

A REVIEW OF THE FEDERAL AND MASSACHUSETTS STANDARD FOR
"RESPONSIBLE PERSONS"
IN "TRUST FUND" TAX CASES
FOLLOWING *VINICK II*, *COVENEY AND FOX*:
A REEXAMINATION OF "DUTY "

by

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INTRODUCTION

As the macro-economy dampens, tax professionals can anticipate that "responsible person" or "trust fund" tax cases will increase as entities burdened by financial straits either neglect or choose not to pay their employees' withheld income or F.I.C.A taxes or customers "trust fund" sales or meals taxes to the one creditor who should always be paid first, the sovereign.

Trust fund tax cases are those arising under 26 U.S.C. sections 6671 and 6672 (The Internal Revenue Code of 1986), federal employee income tax and FICA payroll withholding and Massachusetts General Laws ch. 64H section 16 sales tax and meals tax and ch. 62B section 5, employee income tax withholding.

The foregoing statutes reflect a longstanding policy choice to impose personal liability (thereby "piercing the corporate veil") to ensure that the federal and state sovereigns' tax coffers are replenished by individuals who have neglected to see that withheld employee income taxes, or F.I.C.A. from wages, or meals and sales taxes collected from purchasers have been paid over to the government. The federal statute, which was formerly known as the 100% penalty, is now known as the "Trust Fund Recovery Penalty Provision" (TFRP).

Recent Court of Appeals for the First Circuit cases involving the federal statute (*Vinick*) and the Massachusetts statute (*Coveney*) that will be discussed here have suggested that the courts are willing to more carefully weigh exculpatory claims of alleged responsible persons. As will be seen, the cases are fact intensive and do not have absolute predictive value. The Massachusetts statute contains but one of the two criteria utilized in the federal analysis, and is thus less predictive than it otherwise would be. The Massachusetts Appeals Court, in the very recently decided *Fox v. Commissioner of Revenue*, was reluctant to adopt the analysis of the Massachusetts statute by the Federal Bankruptcy Court in *Coveney*.¹ While this paper does not purport to be an exhaustive treatment, it does review a number of cases the courts utilized in arriving at the *Vinick*, *Coveney* and *Fox* decisions.

I. *The Federal Standard*

The Internal Revenue Code provides in relevant part:

Sec. 6671 Rules for application of assessable penalties.

(a) Penalty assessed as tax.

The penalties and liabilities provided by this subchapter shall be paid upon notice and demand by the Secretary, and shall be assessed and collected in the same manner as taxes. Except as otherwise provided, any reference in this title to "tax" imposed by this title shall be deemed also to refer to the penalties and liabilities provided by this subchapter.

(b) Person defined.

The term "person" as used in this subchapter, includes an officer or employee of a corporation, or a member or employee of a partnership, who as such officer, employee, or member *is under a DUTY to perform the act* in respect of which the violation occurs.²

Sec.6672 Failure to collect and pay over tax, or attempt to evade or defeat tax.

(a) General Rule

Any person required to collect, truthfully account for, or pay over any tax imposed by this title who WILLFULLY fails to collect such tax, or truthfully account for or pay over such tax, or WILLFULLY attempts in any manner to evade or defeat any such tax or the payment thereof, shall, in addition to other penalties provided by the law, be liable to a penalty equal to the total amount of the tax evaded, or not collected, or not accounted for and paid over. No penalty shall be imposed under section 6653... for any offense to which this section is applicable.³

1. *Discussion*

Notwithstanding the mandates of the foregoing federal tax statute, which focuses upon “duty” and “willfulness” the federal courts have crafted a two-prong test consisting of

“responsible person” and “willfulness”.

