

STATE OF ALABAMA,  
DEPARTMENT OF REVENUE,

vs.

CURTIS F. FRANKLIN  
802 Wana Avenue  
Weaver, AL 36277,

Taxpayer.

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STATE OF ALABAMA  
DEPARTMENT OF REVENUE  
ADMINISTRATIVE LAW DIVISION

DOCKET NO. P. 94-220

FINAL ORDER

The Revenue Department entered a 100% penalty assessment against Curtis F. Franklin ("Taxpayer"), as a person responsible for paying over the withholding tax of Franklin Box and Crate Company, Inc. ("Franklin Box") for the years 1991 and 1992 and the quarter ending March 1992. The Taxpayer appealed to the Administrative Law Division and a hearing was conducted on August 25, 1994. The Taxpayer represented himself at the hearing. Assistant counsel Beth Acker represented the Department.

The issue in this case is whether the Taxpayer is individually liable for the withholding tax of Franklin Box for the period in issue pursuant to Alabama's 100% penalty statutes, Code of Ala. 1975, §§40-29-72 and 40-29-73.

Franklin Box was formed by the Taxpayer's father in 1961. The Taxpayer's brother took over the business when his father died in 1974. The Taxpayer owned 10% of the stock of the corporation at that time, but otherwise had no connection with the business.

The Taxpayer's brother was forced out of the business in 1984.

A long-time employee, Grady Johns, took over management of the business at that time.

The Taxpayer learned in 1990 that Johns had mismanaged the company and that the company owed much more than the Taxpayer had been led to believe. Johns was dismissed in August 1991. The Taxpayer and his wife and youngest son managed the business after that date. The corporation filed for bankruptcy in October 1992, and was sold in May 1993.

The Taxpayer had hoped when he took over the business in 1991 that the business could make enough money to pay its creditors, including the IRS and the Revenue Department. However, the business was not successful and the Taxpayer was required to use the company's cash to buy lumber and other necessary materials so the business could continue operating.

The Taxpayer concedes that he managed the business and was responsible for paying the corporation's debts, including its taxes, during the subject period. The Taxpayer also concedes that other creditors were paid in lieu of the Department because otherwise the business could not have continued operating.

Alabama's 100% penalty statutes are levied at Code of Ala. 1975, §§40-29-72 and 40-29-73. Those sections impose a liability on any person responsible for paying a corporation's trust fund taxes that willfully fails to collect, account for or pay over the taxes to the government. Morgan v. U.S., 937 F.2d 281.

A "responsible" person under the 100% penalty statutes is someone with knowledge that the delinquent taxes are owed and that has the "effective power" to pay. Stallard v. U.S., 12 F.3rd 489.

As stated, the Taxpayer in this case concedes that he was responsible for paying the corporation's withholding tax during the subject period.

A responsible person "willfully" fails to pay a corporation's taxes if he has the ability to pay, but fails to do so. Payment of other creditors in lieu of the government is prima facie evidence of willfulness. U.S. v. Deberadines, 395 F.Supp. 944. The Taxpayer thus also willfully failed to pay the taxes in issue because he had sufficient money to do so but paid other creditors instead of the Department.

The Taxpayer at all times operated in good faith and hoped that he would eventually be able to pay both the Revenue Department and the IRS. However, a malicious intent or an intent to deceive is not necessary for someone to be individually liable for a corporation's trust fund taxes. Roth v. U.S., 567 F.Supp. 496, 499. The Taxpayer in this case was a responsible person and also willfully failed to pay the withholding taxes in issue. Consequently, the final assessment is upheld, and judgment is entered against the Taxpayer in the amount of \$8,194.94.

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

Entered on September 9, 1994.

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BILL THOMPSON  
Chief Administrative Law Judge