

**UNITED STATES BANKRUPTCY COURT  
SOUTHERN DISTRICT OF FLORIDA**

**In re Thomas J. METZGER and Betty S. Metzger, Debtors**

**No. 99-21712-BKC-RBR**

(Cite as: 2000 WL 1479149 (Bankr.S.D.Fla.))

**FINDINGS OF FACT AND CONCLUSIONS OF LAW DETERMINING DEBTORS'  
OBJECTION TO CLAIMS 10 AND 16 OF THE INTERNAL REVENUE SERVICE**

THIS CAUSE having come before the Court at the evidentiary hearing held on May 16, 2000 on the Debtors' Objection to Claims 10 and 16 of the Internal Revenue Service (the "IRS"), and the Court having considered the exhibits admitted into evidence, the testimony, credibility and demeanor of the numerous witnesses, the arguments of counsel, and otherwise being duly advised in the premises, hereby enters its findings of fact and conclusions of law pursuant to Federal Rule of Bankruptcy Procedure 7052.

**FINDINGS OF FACT**

1. On September 1, 1997, the IRS assessed penalties (the "Assessments"), as provided in section 6672 of the Internal Revenue Code of 1986, as amended ("IRC") against Debtor, Thomas J. Metzger (the "Debtor") as the person responsible for collecting, accounting for and paying over employment taxes for TM Building Products, Ltd., a Florida limited partnership (the "Partnership").

2. The tax periods for which penalties were assessed, and the penalty assessed for each such period (the "Assessed Penalties") are as follows:

Tax Period -----	Penalty Assessed -----
Quarter ending March 31, 1992	\$ 57,924.80
Quarter ending June 30, 1992	\$ 89,525.16
Quarter ending September 30, 1992	\$ 117,532.39
Quarter ending December 31, 1992	\$ 138,613.52
Quarter ending September 30, 1993	\$ 74.26
Quarter ending December 31, 1993	\$ 206,060.79
Quarter ending March 31, 1994	\$ 191,407.63

Quarter ending December 31, 1994	\$ 37,489.36
Quarter ending March 31, 1995	\$ 12,788.30
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TOTAL	\$ 851,416.21

3. The Partnership was the successor to TM Products, Co., a Florida corporation. The Partnership purchased the machinery and equipment of the predecessor entity, including the right to use the name "TM". The business of the Partnership was the manufacturing and installation of windows and doors.

4. At the time of formation, Corporate Life Insurance Company ("Corporate Life"), a Pennsylvania corporation, was the Partnership's sole limited partner. TM Acquisition Corporation ("TM Acquisition"), a Florida corporation, was the Partnership's sole general partner. The limited and general partners' interests in the Partnership were 55% and 45%, respectively.

5. The Metzger family owned 35% of the outstanding common stock of TM Acquisition. The Debtor and his wife, Betty S. Metzger, owned 9.5% of the stock of TM Acquisition. The remaining 65% of TM Acquisition was owned by an "investment group" headed by Mr. Gary Kabot.

6. The Debtor did not contribute capital to the Partnership. Corporate Life made an initial capital contribution of \$1.5 million, and contributed over \$4 million to the Partnership over time.

7. Corporate Life was to have exclusive responsibility and control over the financial aspects of the Partnership. Corporate Life initially delegated responsibility for the Partnership's daily financial affairs to Mr. Kabot as the Chief Executive Officer of the Partnership.

8. On formation of the Partnership, the Debtor was hired by the Partnership as an employee at an annual salary of \$120,000. He signed an Employment Agreement with the Partnership. His duties were to manage the sales and manufacturing functions of the Partnership. The Debtor was very experienced and well known in the window and door industry. As such, the Debtor was given the honorary title of "President" for customer-relations purposes. The Debtor's salary did not increase over the life of the Partnership.

9. Due to the mismanagement of the Partnership's financial affairs by Mr. Kabot, Corporate Life terminated Mr. Kabot's employment in 1991 and became more involved in overseeing the financial affairs of the Partnership.

10. After Mr. Kabot's termination in 1991, Mr. David Smith, an officer of Corporate Life, became actively involved in the Partnership's financial affairs. Mr. Smith took over the responsibilities of Mr. Kabot, including all financial responsibilities. In effect, Mr. Smith became the Chief Executive Officer of the Partnership.

11. Mr. Smith was based out of Corporate Life's Atlanta office, yet he remained highly informed of the Partnership's activities. Mr. Smith spoke with Partnership employees daily and

traveled regularly to Florida. At times, he visited weekly; other times, he traveled once a month.

12. The Debtor's duties however, remained operational, i.e., management of all aspects of the sales and manufacturing functions of the business. Further, the Debtor's compensation did not increase. His duties and position remained the same.

13. The Debtor did not have check-signing authority on behalf of the Partnership until August, 1992. The Debtor however, did not exercise this authority until November, 1994. Michael Metzger had signed the Partnership checks until that time.

14. Mr. Charles Williams was the Controller of the Partnership from August, 1991 to March, 1994. The Debtor did not direct Mr. Williams in the payment of creditors.

