

STATE OF ALABAMA,
DEPARTMENT OF REVENUE,

vs.

RICHARD BALL
4205 Oak Hill Road
Semmes, AL 36575,

Taxpayer.

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STATE OF ALABAMA
DEPARTMENT OF REVENUE
ADMINISTRATIVE LAW DIVISION

DOCKET NO. P. 93-190

FINAL ORDER

The Revenue Department entered a 100% penalty assessment against Richard Ball (Taxpayer), an officer of Welding Specialists, Inc., for withholding tax for the quarters ending June 30, 1989 and September 30, 1989. The Taxpayer appealed to the Administrative Law Division and a hearing was conducted in Mobile on June 25, 1993. The Taxpayer appeared at the hearing. Assistant counsel Duncan Crow represented the Department.

The issue in dispute is whether the Taxpayer was responsible for and willfully failed to pay the corporation's withholding tax during the period in issue so as to be personally liable under Code of Ala. 1975, §§40-29-72 and 40-29-73.

The Taxpayer co-founded Welding Specialists, Inc. in 1978 and was president during the period in issue. The Taxpayer wrote checks on behalf of the corporation and conceded at the administrative hearing that he was responsible for paying the corporation's debts during the subject period.

The Taxpayer signed the corporation's quarterly withholding tax returns for the quarters ending June 30, 1989 and September 30, 1989 on July 20, 1989 and October 30, 1989, respectively. The June liability was \$1,581.14 and the September liability was \$474.99. No tax was paid with either return.

The corporation wrote checks totaling \$17,389.00 during July 1989 and the account had a ending July balance of \$20,925.00. A total of \$25,803.00 was paid out in August and the ending balance for the month was \$2,021.00. The corporation issued \$2,133.00 in checks during September and the ending balance was minus \$8.00. The October bank statement shows one check for \$16.65 paid on October 4. The ending October balance was \$0.00.

The corporation filed a chapter 11 bankruptcy petition on August 24, 1989. The corporation continued to operate for a short period, but converted to chapter 7 on September 27, 1989 and ceased operating at that time or shortly thereafter.

Code of Ala. 1975, §§40-29-72 and 40-29-73 provide that a corporate officer is personally liable for the unpaid trust fund (sales and withholding) taxes of the corporation if (1) the officer was responsible for paying the taxes on behalf of the corporation, and (2) the officer had the ability to pay the taxes and willfully failed to do so. See generally, Schwinger v. United States, 652 F. Supp. 464; Roth v. United States, 567 F. Supp. 496.

The Taxpayer concedes that he was responsible for paying the taxes and other debts of the corporation during the quarters in question. Thus, the only issue is whether the Taxpayer also willfully failed to pay the tax.

A corporate officer is deemed to have willfully failed to pay the corporation's taxes if money was available but the officer chose to pay other creditors in lieu of the government. Braden v. United States, 442 F.2d 342; Roth v. United States, supra.

The tax for the quarter ending June 1989 was due on July 1. During July the corporation issued checks totaling \$17,389.00 and had a balance of \$20,925.00 at the end of the month. Money was clearly available to pay the tax but the Taxpayer chose to pay other creditors in lieu of the Department. Consequently, the Taxpayer willfully failed to pay the tax and is personally liable for the quarter ending June 1989.

The Taxpayer is also liable for the quarter ending September 1989. It is true that the corporation had filed for bankruptcy and had no money available to pay the tax on the due date of the quarterly return. However, withholding liability arises at the time the taxes are withheld, not on the due date of the return. Bolding v. U.S., 565 F.2d 663; Thibodeau v. U.S., 828 F.2d 1499.

The corporation withheld tax during the quarter in issue but paid other creditors in lieu of putting the money in trust for the Department. The Taxpayer was responsible for seeing that the taxes

were paid and consequently must be held personally liable for the unpaid tax.

The assessment in issue is upheld and judgment is entered against the Taxpayer for \$3,278.85, with additional interest running from February 5, 1993.

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

Entered on July 26, 1993.

BILL THOMPSON
Chief Administrative Law Judge