform these accounting services as a convenience for Ms. Geer so she could concentrate on the operations of the restaurant. According to Mr. Guenther, he had no authority regarding the corporation.

With regard to sales taxes, Mr. Guenther and Ms. Geer had a similar routine. Each Monday Ms. Geer would provide Mr. Guenther with a weekly report of the sales for Crossville Foods, Inc. and the sales tax collected from its customers. Mr. Guenther then prepared the monthly sales tax return, signed checks for amounts owed, signed the return and forwarded it to the state by the 20th of each month. Mr. Guenther testified preparation of their returns required no discretion and was a straight forward calculation. While he signed some returns as an officer of the corporation, it was to avoid mailing it to Ms. Geer for signature.

Mr. Guenther testified that initially he paid the bills as they became due, but over time the restaurant developed "cash flow difficulties." Mr. Guenther sought Mr. Jones' guidance about which bills to pay immediately and which vendors could be delayed. The bills to be paid immediately were payroll, payroll tax, sales tax, and vendors for which there was no alternative. Food vendors, royalties and advertising bills could be delayed. This system remained in place after the undocumented transfer of ownership from Mr. Jones to Ms. Geer.

The testimony of Mr. Jones corroborated Mr. Guenther's testimony about the extent of his authority and the bill paying routine described by Mr. Guenther.

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<sup>1</sup> The land where the restaurant was located and its equipment was not owned by the corporation but was owned by the corporation's stockholder, Mr. Jones.

Mr. Guenther testified that he had no advance warning that the restaurant would close on March 24, 2001. He learned of the closure on March 25. Mr. Guenther testified that Ms. Geer distributed the payroll checks on March 24 and that he transferred \$8,000 into the payroll bank account to cover the checks. Ms. Geer had issued a couple of checks over \$2,000 each to vendors making delivery that Mr. Guenther did not know about at the time. According to Mr. Guenther, Ms. Geer told Mr. Guenther to pay himself his monthly \$700 fee.

Between March 26, and March 30, 2001 over \$14,000 was deposited into the bank account of Crossville Foods, Inc. These deposits were all made by Ms. Geer. Mr. Guenther had no role in the bank deposits except he received deposit slips and weekly reports. These funds were not used to pay the state sales taxes collected from its customers in March that were due to be paid the state on April 20th. These funds were applied to pay other outstanding checks including the payroll checks issued to employees and to pay Mr. Guenther his monthly fee of \$700.

The Department of Revenue sought to assess Mr. Guenther individually for the March, 2001 unpaid sales tax of \$6,568 under Tenn. Code Ann. § 67-1-1443 which provides as follows:

(a) 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.

(b) As used in this section:

(1) "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 of which the violation occurs; and

(2) "Willfully" is limited to material and informed participation in the diversion of such collected funds to a source other than to the state.

Based on evidence introduced at a hearing on the merits, in ruling from the bench the trial court found that Ms. Geer managed the business, that she decided to issue the payroll checks before the business closed, and that she decided to close the business. Mr. Guenther's activity, on the other hand, was at the direction of the corporate officers. The trial court found that the statute required "informed participation in the diversion of collected funds." Between the two, the trial court found Ms. Geer knew more about the situation than Mr. Guenther and that she released the payroll checks. Therefore, Mr. Guenther was not a responsible person as contemplated by Tenn. Code Ann. § 67-1-1443(b)(1) and he did not willfully attempt to evade or defeat payment of sales taxes to the state. The trial court granted a judgment for the plaintiff.

## **II. STANDARD OF REVIEW**

We review this case *de novo* on the record with a presumption of correctness of the trial court's findings of fact, unless the preponderance of the evidence is otherwise. Tenn. R. App. P. 13(d); *Brooks v. Brooks*, 992 S.W.2d 403, 404 (Tenn. 1999). No presumption of correctness attaches to the trial court's decisions regarding questions of law. *Wilson v. Wilson*, 984 S.W.2d 898, 900 (Tenn. 1998), *cert. denied*, *Oakley v. Wilson*, 528 U.S. 822, 120 S.Ct. 68, (1999).

### III. ANALYSIS

Based on the record before us, we do not find that the evidence preponderates against the trial court's finding. As the trial court noted in its ruling from the bench, this is a fact intensive case. The proof showed Mr. Guenther performed clerical types of bookkeeping functions. Mr. Guenther was not an employee or an officer of the corporation. He had no authority over the corporation or its assets. His sole responsibility was to pay bills approved by and based upon information supplied by Ms. Geer. When Mr. Guenther 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 Ms. Geer would be depositing. Ms. Geer chose to disburse the employee payroll checks the day before she closed the business. Furthermore, Ms. Geer had issued at least two other checks that Mr. Guenther did not know about to pay vendors on delivery. In other words, Mr. Guenther did not know that there would be insufficient funds to pay the March sales tax.<sup>2</sup>

Under Tenn. Code Ann. § 67-1-1443, personal liability for sales taxes arises if a person willfully either fails to truthfully account for and pay the tax or attempts to evade the tax. The key determination is whether Mr. Guenther acted "willfully" as defined by Tenn. Code Ann. § 67-1-1443(b)(2), *i.e.*, did Mr. Guenther participate in a material way and with knowledge to divert the funds. Based on our review of the record we cannot find that the evidence preponderates against the trial court's finding that Mr. Guenther's participation was not informed. Ms. Geer knew the business was closing, knew the amounts that were to be deposited and disbursed the payroll checks. Mr. Guenther did not have this information. For these reasons we believe the facts as found by the trial court support the finding that Mr. Guenther's participation was neither material or willful. Therefore, the finding of the trial court is affirmed.

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<sup>2</sup> Furthermore, even if the business did not have the funds to pay the taxes and bills, on at least one other occasion Ms. Geer had personally contributed \$10,000 to pay the bills.

Costs of the appeal are taxed to the Tennessee Department of Revenue for which execution may issue if necessary.

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PATRICIA J. COTTRELL, JUDGE