

STATE OF ALABAMA  
DEPARTMENT OF REVENUE,

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STATE OF ALABAMA  
DEPARTMENT OF REVENUE  
ADMINISTRATIVE LAW DIVISION

§

vs.

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ALVA L. LEACH  
P. O. Box 1447  
Hamilton, AL 35570,

§

DOCKET NO. P. 94-338

§

Taxpayer.

FINAL ORDER

The Revenue Department entered two final assessments of 100% penalty against Alva L. Leach ("Taxpayer"), as a person responsible for paying the trust fund taxes of Leach Petroleum Company, Inc. ("Leach Petroleum"). One assessment is for gasoline tax for June through September 1992 and motor fuel tax for July through September 1992. A second assessment is for State sales tax for September 1992 through May 1993 and withholding tax for the quarters ending June, September and December 1992 and March and June 1993. The Taxpayer appealed the assessments to the Administrative Law Division and a hearing was conducted on November 23, 1994. Thomas A. Nettles, IV, represented the Taxpayer. Assistant counsel John Breckenridge represented the Department.

The issue in this case is whether the Taxpayer is personally liable for the unpaid gasoline, motor fuel, sales and withholding taxes of Leach Petroleum for the periods in issue pursuant to Alabama's 100% penalty statutes, Code of Ala. 1975, §§40-29-72 and 40-29-73.

The facts are undisputed.

Leach Petroleum operated a gasoline distributorship in

Tuscaloosa, Alabama during the periods in question. The corporation was 100% owned by William Leach, the Taxpayer's husband. Mr. Leach managed the day-to-day operations of the business and made the final decisions for the business, including what creditors to pay and when.

The Taxpayer was secretary/treasurer of the business and in that capacity handled the books and also wrote checks on behalf of the corporation. She also prepared and filed the gasoline, motor fuel, sales and withholding tax returns for the corporation.

The Taxpayer admits that Leach Petroleum had sufficient money during the periods in question to pay all taxes due. However, she claims that she did not have the authority to pay the taxes without her husband's permission, and that he ordered her not to pay.

The Taxpayer concedes that receipts from the corporation were deposited directly into her personal account during the period in question because liens had been filed against the corporation. That money was used to pay the corporation's creditors, and also the Taxpayer's personal bills.

Mr. Leach died on March 26, 1993. The Taxpayer operated the business for a short time after her husband's death. The evidence shows that the corporation had sufficient money on hand when the Taxpayer assumed control of the business to pay the delinquent taxes in issue. The Taxpayer also wrote numerous checks to other creditors in lieu of paying those taxes.

Code of Ala. 1975, §§40-29-72 and 40-29-73 together impose a liability on any person "responsible" for payment of a corporation's trust fund taxes who "willfully" fails to pay those 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 (9th Cir. 1989). 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 (5th Cir. 1994). A person has the effective authority to pay if he or she has the "final word" as to which bills to pay and when to pay them. In re Terrell, 65 B.R. 365, at 369; Dudley v. U.S., 428 F.2d 1196 (9th Cir. 1970).

The Taxpayer argues that her husband controlled the business and that she never had the independent authority, status and ability to pay the taxes so as to be liable under the 100% penalty statutes. Alternatively, she claims that her lack of independent authority to pay the taxes negated the "willfulness" element necessary for the 100% penalty to apply. An otherwise responsible person is not relieved of liability because they were instructed by a superior not to pay the taxes. Roth v. United States, 779 F.2d 1567 (11th Cir. 1986); Howard v. United States, 711 F.2d 729 (5th Cir. 1983); and Gustin v. U.S., 876 F.2d 485 (5th Cir. 1989). However, to be liable, the individual must have

initially had the independent authority to pay the taxes. If the person never had the authority to pay, the person is not a "responsible" person and thus cannot be held liable. Schroeder v. U.S., 89-2 USTC. §9274.

While the Taxpayer's husband was alive, he controlled the business and made the final decision who to pay and when. The Taxpayer never had the independent authority to pay without the specific permission and approval of her husband.

However, the Taxpayer assumed control of the business after her husband died in March 1993. Although the business operated for only a short period after her husband's death, the Taxpayer clearly had the authority and ability during that period to pay the taxes in issue. The corporation also had sufficient money to pay the taxes, but the Taxpayer elected to pay other creditors in lieu of the State. Consequently, the Taxpayer, as a responsible person, willfully failed to pay the taxes in issue and thus personally liable for those unpaid taxes under §§40-29-72 and 40-29-73. The final assessments in issue must be affirmed.

The above considered, judgment is entered against the Taxpayer for the delinquent State sales and withholding tax in issue in the amount of \$15,248.72, and for the delinquent gasoline and motor fuel tax in the amount of \$44,828.67.

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

Entered on March 1, 1995.

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BILL THOMPSON  
Chief Administrative Law Judge