Former United States Bankruptcy Judge Queenan originally recognized in analyzing the effect of federal cases and statutes upon a parallel, less analyzed Massachusetts’s statute (c. 64H sec. 16) that a good starting point for an analysis of “duty” was the dictionary. Judge Queenan noted that Black’s Law Dictionary defines the “duty of one holding an office as follows: ‘Those obligations of performance, care, or observance which rests upon a person in an official or fiduciary capacity; as the duty of an executor, trustee, manager, etc.’”⁴ Relating “duty” to obligation comports with common usage, according to Judge Queenan. Webster’s Dictionary says, “duty” includes “obligatory tasks, conduct, service or functions enjoined by order or usage according to rank, occupation, or profession.”⁵ The inquiry should therefore focus on whether, in fulfilling his *obligations* owed to the corporation, the (taxpayer) was required to pay these taxes.⁶

The federal cases have tended to too easily classify an individual a “responsible person,” a judge-made term based primarily upon “status” rather than “duty” as required by 28 U.S.C. 6671 (b). The federal cases rely upon the counterbalancing effect of the second “willfulness” prong of 28U.S.C. 6672(a) to relieve an unwitting individual of the 100% federal penalty. The federal cases have determined “responsible person” to be “simply” a threshold question.⁷ The federal courts developed a multi-factor test for responsible person which “looks to the presence of one or more of the following seven non-exclusive circumstances,” i.e., whether or not the alleged “responsible person”:

1. Is an officer or a member of the board of directors;
2. Owns shares or an entrepreneurial stake in the company;
3. Actively manages the day-to-day affairs of the company;
4. Possesses the authority to hire and fire employees;
5. Decides which, when and in what order outstanding debts or taxes are paid;
6. Exercises control over daily bank accounts and disbursement records; and
7. Has check signing authority.⁸

The Court of Appeals for the First Circuit recently revisited the multi-factor approach it had originally endorsed in *Caterino v. United States*⁹ in *Vinick v. United States (Vinick II)*.¹⁰ The court in *Vinick II* focused upon the last three factors as the most salient of the seven factors, and carved out a test which is closer to that contemplated by the section 6671(b) “duty” language of the Internal Revenue Code. The First Circuit held as a *matter of law* that because there was no finding that Vinick possessed actual, exercised authority over the company’s financial matters, including the duty and power to determine which creditors to pay, he could not be found a responsible person.¹¹

2. Vinick I and Vinick II

A. Vinick I:

In *Vinick I*, the Court of Appeals for the First Circuit upheld District Court Judge Wolf's determination that Arnold Vinick, a CPA, had "willfully" failed to pay over employee withholding taxes under 26 U.S.C. sec 6672 (a). It reversed Judge Wolf's summary judgment determination that Vinick was a responsible person and remanded for trial on the merits of that sec 6671 (a) issue.

Facts:

In 1981, Vinick had acquired one third of the stock in Jefferson Bronze, a foundry, in a transaction where the other two thirds were acquired by Attorney Richard Letterman, who then obtained one third, and Letterman's brother-in-law, Peter Mayer who received the final one third. After two years of unsuccessful operation under Mayer's stewardship, Letterman and Vinick bought out Mayer (each now owned 50%) and installed Ronald Oulette, an employee, to run the business. Oulette managed the business from 1983 through 1987, when Letterman thereafter assumed overseeing the daily operations of the foundry. Withholding taxes went unpaid for the last 3 quarters of 1989 and the first 2 quarters of 1990. Vinick and Letterman were each assessed \$49,129.¹²

Analysis:

The *Vinick I* court upheld the "willfulness" determination against Vinick relying upon *Thomsen v U.S.*¹³ which provides that a responsible person who maintains a "reckless disregard" of knowledge that the person in control of finances in the past had proven unreliable will be deemed to have satisfied the willfulness prong.¹⁴ Vinick had prepared the forms 941 for the tax quarters in question and hence knew the deposits had not been timely made, but relied upon Mr. and Mrs. Letterman's representations that they would pay.

The *Vinick I* court recognized that Vinick's claim he was not a "responsible person" but merely a passive investor deserved a full trial. The mere presence in the summary judgment record of certain "badges" e.g. 50% ownership, treasurer's position, unutilized authority to sign checks (present at the bank's insistence) were insufficient to hold Vinick liable as a matter of law to the first "responsible person" prong of the two prong federal test. As noted *Vinick I* upheld the lower court determination that the second "willfulness" prong had been met.

