

TOMMY BOOTHE
31680 RIVER ROAD
ORANGE BEACH, AL 36561,
A Person Responsible for Payment
of Taxes on Behalf of Wholesale
Imports, Inc., a Corporation,

Taxpayer,

v.

STATE OF ALABAMA
DEPARTMENT OF REVENUE.

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STATE OF ALABAMA
DEPARTMENT OF REVENUE
ADMINISTRATIVE LAW DIVISION

DOCKET NO. P. 04-297

FINAL ORDER

The Revenue Department assessed Tommy Boothe (“Taxpayer”) for a 100 percent penalty as a person responsible for paying the State sales taxes of Wholesale Imports, Inc. for May and July through December 2000, and January, March, and April 2001. 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 February 15, 2006. Jerome Speegle 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 taxes of Wholesale Imports, Inc. 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 a person responsible for paying the sales taxes of the corporation, and in that capacity willfully failed to do so.

The Taxpayer retired from his work as an educator in 1995 to care for his wife, who suffers from multiple sclerosis. The Taxpayer opened a car dealership, Wholesale Imports, Inc., in Atmore in 1995. He and his wife each owned 40 percent of the business. Their adult son owned the remaining 20 percent. The Taxpayer and his son jointly operated the

Atmore dealership until 1999.

The Atmore dealership was successful. The Taxpayer decided to expand in March 1999 by buying an existing dealership in Blountstown, Florida, which is approximately 200 miles from Atmore. The Florida dealership and the Atmore dealership were separate corporations.

The Taxpayer worked at the Blountstown dealership three to five days a week through the Summer of 1999. He periodically returned to Atmore to check on his wife. He eventually hired a general manager to operate the Florida dealership, and thereafter divided his time between the Florida dealership and Atmore. When in Atmore, the Taxpayer regularly visited the Atmore dealership and occasionally signed checks on the dealership's account.

The Atmore dealership had its floor plan financing through Chrysler Financial before March 1999. Both dealerships switched floor plan financing in mid-1999 to Debis Financial, the financial arm of Mercedes Benz. According to the Taxpayer, the floor plans at the Atmore and Blountstown dealerships were cross-collateralized.

The Florida dealership showed a profit in its first month, but thereafter incurred losses. The situation at the Florida dealership progressively worsened, and in early 2000 Debis assigned employees to oversee each of the dealerships. The Taxpayer testified that the Debis employees took absolute control of both dealerships and, in effect, began liquidating the dealerships in an attempt to recoup the Debis loans. The Debis employees approved all sales and required a daily accounting of the dealerships' finances. According to the Taxpayer, Debis took all of the money that came to the dealerships. He conceded, however, that the Debis employee in Atmore allowed the dealership to keep enough money

to pay its employees.

The financial manager at the Blountsville dealership confirmed that the Debis employee took control of the business. He explained that if Debis had floor plan financed a vehicle, "the checks went to Debis." (R. 104) However, if Debis had not financed the vehicle, the check would go to the dealership. The manager conceded that he did not know if Debis later got the money that went to the Blountsville dealership. He also had no knowledge concerning how the money was handled at the Atmore dealership.

The Atmore dealership failed to pay its Alabama sales tax for the months in issue. The Department determined that the Taxpayer was personally liable for the taxes under Alabama's 100 percent penalty statutes. It claims that the Taxpayer is personally liable because he was part-owner, had check writing authority on the dealership's checking account, and wrote some checks on the account in the subject months.

The Taxpayer concedes that he and his son both operated the Atmore dealership before March 1999. He claims, however, that he was not actively involved in the day-to-day operations at the Atmore business after he acquired the Florida dealership in March 1999. Rather, he asserts that his son and a general manager ran the business. He concedes that he regularly visited the Atmore location after March 1999, and sometimes also signed checks on the dealership's account, but that he made no management decisions and did not decide which bills to pay.

The Taxpayer further argues that Debis took over absolute control of the Atmore dealership in May or June 2000, and that the Debis employee thereafter decided which creditors to pay and not to pay. He thus contends that he not only did not decide which bills to pay after May 2000, he did not have the independent authority or ability to pay any

bills, including the dealership's sales tax.

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).

In *Vinick v. United States*, 205 F.3d 1 (1st Cir. 2000), the Court identified seven factors that are relevant in determining if a person is a "responsible person" for purposes of the 100 percent penalty statute:

- (1) Was the person an officer or on the board of directors;
- (2) Was the person an owner;
- (3) Was the person active in the day-to-day management of the company;
- (4) Did the person hire and/or fire employees;
- (5) Did the person decide which bills will be paid, and in what order;
- (6) Did the person control the company's bank account and financial records;

and,

(7) Did the person have check-signing authority.

