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~~To: K...~~

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April 14, 2005

PRIVILEGED AND CONFIDENTIAL
ATTORNEY-CLIENT COMMUNICATION

Mr. James E. Baiers
Presidion Solutions, Inc.
755 W. Big Beaver Road
Suite 1700
Troy, Michigan 48084

Dear Mr. Baiers:

You have requested our opinion, for United States tax purposes, regarding the potential liability of Presidion Solutions, Inc. (APresidion@) for income withholding, social security, and unemployment taxes (collectively, Aemployment taxes@) owed by entities previously owned by Presidion. For the reasons discussed herein, we believe that Presidion has no liability for the employment taxes of these entities.

Our opinion is based on the facts we received from you, the provisions of the Internal Revenue Code of 1986, as amended (the ACode@), the Treasury Regulations promulgated thereunder (the ARegulations@), and court decisions as of the date of this opinion. We assume no obligation to update our opinion based on any changes in the Code, the Regulations, or case law after this opinion has been

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provided to you. Moreover, this opinion cannot be construed as a guarantee or assurance that the Internal Revenue Service (the AIRS@) would not take a contrary position to the one expressed herein, or that such position by the IRS would not be sustained in court. As stated above, however, it is our opinion that under the Code, the Regulations, and relevant case law, Presidion is not liable for the employment taxes of the entities at issue.

A. THE FACTS

Presidion is a Florida corporation. During the years relevant herein, the members of Presidion=s Board of Directors were John W. Burcham, Craig A. Vanderburg, and James E. Baiers. On May 3, 2001, Presidion acquired all the issued and outstanding stock of five privately held Florida corporations, namely, Sunshine Staff Leasing, Inc., Sunshine Companies, Inc., Sunshine Companies, II, Inc., Sunshine Companies, III, Inc., and Sunshine Companies, IV, Inc. (collectively, the ASunshine Companies@). After the acquisition, the Sunshine Companies remained legally distinct, stand alone entities. Each Sunshine Company had its own employer identification number and each corporation filed its own corporation income tax and payroll tax returns.

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The Sunshine Companies were engaged in the employee leasing business, and each Company was licensed to conduct such business by the State of Florida. To qualify for and maintain such licenses, each Sunshine Company was required to submit a financial statement to the State of Florida demonstrating a positive net worth and adequate working capital. The Board of Directors of the Sunshine Companies consisted of Messrs. Burcham, Vanderburg, and Baiers, and Robert Gaines and Fred Sandlin, the latter two being the former owners of the Sunshine Companies.

The Sunshine Companies all operated in a similar fashion. Specifically, they entered into co-employment agreements with clients to provide payroll administration services for employees of the clients' businesses. The employees performed their services at the business premises of the Sunshine Companies' clients.

The Sunshine Companies secured Forms W-4, Employee's Withholding Allowance Certificates, and Forms W-9, Requests for Taxpayer Identification Number and Certification, from the employees. The clients reported wage earnings information for the employees to the Sunshine Companies for each payroll period. The Sunshine Companies then prepared payroll checks for the employees. The

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Sunshine Companies were responsible for withholding Federal and state employment taxes from the employees= wages.

The Sunshine Companies issued invoices to their clients for the wages and employment taxes due with respect to the earnings of the employees. The clients remitted payment on the invoices to a bank account of the particular Sunshine Company that rendered the invoice. Each Sunshine Company was separately responsible for filing Federal and state employment tax returns for employees of each Company, and for remitting employment taxes withheld from the employees= earnings to the appropriate taxing authorities.

Presidion was not a licensed employee leasing company. Moreover, Presidion was not responsible for, and did not handle, the payroll and employment tax operations of the Sunshine Companies. Presidion did not maintain any payroll or employment tax accounts.

The IRS asserts that each of the Sunshine Companies incurred liabilities for unpaid employment taxes for the employees in the quarterly and annual employment tax periods in taxable years 2003 and 2004. Effective December 31, 2004, Presidion sold all of the common stock in each of the Sunshine Companies to Wellington Capital Partners, Inc. (AWellington@), a third-party purchaser unrelated to

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Presidion or the Sunshine Companies. The IRS's claim for employment taxes from the Sunshine Companies was disclosed to Wellington prior to the sale, and Wellington purchased the Sunshine Companies with full knowledge of the claim.

You have asked us whether Presidion is liable, as a so-called responsible person under Section 6672 of the Code, for the unpaid employment taxes of the Sunshine Companies for 2003 and 2004. For the reasons set forth below, we conclude that Presidion has no personal liability for such employment taxes under Section 6672.

B. DISCUSSION AND ANALYSIS

1. The Legal Principles Governing Section 6672

The Code requires employers to withhold Federal income and social security taxes (collectively, "employment taxes") from the wages of employees and to remit them to the IRS on a quarterly basis. See Section 7501(a). See Slodov v. United States, 436 U.S. 238, 243 (1978). If an employer fails to pay over employment taxes, Section 6672 of the Code imposes personal liability for the taxes by providing, in pertinent part:

Any person required to collect, truthfully account for, and pay over any tax imposed by this title who willfully fails to collect such tax, or truthfully account for and pay over such tax, or

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willfully attempts in any manner to evade or defeat any such tax or the payment thereof, shall ... be liable to a penalty equal to the total amount of the tax evaded, or not collected, or not accounted for and paid over.

Section 6672.