B. Vinick II Analysis

The Court of Appeals for the First Circuit reviewed the seven *Vinick I* factors sequentially. Titular authority (e.g., treasurer) and share ownership indicate the (alleged responsible person's) taxpayer's status and are not controlling,¹⁵ where the requisite exercised authority or duty is lacking or a taxpayer assumes a title to protect his investment. Involvement in day-to-day affairs, and ability to hire and fire might, in an appropriate case, add support to a responsible person determination, but are ordinarily not at the heart of the inquiry.¹⁶

The fifth factor, whether or not the taxpayer had decision making authority is critical. Did Vinick have sufficient control of the enterprise's finances? The goal of Section 6672 is to fix liability on those persons who could have and should have remitted taxes to the IRS.¹⁷ Factors six and seven, whether the taxpayer exercised control over the daily bank accounts and whether the taxpayer had check signing authority, merely flesh out factor five, i.e., whether the individual has significant control of the enterprise's finances.¹⁸ Critical to Vinick's success was the First Circuit's emphasis on whether or not Vinick had exercised, during the relevant tax quarters, the power the district court found that he possessed.

3. Other Federal Cases

Two heavily analyzed TFRP cases in the Second Circuit Court of Appeals are *United States v. Landau*¹⁹ and *United States v. Rem.*²⁰ In the first case, Unger, who was the CFO for a marketing and advertising agency in which Landau was sole shareholder and CEO, brought a refund action in the district court and a third party complaint against Landau. The jury found Unger responsible, but not Landau who offered evidence of cocaine abuse and lack of attention during the periods relevant. The district court judge granted judgments NOV absolving Unger and finding Landau responsible, and both the government and Landau appealed. The Second Circuit upheld CEO sole shareholder Landau's status as a responsible person who had willfully failed to pay over withheld taxes. The Court of Appeals for the Second Circuit determined Unger was not entitled to a judgment NOV, but remanded to the trial court for its consideration of a motion for new trial. In a like case, *United States v. Rem.*²¹ a summary judgment for the government upon the issues of "responsible person" and "willfulness" was reversed.

In other relevant cases, such as *Fiataruolo v. United States*,²² members of the Angelo family who were officers, directors, and shareholders of a company which provided financing to a joint venturer, were held not responsible persons of the joint venture company. In *Thomsen v. United States*,²³ Thomsen was the company treasurer who acquiesced in an irresponsible officer overseeing the collection of accounts receivable for a company which was winding up. Where there was a prior track record of irresponsibility of the officer, the court properly determined the treasurer was both a responsible person and willful, i.e., delegating to someone known to be irresponsible is tantamount to willful failure.

In *Caterino v. United States*,²⁴ a purchaser of a foundering company was found liable for two 1974 tax quarters, but not for 1973 unpaid taxes, where the taxpayer purchaser had longstanding acquisition plans and advanced the foundering company money from time to time. Finally, in *O'Connor v. United States*,²⁵ a summary judgment for the government was reversed where a 50% participant in an Aamco transmission dealership was operating under an arrangement whereby there was a separation of duties and authority within the company. O'Connor relied upon *Godfrey*²⁶ that not every investor with a title is a responsible person.

4. Planning Opportunities - Defensive Lawyering

While *Vinick II* provides encouragement to practitioners with its less stringent standards for responsible persons, numerous cases abound finding seemingly peripherally involved investors, CPAs, and attorneys to be responsible persons who have willfully failed to pay over trust fund taxes. The government can be expected to continue to argue the vitality of the older more draconian cases, and to attempt to distinguish the *Vinick II* analysis factually. A taxpayer's representative who seeks to win such issues at the IRS appeals level would be advised to come heavily armed with factual evidence that the alleged responsible person lacked the effective control or ability to determine whom to pay as in *Vinick II*.²⁷

II. The Massachusetts Standard:

Massachusetts General Laws, chapter 62B, section 5, imposes liability upon an "employer" who fails to withhold and pay Massachusetts income taxes withheld from its employees' wages. Section 5 of chapter 62B provides in part:

Every employer who fails to withhold or pay to the commissioner any sums required by this chapter to be withheld or paid shall be personally and individually liable therefor to the commonwealth. The term "employer," as used in this paragraph and in section eleven, includes an officer or employee of a corporation, or a member or employee of a partnership, who as such officer, employee or member is under a duty to withhold and pay over taxes in accordance with this section two shall be deemed to be held in trust for the commonwealth.²⁸

The Massachusetts meals and sales tax statute reads much the same:

Every person who fails to pay to the commissioner any sums required by this chapter shall be personally and individually liable therefore to the commonwealth. The term "person" as used in this section, includes an officer or employee of a corporation, or a member who is under a duty to pay over the taxes imposed by this chapter.²⁹

