

CAROL J. BRADFORD
2129 Park Place
Decatur, AL 35601,

STATE OF ALABAMA
DEPARTMENT OF REVENUE
ADMINISTRATIVE LAW DIVISION

Taxpayer,

DOCKET NO. P. 00-344

v.

STATE OF ALABAMA
DEPARTMENT OF REVENUE.

FINAL ORDER

The Revenue Department assessed a 100 percent penalty against Carol J. Bradford (ATaxpayer@), as a person responsible for paying the sales and withholding tax liabilities of Platters, Inc. (Acorporation@). The assessment includes sales tax for September and October 1996, and August, September, October, and December 1997, and withholding tax for 1996, and the quarters ending March, September, and December 1997. 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 October 12, 2000. Claud Lavender represented 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 sales and withholding taxes of Platters, 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 taxes of the corporation, and in that capacity willfully failed to do so.

FACTS

The Taxpayer is the general manager of a country club in Decatur, Alabama. In early 1996, she became interested in buying a popular restaurant in Decatur. She wanted the restaurant for her son, Anthony Bradford, who had food and beverage experience. She discussed the idea with her brother, John Douglas Hulgen (AHulgen@), a farmer in the area. The parties agreed to buy the business, and in March 1996 formed a corporation, Platters, Inc., for that purpose. Hulgen provided the corporation with \$165,000 to buy the existing facility. The corporation borrowed money to remodel, and the restaurant opened in mid-1996.

Anthony Bradford managed the restaurant when it first opened. The Taxpayer was not employed by the business, but was very involved in running the restaurant. Anthony lived with the Taxpayer, and they discussed the management and operation of the business daily. The country club eventually notified the Taxpayer that she was spending too much time away from her duties at the club. She consequently spent less time at the restaurant during working hours, but continued to be actively involved in the business.

The Taxpayer was the secretary-treasurer and a director of the corporation. The parties initially agreed that Hulgen and the Taxpayer would each own 40 percent of the shares of the corporation, with Anthony owning the remaining 20 percent. However, stock was not issued by the corporation until almost one year after the business opened. When the stock was issued, Hulgen kept 80 percent for himself because he had provided the money to buy the business. The Taxpayer received the other 20 percent.

The business suffered financial problems from the start. As manager, Anthony initially had the responsibility of actually paying the bills. Hulgen became more involved and took over that job after the first year. The limited money available was used to pay the bank loans and buy the food and beverages necessary to operate the business. The Taxpayer testified that she knew the corporation was not paying its sales and withholding taxes to the Department.

The Taxpayer had check signing authority on the corporation's account. She testified that she could have written checks for anything, although she only signed a few checks for beer and liquor. The Taxpayer also personally guaranteed the bank loans used to remodel and operate the business. She arranged for her CPA to prepare tax returns for the corporation, and personally paid the CPA after the corporation failed to do so. There is no evidence that the Taxpayer signed any sales or withholding tax returns for the corporation, although she did sign the corporation's 1997 corporate income tax return.

The Department assessed the corporation for the unpaid sales and withholding taxes for the periods in issue. The corporation failed to pay. The Department consequently assessed the Taxpayer, individually, for the unpaid taxes pursuant to ' ' 40-29-72 and 40-29-73. The Taxpayer appealed.

ANALYSIS

Sections 40-29-72 and 40-29-73 are modeled after the federal 100 percent penalty statute, 26 U.S.C. '6672. Federal case law and authority thus should control in interpreting the Alabama statutes. State v. Gulf Oil Corp., 256 So.2d 172 (1971).

Federal ' 6672 and Alabama ' ' 40-29-72 and 40-29-73 both 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. 1981); *Howard v. U.S.*, 711 F.2d 729 (1983). A person is a responsible person pursuant to the above statutes if he has the duty, status, and authority to pay the taxes in question. *Gustin v. U.S.*, 876 F.2d 485, 491 (5th Cir. 1989). If a person was responsible for paying the taxes, it is irrelevant that other individuals were equally or even more responsible for paying the taxes. *Fiataruolo v. U.S.*, 8 F.3d 930 (2nd Cir. 1993); *U.S. v. Rem*, 38 F.3d 634.

