

STATE OF ALABAMA
DEPARTMENT OF REVENUE,

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STATE OF ALABAMA
DEPARTMENT OF REVENUE
ADMINISTRATIVE LAW DIVISION

§

v.

§

DOCKET NO. P. 91-252

EUGENE W. STALLINGS
Post Office Box 571
New Harmony, IN 47631-0571,

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Taxpayer.

§

FINAL ORDER

The Revenue Department assessed a 100% penalty against Eugene W. Stallings ("Taxpayer"), as a person responsible for paying the delinquent sales and withholding tax liabilities of Western Resources, Inc., Apple II Food and Vending Services, Inc., and Apple Food and Vending Services, Inc. The periods involved are quarters ending December, 1987 and March, June and September, 1988 (withholding tax) and the months of July, 1988 through November, 1988 (sales tax). The Taxpayer appealed to the Administrative Law Division and a hearing was conducted on April 18, 1994. The Taxpayer was notified of the hearing by certified mail, but failed to appear. Assistant counsel Wade Hope represented the Department.

The issue in this case is whether the Taxpayer is liable as a responsible corporate officer for the withholding and sales taxes in issue pursuant to Alabama's 100% penalty statutes, Code of Ala. 1975, §§40-29-72 and 40-29-73.

On or before October, 1987, the Taxpayer acquired both Canteen of Central Alabama, Inc. and Centrala Canteen Service, Inc. The names of both corporations were subsequently changed to Apple Food

and Vending Services, Inc. and Apple II Food and Vending Services, Inc., respectively. The Taxpayer, as president of both corporations, notified the Department of the name changes in January, 1988.

The corporations filed sales and withholding tax returns during the periods in issue, but failed to remit the tax due as reported. Some of the returns were signed by the Taxpayer.

The Department attempted to collect the delinquent taxes from the corporations by entering into a payment agreement with the Taxpayer, through his attorneys. However, the Taxpayer failed to comply with the payment agreement, and the Department subsequently received notice in November 1988 that both corporations had filed petitions in bankruptcy. The Department thereafter assessed the Taxpayer, individually, as a responsible officer of both corporations.

The Department introduced the checking account records of both corporations at the administrative hearing. Those records show that the corporations had sufficient deposits to pay the taxes in issue during the periods in question. The records also indicate that the corporations wrote numerous checks to various creditors during the periods in question. The Taxpayer had check writing authority and signed some of the checks to vendors.

Code of Ala. 1975, §§40-29-72 and 40-29-73 levy a 100% penalty against a responsible person that willfully fails to pay a

corporation's taxes. A "responsible person" under Alabama's 100% penalty statutes is someone that is directly responsible for paying the corporation's taxes, or someone with authority over the person that does actually pay the taxes. Smith v. U.S., 894 F.2d 1549.

A responsible person must know that delinquent taxes are owed and have the "effective power" to pay the taxes. Stallard v. U.S., 12 F.3rd 489.

The Taxpayer in this case was president of both corporations, had check writing authority, and wrote numerous checks on behalf of the corporations. The Taxpayer was clearly a person responsible for paying the corporations' trust fund taxes pursuant to Alabama's 100% penalty statutes.

A responsible person willfully fails to pay a corporation's trust fund taxes if he knows or should know that tax is due, has the ability to pay, but consciously fails to do so. Braden v. United States, 442 F.2d 342. Payment of other creditors in lieu of the government is evidence of willfulness. Roth v. United States, 567 F.Supp. 496; Schwinger v. United States, 652 F.Supp. 646.

The Taxpayer was obviously aware that both corporations owed delinquent taxes because he signed a number of the sales and withholding tax returns during the period in question. The Taxpayer, as president of both corporations, also had direct access to sufficient money to pay the taxes, but willfully failed to do so when he elected to pay other creditors in lieu of the Department.

The Taxpayer claims that he should not be held liable because

the Department failed to actively pursue collection of the taxes from the corporations. However, a responsible person's liability under the 100% penalty statutes is distinct from the corporation's liability, and the government is not required to first attempt to collect from the corporation before going against a responsible person individually. Teel v. United States, 529 F.2d 903; United States v. Huckabee Auto Company, 783 F.2d 1546. The Department in fact attempted to collect the delinquent liabilities from both corporations, to no avail. In any case, the Taxpayer cannot be relieved of individual liability because the Department could not or did not collect the delinquent taxes from the corporations.

The above considered, the assessment in issue is upheld and judgment is entered against the Taxpayer, Eugene W. Stallings, for 100% penalty in the amount of \$15,056.06, plus applicable interest.

This Final Order may be appealed to circuit court within 30 days pursuant to Code of Ala. 1975, §40-2A-9(g).

Entered on April 28, 1994.

BILL THOMPSON
Chief Administrative Law Judge