

WILLIAM T. GIPSON
617 Greensboro Avenue
Tuscaloosa, Alabama 35401,

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Taxpayer, §

v. §

STATE OF ALABAMA §
DEPARTMENT OF REVENUE.

STATE OF ALABAMA
DEPARTMENT OF REVENUE
ADMINISTRATIVE LAW DIVISION

DOCKET NO. P. 95-210

FINAL ORDER

The Revenue Department assessed a 100% penalty against William T. Gipson ("Taxpayer"), as the person responsible for paying the sales tax liability of Gipson & Walters, Inc. for the period March 1992 through September 1993. The Taxpayer appealed to the Administrative Law Division, and a hearing was conducted on October 31, 1995. E. Kenneth Aycock represented the Taxpayer. Assistant Counsel Wade Hope represented the Department.

The issues in this case are as follows:

(1) Did the Department properly compute the sales tax liability of Gipson & Walters, Inc. during the subject period; and

(2) Is the Taxpayer personally liable for the unpaid sales tax of the corporation pursuant to Alabama's 100% penalty statutes, Code of Ala. 1975, §§40-29-72 and 40-29-73. That issue turns on whether the Taxpayer was a "responsible person" pursuant to the above statutes.

Gipson & Walters, Inc. was incorporated in 1992 for the purpose of owning and operating a bar/delicatessen on the University of Alabama campus in Tuscaloosa, Alabama. The Taxpayer was president and owned 60% of the corporation. Robert Walters

owned the remaining 40% of the corporation.

The Department audited the corporation and requested the corporation's sales records for the subject period. The corporation failed to provide adequate records sufficient to do a direct audit.¹ Consequently, the Department examiner conducted an indirect purchase invoice/bank analysis audit. The Department attorney summarized the audit method at the October 31 hearing as follows:

Mr. Hope:

. . . The records that were available for the auditor to review were poor to nonexistent. The audit was not done based on a markup on a per-drink basis, with all due respect to Mr. Aycock and what he had to say. The audit was calculated based upon looking at purchase invoices, doing an analysis of the bank deposits, bank records, talking to the taxpayer, the employees who worked there, to determine basically what was the total income or cash that was available to this business and then to taking out of that items that would not be subject to sales tax. So what you end up with would be just the activity from operating the business that would be subject to sales tax. And to that, the applicable sales tax rate was applied and credit was given for any sales taxes already paid.

¹The Taxpayer explained that the records were lost or destroyed during litigation involving a subsequent purchaser of the business. However, the Taxpayer failed to specify what records were available or how they were lost or destroyed.

Mr. Jones: It's just a reconstruction of bank activity and cash activity.

Mr. Hope: And the gentleman speaking is Gary Jones, who is the actual auditor who did the sales tax audit of the corporation.

(R. at pages 15, 16, and 17)

The Department entered a final assessment against the corporation after the audit was completed. The corporation failed to appeal. The Department subsequently entered the 100% final assessment in issue against the Taxpayer based on the amount of the final assessment entered against the corporation.

The Department argues that the Taxpayer is prohibited from challenging the amount of the final assessment entered against him because that would constitute a collateral attack of the corporation final assessment. I disagree.

I agree that a final assessment unappealed from is as conclusive as a circuit court judgment and cannot be collaterally attacked. Lambert v. State Dep't. of Revenue, 414 So.2d 983 (Ala.Civ.App. 1982). But the Taxpayer is not collaterally attacking the final assessment against the corporation. He is only attacking the audit calculations upon which the final assessment against him is based. Certainly a taxpayer in a pending appeal can challenge the audit method and calculations used by the Department in arriving at his disputed tax liability.²

²In some cases, an employee responsible for paying a corporation's trust fund taxes may not be entitled or empowered to appeal a final assessment against the corporation itself. Consequently, if the Department's position is correct, that employee would be prohibited from challenging the amount of the

100% penalty assessment against him personally, even though he was unable to appeal the corporate final assessment. Clearly, the employee cannot be prohibited from doing so.

By analogy, the Department can recompute the tax due by a taxpayer in a closed year to determine the taxpayer's liability in a later open year. Barenholtz v. U.S., 784 F.2d 375 (1986). Likewise, a corporate employee or officer can challenge the audit calculations used by the Department to finally assess tax against a corporation, where those calculations are being used as a basis for a 100% penalty assessment against the employee or officer individually. In that case, the officer or employee is not attacking the finality of the assessment against the corporation, only the underlying amount on which the assessment against him is based.

The Taxpayer makes three broad objections to the audit.

First, the Taxpayer objects that the door receipts were improperly included in the audit because the bands collected the money at the door and usually kept all or most of the cover charge.

However, Code of Ala. 1975, §40-23-2(2) levies a sales tax on the gross receipts derived from the operation of a public place of amusement. The tax is levied against the person or corporation operating such public place of amusement. Consequently, the corporation, as the licensed owner and operator of the business, was liable for the sales tax on the gross receipts derived from the cover charges. The corporation cannot be relieved of liability because the bands may have collected and kept the receipts. See, State v. Red Brahma Club, Inc., Admin. Law Docket S. 92-171,

decided April 7, 1995.

