STATE OF ALABAMA DEPARTMENT OF REVENUE, vs. ROBERT E. MINOR 98 Crestview Drive Birmingham, AL 35213, Taxpayer.	§ § § § § §	STATE OF ALABAMA DEPARTMENT OF REVENUE ADMINISTRATIVE LAW DIVISION DOCKET NO. P. 93-342

FINAL ORDER

The Revenue Department assessed a 100% penalty against Robert E. Minor ("Taxpayer"), as a person responsible for paying over the delinquent withholding tax liability of River King Energy Company of Alabama, Inc. ("River King") for the months of November and December 1991, January, May and June 1992, the quarter ending March 1992, and the year ending December 1991. The Taxpayer timely appealed to the Administrative Law Division and a hearing was conducted on June 29, 1994. Lee Thuston represented the Taxpayer. Assistant counsel Beth Acker represented the Department.

The issue in this case is whether the Taxpayer is personally liable for the unpaid withholding taxes of River King for the period in question pursuant to Alabama's 100% penalty statutes, Code of Ala. 1975, §§40-29-72 and 40-29-73. That issue turns on whether the Taxpayer was responsible for paying the withholding taxes on behalf of River King, and in that capacity willfully failed to do so.

The Taxpayer graduated from law school in 1978 and was immediately hired by Charles H. Raines ("Raines"). Raines owned a number of companies that operated in Alabama. The Taxpayer worked from 1978 through the period in issue in both a legal and business capacity for a number of different businesses controlled by Raines.

Raines incorporated River King in July 1989 and was president of the corporation from July 1989 until September 1990. The Taxpayer was never formally employed by River King. Nonetheless, Raines designated the Taxpayer as president of the company in September 1990. The Taxpayer served as president until July 1993. As president, the Taxpayer was directly involved in the day-to-day operations of the company. He was also authorized to sign notes and tax returns for the corporation.

The Taxpayer signed payroll checks and issued checks to creditors of the corporation during the subject period. However, the Taxpayer wrote checks and paid creditors only as directed by Raines. The Taxpayer prepared a list of bills due and presented the list to Raines on a weekly basis. Raines instructed the Taxpayer which creditors to pay and how much. The Taxpayer acted accordingly.

The IRS interviewed the Taxpayer in 1992 concerning his liability for the unpaid trust fund taxes of River King. The IRS concluded that Raines was solely responsible for the unpaid taxes, not the Taxpayer. See, Taxpayer's Exhibit 1.

Code of Ala. 1975, §§40-29-72 and 40-29-73 together levy a 100% penalty against a responsible person that willfully fails to pay a corporation's trust fund taxes.

A "responsible person" is someone with the duty, status, and authority to pay the taxes in question. Gustin v. U. S., 876 F.2d 485. A responsible person must know that delinquent taxes are due and have the "effective power" to pay the taxes. Stallard v. U. S., 12 F.3rd 489. The Taxpayer's sole defense in this case is that he was not a "responsible person" because he did not have the independent authority to pay the withholding tax in issue, except as directed by Raines.

The Department responds that the Taxpayer cannot be relieved of liability as a responsible person solely because he was directed by a superior, Raines, not to pay the taxes in question, citing Roth v. United States, 779 F.2d 1567; Howard v. United States, 711 F.2d 729; and Gustin v. U. S., supra.

The above cases hold that an otherwise responsible person is not relieved of liability because he was instructed or directed by a superior not to pay the taxes. However, to be liable, the individual must still be an "otherwise responsible person". In each of the above cases, the court found that the taxpayer was an "otherwise responsible person" because he initially had the independent authority and ability ("status, duty and authority") to select which creditors to pay and to pay those creditors. Once that independent authority was conferred, the "otherwise responsible person" was not relieved of liability because he was subsequently directed by a superior not to pay .

In Roth, the taxpayer had discretion as to which creditors to pay and even wrote himself a weekly $700.00 salary check. The court found that "he was certainly the responsible officer up until the time he was told by Dobbins (his superior) to stop making such payments . . .". Roth, at page 1571. The court concluded that "no instruction by the president or the majority owner of LDC (the corporation) could effectively bar an otherwise responsible officer from paying these funds in accordance with the law". Roth, at page 1572.

In Howard, the taxpayer ran the day-to-day operations of the subject corporation, was sole signatory on the corporation's checking account, and routinely decided who to pay and when. The taxpayer even directed that $8,000.00 in back taxes be paid to the IRS. Howard, at page 734. The court concluded that because the taxpayer initially had the independent authority to pay creditors, he was an "otherwise responsible person", and could not be relieved of liability because he was subsequently instructed by a superior not to pay the taxes in issue.

In Gustin, the court found that the taxpayer was a responsible person because he controlled the day-to-day operations of the business and had independent authority to write checks (up to $2,500.00) on behalf of the corporation. The court stated that "one does not cease to be a responsible person merely by delegating that responsibility to others, nor do instructions from a superior not to pay the taxes or the threat of being fired if one pays the taxes make one not a responsible person under the statute."

Gustin, at page 491.

