

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

**IN THE MATTER OF THE PROTEST OF
BRYAN C. TEMPLETON
TO ASSESSMENT OF WITHHOLDING TAX
ISSUED UNDER LETTER ID L1159215872 & L0839744256**

No. 10-03

DECISION AND ORDER

A formal hearing on the above-referenced protest was held on October 8, 2009, before Brian VanDenzen, Hearing Officer. The Taxation and Revenue Department (“Department”) was represented by Tanya Noonan Herring, Special Assistant Attorney General. Bryan C. Templeton (“Taxpayer”) appeared. Counsel Gary D. Eisenberg appeared representing Taxpayer. Based on the evidence and arguments presented, IT IS DECIDED AND ORDERED AS FOLLOWS:

FINDINGS OF FACT

1. In 1999, Mark Day founded the Texas C-Corporation Sandia Food Group, Inc.
2. Sandia Food Group, Inc., through Mark Day, possessed the franchise development rights.
3. The primary business of Sandia Food Group, Inc. was to develop and manage a series of Johnny Carino’s Restaurant franchises.
4. In March 2000, Taxpayer left Mobil Oil Company to join Sandia Food Group, Inc. as Chief Operating Officer.
5. At an unspecified time between March 2000 and 2004, Taxpayer was added as the corporate secretary to Sandia Food Group, Inc.
6. Taxpayer did the accounting and paid the bills for Sandia Food Group, Inc.

7. Sandia Food Management, Inc., a Texas Corporation, was formed as the management company for Sandia Food Group, Inc.
8. Due to difficulty in obtaining financing and on the advice of an attorney, Sandia Food Group, Inc. restructured from a C Corporation into a Limited Partnership at an unspecified time between 2002 and 2004.
9. The new corporate limited partnership that resulted from the restructuring was called SFG, LP.
10. SFG, LP was a limited partnership with a corporate general partner, JCCR, Inc.
11. JCCR, Inc. was solely owned by Mark Day, the original founder of Sandia Food Group, Inc.
12. SFG, LP replaced Sandia Food Management, Inc. and Sandia Food Group, Inc. as the operating entity for all the restaurants and their respective corporate structures.
13. Taxpayer was the Chief Accounting Officer (“CAO”) of SFG, LP.
14. SFG, LP received all revenues and paid all obligations for all restaurants and separate corporate entities it managed.
15. SFG, LP maintained all bank accounts for all restaurants and separate corporate entities it managed.
16. In order to obtain financing and segregate liabilities for its Albuquerque and Los Lunas Johnny Carino’s Restaurants, SFG, LP created the leasehold entity SFG, Albuquerque GP 1 (“SFG-ABQ”).
17. SFG-ABQ was a limited partnership where SFG-LP was the corporate general partner.

18. Taxpayer applied for and obtained CRS number 02-966068-00-8 from the State of New Mexico for SFG-ABQ. [Department S1]
19. Taxpayer is listed as a corporate Director of SFG-ABQ. [Department N]
20. All accounts receivable from SFG-ABQ were sent to SFG, LP, and were deposited into SFG, LP's bank account.
21. All accounts payable for SFG-ABQ were paid by SFG, LP from SFG, LP's bank accounts.
22. All employees working at SFG-ABQ d/b/a Johnny Carino's Restaurant in Albuquerque and Los Lunas were paid with checks issued from SFG, LP and drawn against SFG, LP's bank accounts.
23. Taxpayer electronically signed all paychecks for the employees working at SFG-ABQ d/b/a Johnny Carino's Restaurant in Albuquerque and Los Lunas.
24. The employees of SFG-ABQ only received their pay checks and got paid because either Mr. Day or Taxpayer signed their paychecks, and would not have gotten paid otherwise.
25. All withholding taxes that were paid for SFG-ABQ during the relevant period were paid for by SFG, LP with checks drawn against SFG, LP's bank accounts.
26. All thirty-nine withholding tax payment checks issued by SFG, LP for SFG-ABQ to the Department between February 06, 2004 and April 29, 2005 were signed only by Taxpayer.
[Department J]
27. Taxpayer filed and signed all four CRS combined filings for SFG-ABQ between February 25, 2006 and July 13, 2006. [Department K]

