

Before the
Administrative Hearing Commission
State of Missouri



THOMAS BISCH,)	
)	
Petitioner,)	
)	
vs.)	No. 11-1813 RS
)	
DIRECTOR OF REVENUE,)	
)	
Respondent.)	

DECISION

Thomas Bisch is liable, as a responsible party, for \$69,287.70 in unpaid sales tax for Bischco, Inc., plus interest and additions, for tax periods March 2008 through September 2008.

Procedure

Thomas Bisch filed a complaint on September 9, 2011, appealing the Director of Revenue’s (“the Director”) assessments of sales tax against Thomas Bisch as a responsible party.

Thomas Bisch’s relatives, Susan Bisch and Jeffrey Bisch, were also assessed by the Director as responsible parties for the same amount at issue. They each appealed separately and we opened their cases under 11-1799 RS for Susan Bisch and 11-1814 RS for Jeffrey Bisch. On April 18, 2013, we held one combined hearing for all three cases, but we will issue separate

decisions. The petitioners were represented by Timothy R. Gerding of Rotts & Gibbs LLC. The Director was represented by Spencer Adam Martin and Christopher R. Fehr.

On July 23, 2013, we granted the Director's motion to dismiss Susan Bisch's case because there was no longer a dispute.

The matter became ready for our decision on September 4, 2013, when the final written argument was filed.

Findings of Fact

1. At all relevant times, Bischco, Inc. ("Bischco") was a Missouri corporation with its principal place of business in Macon, Missouri. On September 21, 2008, Bischco closed.
2. Bischco owned and operated Kentucky Fried Chicken and Taco Bell restaurant franchises in Missouri and Iowa.
3. In 2008, Thomas Bisch was the President of Bischco and Jeffrey Bisch was the Vice-President of Bischco. Both were Missouri residents at the time.
4. Bischco filed sales tax returns, along with sales tax payments, to the Director on a monthly basis until 2008. In 2008, with the exception of July, Bischco failed to remit sales tax payments with its sales tax returns.
5. In 2008, Bischco's sales tax returns were filed by either Thomas Bisch or Jeffrey Bisch. Thomas Bisch filed sales tax returns for February 2008, March 2008, April 2008, and May 2008. Jeffrey Bisch filed sales tax returns for January 2008, July 2008, August 2008, and September 2008. The June 2008 sales tax return was unsigned.

6. Each sales tax return included the following language accompanying the signature box in which Thomas or Jeffrey Bisch signed: “I HAVE DIRECT CONTROL, SUPERVISION OR RESPONSIBILITY FOR FILING THIS RETURN AND PAYMENT OF THE TAX DUE.”

7. Sales tax returns for 2008 were filed on the following dates:

<u>Sales Tax Return</u>	<u>Date Filed</u>
January 2008	2/18/08
February 2008	3/18/08
March 2008	4/21/08
April 2008	5/19/08
May 2008	6/18/08
June 2008	BLANK
July 2008	8/20/08
August 2008	9/30/08
September 2008	10/1/08

8. The Director alleges that he made timely assessments to Bischco for unpaid sales tax for 2008. Bischco did not pay these alleged assessments. The alleged assessments made against Bischco are as follows:¹

<u>Sales Tax Period</u>	<u>Assessment Date</u>
January 2008	5/9/08
February 2008	5/9/08
March 2008	7/11/08
April 2008	6/13/08
May 2008	7/18/08
June 2008	10/3/08
August 2008	12/2/08
September 2008	12/2/08

9. On July 12, 2011, the Director assessed \$155,568.93 for unpaid sales tax, along with additions, penalty, and interest, against Thomas Bisch, as President of Bischco. This

¹ This information is taken from the Director’s proposed findings of fact. However, the Director failed to provide a citation in the record for this information and we have failed to find this information in the record ourselves. We do not make these findings, but simply repeat the Director’s allegations, which will be relevant in our discussion below.

assessment included the months of January 2008, February 2008, March 2008, April 2008, May 2008, June 2008, August 2008, and September 2008.

10. The Director later conceded that his assessments for January 2008 and February 2008 were made beyond the statute of limitations and reduced the amount he seeks to recover from Thomas Bisch, as President of Bischco. The Director further reduced this amount by occasional payments made on behalf of Bischco.

11. The Director seeks to recover \$69,287.70 plus interest and additions.

12. On September 9, 2011, Thomas Bisch filed his appeal of the Director's assessment with this Commission.

Conclusions of Law

I. Jurisdiction and Burden of Proof

We have jurisdiction to hear an appeal from “any finding, order, decision, assessment, or additional assessment” made by the Director.² Section 621.050.1 requires that a petition for review of an income or withholding tax decision or assessment of the Director be filed within thirty days after the Director mails his decision or assessment. Section 144.261 provides an exception for sales tax cases and allows a sixty-day period within which to file an appeal of the Director's sales tax assessments before this Commission. Thomas Bisch has the burden to prove that he is not liable for the amounts that the Director assessed.³

II. Governing Statutes

Section 144.020.1(1)⁴ imposes the sales tax, and reads in relevant part:

A tax is hereby levied and imposed upon all sellers for the privilege of engaging in the business of selling tangible personal

²Section 621.050.1. Statutory references are to RSMo 2000, unless otherwise noted.