The Taxpayer also argues that the drink prices were over-estimated in the audit. But the audit method used by the examiner did not consider the specific sales price of each drink. Rather, the examiner used the corporation's purchase invoices, bank records, etc. to determine the business's total gross receipts. Consequently, the fact that the business' drink prices often fluctuated is irrelevant to the audit method used by the Department.

Finally, the Taxpayer argues that sales tax was included in the lump-sum price of the drinks, which was then included by the Department in the taxable measure. However, the evidence indicates that the Department auditor backed out sales tax from the taxable measure and also allowed a credit for any sales tax already paid by the Taxpayer.

All taxpayers subject to sales tax are required to keep complete and accurate records from which the Department can accurately determine the taxpayer's correct sales tax liability.

Code of Ala. 1975, §40-23-9 (relating specifically to sales tax) and Code of Ala. 1975, §40-2A-7(a)(1) (relating generally to all taxes). The corporation in this case admittedly failed to provide the Department with adequate records. The fact that some records may have been destroyed by a third party after the audit period cannot prohibit the Department from auditing the corporation using

the best information available. If a taxpayer fails to provide adequate records, for whatever reason, the Department can then use any reasonable method to compute the taxpayer's liability. If the Department's computations are reasonable, the taxpayer cannot complain that the liability so computed is inexact. Jones v. CIR, 903 F.2d 1301 (10th Cir. 1990); Denison v. CIR, 689 F.2d 777 (10th Cir. 1982); Webb v. CIR, 394 F.2d 366 (5th Cir. 1968).

The corporation clearly underreported its sales tax liability during the audit period because the deli, beer, and liquor purchases, without adding a markup or the door receipts, by themselves exceeded the total gross receipts reported on the Taxpayer's sales tax returns for the period. Even the Taxpayer conceded that anywhere from \$8,000.00 - \$12,000.00 in additional tax is owed by the corporation. (R. 69).

Although not exact, under the circumstances, the Department's audit method using the best information available was reasonable and is affirmed.

Sections 40-29-72 and 40-29-73 levy a 100% penalty against any person responsible for paying a corporation's trust fund taxes that in that capacity willfully fails to do so. See generally, Morgan v. U.S., 937 F.2d 281 (5th Cir. 1981); Howard v. U.S., 711 F.2d 729 (1983). A person is a responsible person pursuant to the above statutes if he has the duty, status, and authority to pay the taxes in question. Gustin v. U.S., 876 F.2d 485, 491 (5th Cir. 1989).

The determinative question "is whether the individual

has significant control over the enterprises finances.'" *Fiataruolo*, 8 F.2d at 939 (quoting *Hochstein*, 900 F.2d at 547 (emphasis in *Fiataruolo*)). No single factor is dispositive in evaluating whether the individual had significant control; that determination must be made in light of "the totality of the circumstances," *Fiataruolo*, 8 F.3d 939. Relevant considerations include whether the individual

(1) is an officer or member of the board of directors, (2) owns shares or possesses an entrepreneurial stake in the company, (3) is active in the management of day-to-day affairs of the company, (4) has the ability to hire and fire employees, (5) makes decisions regarding which, when and in what order outstanding debts or taxes will be paid, (6) exercises control over daily bank accounts and disbursement records, and (7) has check-signing authority.

Id. at 939; see also *Hochstein*, 900 F.2d at 547; *Barnett v. IRS*, 988 F.2d 1449, 1455 (5th Cir.), cert. denied, --- U.S. ----, 114 S.Ct. 546, 126 L.Ed.2d 448 (1993); *Bowlen v. United States*, 956 F.2d 723, 728 (7th Cir. 1992).

U. S. v. Rem, 38 F.3d 634 (2nd Cir. 1994).

In this case, the Taxpayer was president and 60% stockholder of the corporation. He had the ability to hire and fire employees. He sometimes decided which debts and taxes to pay. He also signed checks and controlled all expenditures over \$500.00.

He apparently did not directly participate to a great extent in the daily running of the business, but he had authority over those who did. In other words, almost all of the above seven factors are present in this case.

The Taxpayer argues that his son and Walters were equally responsible for paying the taxes in question. (Taxpayer's brief at

page 6). That may be true, although it is not necessary to decide that question in this case. The fact that others may also be equally responsible is irrelevant because more than one person can be a responsible person. U. S. v. Rem, supra, at page 642. The Taxpayer is not relieved of liability because the Department has not assessed other possible responsible persons.

The Taxpayer clearly had the duty, status, and authority to pay the corporation's taxes so as to be a responsible person under §§40-29-72 and 40-29-73. He thus is personally liable for the tax in question. The final assessment is accordingly affirmed, and judgment is entered against the Taxpayer in the amount of \$24,183.45, plus applicable interest.

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

Entered January 26, 1996.

BILL THOMPSON
Chief Administrative Law Judge