

| | | |
|--|--------|--|
| OLIVER T. MOODY, JR. P.O. BOX 1526 ORANGE BEACH, AL 36561-1526 | § § | STATE OF ALABAMA ALABAMA TAX TRIBUNAL |
| TERESA T. MOODY P.O. BOX 1526 ORANGE BEACH, AL 36561-1526 | § § | DOCKET NOS. P. 14-370 P. 14-371 |
| Taxpayers, | § | |
| v. | § | |
| STATE OF ALABAMA DEPARTMENT OF REVENUE. | § | |

FINAL ORDER

The Revenue Department separately assessed Oliver T. and Teresa T. Moody (together "Taxpayers") for a 100 percent penalty, as persons responsible for paying the October through December 2009 and February and March 2010 withholding tax on behalf of Boiler Tek, Inc. The Taxpayers appealed to the Department's Administrative Law Division, now the Tax Tribunal, pursuant to Code of Ala. 1975, §40-2A-7(b)(5)a. The cases were consolidated and heard together on February 11, 2016. The Taxpayers and their attorney, Bob Galloway, attended the hearing. Assistant Counsel Duncan Crow represented the Revenue Department.

Boiler Tek performed construction, repair, and maintenance work on large, industrial boilers during the months in issue. The company was owned by Oliver Moody. Teresa Moody was the office manager.

The nature of the company's work required it to generate a significant amount of payroll and other expenses in a short period. Because the company could not fund the expenses up-front, it used a factoring company, Porter Capital, to finance its operations on a job by job basis.

Simply stated, when Boiler Tek got a job, it notified Porter Capital, which would provide the company with the money needed to pay the payroll and the other expenses incurred by Boiler Tek on the job, including the federal and state withholding taxes owed by the company. Boiler Tek would then issue the customer an invoice, and the customer would pay the invoice by remitting the money to a Porter Capital lock box.

Boiler Tek had a job with Georgia Pacific in the Fall of 2009. Unfortunately, a dispute arose about a vendor billing, and Georgia Pacific stopped paying the Boiler Tek invoices to the Porter Capital lock box. Boiler Tek continued doing emergency jobs for Georgia Pacific as the parties attempted to resolve the problem.

Teresa Moody testified at the February 11, 2016 hearing that the dispute drug on, and Georgia Pacific eventually owed their company over one million dollars. The company was eventually forced to file a Chapter 11 bankruptcy petition on March 26, 2010. It was thereafter unable to obtain financing for its jobs, and eventually ceased operating in late 2010.

Georgia Pacific eventually paid approximately \$998,000 into the bankruptcy court that was handling Boiler Tek's bankruptcy. The IRS filed a claim with the court, and was eventually paid approximately \$660,000. Porter Capital received approximately \$282,000, and a law firm and other creditors of the company were also paid various amounts. The Revenue Department filed a claim with the court on April 13, 2010, but for reasons unknown did not receive any payments from the court.

Boiler Tek failed to pay the State withholding taxes due for the months in issue. The Department investigated and determined that the Taxpayers were the parties responsible for collecting and paying over the company's withholding taxes to the State, and that they

had willfully failed to do so. It consequently assessed them individually for the 100 percent penalty levied at Code of Ala. 1975, §§40-29-72 and 40-29-73. This appeal followed.

Sections 40-29-72 and 40-29-73 are modeled after the federal 100 percent penalty statute, 26 U.S.C. §6672. That statute levies a 100 percent penalty against any person responsible for paying a corporation's trust fund taxes that willfully fails to do so. See generally, *Morgan v. U.S.*, 937 F.2d 281 (5th Cir. 1991); *Howard v. U.S.*, 711 F.2d 729 (5th Cir. 1983).

A person is a "responsible person" pursuant to the above statute if he or she has the duty, status, and authority to pay the taxes in question. *Gustin v. U.S.*, 876 F.2d 485 (5th Cir. 1989). If a person was responsible for paying the corporation's taxes, it is irrelevant that other individuals were equally or even more responsible for the taxes. *U.S. v. Rem*, 38 F.3d 634 (2nd Cir. 1994). A responsible person willfully fails to pay a corporation's trust fund taxes if the person knew that taxes were owed, but paid other creditors in lieu of the government. *Malloy v. U.S.*, 17 F.3d 329 (11th Cir. 1994).

The Taxpayers concede that they were responsible for collecting and paying over the withholding tax in issue to the Department. They contend, however, that they did not willfully fail to pay the amount due because money sufficient to pay the tax was paid into the bankruptcy court, but the Department "didn't participate and thus, (the Department) didn't get paid." (T. 4).

To begin, the Revenue Department timely filed a claim in Boiler Tek's bankruptcy proceeding shortly after the company filed its bankruptcy petition. The Department thus participated in the bankruptcy. As indicated, it is not known why the Department did not receive any of the funds available to pay Boiler Tek's creditors.

