

JOHN KNOPF  
3303 Pembroke Lane  
Birmingham, Alabama 35226,

§

STATE OF ALABAMA  
DEPARTMENT OF REVENUE  
ADMINISTRATIVE LAW DIVISION

§

Taxpayer,

§

DOCKET NO. P. 94-400

v.

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STATE OF ALABAMA  
DEPARTMENT OF REVENUE.

§

#### FINAL ORDER

The Revenue Department assessed a 100% penalty against John Knopf ("Taxpayer"), as a person responsible for paying over taxes on behalf of Jiffy Check Company of Alabama, Inc. ("Jiffy Check").

The assessment in issue is for withholding tax for the quarters ending June 1993 and December 1993; State sales tax for April, June and August through December 1993; and county sales tax for August through December 1993. The Taxpayer appealed to the Administrative Law Division and a hearing was conducted in Birmingham on February 14, 1995. William C. Brower represented the Taxpayer. Assistant counsel Beth Acker represented the Department.

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

An individual is personally responsible for a corporation's unpaid trust fund taxes if (1) the person was "responsible" for payment of the taxes, and (2) the person "willfully" failed to pay the taxes. See generally, Morgan v. U.S., 937 F.2d 281 (5th Cir. 1991); Stallard v. U.S., 12 F.3rd 489 (5th Cir. 1994).

The facts in this case are succinctly set out in the Department's brief, as follows:

"Jiffy Check consisted of a chain of convenience/gasoline stores. Corporate officers and stockholders during the relevant time period were John Knopf, president and 38% stockholder, and Freddie Knopf, vice-president and 62% stockholder. At all times during the relevant time period Freddie Knopf and John Knopf earned equal pay (\$35,035) and were equally responsible for paying taxes. Both worked full time for the business and had no other jobs. Both had check signing authority, and only one signature was required on a check. During the relevant time period, both John and Freddie signed checks and tax returns. The majority of the checks and tax returns bearing John's signature bore his facsimile stamp, although some bore his actual signature.

John Knopf personally guaranteed loans on behalf of Jiffy Check, and he signed UCC financing statements on behalf of Jiffy Check. He signed leases on behalf of Jiffy Check. John participated in decisions on who to pay and either he or Freddie would decide whether or not to pay taxes, depending on who was in the office or who the bookkeeper, Suzie Fulton, could reach. John knew that taxes were due at the time each return was due.

The business began experiencing difficulties, and the taxes were not paid. All payrolls were met, and other creditors and vendors were paid. State and local sales taxes were collected on all taxable sales, and Alabama income tax was withheld from all employees' paychecks.

At the administrative law hearing held on February 14, 1995 Freddie Knopf testified that he and John were equally responsible for paying the taxes. He also testified that both of them knew the taxes were due, but chose to pay vendors and other creditors instead of the State of Alabama.

Suzie Fulton, Jiffy Check's bookkeeper, also testified. She testified that she prepared all tax returns and checks for the payment of taxes. She testified that she would give the checks to either Freddie or John for signing. She testified that when there was not enough money available to pay both the taxes and the other creditors, she was instructed not to pay the taxes, but instead to pay the other creditors (vendors) and meet

payroll. She testified that John Knopf provided her with a facsimile stamp to use when she needed a signature and no one was available to sign a check. She testified that she only used the stamp at his direction and would call him each time before using it. She testified that she used the stamp for the payment of taxes, creditors and vendors. She testified that she also used it to sign the sales and withholding tax returns. She testified that John and Freddie knew the taxes were not paid and advised her on who to pay. Another office employee, Sue Mickle, corroborated Ms. Fulton's testimony. John Knopf testified that he only authorized Suzie to use the facsimile stamp for payroll checks. His testimony is unpersuaded in light of Suzie Fulton's testimony and Sue Mickle's testimony to the contrary.

Several store managers, Pamela Samuels and Ronald Lively, also testified. They testified that both John and Freddie equally controlled the business and that both were responsible for paying the taxes. They testified that both John and Freddie knew the taxes were not being paid. They testified that they took their instructions from both John and Freddie. They testified that deposits were picked up from their stores by either Freddie, or John or Sue Mickle. They testified that John instructed them on what bills to pay, and that near the end John would instruct them to pay vendors out of the cash register and to cash payroll checks from the cash register."

As stated above, an individual is personally liable for the unpaid trust fund taxes of a corporation if the person was responsible for paying the taxes, and in that capacity willfully failed to do so.

A "responsible person" is defined as "any person with significant control over the corporation's business affairs who participates in decisions concerning payment of creditors or disbursement of funds". Roth v. U.S., 567 F.Supp. 496, 499 (1983).

The Taxpayer in this case was a "responsible person" because he clearly had significant control over the corporation, had check

signing authority for the corporation, and he and his brother decided what creditors to pay and when.

A responsible person "willfully" fails to pay a corporation's trust fund taxes if the person knows that the taxes are due, has the ability and responsibility to pay, but fails to do so. Braden v. U.S., 442 F.2d 342 (6th Cir. 1971). Payment of other debts or creditors in lieu of the government is prima facie evidence of willfulness. Roth, supra; Hornsby v. IRS, 588 F.2d 952 (5th Cir. 1979). There is ample evidence in this case to establish that the Taxpayer knew that the taxes in issue were due. There is also evidence that the Taxpayer directed or instructed the office personnel to pay other creditors in lieu of the Revenue Department. The Taxpayer thus also willfully failed to pay the taxes in issue.

The Taxpayer's primary argument is that he authorized the use of his facsimile signature stamp for payroll checks only. However, the testimony of Suzie Fulton (R. 80-97) and Sue Mickle (R. 99-109) clearly indicates that the Taxpayer authorized use of the facsimile stamp on all checks and also on all tax returns filed by the corporation.

The above considered, the Taxpayer was a responsible person and in that capacity willfully failed to pay the trust fund taxes in issue. The Taxpayer thus is personally liable for those taxes pursuant to Code of Ala. 1975, §§40-29-72 and 40-29-73. The final assessment in issue is accordingly upheld, and judgment is entered against the Taxpayer in the amount of \$71,270.42.

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

Entered March 28, 1995.

BILL THOMPSON  
Chief Administrative Law Judge