The Massachusetts Commissioner of Revenue has promulgated a regulation concerning who is "under a duty" to pay over withheld income taxes or collected meal taxes. It reads in part:

(2) *Definitions...*The following terms shall have the following meanings:

Duty to pay over taxes, an obligation to remit taxes that arise from a person's position, function, or responsibility undertaken on behalf of a corporation or partnership. Such obligation need not be a legally enforceable agreement between the corporation or partnership and the responsible person.³⁰

1. *Discussion*

As Judge Queenan noted in *Coveney*, it seems obvious from the statutes that holding corporate office is insufficient, of itself, to render an officer personally liable for unpaid corporate meals (sales) or withholding taxes. If it were sufficient, the statutes would simply say so. Instead, for personal liability to attach, the individual must "as such officer" be "under a duty to pay over the taxes..."³¹

The Massachusetts legislature has thus commanded that "every person who fails to pay to the commissioner any sums required by (the sales and meals tax laws) shall be personally and individually liable therefore to the Commonwealth."³² The term "person" referred to in the preceding sentence "includes an officer or employee of a corporation... who as such officer (or) employee... is under a duty to pay over the taxes imposed by" the sales tax laws. The commissioner has promulgated the foregoing regulation intending to assist in the determination of who is under such a duty to pay over the taxes. This duty is defined as "an obligation to remit taxes that arises from a person's position, function, or responsibility undertaken on behalf of a corporation or partnership."³³ With some circularity, the regulation thus defines a "responsible person" as "any person who is or was under a duty to pay over taxes imposed on a corporation or partnership by M.G. L. chs. 62B, 64G, 64H, and 64I."³⁴

As the Supreme Judicial Court, in first treating the issue recognized, "there is no Massachusetts case that identifies circumstances in which a person is a responsible person or lists factors that bear on whether there is an obligation to remit taxes arising from a person's circumstances."³⁵ However, there is a body of case law interpreting 26 U.S.C. §6672, a federal statute that similarly imposes personal liability for unpaid taxes. Given the general rule that Massachusetts' courts look to federal court construction of federal tax statutes when construing similar state tax statutes,³⁶ the federal courts applying Massachusetts law properly looked to analogous federal law for secondarily persuasive authority.

2. Comparison with the Federal Standard:

The federal standard for imposing liability on a person for failure to pay a corporation's taxes requires that the person be (1) a "responsible person" under a duty to pay the taxes and (2) that the person's failure to pay over the taxes was willful.³⁷ Section 16 is not a mirror image of the federal statute because it does not use the word "willful."

3. The Coveney Case- The Bankruptcy Court Finding:

Robert Coveney was assessed for unpaid meals and withholding taxes, which the Massachusetts Commission of Revenue (Mitchell Adams) claimed were due from Covynn, Inc. for the periods from Jan. 1, 1988 through Aug. 31, 1989 in the amount of \$251,527.03. Coveney and his wife had with A. Lawrence Glynn and his wife organized Covynn, Inc. in May 1983 and bought a restaurant in Marlboro. Each was a 25% shareholder and director. Thereafter, in 1986, Covynn bought a second Marlboro restaurant, which Coveney then managed, and the first restaurant was then leased by and operated by Glynn's brothers.³⁸

Glynn, the treasurer, was a practicing CPA and attorney and attended to paying the payroll service from an account in the name of the related realty trust. Coveney purchased food and supplies and attended to paying other trade vendors, with checks from the corporate account signed by Coveney. In the spring of 1998 and again in March 1989 Glynn informed Coveney of unpaid trust fund taxes. In 1988, the shortfall was paid by Glynn's mother's loan of \$200,000.00 secured by a second mortgage on the restaurant. Thereafter, another \$210,000.00 was obtained from Glynn's mother in return for a mortgage on Coveney's home to clear up the March 1989 shortfall.³⁹

Based upon a statement of agreed facts, supplemented by an affidavit of the Chapter 13 debtor Coveney, the bankruptcy court found that by virtue of the parties' oral agreement, Coveney and Glynn had divided labor between the officers as above described and, hence Coveney was not under a "duty to pay over" under either the Massachusetts meals (sales) tax statute G.L.c. 64H, section 16 or income tax withholding statute G.L.ch. 62B §5. The bankruptcy judge when deciding the case in November 1996 while analyzing the federal "100% penalty" cases did not look to the same for guidance.⁴⁰ The *Brown* case had not been decided by the Massachusetts Supreme Judicial Court when the Bankruptcy Court issued its decision.⁴¹

