

CHARLES BEARD, III
1350 Kendall Place
Birmingham, AL 35209,

Taxpayer,

v.

STATE OF ALABAMA
DEPARTMENT OF REVENUE.

STATE OF ALABAMA
DEPARTMENT OF REVENUE
ADMINISTRATIVE LAW DIVISION

DOCKET NO. P. 98-544

FINAL ORDER

The Revenue Department assessed a 100 percent penalty against Charles Beard, III (ATaxpayer@), as a person responsible for paying the withholding tax liability of Health Systems Medical Supply of Alabama, Inc. (Acorporation@) for the years 1995 and 1996, and for the quarters ending March, September, and December 1996. 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 April 27, 1999. The Taxpayer represented himself. Assistant Counsel Margaret McNeill represented the Department.

The issue in this case is whether the Taxpayer is personally liable for the corporation's unpaid withholding taxes pursuant to Alabama's 100 percent penalty statutes, Code of Ala. 1975, ' 40-29-72 and 40-29-73. That issue turns on whether the Taxpayer was responsible for paying the withholding taxes, and wilfully failed to do so. The Taxpayer was president of the corporation from 1975 until the corporation closed in December 1997. The Taxpayer signed checks for the corporation, and during 1995 and 1996 signed numerous checks payable to himself

and various creditors. The Taxpayer also signed the corporation's withholding tax returns.

The corporation began experiencing financial difficulties in 1993 or 1994 because of competition from a State-operated home health care business. The Department determined from the corporation's 1995 and 1996 employee W-2 statements that the corporation failed to remit all withholding tax due for those years. The corporation also failed to pay its quarterly withholding tax as reported for the quarters ending March, September, and December 1995.

The Department assessed the corporation for the unpaid withholding taxes. The corporation failed to pay. The Department consequently assessed the Taxpayer, individually, as a person responsible for paying the corporation's unpaid trust fund taxes. The Taxpayer appealed.

If an employer fails to pay trust fund taxes, the government may collect the taxes from any person responsible for paying over the taxes who wilfully fails to do so. Sections 40-29-72 and 40-29-73. The above Alabama statutes are modeled after 26 U.S.C. § 6672. In such cases, federal case law should be followed in interpreting the Alabama statutes. State v. Gulf Oil Corp., 256 So.2d 172 (1971).

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 (1989). A responsible person must know that delinquent taxes are due and have the effective power to pay. Stallard v. U.S., 12 F.3d 489 (1993); Taylor v. U.S., 69 F.3d 411 (1995).

The Taxpayer concedes he was responsible for paying the corporations' withholding tax liability. He argues, however, that he should be relieved of liability because both he and the corporation suffered severe financial hardships during the subject years. He also claims it would be unfair for the State to require him to pay the taxes because a State-operated competitor caused his business to fail.

I sympathize with the Taxpayer. However, the Taxpayer, as a responsible person, wilfully failed to pay the withholding taxes owed by his corporation. The Taxpayer knew that the taxes were owed, had the money to pay, yet wrote numerous checks during the subject years to creditors and to himself. He wrote at least three checks to himself in 1996 for over \$2,600 each. Paying other creditors, or yourself, with knowledge that taxes are owed constitutes wilfulness for purposes of the 100 percent penalty statute. Morgan v. U.S., 937 F.2d 281 (1991); Howard v. U.S., 711 F.2d 729 (1983). The Taxpayer claims he paid only the corporations' survival expenses in lieu of the taxes. In such situations, however, the corporations' trust fund taxes must be paid ahead of all other creditors.

The final assessment is affirmed. Judgment is entered against the Taxpayer for \$12,775.04, plus applicable interest. The Taxpayer should contact the Department's Collection Services Division at 334-242-1067 concerning payment of the amount due. This Final Order may be appealed to circuit court within 30 days. Code of Ala. 1975, ' 40-2A-9(g).

Entered May 5, 1999.

BILL THOMPSON
Chief Administrative Law Judge

BT:ks

cc: Margaret Johnson McNeill, Esq.
Charles Beard, III
Joan Crumbley
Martha Pegues