

STATE OF ALABAMA, §
DEPARTMENT OF REVENUE, §

STATE OF ALABAMA
DEPARTMENT OF REVENUE
ADMINISTRATIVE LAW DIVISION

vs.

MIKE MOODY, An Officer of §
MUSIC MATTERS, INC. §
2319 Edinburgh Drive §
Montgomery, AL 36117, §

DOCKET NO. P92-158

Taxpayer. §

FINAL ORDER

The Revenue Department entered a 100% penalty assessment against Mike Moody, an officer of Music Matters, Inc. (Taxpayer), for State sales tax for the period December 1988 through July 1989, August 1989, September 1989, and June through September 1990; county sales tax for the period December 1988 through July 1989, August 1989, and September 1989; and State withholding tax for the quarters ending December 1987 through December 1989. The Taxpayer appealed to the Administrative Law Division and a hearing was conducted on October 6, 1992. The Taxpayer appeared at the hearing. Assistant counsel Beth Acker represented the Department.

FINDINGS OF FACT

The Taxpayer was president of Music Matters, Inc. and signed all of the corporation's sales and withholding tax returns during the periods in question. The Taxpayer also signed checks for the corporation and otherwise controlled the corporation's funds. The corporation struggled financially during the period in question and

the Taxpayer was required to chose which creditors would be paid with the limited funds available to the corporation.

The Department entered final sales tax and withholding tax assessments against the corporation based on signed returns. The 100% penalty assessed against the Taxpayer individually is based on those final assessments. The Department's position is that the Taxpayer was a responsible corporate officer and willfully failed to pay the corporation's sales and withholding tax liability during the subject periods.

The Taxpayer does not dispute that he was president of the corporation or that the corporation failed to pay its full tax due.

The Taxpayer does argue that the assessment is excessive because some of the underlying sales tax included in the assessment is based on sales of exempt computer software. The Taxpayer had charged sales tax to his customers on computer software sales until he learned sometime in 1989 that software was exempt.

CONCLUSIONS OF LAW

Code of Ala. 1975, §§40-29-72 and 40-29-73 together impose a 100% penalty against any corporate officer that is responsible for payment of the corporation's withholding or sales taxes and willfully fails to do so. See, Schlinger v. United States, 652 F.Supp. 464.

A "responsible officer" is defined as "any person with significant control over the corporation's business affairs who

participates in decisions concerning payment of creditors or disbursal of funds." See Roth v. U. S., 567 F.Supp. 496, at p. 499. The Taxpayer in this case was clearly a responsible corporate officer because as president he was primarily responsible for operating the business and filed the corporation's sales and withholding tax returns during the subject period.

A responsible corporate officer "willfully" fails to pay tax if the officer knows that tax is due, has the power and responsibility to pay, and fails to do so. See, Braden v. United States, 442 F.2d 342. Payment of other debts in lieu of taxes is evidence of willfulness. See, Roth v. United State, supra.

The Taxpayer in this case willfully failed to pay the corporation's sales and withholding tax during the periods in issue because he controlled the finances of the corporation, had check writing authority, and elected to pay other creditors in lieu of the Department.

The Taxpayer argues that computer software was erroneously reported as taxable by the corporation and that the assessment against him should be reduced accordingly. However, the Taxpayer cannot prove how much software was reported as taxable. In any case, tax was collected from the customers on those computer software sales reported by the corporation. Code of Ala. 1975, §40-23-26(d) provides that any erroneously collected sales tax must be paid by the retailer to the State. Consequently, any tax

collected by the corporation on exempt software sales should be paid (by the Taxpayer) to the Department.

The above considered, the assessment of 100% penalty entered against the Taxpayer in the amount of \$3,740.74 is affirmed. This Final Order may be appealed to circuit court within 30 days pursuant to Code of Ala. 1975, §40-2A-9(g).

Entered on October 22, 1992.

BILL THOMPSON
CHIEF ADMINISTRATIVE LAW DIVISION