

STATE OF ALABAMA
DEPARTMENT OF REVENUE,

§

STATE OF ALABAMA
DEPARTMENT OF REVENUE
ADMINISTRATIVE LAW DIVISION

§

v.

§

DOCKET NO. P. 91-232

RAYMOND C., JR. & KATIE DALEE §
as officers of Dura Built Homes, Inc.
4441 Remington Road §
Montgomery, AL 36116,

Taxpayers. §

FINAL ORDER

The Department entered 100% penalty assessments against Raymond C. Dalee, Jr. and Katie Dalee (Taxpayers), as officers of Dura. Built Homes, Inc. The assessments are for unpaid corporate sales and withholding tax for 1988. The Taxpayers appealed to the Administrative Law Division and the case was submitted on a joint stipulation of facts and briefs. Assistant counsel Claude Patton represented the Department. Von G. Memory represented the Taxpayers.

FINDINGS OF FACT

The Taxpayers as officers of Dura Built Homes, 'Inc.. were responsible for but failed to pay various sales and withholding taxes owed by the corporation for 1988.

The Taxpayers admit that they are personally liable for the corporation's delinquent taxes under the 100% penalty statutes, Code of Ala. 1975, §§40-29-72 and 40-29-73. However, the Taxpayers argue that interest cannot be added to the tax.

CONCLUSIONS OF LAW

This issue has never been addressed In Alabama - can interest be added to the amount of tax owed by a responsible corporate officer under Alabama's 100% penalty statutes, §§40-29-72 and 40-29-73?

Sections 40-29-72 and 40-29-73 were enacted in 1983 as part of the Tax Enforcement and Compliance Act (TECA), and are generally modeled after the federal 100% penalty statutes, 26 U.S.C. §§6671 and 6672.

The federal 100% penalty provisions do not specify that interest shall be added to the tax due. Nonetheless., the IRS is authorized to assess interest against a responsible corporate officer based on 26 U.S.C. §6601. That section provides that interest shall run on all tax liabilities not paid by the due date.

See also, Holland v. U.S., 873 F.2d 1321 (1989), and Bradley v. U.S., 936 F.2d 707 (1991).

Likewise, while §§40-29-72 and 40-29-73 do not specifically require interest, §40-1-44 provides in part that "the annual rate of interest to be added to all taxes administered by the department of revenue which are not paid by the prescribed due dates shall be at the same rate established by the secretary of the treasury under the authority of 26 U.S.C.A. §6621." In my opinion the first sentence of §40-1-44 quoted above allows the Department to charge interest on all delinquent taxes, including the 100% penalty levied at §40-29-73.

The Taxpayers may argue that §40-1-44 only fixes the rate of interest and does not authorize the Department of charge interest on all delinquencies, citing Sizemore v. Fisherman Marine Products, Inc., 536 So.2d 73 (1988). However, the Fisherman Marine case involved the second sentence of §40-1-44 relating to the payment of interest by the Department on refunds. While the Court of Civil Appeals held that the second sentence fixed the rate of interest only, the first sentence is more affirmative and shows the Legislature's intent that interest should run on all delinquent taxes. The first sentence requires that interest is "to be added" to all delinquent taxes, while the second sentence only provides that interest "shall be computed" at the prescribed federal rate.

If the Department cannot assess interest on a 100% penalty assessment, then a corporate officer could refuse to pay the corporation's taxes and thus limit his personal liability to the base tax owed by the corporation. Certainly that was not intended by the Legislature. A similar concern was expressed in Holland, supra, at page 1322:

This (payment of interest) is the only logical interpretation of the applicable statute. Were it otherwise a responsible party could evade corporate taxes with the knowledge that his potential liability could never exceed the initial tax liability, and any lapse of time between assessment and collection would work to his advantage because interest could not accrue on the penalty. The tax code does not contemplate the interest-free use of government funds.

While the above is sufficient to support the assessment of

interest in the present case, I should also mention State v. Pollock, 38 So.2d 870 (1949). In Pollock, at page 876, the Supreme Court, citing Title 51, §196, Code 1940 (§40-5-9), held that the Legislature intended to charge interest on all delinquent taxes.

While §40-5-9 is found in the chapter concerning tax collectors, apparently the Supreme Court believed that it was sufficiently broad to require interest on all taxes, including income tax, the tax in issue in the Pollock case. Also, as pointed out in Pollock, §40-1-2 (§831, Title 51, Code 1940) and §40-2-22 (§140, Title 51, Code 1940) both contemplate payment of interest by a delinquent taxpayer.

The above considered, the Department is directed to make the assessments in issue final, with interest running to the date of final assessment. It should be noted that while all responsible officers are jointly and severally liable, the Department can collect only up to the amount owed by the corporation, plus interest. Gray v. U.S., 586 F. Supp. 1127 (1984); McCrary v. U.S., 910 F.2d 1289 (1990).

Entered on March 31, 1992.

BILL THOMPSON
Chief Administrative Law Judge