STATE OF ALABAMA, DEPARTMENT OF REVENUE,	§	STATE OF ALABAMA DEPARTMENT OF REVENUE
	§	ADMINISTRATIVE LAW DIVISION
vs.	§	
GEORGE E. WILSON, JR. 206 ASPHODEL DOTHAN, AL 36303,	§	DOCKET NO. S93-280
	§	
STEVEN R. WILSON 208 ASPOHDEL DOTHAN, AL 36303,	§	
Taxpayers.	§	

FINAL ORDER

The Revenue Department assessed a 100% penalty against George E. Wilson, Jr. and Steven R. Wilson, as individuals responsible for paying the delinquent sales tax liability of Wilbro, Inc. for the months of May and June 1991. Both Taxpayers appealed to the Administrative Law Division and the cases were consolidated and heard together on November 9, 1993. G. David Johnston appeared for the Taxpayers. Assistant counsel Beth Acker represented the Department.

Code of Ala. 1975, §§40-29-72 and 40-29-73 levy a 100% penalty against any individual that is responsible for paying a corporation's trust fund taxes who in that capacity willfully fails to do so. The Taxpayers in this case concede that they were responsible corporate officers of Wilbro, Inc.. Thus, the only issue in dispute is whether the Taxpayers willfully failed to pay the taxes in issue.

The Taxpayers contend that they did not willfully fail to pay because they relied in good faith on an attorney's advice not to pay the taxes. The Taxpayers also argue that the Department should be estopped from assessing them individually because the Department negligently failed to timely file a proof of claim against the corporation in U. S. Bankruptcy Court.

The relevant facts are undisputed.

George E. Wilson, Jr. was secretary/treasurer of Wilbro, Inc. and his brother Steven R. Wilson was president of the corporation during the period in question.

The corporation had prepared its May 1991 Alabama, Georgia and Florida sales tax returns and had written checks for the tax due when it was put into involuntary bankruptcy by some of its creditors on June 17, 1991. The Taxpayers immediately contacted the corporation's attorney, who advised the Taxpayers not to pay any more bills until he had a chance to review the situation.

The attorney subsequently advised the Taxpayers to pay the federal and state withholding taxes due, but not to pay the Alabama, Florida or Georgia sales tax due. The attorney informed the Taxpayers that the States would file claims and that the sales taxes would be paid in the bankruptcy proceeding. The Taxpayers followed the attorney's advice and accordingly paid the withholding taxes owed but not the sales taxes for the months of May and June, 1991. The corporation ceased operating on June 30, 1991.

The Bankruptcy Court entered an Order for Relief on July 18, 1991 and appointed a trustee on July 23, 1991. The trustee took over the corporation's bank accounts on or about August 9, 1991.

The corporation filed a Schedule A-1 of priority creditors on August 15, 1991 which listed sales tax owed to Alabama, Georgia and Florida. All three states were notified of the bankruptcy proceeding. Georgia and Florida subsequently filed claims with the Bankruptcy Court, which were paid in full.

The Bankruptcy Court on August 27, 1993 ordered the corporation to file all necessary tax returns. However, the corporation failed to file Alabama sales tax returns for the months in question until requested to do so by the Revenue Department. The corporation filed the delinquent May and June returns with the Revenue Department's Dothan Office on November 27, 1991. The returns were forwarded to the Sales and Use Tax Division in Montgomery, and a bankruptcy claim was prepared and subsequently filed with the Bankruptcy Court on January 17, 1992.

The Bankruptcy Court had set December 31, 1991 as the bar date for filing claims against the corporation. Consequently, the Department's delinquent claim was disallowed by the Bankruptcy Court.

As stated, the issue is whether the Taxpayers willfully failed to pay the sales tax in question.

A responsible person willfully fails to pay a corporation's tax if he knows or should know that tax is due, has the ability to pay, but consciously fails to do so. Braden v. United States, 442 F.2d 342. Payment of other creditors in lieu of the Department is evidence of willfulness. Roth v. United States, 567 F.Supp. 496; Schwinger v. United States, 652 F.Supp. 646.

The Taxpayers in this case knew that sales tax was owed, had sufficient money to pay the taxes for both months, but knowingly failed to do so. Under normal circumstances, those facts would constitute a willful failure to pay under the 100% penalty statutes.

However, the Taxpayers argue that they failed to pay for reasonable cause because they relied in good faith on the advice of counsel.

Some courts have recognized that a responsible person may be relieved of liability if there is "reasonable cause" for failing to pay the tax. See, Cash v. Campbell, 346 F.2d 670, and other cases cited in Taxpayers' post-hearing brief. Failure to pay based on the advice of an attorney has been held to constitute reasonable cause under limited circumstances. See, Newsome v. U.S., 431 F.2d 742, footnote 12 at page 748. However, the majority view is that good faith reliance on the advice of counsel does not negate the willfulness requirement of the 100% penalty statutes.

In Hutchinson v. U.S., 559 F.Supp. 890, a corporation was suffering financial problems and the corporation's president discussed with the IRS the difficulty the corporation was having in paying its federal withholding taxes. The corporation subsequently filed a petition in bankruptcy and listed the IRS as a creditor. The IRS failed to timely file a proof of claim with the bankruptcy court, and instead assessed the president individually as a responsible corporate officer. The president argued that he failed to pay for reasonable cause because he believed based on discussions with IRS agents and an attorney that there would be sufficient corporate assets to pay the taxes. The court rejected the president's argument as follows:

> It also appears that through discussions with IRS agents and counsel retained to advise the corporation on bankruptcy matters, plaintiff came to believe that there would be sufficient corporate assets with which to pay the taxes. However, "willful" as used in § 6672 does not require proof of an intent to defraud or an evil motive; rather, it means an intentional, voluntary or conscious act or omission. Willfulness is shown if a responsible person knows that money owing to the government for unpaid withholding taxes is used for other corporate purposes. *Hornsby v. Internal Revenue Service*, 588 F.2d 952 (5th Cir. 1979). Furthermore, whatever the advice was that Hutchinson received from his attorney regarding the payment of taxes, it was insufficient to constitute "reasonable cause" to excuse payment thereof. *Newsome v. United States*, 431 F.2d 742 (5th Cir. 1970). His belief that there would be sufficient corporate assets to cover this liability is insufficient to have given him reasonable cause not to have paid the taxes due while the corporation was still a going concern.

