

TY P. TAYLOR
4820 MARYLAND AVENUE
IRONDALE, AL 35210-3246,

Taxpayer,

v.

STATE OF ALABAMA
DEPARTMENT OF REVENUE.

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STATE OF ALABAMA
ALABAMA TAX TRIBUNAL

DOCKET NO. P. 16-103

FINAL ORDER ON REVEUE DEPARTMENT'S APPLICATION FOR REHEARING

The Revenue Department assessed Ty P. Taylor ("Taxpayer") for a 100 percent penalty, as a person responsible for paying the State sales tax for the periods of May and October 2012, January and June 2013, and October 2013 through January 2014; local sales tax for the periods of July 2012, September 2012 through November 2012, April 2013, May 2013, August 2013, and November 2013 through January 2014, and the withholding tax for the quarter ending December 2012, on behalf of Pinches Anaya V, LLC ("Company"). The Taxpayer appealed to the Tax Tribunal pursuant to §40-2A-7(b)(5)(a), Code of Ala. 1975. A Final Order was entered on December 12, 2016 voiding the final assessment. The Department timely applied for a rehearing.

The Company operated a restaurant, Pinches Taco ("Restaurant"), in Homewood, Alabama during the periods in issue. The Company failed to pay its State and local sales tax and its withholding tax for the periods. The Department assessed the Company for the unpaid taxes. The Company failed to pay. The Department conducted an investigation and determined that the Taxpayer was a "responsible person" for paying the company's unpaid trust fund taxes, as that term is defined in §40-29-73, Code of Ala. 1975. It consequently assessed the Taxpayer, individually.

The Taxpayer appealed, asserting that he was merely an employee of the Company, and that he had no decision-making authority regarding which of the Company's creditors were paid.

The Tax Tribunal held that Alabama's 100 percent penalty, authorized in §40-29-73, is generally modeled after the federal penalty statute found at 26 U.S.C. §6672, but that there is a significant difference between the two statutes regarding who is a responsible person. Specifically, a responsible person under federal law is any person with the duty, status, and authority to pay the trust fund taxes in issue, including an employee. However, under Alabama law, a "person" for purposes of the 100 percent penalty is limited to an officer of a corporation, or a member of a partnership, who as such officer or member is under a duty to collect and pay over the trust fund tax on behalf of the business. §40-29-72(b), Code of Ala. 1975; See Ala. Tax Reg. 810-12-1-.01 (specifying that the term "person" means "an officer of a corporation or a member of a partnership who by virtue of such position held, is charged with a duty to perform the act of collecting, truthfully accounting for, and/or paying over any trust fund tax to which this penalty relates.").

Finding no evidence that the Taxpayer was an officer or member of the Company, and finding that the Taxpayer had no decision-making authority other than to resolve day-to-day issues with guests and to manage day-to-day operations at the restaurant, the Tax Tribunal held that the 100 percent penalty statute did not levy a penalty against the Taxpayer.

On rehearing, the Department argues that Alabama's 100 percent penalty was modeled after the federal penalty statute, and therefore, the Alabama statute should be construed and interpreted in the same manner as the federal statute. Because the federal

statute has been interpreted to apply to employees as well as to officers of a corporation or members of a partnership, the Department argues that the Tax Tribunal should interpret the Alabama 100 percent penalty statute the same way—to levy the penalty on persons who are merely employees of the corporation or partnership—unless it is clear from the content of the statute that the Alabama legislature intended to adopt a different rule.

The Department also argues that the Taxpayer has not met his burden of proving that he is not a member of the Company, and alternatively, that he should be estopped from asserting that he is not a member in light of the facts presented at the October 18, 2016 hearing establishing that the Taxpayer held himself out to be an owner of the Restaurant.

Generally, I agree that where Alabama's taxing statutes are modeled after their federal counterparts, the statutes should be construed and interpreted the same way. See *Best v. Alabama Dept. of Rev.*, 417 So.2d 197(Ala. 1981). However, as the Department points out, this rule gives way where the intent to adopt a different rule is clear. It is clear that Alabama's 100 percent penalty statute is narrower than its federal counterpart. As discussed above, the federal statute specifically includes employees in the definition of "person." While I agree that Alabama's 100 percent penalty statute is generally modeled after the federal statute, it is important to note that the legislature clearly left out the word employee when it defined the term "person." Specifically, despite the fact that the word employee was in the federal statute when the state adopted its statute, the state clearly left out the word employee. The interpretation the Department asks the Tax Tribunal to adopt

would result in putting an employee in the state's statute when it was clearly intended not to be.