³Section 621.050.2.

⁴RSMo Supp. 2012.

property . . . at retail in this state. The rate of tax shall be as follows:

- (1) Upon every retail sale in this state of tangible personal property . . . a tax equivalent to four percent of the purchase price paid or charged[.]

Section 144.157.3⁵ creates responsible party liability, and at all times relevant to this case read:

Any officers, directors, or statutory trustees of any corporation, including administratively dissolved corporations or foreign corporations that have had their certificate of authority revoked, subject to the provisions of sections 144.010 to 144.745, who has the direct control, supervision or responsibility for filing returns and making payment of the amount of tax imposed in accordance with sections 144.010 to 144.745, and who fails to file such return or make payment of all taxes due with the director of revenue shall be personally assessed for such amounts, including interest, additions to tax and penalties thereon. This assessment shall be imposed only in the event that the assessment on the corporation is final, and such corporation fails to pay such amounts to the director of revenue. Notice shall be given of the director of revenue's intent to make the assessment against such officers, directors, statutory trustees or employees. The personal liability of such officers, directors, statutory trustees or employees as provided in this section shall survive the administrative dissolution of the corporation or, if a foreign corporation, the revocation of the corporation's certificate of authority.

Section 144.220.3 creates a statute of limitations upon the Director's assessments:

In other cases, every notice of additional amount proposed to be assessed under this chapter shall be mailed to the person within three years after the return was filed or required to be filed.

III. Responsibility under § 144.157.3 – Corporate Officer
or Director with Direct Control, Supervision or
Responsibility for Filing Returns and Making Payment

There is no dispute that Bischco was to collect and remit sales tax on its sales and failed to do so. Therefore, the question of whether Bischco owed sales tax under § 144.020.1(1) is not

⁵ RSMo Supp. 2012.

in dispute. The question is whether such obligation is now the responsibility of Thomas Bisch for the 2008 assessment periods at issue.

Section 144.157.3 creates individual liability for corporate officers who have the direct control, supervision or responsibility for filing returns and making payment of the amount of tax imposed. As President, Thomas Bisch was an officer of Bischco. As Vice-President, Jeffrey Bisch was an officer of Bischco. In 2008, Bischco's sales tax returns were filed by Thomas Bisch for February, March, April, and May; Jeffrey Bisch filed Bischco's sales tax returns for January, July, August, and September. Furthermore, when they signed the sales tax returns for the months they respectively filed, both Thomas Bisch and Jeffrey Bisch attested to the fact that they had direct control, supervision, or responsibility for filing the sales tax return. As such, both had direct control, supervision, or responsibility for filing returns on behalf of Bischco in 2008.

Both Thomas Bisch and Jeffrey Bisch are personally liable for Bischco's unpaid sales tax assessments for 2008 because they were both corporate officers that had direct control, supervision, or responsibility for filing sales tax returns for Bischco that year.

IV. Statute of limitations under § 144.220.3

The Director already conceded that the assessments for January 2008 and February 2008 were made beyond the period allowed under § 144.220.3. Therefore, these months are not at issue.

Thomas Bisch argues that the Director's July 12, 2011 assessment against him personally, as an officer of Bischco, for the months of March 2008, April 2008, May 2008, and June 2008 was made beyond the statute of limitations. This is because, Thomas Bisch argues, these sales tax returns were filed prior to three years before July 12, 2011.

The Director argues that the provisions of § 144.157.3 do not apply until the assessment against Bischco becomes final and is unpaid. In support of his position, the Director provides the plain language of the statute, which provides:

This assessment shall be imposed only in the event that the assessment on the corporation is final, and such corporation fails to pay such amounts to the director of revenue.

We agree with the Director. The Director was unable to personally assess Thomas Bisch, as an officer responsible for filing sales tax returns, until after the initial sales tax assessments against Bischco became final. Therefore, the statute of limitations for the assessment against Thomas Bisch did not begin to run until the Director's assessments against Bischco became final.

However, there is no evidence in the record as to when these original sales tax assessments against Bischco were made. The Director provided dates in his proposed findings of fact that seem to indicate that the assessments for March 2008 through September 2008 were timely made. We cannot rely on a party's proposed findings of fact as a substitute for admissible evidence when making our decision; therefore, we did not make these findings above when merely providing these alleged dates.

Nonetheless, it is Thomas Bisch's burden to provide evidence that he is not liable for the amounts assessed by the Director. If the Director's assessments against him were beyond the statute of limitations, which began after the Director's assessments against Bischco became final, then it is Thomas Bisch who must provide such evidence.

Accordingly, we find that the Director's assessments against Thomas Bisch, for the months of March 2008 through September 2008, are within the proper time frame allowed under § 144.157.3.

Summary

Thomas Bisch is liable, as a responsible party, for \$69,287.70 in unpaid sales tax for Bischco, Inc., plus interest and additions, for tax periods March 2008, April 2008, May 2008, June 2008, August 2008, and September 2008.

SO ORDERED on February 5, 2014.

\s\ Sreenivasa Rao Dandamudi
SREENIVASA RAO DANDAMUDI
Commissioner