No one factor is determinative. Rather, “[t]he deciding court must look at the ‘totality of the circumstances’ when making the determination of responsibility.” *Vinick v. United States*, 205 F.3d at 8, quoting *Fiataruolo v. United States*, 8 F.3d 930, 939 (2nd Cir. 1993). In weighing a taxpayer’s liability, the burden is on the taxpayer to prove he or she is not a responsible person. *Caterino v. United States*, 794 F.2d 1 (1st Cir. 1986).

In this case, the Taxpayer was part owner of the Atmore dealership and also signed checks on the dealership’s account during the months in issue. Those factors support the Department’s case.

On the other hand, while the Taxpayer regularly visited the Atmore dealership, there is no evidence he was actively involved in the day-to-day operations of the business during the subject months, or that he hired and/or fired any employees during those months. Those factors support the Taxpayer’s position.

The Taxpayer’s primary defense is that Debis took over effective control of the dealership’s finances in May or June 2000, and thereafter exercised absolute control during the months in issue. He thus claims that he was effectively unable to pay the taxes.

There is evidence confirming the Taxpayer’s claim that Debis was actively involved at the Atmore dealership after May 2000. The evidence does not confirm, however, that Debis controlled the dealership’s finances to such an extent that the Taxpayer was unable to independently pay the taxes in issue.

If the dealership sold a vehicle financed by Debis, Debis received the sale proceeds up to the amount financed. However, the sale proceeds over the amount financed by Debis went to the dealership. The dealership also received the sale proceeds from all

vehicles not floor planned by Debis. The dealership wrote hundreds of checks a month on its checking account, which shows that the dealership, i.e., the Taxpayer, had money not controlled by Debis during the subject months sufficient to pay its bills.

The Taxpayer testified that the Atmore dealership struggled to pay its employees during the subject months. The fact is, however, that the employees were paid, as were the other monthly bills required to operate the business.

The Taxpayer signed numerous large checks on the dealership's account during the months in issue. The checks were primarily to banks and car dealerships and were required to satisfy liens on the vehicles sold by the dealership. Some were also cashiers checks to Debis to pay down the Debis loan. The Taxpayer claims that the dealership had not choice but to satisfy the liens if it wanted to continue in business.

I recognize that the Taxpayer faced a hard choice. Either satisfy the liens on the vehicles and pay its employees and the corporation's other immediate operating cost, or go out of business. Unfortunately for the Taxpayer, his primary duty was to retain and pay over to the Department the trust fund sales taxes being collected from the dealership's customers. "The desire to continue in business is not justification for violating the trust imposed by law to pay (trust fund) taxes." *United States v. Hill*, 368 F.2d 617, 621 (5th Cir. 1966).

In some instances, the federal courts have held that a bank or lending company may be liable for the unpaid trust fund taxes of a corporation. For example, in *Commonwealth National Bank of Dallas v. United States*, 665 F.2d 743 (5th Cir. 1982), a bank loaned money to a corporation that subsequently failed to pay its federal employment taxes. The IRS went against the bank for the unpaid taxes. The Fifth Circuit confirmed the lower

court's holding that the bank was liable because the bank and its officers effectively controlled the corporation's finances and decided which creditors to pay and when. "What will subject the bank to liability for those (trust fund) taxes is the assumption of control over how the employee's funds are to be spent and over the process of deciding which creditors of the employer are to be paid and which are not, and when." *Commonwealth*, 665 F.2d at 757. See also, *Merchants National Bank of Mobile v. United States*, 878 F.2d 1382 (11th Cir. 1989).

On the other hand, courts have also held that a bank will not be liable for a corporation's trust fund taxes if "the bank did not interfere with the management of the corporation and the corporation was free to draw on its own account to the extent it had funds in the bank." *United States v. Hill*, 368 F.2d at 622.

The facts in *Hill* are more applicable in this case. While the Debis employee did to some extent interfere with how the Atmore dealership was operated, the dealership still had money in its account from which the taxes in issue could have been paid. The fatal fact for the Taxpayer is that he wrote checks to pay other creditors during the subject months in lieu of the Department. The fact that the other creditors had to be paid for the dealership to stay in business is not relevant. The Taxpayer was under a primary duty to first remit the trust fund sales taxes to the Department.

The final assessment is affirmed. Judgment is entered against the Taxpayer for tax, penalties, and interest of \$17,121.51. Additional interest is also due from the date the final assessment was entered, February 18, 2004.

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

Entered June 26, 2006.

BILL THOMPSON
Chief Administrative Law Judge