

STATE OF ALABAMA,
DEPARTMENT OF REVENUE,

vs.

SUSAN C. MCELLEN
311 Ridgeway Drive
Alexander City, AL 35010,

Taxpayer.

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STATE OF ALABAMA
DEPARTMENT OF REVENUE
ADMINISTRATIVE LAW DIVISION

DOCKET NO. P. 93-122

FINAL ORDER

The Revenue Department assessed a 100% penalty for withholding tax against Susan C. McEllen (Taxpayer), a person responsible for paying the trust fund taxes of M and J Productions, Inc., for the year 1990. The Taxpayer appealed to the Administrative Law Division and a hearing was conducted on July 6, 1993. The Taxpayer represented herself. Assistant counsel Beth Acker represented the Department.

The issue in dispute is whether the Taxpayer was responsible for and willfully failed to pay the withholding taxes of M and J Productions, Inc. during 1990 so as to be personally liable pursuant to Code of Ala. 1975, §§40-29-72 and 40-29-73.

M and J Productions, Inc. operated as the Blue Moon Dinner Theater in Birmingham and was incorporated in 1986. The Taxpayer was a full-time stockbroker in Birmingham during the period in issue and was never an officer, owner or employee of the corporation. However, one of the Taxpayer's largest clients was also the corporation's principle shareholder (owner) during the subject period.

The Taxpayer was initially not involved in the operation of the dinner theater. However, the employee that usually handled the dinner theater's business affairs left in early 1989, and the owner, who lived in Kentucky, asked the Taxpayer to help out. The Taxpayer testified that she helped as a friend of the owner and also because she wanted the dinner theater to stay in business. She typically went by the dinner theater two or three nights a week for a total of three or four hours per week.

The Taxpayer signed the corporation's sales tax returns for the months of December, 1989 through July, 1990. The returns were all signed on November 2, 1990 at the request of a Department examiner. She also occasionally wrote checks on the corporation's account, but only as instructed by the owner in Kentucky.

The Taxpayer signed a TECA notice as president of the corporation in July, 1989. She signed as president only because a Department examiner told her that was the only way she could accept the notice for the owner.

The dinner theater closed in June, 1990.

The Department contacted the Taxpayer in February, 1991 concerning the dinner theater's outstanding sales tax liability.

The Taxpayer subsequently signed a consent 100% penalty assessment making herself liable for the delinquent sales tax. The Taxpayer signed the sales tax assessment based on her understanding with the owner that the owner would actually pay the tax. Unfortunately, the owner has refused to pay and the sales tax liability is still

outstanding.

The Taxpayer argues that she is not liable for the unpaid withholding tax because she was not an employee or shareholder of the corporation, had no financial interest in the corporation, and did not control or determine who was or wasn't paid by the corporation. In other words, she only did what she was told by the owner and was not a responsible party under the 100% penalty statutes. I agree.

A "responsible person" subject to the 100% penalty statutes is "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, 499. That person may be an officer, employee, or any other person with control over the corporation's financial assets and with authority over who is and isn't paid.

The Taxpayer wrote checks for the corporation, but only as directed by the owner in Kentucky. That does not make her a responsible party. There is no evidence showing that the Taxpayer had the independent authority to decide who would be paid.

The Taxpayer also adequately explained why she signed the corporation's sales tax returns and the TECA notice as president of the corporation. Again, those actions do not make her a responsible party under the 100% penalty statutes.

The Taxpayer is not liable for the 100% penalty in this case. The assessment is dismissed.

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

Entered on August 26, 1993.

BILL THOMPSON
Chief Administrative Law Judge