

STATE OF ALABAMA,  
DEPARTMENT OF REVENUE,

§

STATE OF ALABAMA  
DEPARTMENT OF REVENUE  
ADMINISTRATIVE LAW DIVISION

§

vs.

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DOCKET NO. P. 92-145

PETER M. BELLI, an officer  
of Tradewinds Hospitality Corp.  
324 Shadow Brook Lane  
Milford, MA 01757,

§

Taxpayer.

§

FINAL ORDER

The Revenue Department assessed a 100% penalty for withholding, sales and lodgings tax against Peter M. Belli (Taxpayer), as an officer of Tradewinds Hospitality Corp., Inc. The period involved is June, 1989. The Taxpayer appealed to the Administrative Law Division and a hearing was conducted on March 8, 1993. The Taxpayer was mailed notice of the hearing by certified mail, but refused the notice and failed to appear at the hearing. Assistant counsel Beth Acker represented the Department.

The issue in this case is whether the Taxpayer was a "responsible" corporate officer of Tradewinds Hospitality Corp., Inc. during June, 1989 and in that capacity "willfully" failed to pay the corporation's sales, withholding and lodgings taxes to the Department.

The Taxpayer was a corporate officer of Tradewinds Hospitality Corp. during the period in issue. The corporation operated a hotel in Mobile, Alabama. The Taxpayer signed the corporation's withholding, lodgings and sales tax applications as president, the

corporation's checking account authorization form as secretary/treasurer, and the corporation's ABC license as vice-president.

The Taxpayer lives in Massachusetts and was not initially involved in the day-to-day operation of the hotel. The hotel was in severe financial distress in early 1989, and when the general manager resigned in May 1989, the Taxpayer agreed to temporarily run the business.

The Taxpayer ran the hotel and paid numerous creditors of the hotel during June. The corporation's June checking account statement shows deposits of \$18,335.81 and checks written of \$23,261.82.

The bank that held the mortgage on the hotel foreclosed on June 30. However, the Taxpayer apparently refused to turn over the property to the bank at that time. As a result, the bank filed an action in Mobile County Circuit Court asking the Court to require the corporation, and the Taxpayer individually, to give up possession of the hotel. A temporary restraining order was issued and the Taxpayer gave up possession on July 6. There is no evidence indicating that the bank froze the corporation's bank account or seized the funds in the account either prior to or after July 6. A letter from bank vice-president Kerry O'Connor dated May 11, 1993 indicates that the bank never seized the corporation's bank accounts.

The Department entered final assessments against the corporation for withholding, sales, and lodgings tax for the quarter ending June 1989. Based thereon, the Department subsequently assessed the Taxpayer personally for the tax due for June as a responsible corporate officer under the 100% penalty statutes, Code of Ala. 1975, §§40-29-72 and 40-29-73.

Alabama's 100% penalty statutes are levied against any responsible corporate officer or other person that has the responsibility and authority to pay the corporation's trust fund taxes but willfully fails to do so. Schwinger v. United States, 652 F.Supp. 464. A "responsible person" is defined as "any person with significant control over the corporation's business affairs who participates in decisions concerning payment of creditors or disbursement of funds". Roth v. United States, 567 F.Supp. 496, at 499. A responsible person "willfully" fails to pay tax if he knows or should know that tax is due, has the authority and responsibility to pay the tax, but fails to do so. Braden v. United States, 442 F.2d 342. Payment of other creditors in lieu of the Department is evidence of willfulness. Roth, supra, at 499.

The Taxpayer in this case claims that he was a caretaker only pending foreclosure by the bank. However, the Taxpayer was a corporate officer and during the month in issue exercised authority and control over which creditors were paid by the corporation. The

Taxpayer was a responsible corporate officer during the month in issue.

The Taxpayer also argues that he was unable to pay the taxes in issue because the hotel was not paid for services rendered in June until after the bank foreclosed. That argument, even if true, is not valid because the corporation had sufficient funds on hand in June which could have been set aside to pay the taxes in issue.

Also, as discussed below, liability for trust fund taxes arises when the taxes are collected from the corporation's employees or customers, not later when the return is due or the taxes must be paid to the Department.

The Taxpayer also contends that the bank froze or seized the corporation's checking account when it foreclosed on June 30, before the taxes in issue became due. There is no evidence supporting that claim. The bank did foreclose on June 30, but the Taxpayer apparently refused to turn over possession of the property until forced to do so by court order on July 6. There is also no evidence indicating that the bank seized the corporation's bank account or accounts after July 6.

A responsible corporate officer's liability for payment of the corporation's withholding tax accrues when the withholding taxes are withheld from employee wages, not later when payment is due or the return must be filed. United States v. Deberadinis, 395 F.Supp. 944. Applying the same principle to sales and lodgings

tax, a responsible corporate officer becomes liable for those taxes when the taxes are collected from the customer. Consequently, the Taxpayer could not be held liable for sales and lodgings on transactions in June if payment was not received by the corporation until later. However, the assessment against the corporation and on which the 100% penalty assessment in issue is based was computed on signed returns showing taxes due and collected during June. Consequently, the withholding taxes became due when withheld from employee wages and the sales and lodgings taxes included in the assessment became due when collected from the hotel's customers, all in June, 1989.

The Taxpayer also had control and authority over the corporation's checking account at least until July 6. The taxes in issue all became due on July 1 and the Taxpayer had the ability and could have paid the taxes at that time. The Taxpayer as a responsible corporate officer thus willfully failed to pay the corporation's trust fund taxes and is liable under the 100% penalty statutes.

The assessment in issue is upheld and judgment is entered against the Taxpayer for \$7,310.15, with additional interest computed from December 27, 1991.

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

Entered September 2, 1993.

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BILL THOMPSON  
Chief Administrative Law Judge