28. In 2003, Taxpayer signed SFG-ABQ's 2002 New Mexico Income and Information Return for Pass-Through Entities. [Department R]
29. In 2004, Taxpayer signed SFG-ABQ's 2003 New Mexico Income and Information Return for Pass-Through Entities. [Department Q]
30. On December 29, 2004, Taxpayer signed SFG-ABQ's 2003 New Mexico Corporate Income and Franchise Tax Return, listing his position as "CAO". [Department O]
31. Between June 30, 2005 and July 31, 2006, Taxpayer was listed and signed as the "Taxpayer or Agent" on nine separate monthly CRS Returns for SFG-ABQ, more than any other person during that time period. [Department F6, F7, F8, F9, F10, F11, F12, F13, F14]
32. Although Taxpayer was not listed as the "Taxpayer or Agent" for SFG-ABQ's monthly CRS reporting period ending August 31, 2005, Taxpayer did obtain and sign two personal money orders totaling \$1200 for payment of taxes to the Department. [Department F3]
33. On January 20, 2006, Taxpayer filed and signed ten amended CRS returns for SFG-ABQ for monthly periods beginning in March and continuing through December of 2005, listing himself as "Taxpayer or Agent" with the title "CAO".
34. In order to obtain financing and segregate liabilities for its Las Cruces Johnny Carino's Restaurant, SFG, LP created the leasehold entity SFG, Las Cruces GP 1 ("SFG-LASC").
35. SFG-LASC was a limited partnership where SFG-LP was the corporate general partner.
36. Taxpayer applied for and obtained CRS number 02-948221-00-6 from the State of New Mexico for SFG-LASC. [Department S1]
37. SFG-LASC did not have or maintain its own bank accounts

38. All accounts receivable from SFG-LASC were sent to SFG, LP, and were deposited into SFG, LP's bank account.
39. All accounts payable for SFG-LASC were paid by SFG, LP from SFG, LP's bank accounts.
40. All employees working at SFG-LASC dba Johnny Carino's Restaurant in Las Cruces were paid with checks issued from SFG, LP and drawn against SFG, LP's bank accounts.
41. Taxpayer electronically signed all paychecks for the employees working at SFG-LASC d/b/a Johnny Carino's Restaurant in Las Cruces.
42. The employees of SFG-LASC only received their pay checks and got paid because either Mr. Day or Taxpayer signed their paychecks, and would not have gotten paid otherwise.
43. All withholding taxes that were paid for SFG-LASC during the relevant period were paid for by SFG, LP with checks drawn against SFG, LP's bank accounts.
44. Of the twenty withholding tax payment checks issued by SFG, LP for SFG-LASC to the Department between March 19, 2004 and May 15, 2006, nineteen were signed by Taxpayer. [Department I].
45. Taxpayer filed and signed all seven CRS combined filings for SFG-LASC between February 25, 2006 and July 13, 2006. [Department K]
46. Between May 31, 2005 and July 31, 2006, Taxpayer was listed and signed as the "Taxpayer or Agent" on at least five separate monthly CRS Returns for SFG-LASC, more than any other person during that time period. [Department E1, E7, E8, E14, E15]

47. Although Taxpayer was not listed as the “Taxpayer or Agent” for SFG-LASC’s monthly CRS reporting period ending August 31, 2005, Taxpayer obtained and signed two personal money orders totaling \$1200 for payment of taxes to the Department. [Department E4]
48. On January 20, 2006, Taxpayer filed and signed ten amended CRS returns for SFG-LASC for monthly periods beginning in March and continuing through December of 2005, listing himself as “Taxpayer or Agent” with the title “CAO”.
49. Taxpayer has a bachelor’s degree in business from Baylor University, a Master in Business Administration from North Texas University, and worked in accounting and financing positions at Mobile Oil for 15-years.
50. Taxpayer received annual compensation for his management work for SFG, LP in the amount of \$100,000-\$125,000 per year during the relevant period of time, more than most other employees associated with the business.
51. Taxpayer personally guaranteed lease obligations of the SFG, LP. [Department T]
52. Taxpayer personally provided SFG, LP with at least \$50,000 for franchise development rights, which increased the Taxpayer’s interest in SFG, LP.
53. Taxpayer was a listed limited partner in at least eight corporate entities under the Sandia Food Group, Inc. umbrella.
54. Mr. Day died on July 19, 2006.
55. SFG, LP and SFG, Inc. filed for bankruptcy in late July, 2006.
56. In the bankruptcy petition filed for SFG, Inc., Taxpayer listed himself as “President” of SFG, Inc.

