

ARTHUR W. MCPHILLIPS, JR. §
4 Graf Court §
Mobile, AL 36606, §
A Person Responsible for Payment of §
Taxes on Behalf of Mathes McPhillips §
Electrical Supply, Inc., a Corporation, §
Taxpayer, §
v. §
STATE OF ALABAMA §
DEPARTMENT OF REVENUE. §

STATE OF ALABAMA
DEPARTMENT OF REVENUE
ADMINISTRATIVE LAW DIVISION

DOCKET NO. P. 04-377

**FINAL ORDER DENYING TAXPAYER'S
APPLICATION FOR REHEARING**

This appeal involves a 100 percent penalty final assessment entered against the above Taxpayer, as a person responsible for paying the State sales tax for Mathes McPhillips Electrical Supply, Inc. for September through December 1999 and October 2000 through July 2002. A Final Order was entered on April 5, 2006 affirming the final assessment. The Taxpayer timely applied for a rehearing.

The Taxpayer claims on rehearing that AmSouth "had almost complete control" of the corporation's finances after February 2000, and that "[t]here were no unencumbered funds over which the taxpayer had complete control by which he could have paid any taxes." See, Taxpayer's Request for Rehearing, at paragraphs 5 and 6. The evidence shows otherwise.

If the Taxpayer's business billed a customer after February 2000, the customer was directed to pay the money to a lockbox controlled by AmSouth. But if a customer paid using a credit card or in cash, the money went into the corporation's SouthTrust account. When questioned about the SouthTrust account at the February 14, 2006 hearing, the Taxpayer testified as follows:

By Ms. McPhillips:

Q. Now, there was money that went in (the SouthTrust account) after 2000, was there not.

A. Yes.

Q. Okay. Where did that money come from?

A. Well - -

Q. And how did that money go into that account?

A. There would only be two ways to do it. One is any credit card bills that happened to be - - anybody that happened to pay with a credit card would have still gone in there. Because the credit card processing company had that account number.

The second, I had a big fight with AmSouth where they wouldn't let me write any checks. I told them if they wanted me to try to liquidate this thing, I had to pay bills, rent, utilities, and the people that were working helping me to - - you know, that I had to have money to pay them. I couldn't keep the doors open and liquidate if I didn't do that.

And they said, okay. Well, you know, any cash sales that you have can go in - - you know, and use that to pay them. But not any of the lockbox money or anything, we're not going to give you anything.

Judge Thompson: So you're saying the cash sale money went into the SouthTrust account?

Mr. McPhillips: Yes, Sir.

Judge Thompson: Okay.

A. And that's where the funds to disburse out of that account came from.

T. at 52 – 53.

AmSouth did not control the SouthTrust account, which the corporation used to pay its operating expenses. An average of almost \$20,000 per month was deposited into the SouthTrust account from January 2001 through August 2002. See, Dept. Ex. 2. The

Taxpayer thus had access to sufficient funds in the SouthTrust account from which the corporation's sales taxes could have been paid. He elected not to, and paid other creditors instead. I understand that the Taxpayer had to pay the corporation's monthly operating expenses to stay in business. But "[t]he 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). As stated in the Final Order, "the Taxpayer was under a primary legal duty to pay the corporation's trust fund taxes to the Department. He elected not to, and instead paid other creditors in lieu of the Department. By doing so, the Taxpayer became personally liable for the corporation's unpaid trust fund taxes." Final Order at 3.

The Taxpayer's representative cites *Merchant's National Bank v. U.S.*, 878 F.2d 1382 (11th Cir. 1989) in support of the Taxpayer's position. However, that case can be distinguished on its facts.

In *Merchant's National*, the issue was whether the bank was liable for the corporation's trust fund taxes. The Eleventh Circuit held that the bank was liable because it tightly controlled all monies going into the corporation's accounts from which the taxes could have been paid. Not so in this case. As discussed, the funds in the SouthTrust account were not controlled by AmSouth, and could have been used by the Taxpayer to pay the corporation's trust fund taxes. In that regard, this case is similar to the *Hill* case quoted above.

In *Hill*, the IRS attempted to hold two corporate officers and also a bank liable for the unpaid trust fund taxes of a corporation. The lower court held the officers liable but not the bank. The Fifth Circuit affirmed. In so holding, the Court noted that the bank did not have absolute control of the corporation's finances, "and that the corporation was free to draw on

its own account to the extent that it had funds in the bank.” *Hill*, 368 F.2d at 322. In *Merchant’s National*, the Court distinguished *Hill* – “In *Hill*, there were ample funds in the Hill and Moore general account from sources other than the bank advances with which the company could have paid the (trust fund) taxes.” *Merchant’s National*, 878 F.2d at 1387. The same is true in this case. The Taxpayer had access to the credit card and cash payments deposited into the SouthTrust account that he could have used to pay the corporation’s sales taxes.

The Taxpayer’s application for rehearing is denied. The April 5, 2006 Final Order is affirmed.

This Final Order Denying Taxpayer’s Application for Rehearing 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