

HAYLEY MAULSBY
278 Dauphin Street
Mobile, AL 36602,

STATE OF ALABAMA
DEPARTMENT OF REVENUE
ADMINISTRATIVE LAW DIVISION

Taxpayer,

DOCKET NO. P. 00-699

v.

STATE OF ALABAMA
DEPARTMENT OF REVENUE.

OPINION AND PRELIMINARY ORDER

The Revenue Department assessed a 100 percent penalty against Hayley Maulsby (ATaxpayer@), as a person responsible for paying the trust fund taxes of Almost Six, Inc. The assessment involves sales tax for May and June 1996, and September 1996 through March 1997, and withholding tax for the years 1996 and 1997, and the quarter ending June 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 April 20, 2001 in Mobile, Alabama. Robert Clute, Jr. represented the Taxpayer. Assistant Counsel Duncan Crow represented the Department.

ISSUE

The issue in this case is whether the Taxpayer was a person responsible for paying the trust fund taxes of Almost Six, Inc. during the periods in issue, and in that capacity willfully failed to do so. If so, the Taxpayer is liable for the tax in issue pursuant to Alabama's 100 percent penalty statute, Code of Ala. 1975, § 40-29-73(a).

FACTS

The Taxpayer was approached by David White-Spunner and Lisa Spence in 1993 about opening a restaurant in Mobile, Alabama. The Taxpayer and another individual, Robin Gaston, agreed to invest \$5,000 each in the venture. White-Spunner is a chef and agreed to operate the kitchen. Spence agreed to manage

the business.

The group incorporated Almost Six, Inc. in 1993. They each owned 25 percent of the corporation. The Taxpayer was president of the corporation, and applied for the corporation's combined sales tax/withholding tax license with the Department. She also had check signing authority for the corporation.

The restaurant opened in early 1994. As agreed, White-Spunner and Spence operated the business. The Taxpayer visited the restaurant from time to time, but before 1997 spent most of her time running an unrelated business and working as a bartender.

The Taxpayer signed numerous checks on behalf of the corporation during the period in issue. She testified, however, that before 1997, Spence was responsible for the finances of the business, and decided which bills would be paid. Spence prepared the checks, and presented them to the Taxpayer for her signature. The Taxpayer presumed that before 1997, all taxes and other debts of the corporation were being paid.

According to the Taxpayer, the other owners discovered in late 1996 that Spence had embezzled approximately \$50,000 from the business. In an attempt to salvage the business, the Taxpayer became actively involved in operating the restaurant in January 1997. She managed the business until June 1997, when the restaurant closed.

The IRS subsequently sold the restaurant's assets in September 1997 to pay the corporation's back federal taxes. The sale proceeds were insufficient to pay the federal taxes due. Consequently, the IRS assessed the Taxpayer, individually, for one-quarter of the unpaid trust fund taxes of the corporation for January through June 1997. The Taxpayer is making payments to the IRS concerning those taxes.

The Taxpayer conceded she is liable for the corporation's unpaid taxes for the period she operated

the business, January through July 1997. She argues, however, that she should not be held liable for any taxes before 1997.

ANALYSIS

Section 40-29-73 is 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 statute. *State v. Gulf Oil Corp.*, 256 So.2d 172 (1971).

Federal § 6672 and Alabama § 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). 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 in this case concedes she is liable for the corporation's trust fund taxes beginning in January 1997. The question thus is whether she is also liable for the unpaid tax that accrued before that time.

The Taxpayer was a responsible person during 1996 within the context of § 40-29-73 because she was president of the corporation and had the authority and ability to pay the corporation's taxes. To willfully fail to pay, however, the Taxpayer either had to have actual knowledge that the taxes were not being paid, or show a reckless disregard for an obvious risk that the taxes had not been paid. *Malley v. U.S.*, 17 F.3d 329 (11th Cir. 1994); *Lowery v. State of Alabama*, P. 94-104 (Admin. Law Div. 3/20/95). The Taxpayer thus did not willfully fail to pay the pre-1997 taxes because she did not know the taxes were not being paid, and had no

reason to believe the taxes were not being paid.

Although the IRS's actions are not binding on the Department, the above finding is consistent with the IRS's decision to assess the Taxpayer personally for only the 1997 taxes. However, the Taxpayer is jointly and severally liable for the entire tax owed for 1997. *U.S. v. Rem*, 38 F.3rd 634 (2nd Cir. 1994). The Department was authorized to assess the Taxpayer for the entire 1997 tax owed, not just one-quarter of the tax as assessed by the IRS.

The Department is directed to recompute the Taxpayer's liability as indicated above. 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 May 30, 2001.