More than one individual may be a responsible person within the meaning of ' 6672(a). See, e.g., *Fiataruolo*, 8 F.3d at 939; *Kinnie v. United States*, 994 F.2d 279, 284 (6th Cir. 1993); *Gephart v. United States*, 818 F.2d 469, 476 (6th Cir. 1987) (While it may be that [other corporate officials] were more responsible than plaintiff, and exercised greater authority, this does not affect a finding of liability against the plaintiff (emphasis in original)). And it is not necessary that the individual in question have the final word as to which creditors should be paid in order to be subject to liability under this section. *Hochstein v. United States*, 900 F.2d 543, 547 (2d Cir. 1990) (*Hochstein*) (quoting *Gephart v. United States*, 818 F.2d at 475), cert. denied, ___ U.S. ___, 112 S.Ct. 2967, 119 L.Ed.2d 587 (1992). The determinative question is whether the individual has significant control over the enterprise's finances. *Fiataruolo*, 8 F.3d at 939 (quoting *Hochstein*, 900 F.2d at 547 (emphasis in *Fiataruolo*)). No single factor is dispositive in evaluating whether the individual had significant control; that determination must be made in light of the totality of the circumstance, *Fiataruolo*, 8 F.3d at 939. Relevant considerations include whether the individual

- (1) is an officer or member of the board of directors,
- (2) owns shares or possessed an entrepreneurial stake in the company,
- (3) is active in the management of day-to-day affairs of the company,
- (4) has the ability to hire and fire employees,
- (5) makes decisions regarding which, when and in what order outstanding debts or taxes will be paid,
- (6) exercises control over daily bank accounts and disbursement records, and
- (7) has check-signing authority.

Id. at 939; *see also Hochstein*, 900 F.2d at 547; *Barnett v. IRS*, 988 F.2d 1449, 1455 (5th Cir.), *cert. denied*, _____ U.S. _____, 114 S.Ct. 546, 126 L.Ed.2d 448 (1993); *Bowlen v. United States*, 956 F.2d 723, 728 (7th Cir. 1992).

U.S. v. Rem, 38 F.3d at 642.

Hulgen owned most of the stock in the corporation and was actively involved in running the business. Anthony Bradford managed the business and had the duty of actually paying the creditors. The Taxpayer could argue that those individuals were primarily responsible for paying the corporation's taxes. However, the Taxpayer was secretary-treasurer and a director of the corporation, owned shares in the corporation, helped manage the day-to-day affairs of the business, and could sign checks on the corporation's account. The Taxpayer candidly admitted that she could have written checks on the account for any purpose. Given that courts generally take a broad view of who qualifies as a responsible person, *Fiataruolo v. United States*, 8 F.3d at 939, the Taxpayer was a person responsible for paying the trust fund taxes of the corporation within the purview of ' ' 40-29-72 and 40-29-73.

The next question is whether the Taxpayer willfully failed to pay the taxes. A responsible person willfully fails to pay the trust fund taxes of a corporation if the person knew that taxes were owed, but paid or acquiesced in the payment of other creditors in lieu of the government. *Morgan v. U.S.*, *supra*; *Roth v. U.S.*, 567 F.Supp. 496 (1983). The Taxpayer willfully failed to pay the taxes in issue because she knew that other bills were being paid in lieu of the taxes.

The Taxpayer is a sincere, honest individual. However, she knew that the taxes were not being paid, had the ability to pay them, but failed to do so. Given those facts, the

Taxpayer must accept her liability for the unpaid trust fund taxes of the corporation.

The final assessment is affirmed. Judgment is entered against the Taxpayer for \$16,235.51. Additional interest is also due from the date of entry of the final assessment, May 3, 2000.

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

Entered November 28, 2000.