STATE OF ALABAMA,   §   STATE OF ALABAMA
DEPARTMENT OF REVENUE,   DEPARTMENT OF REVENUE
                             §   ADMINISTRATIVE LAW DIVISION
    vs.
                             §
SHELIA GAST   DOCKET NO. P. 94-237
124 Vines Avenue   §
Hueytown, AL 35023,
                             §
        Taxpayer.
                          FINAL ORDER

The Revenue Department assessed a 100% penalty against Shelia Gast ("Taxpayer"), a person responsible for paying over withholding taxes on behalf of DC Consulting Services and Supplies, Inc. for the quarters ending June, September and December 1989. The Taxpayer appealed to the Administrative Law Division and a hearing was conducted on August 2, 1994. The Taxpayer was notified of the hearing by certified mail, but failed to appear. Assistant counsel Jeff Patterson represented the Department.

The issue in this case is whether the Taxpayer was (1) responsible for paying the withholding tax liability of DC Consulting Services and Supplies, Inc. during the period in question, and (2) in that capacity willfully failed to do so. If so, then the Taxpayer is personally liable for the corporation's taxes pursuant to Alabama's 100% penalty statutes, Code of Ala. 1975, §§40-29-72 and 40-29-73.

DC Consulting filed quarterly withholding tax returns for the quarters in question but failed to pay the tax due as reported on

the returns. The Department subsequently entered the final assessment in issue against the Taxpayer individually.

DC Consulting was incorporated in January 1989. The Taxpayer was an incorporator, a director, the secretary/treasurer, and a 10% shareholder of the corporation. The Taxpayer signed the application for a withholding tax license on behalf of the corporation as secretary/treasurer on January 13, 1989. The Taxpayer also signed the sales tax returns for the corporation, although she did not sign the withholding tax returns filed by the corporation. The Taxpayer had authority to sign checks for the corporation, and she in fact wrote numerous checks to pay the corporation's sales tax liability and also other creditors during the subject period.

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

A person is a responsible person under the 100% penalty statutes if they are directly responsible for paying the taxes, or have authority and control over the person that actually pays the taxes. A responsible person must know that the delinquent taxes are owed and have the "effective power" to pay. Gustin v. United States, 876 F.2d 485; Stallard v. U.S., 12 F.3d 489.

The evidence in this case indicates that the Taxpayer clearly had the effective power to pay the withholding taxes in question. Also, there can be more than one responsible person. Gustin v. United States, supra. Consequently, the fact that the Taxpayer's ex-husband may also have been a responsible person cannot relieve the Taxpayer of liability.

A responsible person "willfully" fails to pay a corporation's taxes if they have the ability to pay but fail to do so. Payment of other creditors in lieu of the government is prima facie evidence of willfulness. U. S. v. Deberadinis, 395 F.Supp. 944.

The Taxpayer in this case willfully failed to pay the withholding taxes in issue because she wrote numerous checks both to the Revenue Department and also to other creditors during the period in issue. The Taxpayer had sufficient funds to pay the taxes in question because the amounts paid to other creditors were in excess of the amount owed the Department.

The above considered, the final assessment is affirmed and judgment is entered against the Taxpayer in the amount of $2,374.19, plus additional interest from the date of entry of the final assessment, April 4, 1994.

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

Entered on August 4, 1994.

BILL THOMPSON
Chief Administrative Law Judge