57. SFG, LP and SFG, Inc. were unsuccessful in their attempt to reorganize in bankruptcy, and consequently, were unable to continue operation of any of the Johnny Carino's Restaurants.

58. On January 11, 2007, the Department assessed Taxpayer for SFG-LASC's unpaid withholding tax, penalty, and interest for filing periods May 31, 2005 through July 31, 2005.
[Department A]

59. On February 1, 2007, the Department assessed Taxpayer for SFG-ABQ's unpaid withholding tax, penalty, and interest for filing periods of June 30, 2005 through October 31, 2006.

60. Taxpayer timely filed written notice of protest to both of the assessments issued in this matter.

DISCUSSION

Taxpayer challenges the assessment of withholding tax, penalty and interest against him as a result of the unpaid withholding tax obligations of SFG-ABQ and SFG-LASC. Taxpayer argues that he was not a corporate officer, agent, or employee of either SFG-ABQ or SFG-LASC, the entities subject to the Department's assessments. Taxpayer further argues that even if he was a corporate officer, agent or employee of those entities, Taxpayer was not in "control of the payment of wages" for either SFG-ABQ or SFG-LASC. According to Taxpayer, only Mr. Mark Day was truly in control of everything associated with SFG, Inc., SFG-LP, and all their associated subsidiary entities.

I. Presumption of Correctness and Burden of Proof.

Under NMSA 1978, §7-1-17(C) (2007), both assessments issued in this case are presumed to be correct. Consequently, the Taxpayer has the burden to overcome the assessment of Withholding Tax, Penalty, and Interest for SFG-ABQ and SFG-LASC.

II. Withholding Tax Act.

New Mexico's Withholding Tax Act (NMSA 1978, §7-3-1, *et seq.*) requires "every employer" who deducts and withholds federal income tax from an employee's wages to also deduct and withhold state income tax and pay that amount over to the state. *See* NMSA 1978, §§ 7-3-3 and 7-3-6 (1999). Under the Withholding Tax Act, "every withholder or pass-through entity shall be liable for amounts required to be deducted and withheld... regardless of whether the amounts were in fact deducted and withheld." NMSA 1978, §7-3-5 (1999). NMSA 1978 §7-3-2(N) (2002) defines a withholder as "a payor, an employer or any person required to deduct and withhold." The term "employer" under NMSA 1978, §7-3-2(C) (2002)

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 service as the employee of that person, except that if the person for whom the individual performs or performed the services does not have control over the payment of the wages for such services, "employer" means the person having control of the payment of wages.

III. Meaning of "Control of the Payment of Wages".

The New Mexico Withholding Tax Act does not provide a definition or test for what is meant by the term "control of the payment of wages". The Department has not promulgated any

regulatory definition or test for the term “control of the payment of wages.” Neither party cited to any New Mexico case law that discusses or defines “control of the payment of wages.”

Without a clear statutory or regulatory definition or test for the term “control of the payment of wages”, the plain meaning of the language employed by the statute controls. *See Dona Ana Sav. & Loan Ass'n v. Dofflemeyer*, 115 N.M. 590, 592, 855 P.2d 1054, 1056, 1993 N.M. LEXIS 184 (N.M. 1993). Webster’s Dictionary defines control as “an act or instance of controlling; also: power or authority to guide or manage”. *See* MERRIAM WEBSTER’S COLLEGIATE DICTIONARY (10th ed. 1994). However, to the extent that this definition of control suggests managerial functions are necessary for control, this definition appears too broad in light of federal case law addressing the term “control of the payment of wages.”

