

STATE OF ALABAMA,
DEPARTMENT OF REVENUE,

vs.

STANLEY DAWSON POSEY
295 Whippoorwill Lane
Albertville, AL 35950,

Taxpayer,

DON TOWERY
Route 9, Box 384-D
Scottsboro, AL 35768,

Taxpayer.

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STATE OF ALABAMA
DEPARTMENT OF REVENUE
ADMINISTRATIVE LAW DIVISION

DOCKET NO. P93-271

DOCKET NO. P93-288

FINAL ORDER

The Revenue Department entered separate 100% penalty assessments against Dow Towery and Stanley Dawson Posey, as individuals responsible for the delinquent 1991 withholding tax liability of Marshall Homes, Inc. Towery and Posey (hereinafter "Taxpayers") both appealed to the Administrative Law Division. The appeals were consolidated and heard together on October 14, 1993.

The Taxpayers represented themselves at the hearing. Assistant counsel Beth Acker represented the Department.

The issue in this case is whether the Taxpayers as responsible corporate officers willfully failed to pay the withholding taxes of Marshall Homes, Inc. for 1991. If so, then the Taxpayers are individually liable for the delinquent taxes pursuant to Alabama's 100% penalty statutes, Code of Ala. 1975, §§40-29-72 and 40-29-73.

Marshall Homes, Inc. opened for business in 1988 and was in the mobile homes sales business. Posey was secretary-treasurer of the corporation and handled the financial aspects of the business. Towery was president of the corporation and primarily handled the sales and production end of the business.

The corporation filed an Alabama withholding tax return for the first quarter of 1991. However, the corporation remitted the tax due for March only because it was having financial problems.

The corporation failed to file any other quarterly returns or pay any withholding tax for the remainder of the year.

Posey testified that he told Towery about the delinquent withholding taxes in March or April, 1991, and thereafter kept Towery informed of the amount of the delinquency. Towery denies that he knew about the delinquent taxes until sometime in August, 1991.

The corporation continued having financial problems and was required to go on a cash only basis with its suppliers in mid-1991.

As illustrated by Exhibit 4 below, the corporation had sufficient money and could have paid its withholding liability during 1991.

However, the Taxpayers jointly decided to instead pay their suppliers as necessary to keep the business operating.

Department Exhibit 4 includes the corporation's bank statements beginning in May 1991. The deposits and withdrawals (checks) for May through December 1991 appear as follows:

	<u>DEPOSITS</u>	<u>WITHDRAWALS</u>
MAY	\$ 565,907.21	\$ 539,718.02
JUNE	\$ 502,308.85	\$ 526,043.46
JULY	\$1,091,184.43	\$1,042,416.01
AUGUST	\$ 657,486.14	\$ 706,259.52
SEPTEMBER	\$ 699,972.27	\$ 702,399.44
OCTOBER	\$ 376,671.32	\$ 320,065.70
NOVEMBER	\$ 43,573.27	\$ 88,098.60
DECEMBER	\$ 80,910.33	\$ 90,518.20

The corporation closed in early 1992, but it did file an annual reconciliation withholding tax return with the Department showing its total withholding liability for 1991. The assessments against Posey and Towery are based on the liability as shown on that annual return.

Alabama's 100% penalty statutes are found at Code of Ala. 1975, §§40-29-72 and 40-29-73. The purpose for the 100% penalty statutes is to allow the Department to collect a corporation's unpaid taxes from the individual or individuals responsible for paying the taxes

who in that capacity willfully failed 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 is one who has the duty to perform or the power to direct the act of collecting, accounting for, and paying over trust fund taxes to the government.

A responsible person "willfully" fails to pay the corporation's trust fund taxes if the person knows that the tax is due, has the ability 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 prima facie evidence of willfulness. Roth, supra.

Posey candidly admitted at the administrative hearing that he was responsible for paying the corporation's taxes and that he knowingly and willfully failed to do so.

On the other hand, Towery denies liability and argues that he was not responsible for paying the corporation's taxes and was not aware of any problem until August 1991.

Towery as president of the corporation was Posey's boss and in that capacity was responsible for and should have known that the corporation owed delinquent withholding tax to the State. Even if Towery was not actually aware of the delinquent taxes until August,

he admits that even after he became aware of the problem he took no action to pay the taxes. Rather, Towery and Posey jointed decided to continue paying the corporation's suppliers and other creditors in lieu of the Department. State's Exhibit 4 clearly establishes that the corporation had more than sufficient cash flow during and after August, 1991 from which the delinquent and current withholding taxes could have been paid. Consequently, Towery, as a responsible corporate officer, willfully failed to pay the withholding taxes in issue when he knowingly and intentionally authorized or allowed payment of other creditors in lieu of the Department.

The assessments in issue are upheld and judgement is entered against Stanley D. Posey in the amount of \$50,210.55, and against Don Towery in the amount of \$50,295.53. Additional interest is owed by Posey from June 16, 1993, and by Towery from July 12, 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 December 10, 1993

BILL THOMPSON
Chief Administrative Law Judge

