

ELMER DEAN GITHENS  
37 Bayshore Drive  
Pensacola, Florida 32507,

Taxpayer,

v.

STATE OF ALABAMA  
DEPARTMENT OF REVENUE.

STATE OF ALABAMA  
DEPARTMENT OF REVENUE  
ADMINISTRATIVE LAW DIVISION

DOCKET NO. P. 95-365

#### FINAL ORDER

The Revenue Department assessed a 100% penalty against Elmer Dean Githens ("Taxpayer"), as a person responsible for the unpaid sales tax liability of Superior Sleep Shop, Inc. ("corporation"), for December 1992 through March 1993. The Taxpayer appealed to the Administrative Law Division pursuant to Code of Ala. 1975, ' 40-2A-7(b)(5)a. A hearing was conducted on March 28, 1997. Richard Jesmonth represented the Taxpayer. Assistant Counsel Duncan Crow represented the Department.

The issue in this case is whether the Taxpayer is personally liable for the unpaid sales tax liability of the corporation for the period in issue pursuant to Alabama's 100% penalty statutes, Code of Ala. 1975, ' ' 40-29-72 and 40-29-73.

The corporation operated a retail bedding outlet in Mobile, Alabama during the months in issue. The corporation failed to timely file Alabama sales tax returns for those months. A Department examiner visited the corporation's offices in Pensacola, Florida on September 13, 1993 to obtain the delinquent returns. The corporation prepared and filed the returns, which were not signed. The corporation also failed to pay the tax due as reported on the returns.

The Department investigated and determined that the Taxpayer was a person responsible for paying the corporation's trust fund taxes, and in that capacity willfully failed to do so. The Department accordingly assessed the Taxpayer for the unpaid tax pursuant to §§ 40-29-72 and 40-29-73.

The facts relied on by the Department are - Superior Sleep Shop, Inc. was incorporated in Alabama in 1985. The Taxpayer, as president of the corporation, leased a building for the corporation in Mobile in April 1990. The Taxpayer applied for an Alabama sales tax number for the corporation in May 1990. The application identified the Taxpayer as the owner and an officer of the corporation.

The Department also subpoenaed the corporation's records from AmSouth Bank. AmSouth provided a sampling of cancelled checks, deposit records, and signature cards on the corporation's account at its branch in Panama City, Florida. The checks were signed by the Taxpayer, and the deposit records showed sufficient deposits during the subject period to pay the taxes in issue.

The Taxpayer's representative initially moved to have the final assessment dismissed because Alabama did not have jurisdiction to tax the Taxpayer. The motion was denied by Order Denying Motion to Set Aside Assessment, entered December 4, 1996.

That Order held that jurisdictional nexus is established for due process purposes if an out-of-state taxpayer is given fair warning or notice that his in-state activities may subject him to tax in the state. Quill Corporation v. North Dakota, 112 S.Ct.

1904, 1913 (1992). An out-of-state taxpayer subjects himself to a state's taxing jurisdiction if he "purposely avails (himself) of the benefits of an economic market in the taxing state." Quill, 112 S.Ct. at 1910. The issue of jurisdictional nexus thus turns on the specific facts of each case.

The Taxpayer clearly had sufficient nexus to be subject to Alabama's taxing jurisdiction. The Taxpayer, as president of the corporation, applied for and was issued an Alabama sales tax license to conduct retail business in Alabama. He also leased a building in Mobile in which his corporation conducted business in Alabama. The Taxpayer clearly had fair warning and notice that Alabama taxes may be due.

An individual is a responsible person and thus personally liable for a corporation's unpaid trust fund taxes if the individual has significant control over the corporation's finances. U.S. v. Rem, 38 F.3d 634 (2nd Cir. 1994). An individual is a responsible person if he has the "duty, status, and authority" to pay or order payment of the taxes. Gustin v. U.S., 876 F.2d 485 (5th Cir. 1989).

The Taxpayer claims the Department failed to prove he was responsible for paying the corporation's unpaid sales tax. However, the Department's final assessment is prima facie correct, and the burden is on the Taxpayer to prove that the assessment is incorrect. Code of Ala. 1975, ' 40-2A-7(b)(5)c.

A final assessment unsupported by any evidence will not be affirmed. U.S. v. Walton, 909 F.2d 915, 919 (6th Cir. 1990). However, once the Department submits evidence supporting the final assessment, the burden shifts to the taxpayer to present

competent, relevant evidence disputing the Department's case. Sharwell v. C.I.R., 419 F.2d 1057 (1969); U.S. v. Walton, *supra*.

The Department submitted evidence that the Taxpayer was president of the corporation, he obtained an Alabama sales tax license for the operation of the business in Alabama, he leased the building in Alabama in which the business operated, and he signed checks for the corporation.<sup>1</sup> The burden then shifted to the Taxpayer to rebut the Department's case. The Taxpayer failed to do so. He failed to testify, and failed to offer any other evidence rebutting the Department's prima facie correct assessment. Consequently, the final assessment must be affirmed.

The Taxpayer also claims the Department should be bound by a settlement agreement entered into by the parties. Specifically, the Taxpayer's attorney offered to settle the case for \$2,500. The Department rejected that offer, and counter-offered through its attorney in the amount of \$6,510.45. The Taxpayer's attorney confirmed to the Department's attorney that the Taxpayer accepted the Department's counteroffer. However, the Department later reneged on the settlement when it discovered that its counteroffer did not include total interest on the amount due.

The Taxpayer claims the Department is legally bound by its settlement agreement, citing Jones v. Stedman, 595 So.2d 1355 (Ala. 1992). I must disagree.

Jones v. Stedman holds that a client is bound by a settlement agreement made

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<sup>1</sup>It is irrelevant that the checks obtained by the Department were on a Panama City account, and that none related to the corporation's business in Alabama. The Taxpayer still had the authority and ability to pay the corporation's debts, including its Alabama taxes.

by his attorney if (1) the attorney had authority to settle the case, and (2) the settlement was in writing or made on the record in circuit court.

Requirement (1) is inapplicable in this case because the Department actually made the counteroffer, not the Department's attorney. The attorney only conveyed the counteroffer to the Taxpayer's attorney. However, the holding in Jones v. Stedman is not applicable because the agreement was neither written nor entered on the record in circuit court. Consequently, while as a matter of public policy the Department should abide by any verbal agreement entered into in good faith with a taxpayer, I can find no authority that it is legally bound to do so in this case.

The final assessment is affirmed. Judgment is entered against the Taxpayer for \$9,689.07, 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 July 30, 1997.

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BILL THOMPSON  
Chief Administrative Law Judge