4. *The Brown Case:*

In January 1997, the Massachusetts Supreme Judicial Court upheld a determination of the Massachusetts Appellate Tax Board ("ATB") that Richard J. Brown, a C.P.A., treasurer and director, 23% shareholder, and authorized check signer of Hillco Supply, Inc., was not a person under a duty to pay over sales taxes for the first quarter of 1989. Critical to the ATB's findings were that: Brown had been on the premises only once during the quarter, and that although authorized to sign checks during the quarter, he had not done so. Neither was he responsible for preparing and filing the sales tax returns (although his accounting firm performed audits and prepared the income tax returns). Brown did not participate in the day-to-day operations. Brown's role was limited to raising capital and long range financial planning.⁴²

The *Brown* court noted and endorsed the ATB's consideration of Federal 100% penalty cases as guidance, although the provisions were merely compatible and pointedly the Massachusetts statute does not contain the willful requirement of the Federal Statute 6672 (a).⁴³

5. *Coveney- The District Court Findings:*

The Federal District Court for the District of Massachusetts had the benefit of *Brown* and *Vinick I* when it reviewed the bankruptcy court's decision in March 1998.⁴⁴ Judge O'Toole found controlling an absence of evidence that Coveney had a "precise responsibility" to pay the withheld taxes.⁴⁵ The court relied on *O'Connor v. U.S.*⁴⁶ to the effect that its "focus must instead be on substance rather than form." In other words, "that while it may be true that Coveney had the "authority" in the legal sense to write checks from the corporate account, as a matter of his

function in the corporation, he did not.⁴⁷

6. *Coveney- The First Circuit Affirms:*

The Court of Appeals for the First Circuit's review of *Coveney* reviewed the bankruptcy court's rulings *de novo*, deferring to its factual findings unless clearly erroneous under 28 U.S.C. § 158 (d)⁴⁸ The First Circuit considers the district judge's reasoning where it is persuasive.⁴⁹

The First Circuit determined that the Massachusetts appellate courts would merely look to the federal cases for secondary persuasive authority. It found the Supreme Judicial Court's determination in *Brown* was controlling, i.e., that *Brown* was not under a duty because "it was not his job to pay over the taxes, he did not have supervisory authority for payment of the taxes, and that he had no decision making authority over the disbursement of the funds".⁵⁰ The court endorsed the normal separation of duties that occur within an organization as a legitimate basis for absolving *Coveney* from the Commonwealth's assessment, in accordance with well reasoned federal cases.⁵¹

7. *Fox v. Commissioner of Revenue*⁵²

The *Fox* case involved a former accounting professor, C.P.A., who was also a one-third shareholder and treasurer of two affiliated (father-son) printing companies. These companies were experiencing financial difficulties and their lender, Old Stone Bank (OSB) was concerned with *Fox*'s financial stewardship. The bank subsequently caused *Fox* to be indicted for bank fraud based upon a pre-billing invoicing arrangement.⁵³

For the five quarters at issue (calendar year 1990 and 1st Quarter 1991), a series of three outside consultants were working at the company as well as a full-time controller/chief financial officer who had been hired at the bank's request. The bank accounts were regularly overdrawn and the bank decided what checks to fund. The controller, Joseph Schiappa, C.P.A., never prepared sales tax returns for the 5 quarters in question, although such was his function. When Schiappa's successor discovered the failure to file and the unpaid taxes, the returns were filed and the company requested that the bank fund the payment of more than \$350,000.00 in unpaid taxes. The bank declined to provide for the taxes, subsequently foreclosed on its collateral, ending the corporation's business and the bank itself was closed shortly thereafter by the FDIC.⁵⁴

The Massachusetts Appeals Court determined that in the last two of the five quarters at issue, the record of the Appellate Tax Court was unequivocal that *Fox* had not retained significant control over the company's financial affairs and absolved *Fox* of responsibility for those quarters.