This case can be distinguished from the above cases because the Taxpayer was never granted the independent authority to write checks or pay creditors without the specific consent of Raines. That is, he never was an "otherwise responsible person". The Taxpayer testified at the administrative hearing, beginning at R. 38, as follows:

Q. How about signing or countersigning corporate checks?

A. I was directed to sign or countersign checks.

Q. Did you have any independent authority to sign a check on your own?

A. No.

Q. Did you ever sign checks unless directed by Mr. Raines?

A. No.

Q. Did you have any ability in your own job description to direct where funds went, whether to this creditor or that creditor?

A. No.

The above testimony was confirmed by the testimony of Linda Williams, a secretary at River King, beginning at R. 61, as follows:

Q. Okay. And you could also sign checks on River King Energy, couldn't you?

A. Co-sign, Yes, Sir.

Q. Co-sign checks along with Mr. Minor?

A. Yes Sir.

Q. Okay. And you heard Mr. Minor testify this morning, but tell us in your own words how would you characterize the operation of River King Energy and who ran it.

A. Charles Raines ran River King.

Q. Who directed you to co-sign checks along with Mr. Minor?

A. Charles Raines.

Q. Okay. There is no point in going through all of this again. Did Mr. Raines in your opinion exercise all the financial decisions of River King Energy?

A. Yes, Sir.

Q. Did you and Mr. Minor to your knowledge have any independent authority to make decisions about who was paid and not paid?

A. No Sir.

Q. Okay. All decisions were made by Mr. Raines?

A. Correct.

The above undisputed testimony establishes that the Taxpayer never had the independent authority to pay the withholding taxes in issue.

In Schroeder v. U. S., 89-2 U.S.T.C. §9274, the taxpayer, Schroeder, signed checks and paid bills as directed by a superior. The court distinguished the Roth and Howard cases and held that Schroeder was not liable, as follows:

> " . . . to be liable under §6672 one must have "the power to control the decision-making process by which the employer corporation allocates funds to other creditors in preference to its withholding tax obligations." Haffa v. United States [75-I USTC §9491], 516 F.2d 931, 936 (7th Cir. 1975). A "responsible party" is one with "the

final word as to what bills should or should not be paid, and when." Adams v. United States, 504 F.2d at 75. "Liability attaches to those with power and responsibility within the corporate structure for seeing that the taxes withheld from various sources are remitted to the Government." Monday v . United States [70-1 USTC §9205], 421 F.2d 1210, 1214 (7th. Cir.), cert denied 400 U.S. 821 (1970). The record before the court discloses that Mr. Schroeder had no such authority; he lacked the "status, duty and authority", Howard v. United States [83-2 USTC §9528], 711 F.2d 729, 734 (5th Cir. 1983), necessary to make him a responsible person for purposes of §6672.

Mr. Schroeder never had authority to pay creditors on his own or to decide which creditors should be paid. During the quarters in question, those decisions were made by Mr. Elkin, presumably with Mr. Nissen. Mr. Schroeder did not manage Weltek's day-to-day operations. He oversaw the assembly of financial information, presented it to Mr. Elkin, and signed checks pursuant to Mr. Elkin's instructions.

The cases on which the government bases its principal reliance differ importantly from Mr. Schroeder's circumstances. The plaintiff in Roth v. United States [86-1 USTC §9172], 779 F.2d 1567 (11th. Cir. 1986), was the corporation's executive vice-president. After about a year, the office of his sole superior was moved away from the plaintiff's office. The plaintiff hired all office employees, signed checks for payrolls, paid all bills, had signature authority for checking account, and handled the corporation's day-to-day activities. The plaintiff defended the assessment on the ground that his superior had told him not to pay the Internal Revenue Service. The Eleventh Circuit held that the plaintiff was a "responsible person" before his boss ordered him not to pay the Internal Revenue Service and, since withheld taxes belong to the government rather than the corporation, his boss's orders did not relieve him of that responsibility.

In Howard v. United States [83-2 USTC §9528], 711 F.2d 729, the plaintiff was a director, minority shareholder and corporate officer during the quarters at issue. He ran the corporation's day-to-day operations. He issued checks without his boss's prior approval on a number of occasions; during an earlier quarter, he directed that certain back taxes be paid to the Internal Revenue

> Service. The Fifth Circuit concluded that the plaintiff's "duties, prerogatives, and prior acts are more than sufficient to establish that he was a 'responsible person' for the purpose of section 6672(a) liability." 711 F.2d at 734. His boss's order not to pay the Internal Revenue Service did not change that status, because he would have lost the authority only after the taxes were paid.
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> Unlike the plaintiffs in Roth and Howard, Mr. Schroeder never had day-to-day authority over payment of the corporation's debts. Roth and Howard had such status and authority and could not shed it by following orders that they viewed as superseding that authority.

Schroeder is directly on point in this case. As in Schroeder, the Taxpayer in this case never had the effective power and authority to pay the withholding taxes in question. Consequently, he was never a "responsible person" under §§40-29-72 and 40-29-73. The final assessment in issue is accordingly dismissed.

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 29, 1994.

BILL THOMPSON
Chief Administrative Law Judge