In the Federal realm, there are numerous sources that reference the term “control of the payment of wages.” Internal Revenue Service (“IRS”) Code 26 U.S.C. §3401 deals with the Federal withholding tax requirements. Similarly to the New Mexico Withholding Tax Act, under the IRS Code an “employer” is defined as either the “person for whom an individual performs or performed any service”, or if that person for whom the service was performed lacks control over the payment of wages, then the employer is the person having “control of the payment of such wages” for services rendered. 26 U.S.C. §3401(d).

Taxpayer argues that 26 U.S.C. §3491(d) is distinguishable from the New Mexico Withholding Tax Act because the IRS Code deals with determining the “control of payment of wages” when there are multiple potential employer groups versus when there is only one employer group. While it is true that the IRS Code may encompass a broader definition of what constitutes an “employer”, the IRS Code uses the exact same language—“control of the payment

of wages”—as the New Mexico Withholding Act to describe the touchstone factor of determining the “employer” for purposes of withholding taxes. Consequently, any discussion related to the federal “control of the payment of wages” standard is applicable to analyzing the exact same language under the New Mexico Withholding Tax Act.

The United States Supreme Court considered “control of the payment of wages” in *Otte v. United States*, 419 U.S. 43 (1974). In that case, a bankruptcy trustee claimed not to be the “employer” required to withhold tax under IRS Code 26 U.S.C. §3402. Looking to the employer definition under 26 U.S.C. §3401, the Supreme Court found that the use of control of payment of wages was “obviously intended to place responsibility for withholding at the point of control.” *id.* at 50. Despite the trustee’s argument, the Supreme Court did not find it necessary to determine whether the bankruptcy trustee, the bankruptcy referee, or the bankrupt estate had specific control, only that one among them was at the point of control of payment of wages, and thus was an “employer” for the purposes of 26 U.S.C. §3401 (d)(1).

Southwest Restaurant Systems, Inc. v. IRS, 607 F.2d 1237 (9th Cir. 1979) also addressed “control of the payment of wages” under the IRS Code. Of particular relevance, *Southwest Restaurant* dealt with four separate corporations operating four restaurants in Phoenix, Arizona. The four separate corporations were owned primarily by the same two people who acted as the president and the treasurer in each of the respective corporations. The four corporations relied upon a certified public account to manage all their accounts. Wages for all four separate accounts were paid from one common bank account shared by the four corporations. The certified public accountant had signature authority over all the bank accounts of the four corporations, including the common account used to pay the wages of the employee’s of the four

separate corporations. The pay checks were all electronically signed by the certified public accountant. The Ninth Circuit found that it was not relevant that the certified public accountant lacked control over hiring, firing, determining rate of pay, assigning job duties, or evaluating employee performances. *See id.* at 1239. The Ninth Circuit held in *Southwest Restaurant* that it was enough that the certified public accountant had control of the payment of wages for the four separate corporations even if she lacked other indicia of control over managerial decisions. *See id.* at 1240.

Building further upon *Southwest Restaurant*, the United States Court of Federal Claims held in *Consolidated Flooring Services v. U.S.*, 38 Fed. Cl. 450, 458-459 (1997) that regardless of lack of control over other managerial decisions like hiring, firing, and determining wages, the person with control of the account from which wages are paid is the person in control of the payment of wages under IRS Code 26 U.S.C. §3401 (d)(1). Summarizing *Otte*, *Southwest Restaurant*, and *Consolidated Flooring Services*, the District Court in *U.S. v. Total Employment Company, Inc.*, 305 B.R. 333, 339 (M.D. Fl. 2004) found that the person in control of the payment of wages is “the person or entity actually making payment or having control of the bank account from which payment is made.”

The analysis of *Total Employment Company* of “control of the payment of wages” is compelling to the analysis in New Mexico: the person with control of the payment of wages, and thus the employer under NMSA 1978, §7-3-2(C) (2002), is the person or entity actually making payment *or* having control of the bank account from which payment of wages is made.

