

STATE OF ALABAMA  
DEPARTMENT OF REVENUE,

§

STATE OF ALABAMA  
DEPARTMENT OF REVENUE  
ADMINISTRATIVE LAW DIVISION

§

v.

§

DOCKET NO. P.93-336

JERRY BAJALIA  
62 Sunburst Drive  
Birmingham, AL 35215,

§

§

Taxpayer.

§

OPINION AND PRELIMINARY ORDER

The Revenue Department assessed a 100% penalty against Jerry Bajalia, as a person responsible for paying the sales and withholding tax liability of Parkway Pit and Grill, Inc., for the periods August, September, November and December 1991 and January 1992 (sales tax) and the year 1991 (withholding tax). The Taxpayer appealed to the Administrative Law Division and a hearing was conducted on February 28, 1994. Stephen Schniper appeared for the Taxpayer. Assistant counsel Claude Patton represented the Department.

The Taxpayer concedes that he is personally liable for the corporation's withholding and sales tax liabilities that accrued after October 1991. However, the Taxpayer denies liability for the pre-October 1991 taxes in issue.

The Taxpayer's liability for the pre-October 1991 taxes turns on (1) whether the Taxpayer was a responsible person under Alabama's 100% penalty statutes prior to October 1992, and (2) whether the Taxpayer became personally liable for the pre-October 1991 taxes as a consequence of becoming a responsible person in

October 1991.

Code of Ala. 1975, §§40-29-72 and 49-29-73 levy a 100% penalty against a responsible person that willfully fails to pay a corporation's taxes. A responsible person under Alabama's 100% penalty statutes is someone that is directly responsible for paying the taxes of the corporation, or has authority and control over the person that does actually pay the taxes. Smith v. U.S., 894 F.2d 1549. The responsible person must know that delinquent taxes are owed and have the "effective power" to pay the taxes. Stallard v. U.S., 12 F.3rd 489, at 494; U.S. v. DeBeradinis, 395 F.Supp. 944.

The Taxpayer in this case was an officer of the corporation prior to October 1991, and he did write some checks to pay creditors prior to that time. However, he wrote the checks only as directed by the person with control over the corporation's checking account. The Taxpayer was not involved in the finances of the business and was unaware prior to taking over the business in October, 1991 that delinquent taxes were owed. Based on the above, the Taxpayer was not a responsible person prior to taking over the business in October, 1991.

The Taxpayer also is not liable for the corporation's taxes that accrued before he became a responsible person in October 1991.

A responsible person is liable only for those trust fund taxes of the corporation that accrue during the time that he is a responsible officer of the corporation. Stallard v. U.S., supra.

An exception is where the previously accrued taxes are being held in trust by the corporation for payment to the government at the time the person becomes a responsible person. Slodov v. U.S., 93 S.Ct. 1778, 436 U.S. 238; Wood v. U.S., 808 F.2d 411.

There is no evidence in this case that the pre-October 1991 taxes were being held in trust by the corporation when the Taxpayer took over in October, 1991. Thus, the Taxpayer is not liable for the pre-October taxes that accrued before he became a responsible person in October, 1991.

The Department is directed to delete the sales and withholding taxes in issue that accrued prior to October, 1991. A Final Order will be entered after the Department informs the Administrative Law Division of the Taxpayer's adjusted liability. The Final Order when entered, may be appealed to circuit court within 30 days pursuant to Code of Ala. 1975, §40-2A-9(g).

Entered on April 13, 1994.

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BILL THOMPSON  
Chief Administrative Law Judge