

DAVID LUENEBURG  
15415 Highway 231  
Hazel Green, AL 35750,

Taxpayer,

v.

STATE OF ALABAMA  
DEPARTMENT OF REVENUE.

STATE OF ALABAMA  
DEPARTMENT OF REVENUE  
ADMINISTRATIVE LAW DIVISION

DOCKET NO. P. 00-735

### **FINAL ORDER**

The Revenue Department assessed a 100 percent penalty against David Lueneburg (ATaxpayer@), as a person responsible for paying the withholding tax liabilities of LAR Rebar, Inc., for the quarters ending September 1996 and March, June, and September 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 July 25, 2001. Clarence Casebolt represented the Taxpayer. Assistant Counsel David Avery represented the Department.

### **ISSUE**

The issue in this case is whether the Taxpayer is personally liable for the unpaid withholding taxes of LAR Rebar, 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 and his brother and sister-in-law incorporated LAR Rebar, Inc. in 1991. The corporation installed reinforced steel rebar at construction sites. The Taxpayer was an employee of the corporation, and performed the on-site installation work. The Taxpayer also

had check signing authority on the corporation's bank account, and signed the signatory card as vice president of the corporation.

The business was marginally successfully, and the Taxpayer's brother and sister-in-law decided to get out of the business in 1994. Consequently, they sold their interest in the corporation to Lisa Lewandowski, who was the Taxpayer's girlfriend at the time.

After Lewandowski took over in 1994, she paid all bills and handled all of the corporation's business, except the actual installation of the rebar. Lewandowski signed all of the tax returns for the corporation. The Taxpayer signed some checks, but only as directed by Lewandowski. There is no evidence the Taxpayer ever signed a check for payment of the corporation's taxes.

Because the Taxpayer did not pay the corporation's bills, and was generally not involved in financial matters, he was not aware until the Spring of 1997 that the corporation's taxes were not being paid. After realizing that Lewandowski had made a mess of the corporation's finances, the Taxpayer decided to begin operating as a sole proprietorship in July 1997. He hired his current accountant to do his bookkeeping, obtained a new federal identification number, and since July 1997 has timely paid all taxes due.

The Department was unable to collect the unpaid withholding tax in issue from the corporation. The Department consequently assessed Lewandowski, individually, for the taxes. Lewandowski appealed to the Administrative Law Division. She did not dispute that she was responsible for paying the corporation's taxes. Rather, she claimed that the corporation ceased operating in August 1996, and thus did not owe withholding tax during the quarters in issue.

The Administrative Law Division issued a Final Order on August 7, 2000 affirming the 100 percent penalty against Lewandowski. See, *Lisa Lewandowski v. State of Alabama*, P. 00-313 (Admin. Law Div. 8/7/00). The Department apparently was unable to collect from Lewandowski, and consequently assessed the Taxpayer for the unpaid withholding taxes. 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. 1991); *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 (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) ( "[w]hile 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) (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.

Of the seven relevant considerations listed above, two point to the Taxpayer being a responsible person. That is, he was an officer of the corporation, and he had check signing authority for the corporation. However, although the Taxpayer was technically vice president of the corporation, there is no evidence he ever exercised any managerial control over the corporation. His only duty was to install the rebar. Concerning his check signing authority, he only signed checks as directed by Lewandowski. He was ignorant of the corporation's finances, and exercised no control over which creditors were being paid.

The other relevant considerations indicate that the Taxpayer was not responsible for paying the corporation's taxes. Specifically, he was not active in the day-to-day management of the corporation, he did not hire and fire employees, he was ignorant of the corporation's

outstanding debts, including the unpaid taxes, and he never exercised control over the corporation's bank accounts and disbursement records. Rather, as indicated, the Taxpayer's sole duty was to install the steel rebar.

Viewing the circumstances as a whole, the Taxpayer was not a responsible person within the purview of the 100 percent penalty statutes. The final assessment in issue is accordingly dismissed.

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

Entered October 9, 2001.