IV. Taxpayer was an officer, agent, employer, or employee for SFG-ABQ and SFG-LASC.

Taxpayer first argues that the Department failed to establish that he was an officer, agent, employer, or employee for the person that was the employer, of either SFG-ABQ or SFG-LASC. Without this connection between the Taxpayer and the two assessed entities at issue in this matter, Taxpayer further asserts that he cannot be held liable for unpaid withholding tax, penalty, and interest under the New Mexico Withholding Tax Act. Taxpayer's argument is not persuasive.

The evidence does not support Taxpayer's claim that he was not an officer, agent, or employer, or employee of SFG-ABQ and SFG-LASC. The evidence establishes by the preponderance that Taxpayer was an officer, agent and/or an employee of the person that was the employer for SFG-ABQ. Taxpayer is listed as a corporate Director of SFG-ABQ, making him an officer in that entity. Taxpayer also applied for and obtained CRS number 02-966068-00-8 from the State of New Mexico for SFG-ABQ, the type of activity usually done by either a corporate officer or an agent of the corporation. Additionally, numerous other findings of fact support the conclusion that Taxpayer was an officer and agent for SFG-ABQ: All thirty-nine withholding tax payment checks issued for SFG-ABQ to the Department between February 06, 2004 and April 29, 2005 were signed by Taxpayer, a sign that Taxpayer was acting as agent; Taxpayer filed and signed all four CRS combined filings for SFG-ABQ between February 25, 2006 and July 13, 2006; In 2003 and 2004, Taxpayer signed SFG-ABQ's New Mexico Income and Information Return for Pass-Through Entities; Taxpayer signed SFG-ABQ's 2003 New Mexico Corporate Income and Franchise Tax Return, listing his position as "CAO"; Between June 30, 2005 and

July 31, 2006, Taxpayer was listed and signed as the “Taxpayer or Agent” on nine separate monthly CRS Returns for SFG-ABQ, more than any other person during that time period.

The evidence also establishes by the preponderance that Taxpayer was an officer, agent and/or an employee of the person that was the employer of SFG-LASC. Again, on behalf of SFG-LASC, Taxpayer applied for and obtained CRS number 02-948221-00-6 from the State of New Mexico for SFG-LASC, an action consistent with being an agent for SFG-LASC. More evidence also supports that Taxpayer was an officer, agent, employer, or employee of SFG-LASC: Taxpayer signed nineteen of the twenty withholding tax payments for SFG-LASC to the Department between March 19, 2004 and May 15, 2006; Taxpayer filed and signed all seven CRS combined filings for SFG-LASC between February 25, 2006 and July 13, 2006; Between May 31, 2005 and July 31, 2006, Taxpayer was listed and signed as the “Taxpayer or Agent” on at least five separate monthly CRS Returns for SFG-LASC, more than any other person during that time period; Taxpayer listed himself as “Taxpayer or Agent” with the title “CAO” on ten amended CRS returns for SFG-LASC for monthly reporting periods beginning in March and continuing through December of 2005.

Taxpayer introduced a Stipulated Protective Order of Honorable Judge Clay Campbell of the Second Judicial District Court. That Stipulated Protective Order finds that Taxpayer was not an officer/agent of SFG-ABQ and SFG-LASC for discovery purposes, but this order is not dispositive to this proceeding. That Stipulated Order is not a factual finding made by the court as part of its final decision. Rather it is a procedural discovery order reached by the stipulation between the parties without any evidence that the court conducted a hearing and took evidence on the merits of the order. In light of the other evidence presented in this matter that establishes

that Taxpayer was an officer, agent, or employee, a stipulated protective discovery order does not alter the factual finding in this proceeding that Taxpayer was an officer, agent, or employee of SFG-ABQ and SFG-LASC.

