

STATE OF ALABAMA
DEPARTMENT OF REVENUE,

§

STATE OF ALABAMA
DEPARTMENT OF REVENUE
ADMINISTRATIVE LAW DIVISION

§

v.

§

DOCKET NO. P. 92-266

DEWEY LANKFORD, An Officer of §
Dee Fords, Inc.

Taxpayer. §

FINAL ORDER

The Revenue Department entered a 100% penalty assessment against Dewey Lankford (Taxpayer), an officer of Dee Fords, Inc., on October 9, 1991. The assessment is for State sales tax for the months of July, August, October, November and December, 1989 and January, 1990, county sales tax for October, November and December, 1989, and January, 1990 and State withholding tax for the quarter ending December, 1989. The Taxpayer appealed to the Administrative Law Division and a hearing was conducted on February 9, 1993. Merrill Vardaman appeared for the Taxpayer. Assistant counsel Dan Schmaeling represented the Department.

The issue is whether the Taxpayer, as a responsible corporate officer of Dee Fords, Inc., willfully failed to pay the sales and withholding tax liability of the corporation for the periods in issue. If so, the Taxpayer is personally liable for the tax under Alabama's 100% penalty statutes, Code of Ala. 1975, §§40-29-72 and 40-29-73.

Dee Fords, Inc. was incorporated as a lounge/bar in January, 1983. The Taxpayer was the sole incorporator and also president of the corporation. The Taxpayer personally applied for a sales tax

license for the business in March, 1983 and a withholding tax number in January, 1983.

The Taxpayer signed the corporation's 1989 Alabama franchise tax return and listed himself as registered agent, president and secretary of the corporation. The Taxpayer also signed checks for the corporation. The Department introduced numerous checks written by the Taxpayer on behalf of the corporation during the audit periods.

The Taxpayer claims that he left the business in June 1989, and consequently was not responsible for paying the corporation's sales and withholding taxes after that date. However, the business' liquor license remained in the Taxpayer's name throughout the period in issue (J. D. Carter applied for a new license on January 29, 1990), the Revenue Department District Supervisor made numerous trips to the business and observed the Taxpayer operating the business during the period, and, as stated, the Taxpayer wrote numerous checks on the corporation's checking accounts during the subject period.

A corporate officer is liable under §§40-29-72 and 40-29-73 if he is responsible for paying the corporation's taxes and willfully fails to do so. See generally, Schwinger v. United States, 652 F.Supp. 464.

A "responsible officer" has been 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." Roth v. U.S., 567 F.Supp. 496, at page 499.

The Taxpayer in this case was clearly a responsible corporate officer of Dee Fords, Inc. because he incorporated the business and was the corporation's president and secretary 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. Braden v. United States, 442 F.2d 342.

Payment of other debts in lieu of taxes is evidence of willfulness. Roth v. United States, supra.

The evidence shows that the Taxpayer wrote numerous checks on behalf of the corporation during the audit period, but failed to pay the taxes in issue. Based thereon, the Taxpayer had the ability to pay but willfully failed to pay the taxes in issue, and consequently is liable under the 100% penalty statutes.

The above considered, the assessment is upheld and judgment is entered against the Taxpayer in the amount of \$8,662.94, with additional interest computed from October 9, 1991.

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

Entered on June 11, 1993.

BILL THOMPSON
Chief Administrative Law Judge

