

RODGER & BELINDA GARNER
205 CAHABA SPRINGS CIRCLE
TRUSSVILLE, AL 35173,

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§

STATE OF ALABAMA
DEPARTMENT OF REVENUE
ADMINISTRATIVE LAW DIVISION

Taxpayers,

§

DOCKET NO. P. 10-491

v.

§

STATE OF ALABAMA
DEPARTMENT OF REVENUE.

§

FINAL ORDER

This appeal involves separate final assessments of 100 percent penalty entered by the Department against Rodger and Belinda Garner (together "Taxpayers"), as persons responsible for payment of taxes on behalf of C. J. Fabrication Company, Inc. for 9/2006 local sales tax; 2/2006, 4/2006, 5/2006, 7/2006, and 9/2006 State sales tax; and 2005 withholding tax. The Taxpayers appealed to the Administrative Law Division pursuant to Code of Ala. 1975, §40-2A-7(b)(5)a. A hearing was conducted on December 2, 2010. The Taxpayers attended the hearing. Assistant Counsel Keith Maddox represented the Department.

Rodger Garner (individually "Taxpayer") took over his father's stone installation/construction business in 2000. He thereafter operated the business as C. J. Fabrication Company, Inc. His wife, Belinda Garner, did not have an ownership interest in and was not regularly employed at the business, although she sometimes paid bills and otherwise helped out in the office as needed.

The business was struggling financially in 2005. The Taxpayer discussed the problem with his accountant, who advised the Taxpayer to seek the help of a business consulting company.

The Taxpayer hired the consultants, who come on board in January 2006. The Taxpayer testified that the consultants advised him as to what bills to pay, when to pay, etc. He conceded, however, that he had the final authority concerning which bills to pay, and when.

Judge Thompson: But y'all still wrote the checks.

Ms. Garner: Yes, sir. I signed them.

Judge Thompson: You say they handled the money. They controlled the money.

Mr. Garner: They controlled it.

Ms. Garner: That's right.

Judge Thompson: Did you have to write a check or not write a check if they told you to write one or not write one?

Mr. Garner: Did we have the right to refuse. Yes, sir.

Ms. Garner: But we were going on their wishes.

Judge Thompson: So some months – just a minute. Some months in the assessment period (the taxes) weren't paid, so I assume they told you not to pay them for those months.

Ms. Garner: Yes, sir. And the smaller amounts got paid at the time.

Judge Thompson: And you just took their advice, because you trusted them to pull you out.

Ms. Garner: That's right.

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As indicated, the consultants advised the Taxpayer to file returns for the taxes in issue, but not to pay the reported amounts due. The consultants subsequently advised the Taxpayer in mid-2006 to sell the business. The Taxpayer agreed to sell if the buyers would

contractually agree to pay the debts of the business, including the delinquent taxes in issue. The consultants found a buyer, and the parties prepared a draft sales contract which required the buyers to assume the debts of the company. The sale closed in October 2006. Unfortunately for the Taxpayer, the executed contract did not contain language requiring the buyers to pay or assume liability for the back taxes owed by the business.

Alabama's 100 percent penalty statutes, Code of Ala. 1975, §§ 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). Because the Alabama 100 percent penalty statutes are modeled after the federal statute, federal case law should be followed in applying the Alabama statute. *State Dept. of Revenue v. Acker*, 636 So.2d 470 (Ala. Civ. App. 1994).

In this case, there is no question that at least the Taxpayer willfully failed to pay the Department in lieu of other creditors. The issue thus is whether one or both of the Taxpayers were responsible for payment of those taxes.

A person is a "responsible person" pursuant to §6672 (and the corresponding Alabama 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 trust fund 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).

In *Vinick v. United States*, 205 F.3d 1 (1st Cir. 2000), the Court identified seven factors that are relevant in determining if a person is a “responsible person” for purposes of the 100 percent penalty statute:

- (1) Was the person an officer or on the board of directors;
- (2) Was the person an owner;
- (3) Was the person active in the day-to-day management of the company;
- (4) Did the person hire and/or fire employees;
- (5) Did the person decide which bills will be paid, and in what order;
- (6) Did the person control the company’s bank account and financial records;

and,

- (7) Did the person have check-signing authority.

In this case, the Taxpayer, Rodger Garner, satisfied most if not all of the above seven indicators, and thus clearly was a responsible person within the purview of the 100 percent penalty statutes. He conceded as much at the December 2 hearing when he testified that although his business consultants advised him as to what creditors to pay and when, he had the responsibility and final authority to decide.

The Taxpayer contends that the individuals that bought his business had agreed to assume the company’s liabilities, including the delinquent taxes in issue. But as discussed, the executed sales contract did not include a provision requiring the buyers to assume the Taxpayer’s liability for the taxes in issue. In any case, a taxpayer liable to the State for unpaid taxes cannot relieve himself of liability for the taxes by contracting for a third party to assume liability for the taxes. “(A taxpayer) cannot relieve himself of liability to the

Department by contracting with a third party (to assume the tax liability). The taxpayer may seek reimbursement from the other parties to the contract, but he is still liable to the Department.” *Bayside Tire & Exhaust, LLC*, W. 98-272 at 2 (Admin. Law Div. 1998).

The final assessment against the Taxpayer is affirmed.¹ Judgment is entered against him for \$63,666.25. Additional interest is also due from the date the final assessment was entered, April 20, 2010.

Concerning Belinda Garner, her only connection with the business, other than being married to the owner, is that she sometimes signed checks for the business. Courts have held that check signing authority, without more, is insufficient grounds to establish a person as a “responsible person” under the 100 percent penalty provisions. “Importantly, ‘case law discloses that authority to sign checks, without more, is a weak pillar on which to rest a liability determination that a person is properly subject to a 100 percent penalty under section 6672.’” *Vinick*, 205 F.3d at 11, quoting *Barell v. United States*, 580 F.2d 449, 453 (Ct. Cl. 1978).

¹ The Administrative Law Division inquired at the December 2 hearing as to whether the Department intended to assess the buyers as successors in business pursuant to Code of Ala. 1975, §40-23-25. The Department witness responded that the Department had not done so to date, and that it was not her decision to make. She also stated that if the buyers also did not buy the debts of the business, they could not be held responsible. But the outstanding sales tax liability of a business is transferred by operation of law by §40-23-25 to any subsequent buyer of the business, whether the buyer agrees to assume liability or not. The facts clearly establish that the individuals that purchased the Taxpayer’s stone business were successors to that business as envisioned by §40-23-25. The Department could, and perhaps in equity should, assess the successors for at least the sales tax in issue.

Other than having check signing authority, Belinda Garner otherwise met none of the remaining six indicia of responsibility cited above. She was not an officer of and did not have an ownership interest in the corporation. She did not actively manage the business and did not hire and fire employees. Finally, she did not decide what debts would be paid or control the bank accounts and disbursement records of the business.

Under the circumstances, Belinda Garner was not a person responsible for paying the unpaid taxes in issue. The final assessment against her is voided.

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

Entered January 12, 2011.

BILL THOMPSON
Chief Administrative Law Judge

bt:dr

cc: Margaret Johnson McNeill, Esq.
Rodger & Belinda Garner
Joan Crumbley
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