The second reason why Taxpayer's argument fails to persuade is because whether or not Taxpayer was an agent, officer, employer, or employee of SFG-ABQ and SFG-LASC, the evidence is clear that Taxpayer was the Chief Accounting Officer for SFG, LP, the company that totally controlled and managed all aspects of the entities SFG-ABQ and SFG-LASC. As Taxpayer testified, SFG-ABQ and SFG-LASC were merely subsidiary leasehold entities of SFG, LP. Neither SFG-ABQ nor SFG-LASC maintained their own bank accounts or finances. All receipts and income from SFG-ABQ and SFG-LASC was deposited directly into SFG, LP's bank accounts. All bills and obligations of SFG-ABQ and SFG-LASC were paid out of SFG, LP's bank accounts. Just like in *Southwest Restaurant*, where control over the payment of wages was found against a person who did not work for the respective separate entities but nevertheless electronically signed the paychecks drawn against a collective bank account shared by the separate entities, the employees of SFG-ABQ and SFG-LASC were paid with checks electronically signed by the Taxpayer and drawn against SFG, LP's bank accounts. SFG, LP. was entirely in control of the operations and management of SFG-ABQ and SFG-LASC. In his capacity as C.A.O. of SFG, LP, Taxpayer directed, managed, and controlled the tax obligations of SFG-ABQ and SFG-LASC regardless of whether he was named employer, or the employee of the person who was the employer, of those two subsidiary leasehold entities.

V. Taxpayer was in “control of the payment of wages” for SFG-ABQ and SFG-LASC.

Taxpayer next argues that even if he had a connection to SFG-ABQ and SFG-LASC, he was not the person in “control of the payment of wages,” as only Mr. Day was truly in control. Taxpayer’s argument again fails to persuade. While Mr. Day certainly may have been in control of decisions like hiring, firing, setting wages, determining job obligations, and making strategic decision, the evidence overwhelmingly establishes that Taxpayer was a person having control of the bank account from which payment of wages for SFG-ABQ and SFG-LASC were made.

Again, looking towards the federal definition of the person “control of the payment of wages”, that person is the person or entity actually making payment *or* having control of the bank account from which payment of wages is made. In this case, SFG, LP was the entity that actually made the payment of wages for the SFG-ABQ and SFG-LASC. As CAO of SFG, LP, the Taxpayer had access and signing privileges over SFG, LP.’s bank accounts. Neither SFG-ABQ nor SFG-LASC even had their own bank accounts from which they could have paid their employees. Just like in *Southwest Restaurant*, all paychecks for the employees of SFG-ABQ and SFG-LASC were drawn against SFG, LP’s bank accounts. Just like in *Southwest Restaurant*, Taxpayer’s electronic signature was on every paycheck issued to the employees of SFG-ABQ and SFG-LASC. Compellingly, Taxpayer acknowledged that but for his or Mr. Day’s signature on the paychecks, the employees of SFG-ABQ and SFG-LASC would not have gotten paid. That testimony is nearly the very essence of “control of payment of wages”: an act or omission by the Taxpayer or Mark Day determined whether the employees of SFG-ABQ and SFG-LASC were paid.

Moreover, Taxpayer was the person who had the control and authority to make decisions related to the payment of taxes. For both SFG-ABQ and SFG-LASC, Taxpayer was listed and signed as the “Taxpayer or Agent” on most of CRS tax returns, signed the checks for most of tax payments, and amended many of the tax filings. Other employees at SFG, LP referred Ms. Rosina Romero, Senior Revenue Agent for the Department, specifically to the Taxpayer anytime a decision needed to be made about the filing, late filing, or non-payment of taxes for any of the associated entities. The evidence clearly demonstrates that the authority and responsibility for payment of taxes for all the relevant entities was part of the Taxpayer’s duties as C.A.O. for SFG, LP.

