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DEPARTMENT OF THE TREASURY
INTERNAL REVENUE SERVICE
WASHINGTON, D.C. 20224

CC-2001-02
February 26, 2001
Attachment 1

ACTION ON DECISION

SUBJECT: Arnold W. Vinick v. United States
205 F.3d 1 (1st Cir. 2000), *rehearing denied* May 23, 2000.

Issue:

Whether actual, exercised authority over a company's financial matters, including the duty and power to determine which creditors to pay, is necessary for a finding that a taxpayer is a responsible person under I.R.C. § 6672.

Discussion:

At issue was Arnold W. Vinick's liability under section 6672 for the unpaid withholding taxes of the Jefferson Bronze Company. Section 6672 makes officers, employees, or other persons involved in a business personally liable for a penalty equal to the amount of the delinquent taxes, if they are responsible for the collection and payment of trust fund taxes and they willfully fail to collect or pay the tax. Slodov v. U.S., 436 U.S. 238, 244-245 (1978).

Vinick, a co-owner of Jefferson Bronze, was involved in the company from its formation, serving as its treasurer and also preparing its quarterly employment tax returns. Throughout the company's existence, Vinick was one of two corporate directors. He could and did sign corporate checks. He also had a history of involvement in the company's financial affairs, negotiating with the Internal Revenue Service over past due employment taxes, signing documents in connection at least one loan and meeting with bank officials when the corporation became delinquent on the loan. Based on these facts, the trial court held that he was liable as a responsible person under section 6672.

The First Circuit, however, reversed, holding that the lower court's findings of fact were "based on a misunderstanding of the legal standard for what constitutes a responsible person." The court further stated that "[a]bsent a finding that Vinick possessed actual, exercised authority over the company's financial matters, including the duty and power to determine which creditors to pay, as a matter of law he cannot be a responsible person."

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As originally drafted, the First Circuit's opinion also stated that courts should be precluded from considering evidence outside the quarters at issue in determining whether a plaintiff was a responsible person. This holding is contrary to the government's position and is in conflict with other circuit court opinions. See, e.g., United States v. Kim, 111 F.3d 1351 (7th Cir. 1997).

In its order dated May 23, 2000, the First Circuit rejected the government's petition for rehearing with suggestion for rehearing en banc. Simultaneously, the First Circuit issued an errata sheet amending its opinion by adding a footnote clarifying that it meant to say that "it would be erroneous based solely on evidence from one quarter automatically to conclude that a person is responsible in another quarter." The Service does not disagree with this formulation of the law.

The First Circuit's requirement that a responsible person possess "actual, exercised authority" over a company's financial affairs is a departure from prior First Circuit precedent. See Harrington v. United States, 504 F.2d 1306, 1315 (1st Cir. 1974); Thomsen v. U.S., 887 F.2d 12, 16 (1st Cir. 1989). Nonetheless, the appellate panel in Vinick cited to both Harrington and Thomsen.

The First Circuit in Vinick did not overrule its prior decisions in Harrington and Thomsen, and accordingly, the Service can only conclude that Harrington and Thomsen are still the law in the First Circuit, notwithstanding the intra-circuit conflict Vinick appears to create. Accordingly, the Service will not follow Vinick to the extent that it conflicts with prior, undisturbed precedent in the First Circuit. Specifically, the Service will not follow the statement in Vinick that "actual, exercised authority" over a company's

financial affairs is necessary for a finding of responsibility under section 6672. Instead, the Service will continue to follow Harrington and Thomsen in cases appealable to the First Circuit.

Recommendation:

Nonacquiescence

Reviewers:

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