As to the other three quarters, the board remanded to the Appellate Tax Board for a new trial so that credibility issues between *Fox*'s testimony and that of C.P.A. Schiappa could be resolved. At the time of the Appeals Court hearing in 2001 the taxes with interest exceeded one million

dollars. The original hearing officer had not participated in the ATB's decision and the Appeals Court recognized that as matter of administrative law, credibility issues can not be determined solely on the basis of a "cold record".⁵⁵

Although Fox argued that the board had applied an incorrect legal standard and should follow the analysis of the federal courts in the *Coveney* case, the Massachusetts Appeals Court declined to adopt that analysis. Instead, the court relied upon federal cases interpreting the responsible person prong of the two prong federal standard, and ignored the need for Massachusetts to take into account the counterbalancing effect of the willfulness prong in the federal cases. It is possible that the Appeals Court wanted the ATB to interpret the statute and its regulation in the first instance in light of *Coveney*, *Brown* and *Vinick II*, which hadn't been decided when the ATB decided *Fox* in 1997. Massachusetts courts and the Appellate Tax Board, in analyzing duty, should be mindful of Judge Queenan's dictionary-based analysis of duty, instead of adopting the loose federal "responsible person" standard.

III. Aftermath and Conclusion

In the latest application of *Vinick II*, Judge Queenan determined that a Chapter 13 debtor, Grace Aboody, who was involved as a 12.5 % shareholder in a restaurant with her brother, Joseph, was not a responsible person. This was so although Grace was aware of nonpayment of withheld federal taxes (and hence was willful), she was not a responsible person where her brother had the final say concerning payment of taxes.⁵⁶ The Massachusetts Appeals Court and Supreme Judicial Court have shown a reluctance in *Brown* and *Fox* to guide the Massachusetts ATB by applying the *Coveney* analysis and *Vinick II* to the "duty" language of the Massachusetts statute.

The First Circuit's approach in *Vinick II* may reflect the recent legislative trend toward leniency with taxpayers and the more user-friendly tax system administration. Absent clearer legislative direction, it is likely that the case law will evolve to mirror the prevailing economic and political winds.

¹ The author was counsel on appeal for Charles J. Fox in *Fox v Commissioner of Revenue*, available at <http://masslaw.com>, argued before the Massachusetts Appeals Court on Feb. 1, 2001 and decided in a full opinion

April 12, 2001. Counsel set forth the timeline for the Appeals Court of relevant authority which surround and largely postdate the decision and 1997 report of the Massachusetts Appellate Tax Board (ATB) in the *Fox* case. The ATB heard the *Fox* appeals in August 1995, decided it October 29, 1997 and issued a report June 30, 1998. *Fox v. Commissioner*, No. 194544, slip. op. 688, 1998 WL 391429 (Mass. App. Tax Bd. June 30, 1998). Here follows the timeline of the relevant authority:

In re *Coveney*, 202 B.R. 801 (Bankr. D. Mass. 1996);
Commissioner of Revenue v. *Brown*, 424 Mass. 42 (1997);
Vinick v. Commissioner of Internal Revenue, 110 F.3d 168 (1st Cir. 1997)[hereinafter *Vinick I*];
In re *Coveney*, 217 B.R. 362 (D. Mass. 1998);
Adams v. Coveney, 162 F.3d 23 (1st Cir. 1998);
Vinick v. United States, 205 F.3d 1, (1st Cir. 2000)[hereinafter *Vinick II*];
In re *Aboody*, 250 B.R. 1 (Bankr. D. Mass. 2000).

² 26 U.S.C. § 6671 (1994) (emphasis added).

³ 26 U.S.C. § 6672 (a)(1994) (emphasis added).

⁴ BLACK'S LAW DICTIONARY 453 (5th ed. 1979).

⁵ See WEBSTER'S THIRD INTERNATIONAL DICTIONARY 705, cited in *In Re Coveney*, 202 B.R. 801 (Bankr. D. Mass. 1996).

⁶ In re *Coveney*, 202 B.R. 801, 804 (Bankr. D. Mass. 1996).

⁷ *Barnett v. I.R.S.*, 968 F.2d 1449, 1454 (5th Cir. 1993); *United States v. Rem*, 38 F.3d 634, 642 (2nd Cir. 1998).

