

STATE OF ALABAMA,
DEPARTMENT OF REVENUE,

vs.

MICHELLE LEE
4316 Dolly Ridge Road
Birmingham, AL 35243,

Taxpayer.

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STATE OF ALABAMA
DEPARTMENT OF REVENUE
ADMINISTRATIVE LAW DIVISION

DOCKET NO. P. 93-380

FINAL ORDER

The Revenue Department assessed a 100% penalty against Michelle Lee ("Taxpayer"), a person responsible for paying the sales tax liabilities of Michelle's, Inc., for the months November and December, 1989. The Taxpayer appealed to the Administrative Law Division and a hearing was conducted on May 2, 1994. The Taxpayer was notified of the hearing by certified mail, but failed to appear. Assistant counsel Gwen Garner represented the Department.

The issue in this case is whether the Taxpayer is liable under Alabama's 100% statutes for the delinquent sales tax owed by Michelle's, Inc. for the months of November and December, 1989.

Michelle's, Inc. filed sales tax returns with the Department for the months in issue but failed to pay the tax reported on the return. The corporation subsequently filed a petition in bankruptcy in May, 1990.

The Bankruptcy Court issued a reorganization plan in February, 1991 directing the corporation to pay its delinquent taxes over a

period of 72 months. However, the corporation failed to make any payments, and in November 1993 the Department entered the 100% penalty assessment in issue against the Taxpayer, individually.

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 taxes. A "responsible person" is someone that is directly responsible for paying the corporation's taxes. Smith v. U.S., 894 F.2d 1549. An individual is responsible for a corporation's trust fund taxes if he has the authority and "effective power" to pay the taxes in question. Stallard v. U.S., F.3rd 489.

The Taxpayer in this case owned 100% of the stock of Michelle's, Inc. and was president and sole director of the corporation. The Taxpayer was clearly a responsible person under Alabama's 100% penalty statutes.

A responsible person "willfully" fails to pay a corporation's trust fund taxes if he knows that tax is due, has the ability to pay, but fails to do so. Braden v. United States, 442 F.2d 342.

Payment of other creditors in lieu of the government is evidence of willfulness. Roth v. United States, 567 F.Supp. 496.

The Taxpayer in this case was aware that the taxes in question were due because she signed the returns for the months in issue.

The Department also introduced bank records showing that the corporation had sufficient money on hand to pay the taxes, but

instead wrote numerous checks to other creditors in lieu of the Department. Based thereon, the Taxpayer as a responsible person willfully failed to pay the taxes in question, and consequently, is liable for the delinquent sales taxes in question.

The final assessment is upheld, and judgment is entered against the Taxpayer, Michelle Lee, for the delinquent sales tax liability of Michelle's, Inc. for the months of November and December, 1989 in the amount of \$6,636.23. Additional interest is also due from the date of entry of the final assessment, November 8, 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 May 3, 1994.

BILL THOMPSON
Chief Administrative Law Judge