In any case, case law is clear that a responsible person's liability under the 100 percent penalty statute is separate and distinct from the corporation's liability for the unpaid trust fund taxes. *U.S. v. Huckabee Auto Co.*, 783 F.2d 1546 (11th Cir. 1986). The Department also is not required to attempt to collect unpaid trust fund taxes from a bankrupt corporation before proceeding against a responsible person. As stated by the Revenue Department's Administrative Law Division in *Nash v. State of Alabama*, Docket P. 98-513 (Admin. Law Div. 5/5/1999) at 5, 6:

Alabama's 100 percent penalty statutes are modeled after 26 U.S.C. §6672. In such cases, federal case law should be followed. *State v. Gulf Oil Corp.*, 256 So.2d 172 (1971). Federal courts have consistently held that the government is not required to attempt to collect the unpaid tax from a bankrupt corporation before proceeding against a responsible officer. In *Hutchinson v. United States*, 559 F. Supp. 890, 893-894 (1982), the court held as follows:

Plaintiff next argues that the government is estopped from assessing the 100 percent penalty against him because they failed to take steps to collect the unremitted taxes from the bankrupt corporation. The many courts that have previously considered this argument have found it unpersuasive. As has been succinctly stated in *Van Westerhuyzen v. United States Treasury Dep't*, 407 F.Supp. 334, 335-36 (D. Minn. 1975):

Section 6672 "imposes a personal liability for the withheld amounts upon the individual officers or agents required to collect, account for, and pay over [employment taxes], who are responsible for the corporation's default." *Kelly v. Lethert*, 362 F.2d 629, 633 (8th Cir. 1966). The result of this section is to make the responsible officers equally liable with the corporation to the Government and it "may proceed against either in the order best suited in its judgment to collect the unpaid tax." *Id.* at 635. Therefore, defendant is not required to first try to satisfy the tax liability from the assets of the bankrupt corporation but may properly proceed in the first instance against the plaintiffs.

See also *Monday v. United States*, 421 F.2d 1210 (7th Cir.), *cert. denied* 400 U.S. 821, 91 S. Ct. 38, 27 L.Ed.2d 48 (1970), *on remand*, 342 F.Supp. 1271 (D. Wis. 1972); *Spivak v. United States*, 370 F.2d 612 (2nd Cir. 1967), *cert. denied* 387 U.S. 908, 87 S. Ct. 1690, 18 L.Ed.2d 625 (1968).

For additional cases on point, see *U. S. v. Huckabee Auto Company*, 783 F.2d 1546 (11th Cir. 1986); *Matter of Taylor*, 132 F.3rd 256 (5th Cir. 1998); *State of Alabama v. Wilson*, Docket P. 93-293 (Admin. Law Div. 1/6/94).

Concerning the Taxpayers' claim that they did not willfully fail to pay the taxes in issue, I agree that they had no control over the funds paid by Georgia Pacific into the bankruptcy court. "Willful," as used in the statute, implies an ability to pay and an intentional or willful failure to do so. It arguably follows that if a person does not have control over money that could be used to pay the trust fund taxes due, the person cannot willfully fail to do so.

The evidence shows, however, that during the months in issue, the Taxpayers had significant funds available in the company's operating bank account, and paid various vendors, employees, etc. in lieu of the Revenue Department. Specifically, Boiler Tek's bank statements obtained by the Department showed that from October 1 through October 30, 2009, the account showed deposits and credits of \$154,120.98 and withdrawals of \$13,341.42; for December 1 through December 31, 2009, deposits and credits totaled \$75,000 and withdrawals totaled \$5,967.51; for January 30 through February 26, 2010, deposits and credits totaled \$47,013.35 and withdrawals totaled \$67,943.87; and finally, for February 27 through March 31, 2010, deposits and credits totaled \$74,345.07 and withdrawals totaled \$26,299.99.

The payment of other creditors in lieu of the government constitutes a willful failure to pay – ". . . a voluntary, conscious, and intentional act to prefer other creditors over the

United States constitutes willful failure to pay over.” *Teal v. U.S.*, 529 F.2d 903, 905 (9th Cir. 1976), quoting *Sorenson v. U.S.*, 521 F.2d 325, slip opinion at 5 (9th Cir. 1975). The Taxpayers were the only individuals authorized to sign checks on the Boiler Tek account. They had the funds available during the months in issue to pay the withholding taxes in issue, but paid other creditors in lieu of the Revenue Department. The Taxpayers thus willfully failed to pay the amounts in issue.

I sympathize with the Taxpayers because they lost their company because of malfeasance by a vendor, and through no fault of their own. They earnestly tried to save the company by selling many of their personal assets to keep the company solvent, so it is understandable that they used the available funds to keep the company operating. The law is clear, however, that trust fund taxes must be given priority and paid first, and that a responsible person that willfully fails to pay such taxes must be held accountable.

The final assessments entered against the Taxpayers, individually, are affirmed. The Taxpayers are jointly and severally liable for \$31,654.86; provided, the tax due of \$31,654.86 shall be paid but once. Additional interest is also due from the date the final assessments were entered, March 6, 2014.

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

Entered May 9, 2016.

BILL THOMPSON
Chief Tax Tribunal Judge

bt:dr

cc: Duncan R. Crow, Esq.
Robert M. Galloway, Esq.