⁸ *Fiatarulo v. U.S.*, 8 F.3d 930, 939 (2nd Cir. 1993); see *Vinick v. Commissioner of Internal Revenue*, 110 F.3d 168, 172 (1st Cir. 1997) [*Vinick I*].

⁹ *Caterino v. U.S.*, 794 F.2d 1 (1st Cir. 1988).

¹⁰ *Vinick v. U.S.*, 205 F.3d 1 (1st Cir. 2000) [*Vinick II*]. The First Circuit had also utilized the seven factors in *Vinick I*, 110 F.3d 168 (1st Cir. 1997).

¹¹ *Vinick II*, 205 F.3d, at 15.

¹² *Vinick I*, 110 F.3d 168, 170.

¹³ *Thomsen v. U.S.*, 887 F.2d 12 (1st Cir. 1998).

¹⁴ *Id.* at 18, 19.

¹⁵ *Vinick II*, 205 F.3d at 8.

¹⁶ *Id.* at 8-9.

¹⁷ See *id.*

¹⁸ *Id.* at 10.

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- ¹⁹ 155 F.3d (2nd Cir. 1998).
- ²⁰ 38 F.3d 634 (2nd Cir. 1994).
- ²¹ *Id.* at 14.
- ²² 8 F.3d 930 (2nd Cir. 1993).
- ²³ 887 F.2d 12 (1st Cir. 1989).
- ²⁴ 794 F.2d 1 (1st Cir. 1986).
- ²⁵ 956 F.2d 48 (4th Cir. 1992).
- ²⁶ *Godfrey v. U.S.* 748 F. 2d 1568, 1576 (D.C. Cir. 1984)
- ²⁷ *See Charles, Winning the TFRP Case in IRS Appeal*, PRAC. TAX LAW. (Winter 2000).
- ²⁸ MASS. GEN. LAWS ch. 62B, § 5 (1998).
- ²⁹ MASS. GEN. LAWS ch. 64H § 16 (1998).
- ³⁰ MASS. REGS. CODE tit. 830, §§ 62C, 31A (2) (1989).
- ³¹ *In Re Coveney*, 202 B.R. 801, 804 (Bankr. D. Mass. 1996).
- ³² MASS. GEN. LAWS ch. 64H, § 16 (1998).
- ³³ MASS. REGS. CODE, tit.830, §§ 62C. 31A.1(1)(1993).
- ³⁴ *Id.*
- ³⁵ *Commissioner of Revenue v. Brown*, 424 Mass. 42, 44 (1997).
- ³⁶ *See In Re Coveney*, 217 B.R. 362 (D. Mass. 1998)(upon further appeal, *Adams v. Coveney*, 162 F.3d 23 (1st Cir. 1998).
- ³⁷ *See Brown*, 424 Mass.42, at 44 (and federal cases cited therein).
- ³⁸ *In re Coveney*, 202 B.R. 801, 806 (Bankr. D. Mass. 1996).
- ³⁹ *Id.*
- ⁴⁰ *In re Coveney* 202 B.R. 801, 805-807 (Bankr. D. Mass 1996).
- ⁴¹ *Id.*
- ⁴² *Commissioner of Revenue v. Brown*, 424 Mass. 42, 43 (1997).
- ⁴³ *Id.* at 44 (citations omitted).

⁴⁴ In re Coveney, 217 B.R. 362 (D. Mass 1998).

⁴⁵ *Id.* at 365.

⁴⁶ 956 F.2d 48, 51 (4th Cir. 1992).

⁴⁷ *Id.*

⁴⁸ Adams v. Coveney, 162 F.3d 23, 25 (1st Cir. 1998).

⁴⁹ *Id.*, citing Palmacci v. Umpierrez, 121 F.3d 781, 785 (1st Cir. 1997).

⁵⁰ Adams v. Coveney, 162 F.3d 23, 25.

⁵¹ *Id.* at 27, citing O'Connor v. United States, 956 F.2d 48, 51 (4th Cir. 1992) Godrey v. U.S. 748 F.2d at 576.

⁵² Fox v. Commissioner of Revenue, 51 Mass. App. Ct. 336 (Apr. 12, 2001), *available at* <http://www.masslaw.com>.

⁵³ *Id.*

⁵⁴ *Id.*

⁵⁵ *Id.*

⁵⁶ In re Aboody, 250 B.R. 1 (Bankr. D. Mass. 2000).