

STATE OF ALABAMA
DEPARTMENT OF REVENUE,

vs.

CURTIS WEBBER
3419 Lorna Lane
Birmingham, AL 35216,

Taxpayer.

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STATE OF ALABAMA
DEPARTMENT OF REVENUE
ADMINISTRATIVE LAW DIVISION

DOCKET NO. P. 94-316

FINAL ORDER

The Revenue Department entered a 100% penalty assessment against Curtis Webber ("Taxpayer"), as a person responsible for paying the delinquent sales tax owed by Pacesetter, Inc. for the period September 1993.

The Taxpayer appealed to the Administrative Law Division and a hearing was conducted on January 3, 1995. The Taxpayer's representative submitted a letter brief in lieu of appearing. Assistant counsel Claude Patton represented the Department.

The Taxpayer concedes that he is personally liable under Alabama's 100% penalty statutes for the delinquent sales tax in issue. However, the Taxpayer argues that penalty and interest should not be added to the tax. The issue thus is whether penalty and interest can be included in a 100% penalty assessment.

The issue of whether interest can be added to a 100% penalty assessment was addressed in Admin. Docket No. P. 91-232, decided March 31, 1992. I held in that case as follows:

Sections 40-29-72 and 40-29-73 were enacted in 1983 as part of the Tax Enforcement and Compliance Act (TECA), and are generally modeled after the federal 100% penalty statutes, 26 U.S.C. §§6671 and 6672.

The federal 100% penalty provisions do not specify that interest shall be added to the tax due. Nonetheless, the IRS is authorized to assess interest against a responsible corporate officer based on 26 U.S.C. §6601.

That section provides that interest shall run on all tax liabilities not paid by the due date. See also, Holland v. U.S., 873 F.2d 1321 (1989), and Bradley v. U.S., 936 F.2d 707 (1991).

Likewise, while §§40-29-72 and 40-29-73 do not specifically require interest, §40-1-44 provides in part that "the annual rate of interest to be added to all taxes administered by the department of revenue which are not paid by the prescribed due dates shall be at the same rate established by the secretary of the treasury under the authority of 26 U.S.C.A. §6621." In my opinion the first sentence of §40-1-44 quoted above allows the Department to charge interest on all delinquent taxes, including the 100% penalty levied at §40-29-73.

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If the Department cannot assess interest on a 100% penalty assessment, then a corporate officer could refuse to pay the corporation's taxes and thus limit his personal liability to the base tax owed by the corporation. Certainly that was not intended by the Legislature. A similar concern was expressed in Holland, supra, at page 1322:

This (payment of interest) is the only logical interpretation of the applicable statute. Were it otherwise a responsible party could evade corporate taxes with the knowledge that his potential liability could never exceed the initial tax liability, and any lapse of time between assessment and collection would work to his advantage because interest could not accrue on the penalty. The tax code does not contemplate the interest-free use of government funds.

While the above is sufficient to support the assessment of interest in the present case, I should also mention State v. Pollock, 38 So.2d 870 (1949). In Pollock, at page 876, the Supreme Court, citing Title 51, §196, Code 1940 (§40-5-9), held that the Legislature intended to

charge interest on all delinquent taxes. While §40-5-9 is found in the chapter concerning tax collectors, apparently the Supreme Court believed that it was sufficiently broad to require interest on all taxes, including income tax, the tax in issue in the Pollock case. Also, as pointed out in Pollock, §40-1-2 (§831, Title 51, Code 1940) and §40-2-22 (§140, Title 51, Code 1940) both contemplate payment of interest by a delinquent taxpayer.

Based on the above, the Department properly assessed interest against the Taxpayer in this case.

I can find no cases on point as to whether penalties can be assessed under Alabama's 100% penalty statutes. In my opinion, penalties can also be assessed against a responsible person under the same logic set out above concerning interest.

The Taxpayer concedes that he was responsible for reporting and paying the sales tax in issue on behalf of the corporation, and that he failed to do so. The Department accordingly assessed a late payment penalty against the corporation for the Taxpayer's failure to timely pay the tax. The Taxpayer should not be allowed to avoid that penalty by paying the tax in his individual capacity instead of his capacity as a responsible corporate officer.

In addition, "tax" is defined by Code of Ala. 1975, §40-2A-3(18) as "any amount, including applicable penalty and interest, levied or assessed against a taxpayer . . .". Consequently, any trust fund "tax" owed by a corporation for which a responsible person may be held personally liable must **by definition** include all penalty and interest owed by the corporation relating to the tax.

That is, both penalty and interest constitute a part of "tax" that should be included in a 100% penalty assessment.

The above considered, the assessment in issue is affirmed. Judgment is entered against the Taxpayer for tax in the amount of \$33,913.00, penalty in the amount of \$3,391.30, and interest through June 30, 1994 in the amount of \$1,638.97, for a total amount due of \$38,943.27. (The above amounts are less than the amounts set out in the final assessment because the Department reduced the amounts after entry of the final assessment).

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

Entered on January 27, 1995.

BILL THOMPSON
Chief Administrative Law Judge