

O. HUGH CAMPBELL  
252 Sunnydale Road  
Gadsden, AL 35906,  
A Person Responsible for Payment of  
Taxes on Behalf of Seatrice  
Pharmaceuticals, 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. 04-359

### FINAL ORDER

The Revenue Department assessed O. Hugh Campbell (“Taxpayer”) for a 100 percent penalty, as a person responsible for paying the withholding taxes owed by Seatrice Pharmaceuticals, Inc., for the month ending January 1999; the quarters ending June 1998, September 1998, and September 1999; and the years ending 1998 and 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 September 2, 2005. The Taxpayer and his attorney, Barry McCrary, attended the Taxpayer. Assistant Counsel Margaret McNeill represented the Department.

### ISSUE

The issue in this case is whether the Taxpayer is personally liable for the unpaid withholding taxes of Seatrice Pharmaceuticals, 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 withholding taxes of the corporation, and in that capacity willfully failed to do so.

**FACTS**

Seatrace Pharmaceuticals, Inc. operated during the periods in issue as a pharmaceutical manufacturer and wholesaler in Alabama. The Taxpayer was president of the corporation. As president, he was engaged in all aspects of the business, including administration, manufacturing, and sales. He was also involved in finding investors for the business.

The Taxpayer had check signing authority and periodically wrote checks on the corporation's checking account. He also signed the corporation's Alabama withholding tax returns for the quarter ending March 1998 and the year ending December 31, 2001. He signed UCC filings with the Secretary of State's office in 1998, and was involved in putting the corporation into Chapter 11 bankruptcy in October 2001.

The corporation either failed to file Alabama withholding tax returns or filed returns but failed to pay the reported tax due during the periods in issue. The Department attempted to collect the unpaid withholding tax from the corporation, but was unable to do so. It consequently determined that the Taxpayer was responsible for paying the corporation's taxes, but had failed to do so. It accordingly assessed him personally for the unpaid tax due.

The Taxpayer argues that he was ill during the years in issue and that he had very little to do with the corporation in those years. He concedes that he did perform some duties for the corporation during the subject years, but that he was only involved in either manufacturing or fund raising. He contends that others were responsible for paying the corporation's bills, including the taxes, and that he was unaware that some taxes had not been paid until after the corporation ceased operating.

The Department disputed the Taxpayer's arguments through the testimony of two former employees of the corporation. Pam Burgess was the accountant/bookkeeper for the corporation from 1996 until 1999. She was hired by the Taxpayer, and, according to her testimony, worked under the Taxpayer's guidance. Under questioning by the Department's attorney, Burgess testified as follows:

Q. Did you make day-to-day decisions?

A. No.

Q. Who did?

A. Hugh Campbell.

Q. Was he there pretty much daily?

A. Yes.

Q. Was he hands-on, would you say?

A. Yes.

Q. Did you sign checks at Mr. Campbell's direction?

A. I did.

Q. Did he sign checks as well?

A. Yes, he did.

Q. Did you sign tax returns at Mr. Campbell's direction?

A. I did.

Q. Did you make decisions as to whether or not taxes would be paid?

A. I did not.

Q. Who made those decisions?

A. Hugh Campbell.

Q. Was he aware that the taxes were due?

A. He was.

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A second employee, Kirk Taylor, was hired by the Taxpayer as a salesman in mid-1999. He worked as a salesman until mid-2000, when the Taxpayer asked him to help out in the office. Taylor testified that he signed some small checks on the corporation's account without being told to do so. He also testified, however, that the Taxpayer was active in the business, and that the Taxpayer always okayed or directed him to write all large checks on the corporation's account. Taylor left the corporation in late 2001.

### ANALYSIS

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 Taxpayer in this case was president of the corporation and was active in all aspects of the corporation's business. He had health problems during the subject years, but the evidence establishes that he was still actively involved in the business on a regular basis. There is also evidence that he was notified of the unpaid taxes, but failed to pay the amounts due. Importantly, he wrote checks for the corporation, and directed his employees as to which checks they should write to the corporation's creditors. He thus clearly had "sufficient control over the enterprise's finances" sufficient to make him personally liable for the corporation's unpaid withholding taxes. *Fiataruolo v. U.S.*, 8 F.3d 930, 939 (2nd Cir. 1993). "Liability attaches to those with power and responsibility within the corporate structure for seeing that the taxes withheld from various sources are remitted to the Government." *Monday v. U.S.*, 421 F.2d 1210, 1214 (7th Cir.), cert. denied 400 U.S. 821 (1970). The Taxpayer had the responsibility and power to pay the taxes in issue. He is thus personally liable for failing to do so.

The final assessment is affirmed. Judgment is entered against the Taxpayer for tax, penalty, and interest of \$19,112.50. Additional interest is also due from the date the final assessment was entered, March 19, 2004.

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

Entered November 10, 2005.

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BILL THOMPSON  
Chief Administrative Law Judge