A person cannot be held liable for the penalty in Section 6672 unless (i) he is a "responsible person" for collecting and paying the employer's taxes to the IRS, and (ii) he willfully fails to do so. Fiataruolo v. United States, 8 F.3d 930, 938 (2d Cir. 1993); Godfrey v. United States, 748 F.2d 1568, 1574 (Fed. Cir. 1984). The key question under the first prong of the Section 6672 test is whether "the individual has significant control over the enterprise's finances." Hochstein v. United States, 900 F.2d 543, 547 (2d Cir. 1990), cert. denied, 112 S.Ct. 2967 (1992) (emphasis added). See also Kenagy v. United States, 942 F.2d 459, 464 (8th Cir. 1991) (to be liable responsible person must have significant authority in decision making areas involving employment taxes). In this regard, the penalty "is not meant to ensnare those who have merely technical authority or titular designation." Fiataruolo v. United States, 8 F.3d at 939. The requirement of significant control is met by a person who has "ultimate authority over the expenditure of funds" for the corporation. Godfrey v. United States, 748 F.2d at 1575,

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quoting from, White v. United States, 372 F.2d 513, 517
(Ct.Cl. 1967).

An investigation of whether someone is a responsible person under Section 6672 requires an examination of the facts and circumstances of the particular case. No individual factor is determinative, and those considered fall into three general categories, namely: status, duty, and authority. Heimark v. United States, 89-2 U.S.T.C. &9247, at 89,437 (Ct.Cl. 1989). Among the particular facts that courts have looked to under Section 6672 are whether the person: (1) is an officer of the company, (2) owns shares in the company, (3) is actively involved in the management of the day-to-day affairs of the company, (4) has the ability to hire and fire employees, (5) makes decisions regarding which creditors will be paid, and when they will be paid, (6) exercises control over daily bank accounts and disbursement records, (7) has check signing authority, and (8) prepares, signs and files payroll tax returns. Barnett v. Internal Revenue Service, 988 F.2d 1449, 1455 (5th Cir. 1993).

The second prong of the Section 6672 test requires that a responsible person's failure to pay the withholding taxes be willful. This calls for "a deliberate choice voluntarily, consciously, and intentionally made to pay other creditors instead of paying the Government." White v.

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United States, 372 F.2d 513, 521 (Ct.Cl. 1967). Mere negligence is insufficient to constitute willfulness under the Code. Godfrey v. United States, 748 F.2d at 1577. Further, it is essential to a finding of willfulness that the person be personally at fault. The United States Supreme Court has stated that: "[t]he fact that the provision imposes a 'penalty' and is violated only by a 'willful failure' is itself strong evidence that it was not intended to impose liability without fault." Slodov v. United States, 436 U.S. 238, 254 (1978).

2. Presidion is Not Liable As a Responsible Person for the Employment Taxes of the Sunshine Companies

We believe that there is no basis for the IRS to assert that Presidion is a Responsible person⁶ under Section 6672 of the Code for the unpaid employment taxes of the Sunshine Companies. Numerous factors support this position. First, there is no employer-employee relationship between Presidion and the employees, and Presidion had no direct or indirect responsibility to make payments of wages to the employees; to withhold employment taxes from the employees wages; or to remit employment taxes to the IRS on behalf of the employees.

Second, the Sunshine Companies were independently organized and operated and the Companies contracted directly

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with their clients to provide payroll and employment tax services. The Sunshine Companies contractually agreed, inter alia, to prepare payroll checks, withhold and remit employment taxes to taxing authorities, and prepare and file payroll tax returns. Presidion was not a party to these agreements and had no responsibility, written or otherwise, for the payroll and employment tax services provided by the Sunshine Companies to its clients.

Presidion also cannot be considered a responsible person for the employment taxes of the Sunshine Companies because Presidion did ^{Not} have the status, duty or authority to collect, account for, or remit the employment taxes of the Sunshine Companies. See Heimark v. United States, 89-2 U.S.T.C. at 89,437. In this regard, Presidion was not an officer or director of the Sunshine Companies, ~~Presidion did not manage the daily affairs of the Companies, Presidion was not responsible for making financial decisions for the Sunshine Companies, Presidion did not control the day-to-day banking activities and disbursement records of the Companies, and Presidion~~ ^{and} was not responsible for the Companies' payroll and employment tax functions. See, e.g., Barnett v. Internal Revenue Service, 988 F.2d at 1455. As stated previously, the Sunshine Companies were all

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independently formed, licensed, and operated and they were exclusively responsible for the payroll and employment tax duties that they undertook on behalf of their clients.

The discussion heretofore addresses mainly the issue of whether Presidion is a responsible person for the Sunshine Companies= employment taxes. The evidence demonstrates, with overwhelming proof, that it was not. The second element of the test for liability under Section 6672, however, requires that the person=s failure to pay the employment taxes be willful. Willfulness is defined as a Adeliberate choice, voluntarily, consciously, and intentionally made to pay other creditors instead of paying the Government.@ White v. United States, 372 F.2d at 521. To sustain a finding of willfulness, the alleged responsible person must be personally at fault. Slodov v. United States, 436 U.S. at 254.

It has been shown in the foregoing analysis that Presidion was not a responsible person within the meaning of Section 6672. Therefore, there is no basis for a finding of willfulness under the statute. Simply put, Presidion did not control the tax and financial affairs of the Sunshine Companies, and it was not responsible for their payroll and employment tax functions. Hence, Presidion could not have

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acted. A willfully@ with respect to the nonpayment of the
Sunshine Companies= employment taxes.

C. CONCLUSION

In summary, it is our opinion that Presidion is
not liable as a responsible person under Section 6672 of the
Code for the employment taxes of the Sunshine Companies.

Please do not hesitate to contact me if you have
any questions regarding this matter.

212-808-8100

KOSTELANETZ & FINK, LLP

By:

Kevin M. Flynn