In Alioto v. United States, 593 F.Supp. 1402, a bankruptcy attorney advised the president of a corporation that the

corporation would not have to pay its delinquent withholding taxes if the corporation filed for bankruptcy. Relying on the attorney's advice, the corporation filed for bankruptcy and filed a withholding tax return, but failed to pay the taxes due. The IRS subsequently assessed the 100% penalty against the president individually. The court rejected the president's defense that he had relied on the advice of the attorney in good faith:

> Alioto relies heavily on *Gray Line Co. v. Granquist*, 237 F.2d 390 (9th Cir. 1956), to support the proposition that willfulness is negated by good faith reliance on advice of counsel; In *Gray Line*, the Commissioner assessed a 100% penalty against the company for failure to pay transportation taxes. The Ninth Circuit overturned the assessment finding that Gray Line had acted in good faith and with reasonable cause as the company acted on the advice of both counsel and a Special Deputy Tax Collector, Id. at 395. Alioto argues that *Gray Line* should be controlling as PFEL acted in good faith reliance on Broude's advice.
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> [2] The Court rejects this argument. While *Gray Line* has never been explicitly overruled, the clear weight of authority holds that willfulness is not negated because the action was taken in good faith and with reasonable cause. See e.g. *Barnett v. United States*, 594 F.2d 219, 221 (9th Cir. 1979); *Bloom v. United States*, 272 F.2d 215, 223-24 (9th Cir. 1959); *accord Monday v. United States*, 421 F.2d 1210, 1216 (7th Cir. 1970); *contra Newsome v. United States*, 431 F.2d 742, 746-47 (5th Cir. 1970) (very limited reasonable cause defense to willfulness recognized). Moreover, even assuming *arguendo* that *Gray Line* were applicable, it is readily distinguishable from the case before the Court. In *Gray Line*, the taxpayer relied not only on advice of counsel, but also on advice from a government agent. Here, PFEL relied solely on advice of counsel; therefore, the degree of reasonableness does not approach that found in *Gray Line*.
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> Thus, the Court holds that reliance on counsel's advice that taxes need not be paid does not negate the willfulness required by section 6672, and, therefore, does not excuse one from penalties for such nonpayment.

The Taxpayers in this case cannot use their reliance on the attorney's advice as a blanket defense for failing to pay the taxes. Even if the Taxpayers' initial reliance on the attorney's advice was reasonable, the Taxpayers were still aware of and responsible for the taxes and were under a duty to ensure that the taxes were in fact paid in the bankruptcy proceeding. The Taxpayers did not have control of the corporation's assets after mid-July, but they could have monitored whether the Department had filed a claim with the Bankruptcy Court, and upon discovering that no claim had been filed within a reasonable time prior to the December 31, 1991 bar date, the Taxpayers could have filed a claim for the Department and thereby ensured payment of the taxes. Neither the corporation nor the Taxpayers were under a specific duty to file a proof of claim on behalf of the Department. However, the Taxpayers were under a duty to pay the delinquent sales taxes, and filing a claim on behalf of the Department would have fulfilled that duty. Based on the above, the Taxpayers cannot be relieved of liability because they relied on the advice of an attorney that the taxes would be paid in the bankruptcy proceeding.

The Taxpayers next argue that the Department should be estopped from assessing them individually because the Department

negligently failed to timely file a claim with the Bankruptcy Court. That argument is also rejected.

The individual liability of a responsible person under the 100% penalty statutes is separate and distinct from the corporation's liability. The government is not required to first attempt to collect from the corporation before going against a responsible individual. Teel v. United States, 529 F.2d 903, at 906 (relating to a corporation in receivership); Hutchinson v. United States, supra; United States v. Huckabee Auto Company 783 F.2d 1546.

The Department could have filed an estimated claim with the Bankruptcy Court prior to the bar date. However, there is no evidence that the Department was notified of the December 31, 1991 bar date. Thus, it was not unreasonable that the Department elected to first obtain the corporation's delinquent returns and then process a bankruptcy claim in due course. To that extent, the Taxpayers contributed to the Department's failure to timely file a claim because the returns in issue were not filed until November 27, 1991, or only a month before the bar date. In any case, the above cited cases are clear that even if the Department had been aware of the bar date, the fact that the Department failed for whatever reason to timely file a claim in bankruptcy or to otherwise attempt collection from the corporation is not sufficient grounds to relieve the Taxpayers from personal liability.

The assessments in issue are upheld and judgment is entered against George E. Wilson, Jr. in the amount of $89,608.71, and against Steven R. Wilson in the amount of $91,413.16. The assessment against Steven R. Wilson is greater because it was entered later and thus includes more interest. Additional interest is due on both judgments until paid. While the Taxpayers are separately liable for the tax in issue, the tax is due only once. Thus, payment by either party will satisfy the liability in full.

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

Entered on January 6, 1994.

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BILL THOMPSON
Chief Administrative Law Judge