

DAVID LEE JACKSON
3049 OLD STONE DRIVE
BIRMINGHAM, AL 35242,

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STATE OF ALABAMA
DEPARTMENT OF REVENUE
ADMINISTRATIVE LAW DIVISION

Taxpayer,

§

DOCKET NO. P. 04-796

v.

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STATE OF ALABAMA
DEPARTMENT OF REVENUE.

§

OPINION AND PRELIMINARY ORDER

The Revenue Department assessed a 100 percent penalty against David Lee Jackson ("Taxpayer"), individually, as a person responsible for paying the delinquent withholding and sales tax of Jackson Foods, Inc. The assessment includes withholding tax for the quarter ending June 1999, the year 1999, which includes the quarters ending September and December 1999, and the quarters ending June 2000 through December 2001, and sales tax for the months of June 1998, February 1999, and April 1999 through April 2000. 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 November 16, 2004. Calvin Bomar represented the Taxpayer. Assistant Counsel Margaret McNeill represented the Department.

The issue in this case is whether the Taxpayer is personally liable for the unpaid trust fund taxes of Jackson Foods, 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 trust fund taxes of the corporation, and in that capacity willfully failed to do so.

Jackson Foods, Inc. was incorporated in 1993. The Taxpayer was president of the corporation. He also applied to the Department for sales and withholding tax accounts for the corporation, and his name was on the corporation's bank account.

Jackson Foods filed State sales tax returns for February 1999 and April through July 1999. The returns were signed by the Taxpayer. Checks were submitted for the reported tax due, but were returned for insufficient funds. The Taxpayer signed the corporation's withholding tax returns for the quarters ending June, September, and December 1999. The tax due as reported on those returns also was not paid.

The Department subsequently assessed the Taxpayer, individually, for the unpaid sales and withholding taxes of Jackson Foods pursuant to §§40-29-72 and 40-29-73. The assessment includes tax for the above periods for which the corporation filed returns. The Department also estimated the corporation's sales tax liability for June 1998 and August 1999 through April 2000, and its withholding tax liability for June 2000 through December 2001 because no returns were filed for those periods. Those estimated amounts are also included in the final assessment. The Department now concedes that the withholding liability for June 2000 through December 2001 should be deleted from the assessment because Jackson Foods merged with DSJ, Inc., and thus stopped operating as a separate entity, in April 2000.

Sections 40-29-72 and 40-29-73 are modeled after the federal 100 percent penalty statute, 26 U.S.C. §6672. Those statutes levy 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 statutes 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 does not dispute that he was responsible for paying the taxes in issue, or that the taxes have not been paid. Rather, he argues that after DSJ, Inc. was incorporated in 1998, that corporation took over the operations of Jackson Foods, and that the two corporations thereafter operated as one. The Department has also assessed the Taxpayer, individually, for the trust fund taxes owed by DSJ, Inc., and the Taxpayer argues that the assessments involve the same tax.

The evidence shows, however, that Jackson Foods and DSJ, Inc. operated as separate businesses until Jackson Foods merged into DSJ in April 2002. They maintained separate sales and withholding tax accounts with the Department, and the Taxpayer filed separate returns for both corporations through the 1999 tax year. Separate annual withholding reconciliation Form A-3s were also filed for each corporation in January 2000 concerning the 1999 tax year.

The Taxpayer argues in his post-hearing brief that the withholding tax for the quarter ending June 1999 and the sales tax for the months of June 1998 and February 1999 are barred by the five year statute of limitations for assessing tax at Code of Ala. 1975, §40-2A-7(b)(2)c. That statute requires that a 100 percent penalty assessment must be entered within five years from the due date of the corporate return on which the underlying tax was required to be reported, or five years from when the return was actually filed, whichever is later.

The Taxpayer argues that all taxes before August 1999 are time-barred because the Department entered the final assessment in issue on August 20, 2004. However, the statute governs when a preliminary assessment must be entered, not when a final assessment must be entered.

The Department entered a preliminary assessment against the Taxpayer on April 13, 2004. The corporation filed a sales tax return for February 1999. Consequently, the tax due for that period was not timely assessed, and is dismissed. However, the corporation failed to file a sales tax return for June 1998. That month thus was not time-barred. See, Code of Ala. 1975, §40-2A-7(b)(2)a. The withholding tax for the quarter ending June 1999 also is not time-barred because it fell within the five year statute.

The Taxpayer also contends that the Department is barred by res judicata and collateral estoppel from assessing him for the tax in issue because the Jefferson County Circuit Court had ruled in a prior case that the tax had been dismissed in bankruptcy. The Department filed an injunction action against Jackson Foods, Inc. in Jefferson County Circuit Court in June 2002. The action attempted to enjoin the corporation from

doing business because it had failed to fully pay its withholding and sales tax for 1993 through May 2002. The Taxpayer submitted a Jefferson County case action summary with its post-hearing brief showing that the Jefferson County Circuit Court dismissed the injunction action because “the claim of the (Department) was dismissed in bankruptcy.”

The doctrines of collateral estoppel and res judicata do not apply in this case. First, the parties are not the same because the Jefferson County case was against the corporation, Jackson Foods, Inc., not the Taxpayer, individually. And even if the Department’s claim against the corporation had been properly dismissed in bankruptcy, the underlying tax would still be owed and could be assessed against the Taxpayer, individually. In any case, trust fund taxes owed by a corporation cannot be dismissed or discharged in bankruptcy. 11 U.S.C. §507(a)(8)(C).

Finally, the Taxpayer argues that he was not properly notified of the final assessment in issue in this case. Alabama’s courts have held, however, that if a taxpayer is allowed an opportunity to contest an assessment, any prior procedural defects are cured. “The due process requirement is satisfied if there is opportunity to question the validity or amount of a tax either before the amount is determined or in subsequent proceedings for its collection and enforcement . . .” *Rabren v. Baxter*, 239 So.2d 206, 212 (Ala. Civ. App. 1970), citing 51 Am. Jur. Taxation §731 and §732. See also, *Matthews v. State of Alabama, Inc.* 03-470 (Admin. Law Div. 10/29/03).

The Department is directed to delete the February 1999 sales tax and the June 2000 through December 2001 withholding tax from the final assessment. A Final Order will then be entered for the adjusted amount due.

This Opinion and Preliminary Order is not an appealable Order. The Final Order, when entered, may be appealed to circuit court within 30 days pursuant to Code of Ala. 1975, §40-2A-9(g).

Entered January 4, 2005.

BILL THOMPSON
Chief Administrative Law Judge