

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

The Revenue Department assessed a 100 penalty against Arthur W. McPhillips, Jr. (“Taxpayer”), as a person responsible for paying the State sales taxes on behalf of Mathes McPhillips Electrical Supply, Inc., for September through December 1999 and October 2000 through July 2002. 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 14, 2006. Attorney Rosa McPhillips and CPA Ceresa Frankel represented the Taxpayer. Assistant Counsel Duncan Crow represented the Department.

The Taxpayer owned and operated Mathes McPhillips Electrical Supply, Inc. during the months in issue. He was president of the corporation. He also signed checks on the corporation’s SouthTrust Bank checking account during the subject months. As discussed below, the corporation also had an account at AmSouth Bank during the period.

The corporation failed to pay its State sales tax for the months in issue. The Taxpayer concedes that he had the authority and ability to pay the corporation’s taxes in 1999, but that the taxes were not paid because the corporation was having financial problems. He argues, however, that he did not have the ability to pay the taxes after 1999

because AmSouth Bank took control of the corporation in January 2000.

The Taxpayer explained that the corporation had a line of credit with AmSouth Bank. In early 2000, AmSouth notified the Taxpayer that it was calling the loan. The Taxpayer testified that the corporation could not pay the loan, and that AmSouth in effect required the corporation to liquidate its inventory to pay down the debt. The corporation began selling its inventory, and AmSouth required the corporation to direct its customers to make all payments to an AmSouth lockbox in Birmingham. AmSouth applied the money remitted to the lockbox to reduce the outstanding loan balance.

The Taxpayer did not write checks on the AmSouth account during the period in issue. Rather, he paid his employees and the corporation's operating expenses using the corporation's SouthTrust account. The money from the corporation's credit card and cash sales went into that account. AmSouth also transferred money into the SouthTrust account so that the corporation could pay its employees.

The corporation finally closed and went into bankruptcy in mid-2002.

The Taxpayer argues that AmSouth virtually controlled the business beginning in January 2000, and dictated what bills he could and could not pay. Consequently, as indicated, he claims that he did not have the ability and authority to pay the corporation's sales taxes after AmSouth took over.

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 concedes that he had the duty and ability to pay the corporation’s sales taxes in 1999, but that he was unable to pay the taxes after AmSouth took over in 2000. The evidence indicates otherwise.

The corporation had money in its SouthTrust account from 2000 until it closed in 2002 sufficient to pay the sales tax in issue. I understand that the Taxpayer had a tough choice because if he did not pay his employees and also the day-to-day operating expenses, the business would have closed. But 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.

The final assessment is affirmed. Judgment is entered against the Taxpayer for tax, penalty, and interest of \$84,773.19. Additional interest is also due from the date the final assessment was entered, March 31, 2004.

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

4

Entered April 5, 2006.

BILL THOMPSON
Chief Administrative Law Judge