Taxpayer argues that Mr. Day made poor decisions, that the Taxpayer was naïve in trying to correct Mr. Day’s errors, and that the Department is merely pursuing Taxpayer in this case because Mr. Day is now deceased. However, Taxpayer is not a naïve and uneducated individual that Mr. Day exploited. Taxpayer has both an undergraduate degree in business and a Master’s in Business Administration. Taxpayer also had many years of experience working in financing and accounting at Mobil Oil Company before agreeing to join in Mr. Day’s ventures. Nor is Taxpayer just a simple employee paying the costs for ownership’s mismanagement of the business. Taxpayer acknowledged that he was paid more than most in the business for his role as Chief Accounting Officer. Taxpayer personally invested a great deal of money into the business that increased his share of partnership in the business, something beyond the expectation for an ordinary employee. Taxpayer provided personal guarantors in order to obtain loans and secure financing for the business. Taxpayer was in a position to benefit from any success in the business, and to influence and make decisions related to the financial operations of the business.

Taxpayer's level of education, experience, and personal investment indicate that despite Taxpayer's victim narrative, the Taxpayer was a sophisticated and integral part of the ownership and management of the business.

Finally, Taxpayer argues that because Mr. Day was in most control of the business, the Department should have assessed Mr. Day's estate rather than the Taxpayer. The evidence certainly established that Mr. Day was also in control of the business. But the evidence does not support that Mr. Day controlled the payment of wages. Unlike Taxpayer, Mr. Day's signature was not on the pay checks, was not on the tax forms, was not on the checks for withholding tax paid to the Department. Regardless of Mr. Day's over control of the company, the fact remains that the Taxpayer was in control of the bank account from which the wages were paid, signed the paychecks electronically, and took direct responsibility for tax issues of SFG-ABQ and SFG-LASC. Even if Mr. Day shared control of the payment of wages, that does not change the fact that Taxpayer also controlled the payment of wages. The United States Supreme Court in *Otte* did not find it necessary to distinguish between multiple parties with potential the control of the payment of wages. It is enough that the Taxpayer had control of the payment of wages.

Because Taxpayer had control of the payment of wages for the employees of SFG-ABQ and SFG-LASC, Taxpayer falls within the definition of "employer" under the New Mexico Withholding Tax Act, NMSA 1978, §7-3-2 (C) (2002). As an employer, Taxpayer was legally required to withhold taxes for SFG-ABQ and SFG-LASC's employees. Consequently, Taxpayer is liable for SFG-ABQ's and SFG-LASC's unpaid withholding tax, penalty, and interest for the tax years 2005 and 2006.

VI. Application of Penalty.

The Department properly capped the penalty at 10% in both assessments issued in this case. At the time the taxes were due but not paid for tax years 2005 and 2006, the applicable penalty statute capped the maximum penalty at 10%. See NMSA 1978, Section 7-1-69 (2003). The penalty provision related to the due but unpaid taxes in both assessments had been exhausted at the 10% cap before the January 1, 2008 effective date of NMSA 1978, Section 7-1-69 (2008). Without evidence of legislative intent for retroactive application of NMSA 1978, Section 7-1-69 (2008), the due but unpaid taxes in this case for tax years 2005 and 2006 were subject to the 10% penalty cap pursuant to NMSA 1978, Section 7-1-69 (2003). See Psomas v. Psomas, 99 N.M. 606, 609, 661 P.2d 884, 887 (1982), which stands for the proposition that in the absence of clear intent by the Legislature to apply a new or amended statute retroactively, a statute operates prospectively; See also Kewanee Industries, Inc. v. Reese, 114 N.M. 784, 845 P.2d 1238 (1993), where the New Mexico Supreme Court declined to retroactively apply a modified penalty regulation enacted after the applicable tax year.

CONCLUSIONS OF LAW

A. Bryan C. Templeton filed a timely, written protest to the assessments of withholding tax issued under letter numbers L1159215872 & L0839744256, and jurisdiction lies over the parties and the subject matter of this protest.

B. Bryan C. Templeton was an “employer” for SFG-ABQ and SFG-LASC because as Chief Accounting Officer with signing authority over the bank accounts from which wages were paid, he controlled the payment of wages for the employees of SFG-ABQ and SFG-LASC.

D. Bryan C. Templeton is liable for the unpaid withholding taxes assessed against him for the applicable periods in 2004 and 2005.

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

DATED: March 18, 2010.