15. During the period that Mr. Williams was the Controller, decisions on financial matters were handled by Mr. Smith. The Partnership was often in need of funds to pay its obligations. Mr. Williams looked to different individuals within the Partnership, including the Debtor, Michael Metzger and Mr. Smith, for direction on the payment of creditors. The Debtor however, had no decision-making authority over such financial matters. Ultimately, these decisions were made by Mr. Smith and relayed to Mr. Williams. Further, on some occasions where Corporate Life would provide funds to the Partnership, these funds were earmarked for specific expenditures.

16. In November, 1993, Mr. Pat Nigro was appointed Chief Executive Officer of the Partnership by Mr. Leon LaRosa, Jr., the Chief Financial Officer of Corporate Life. Mr. Nigro replaced Mr. Williams with Ms. Michelle Pompelio as Controller in March, 1994.

17. Mr. Nigro controlled the day-to-day activities of the Partnership, including all decisions to be made with respect to finances and creditors of the Partnership. Mr. Nigro consulted frequently with Mr. LaRosa on the financial affairs of the Partnership. Mr. Nigro even communicated directly with the IRS with respect to the Partnership's employment tax obligations.

18. On February 15, 1994, the Insurance Commissioner for the Commonwealth of Pennsylvania filed a Petition for Liquidation of Corporate Life, and the Insurance Commissioner was appointed Liquidator of Corporate Life. At this point, all Corporate Life officers were terminated by the Liquidator, including Mr. Smith and Mr. LaRosa. Mr. Nigro however, remained as CEO of the Partnership until April, 1994.

19. After the departures of Mr. Nigro and Mr. Smith, no one was left to assume the responsibility for the financial management of the Partnership. The Debtor then stepped in and assumed control of the Partnership. In November, 1994, the Debtor replaced Ms. Pompelio with Mr. Alan Abramson as Controller.

20. During Mr. Abramson's employment, the Debtor began signing checks and discussed the Partnership's finances with Mr. Abramson, including its employment tax liabilities.

21. In February, 1995, the Debtor caused the Partnership to file a voluntary bankruptcy petition.

22. On March 15, 1999, the Debtors filed a voluntary petition pursuant to Chapter 11 of the United States Bankruptcy Code in the United States Bankruptcy Court for the Southern District of Florida.

23. The IRS timely filed a Proof of Claim on April 15, 1999 for the Assessed Penalties.

24. On January 24, 2000, the Debtor filed the Debtors' First Objection to Claims, including claims 10 and 16 of the IRS (Claim no. 16 is a duplicate of Claim no. 10). The Assessed Penalties were set forth as Claims 10 and 16 in the Objection to Claims.

### CONCLUSIONS OF LAW

1. The Court has jurisdiction over the parties and the subject matter of this action. See Bankruptcy Code Section 505(a)(1).

2. The IRS has the initial burden of proving that Debtor, Thomas J. Metzger was a "responsible person" as to the Partnership. See, In re DeMarco, No. 97-14132-8G3, 1999 WL 72795 (Bankr.M.D.Fla.1999); Malloy v. United States, 17 F.3d 329 (11 th Cir.1994); Williams v. United States, 931 F.2d 805 (11 th Cir.1991). Once responsibility is established, the Debtor has the burden of proving the Debtor's actions were not willful. DeMarco, 1999 WL 72795, at \* 3; Malloy, 17 F.3d at 331; Williams, 931 F.2d at 810.

3. The IRS failed to meet its burden for the following tax periods:

- a. Quarter ending March 31, 1992;
- b. Quarter ending June 30, 1992;
- c. Quarter ending September 30, 1992;
- d. Quarter ending December 31, 1992;
- e. Quarter ending September 30, 1993;
- f. Quarter ending December 31, 1993; and
- g. Quarter ending March 31, 1994.

4. The Debtor was not a person responsible for collecting, accounting for and paying over employment taxes for the Partnership within the meaning of IRC section 6672, for the tax periods listed in Paragraph 3 above. The Assessments for those tax periods are canceled.

5. The IRS met its burden for the tax periods ending December 31, 1994 and March 31, 1995. The Debtor did not meet his burden for those tax periods.

6. The Debtor was a responsible person who willfully failed to pay over trust fund employment taxes of the Partnership within the meaning of IRC section 6672 for the tax periods ending December 31, 1994 and March 31, 1995.

7. The Debtor is liable for Assessed Penalties under IRC section 6672 in the amounts of \$37,489.36 for the tax period ending December 31 1994, and \$12,788.30 for the tax period ending March 31, 1995 for a total of \$50,277.66, plus interest in the sum of \$6,778.69 for a total liability of \$57,056.35.

8. A separate Order sustaining in part and denying in part the Debtors' Objection to Claims 10 and 16 of the IRS shall be entered in accordance with these findings of fact and conclusions of law.

**ORDERED** in the Southern District of Florida on this 23<sup>rd</sup> day of June, 2000.

RAYMOND B. RAY  
United States Bankruptcy Judge