

ANTHONY M. BRADFORD
2129 Park Place Street SE
Decatur, AL 35601,

Taxpayer,

v.

STATE OF ALABAMA
DEPARTMENT OF REVENUE.

STATE OF ALABAMA
DEPARTMENT OF REVENUE
ADMINISTRATIVE LAW DIVISION

DOCKET NO. P. 00-483

FINAL ORDER

The Revenue Department assessed a 100 percent penalty against Anthony M. Bradford (Taxpayer), as a person responsible for paying the sales and withholding tax liabilities of Platters, Inc. (Corporation). The assessment includes sales tax for September and October 1996, and August, September, October, and December 1997, and withholding tax for the year 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 June 26, 2001 in Birmingham, Alabama. 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, his mother, Carol Bradford, and his uncle, John Hulgen, agreed to purchase and operate a restaurant in Decatur, Alabama. They formed a corporation, Platters, Inc., in March 1996 for that purpose. Hulgen borrowed the money to purchase and remodel the restaurant facility. The business opened in mid-1996.

The Taxpayer was vice president of the corporation. He applied to the ABC Board for a liquor license for the corporation, and signed the corporation's application to the Revenue Department for a sales tax/withholding tax license. He also had check signing authority for the corporation, and initially managed the daily operations of the business. He wrote numerous checks in that capacity to pay the corporation's liquor, beer, and food vendors, and various other creditors.

The Taxpayer testified that he was supposed to get 20 percent of the stock of the corporation. However, in late 1996, Hulgen decided not to issue him any of the stock of the corporation. Consequently, the Taxpayer stopped working at the restaurant at that time. However, he returned and worked as a bartender during 1997. He continued to write checks on the corporation's account until the restaurant closed in December 1997.

The restaurant suffered financial problems from the start. Consequently, the corporation failed to pay its sales and withholding taxes for the periods in issue. The Department assessed the corporation for the taxes. 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 controls 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 the taxes. *Fiataruolo v. U.S.*, 8 F.3d 930 (2nd Cir. 1993); *U.S. v. Rem*, 38 F.3d 634 (2nd Cir. 1994).

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.

The Taxpayer testified that Hulgen treated the restaurant as his own personal business. Hulgen may have had the ultimate say-so at the restaurant, but the Taxpayer actively managed the business, wrote numerous checks to pay the corporation's creditors, signed some of the corporation's sales and withholding tax returns, and wrote some checks for taxes due. 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 the 100 percent penalty statutes.¹

A responsible person willfully fails to pay the trust fund taxes of a corporation if the person knew that taxes were owed, but paid other creditors in lieu of the government. *Morgan v. U.S.*, *supra*; *Roth v. U.S.*, 567 F.Supp. 496 (1983). As indicated, the Taxpayer paid

¹The Department also assessed the Taxpayer's mother for the taxes in issue. That assessment was affirmed in *Carol Bradford v. State of Alabama*, P. 00-344 (Admin. Law Div. 11/28/00). It is unknown whether the Department also assessed or is assessing Hulgen for the taxes.

numerous creditors during the periods in issue in lieu of the Department. Consequently, he willfully failed to pay the corporation's taxes during those periods.

The final assessment is affirmed. Judgment is entered against the Taxpayer for \$15,118.43. Additional interest is also due from the date of entry of the final assessment, June 15, 2000.

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

Entered July 2, 2001.