Further, the Department, through its rule making authority, has spoken to the definition of "person" for purposes of Alabama's 100 percent penalty statute, and has interpreted the term to mean an officer of a corporation or a member of a partnership, who by virtue of such position held, is charged with collecting, accounting for, and/or paying over the underlying trust fund tax. Ala. Tax Reg. 810-12-1-.01. The Department asks the Tax Tribunal to find that the regulation conflicts with the clear meaning of the statute, and to render the regulation null and void.

The Department's interpretation of the statutes it is charged with enforcing should be given great weight and deference, unless that interpretation is contrary to the plain wording of the statute. *Farmer v. Hypo Holdings, Inc.*, 675 So.2d 387 (Ala. 1996). A regulation which operates to create a rule out of harmony with the statute it purports to interpret should be rendered null and void. *Ex parte City of Florence*, 417 So.2d 191, 193-194 (Ala. 1982).

While I agree that a regulation that is inconsistent with or that produces different rules than the statute should be given no effect, I do not see the conflict that the Department asserts. The Department's interpretation of the word "includes" in the statute to limit the levy to officers or members is not an unreasonable or erroneous interpretation of the statute. Nor is it clear to me, especially in light of the fact that the legislature clearly excluded employees from the statute when it was adopted, that a different construction is required by the language of the statute.

Additionally, the Department argues that the Taxpayer has not met his burden of proving that he is not a member of the Company. The Department asserts that the Taxpayer's tax returns report that the Taxpayer and his father were members of a limited liability company, Bama Pinches Tacos, LLC, that was itself a member of the Company. The Department asserts that the Taxpayer has not produced evidence to show that he should not be considered a member of the Company for purposes of Alabama's 100 percent penalty statute. I disagree.

The Taxpayer and his father testified at the hearing conducted on March 7, 2017, a hearing on the Department's application for rehearing, that Bama Pinches Tacos, LLC did not have an equity interest in the Company. The Taxpayer's father testified that he and the Taxpayer loaned the Company \$300,000 to complete the build-out of the restaurant, and that the Company was to repay the loan from its profits. The Taxpayer's father admitted that the terms of the loan were not formally memorialized. He further explained that the funds to make the loan were secured from a bank, and produced evidence to substantiate that testimony. He also explained that the returns reporting that Bama Pinches Taco, LLC was a member of Company were incorrect, and that when the mistake was discovered it was rectified going forward.

Additionally, there was some evidence presented at the hearing to indicate that the losses reported by Bama Pinches Tacos, and passed through to the Taxpayer and his father, resulted from interest expense deductions and not from losses allocated from the Company. Further, the formation documents of the Company do not indicate that that Bama Pinches Tacos, LLC was a member of the Company.

I have no reason to doubt the testimony of the Taxpayer's father, a long-standing licensed attorney in Alabama, regarding his interest and the Taxpayer's interest in the Company. The fact that he and the Taxpayer did not formally document the terms of the loan does not in and of itself cause me to doubt his testimony, given the other facts mentioned above.

Alternatively, the Department argues that the Taxpayer should be estopped from asserting that he was not a member of the Company because he previously represented to the public that he was a co-owner of the Restaurant. To establish equitable estoppel, the Department must show that it justifiably relied on the Taxpayer's misrepresentation to its detriment. *Allen v. Bennett*, 823 So.2d 679 (Ala. 2001). The Department has made no such showing in this appeal. The Taxpayer advertised to the public that he was a co-owner in order to market the Company as a locally-owned-and-operated business. The Department has not explained how the Taxpayer's assertion caused justifiable detrimental reliance.

The Final Order entered December 12, 2016 voiding the final assessment is hereby upheld.

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

Entered September 6, 2017.

CHRISTY O. EDWARDS
Associate Tax Tribunal Judge

cc: Ralph M. Clements, III, Esq.
Samuel R. McCord, Esq.