

GEORGE B. HOWARD, III  
2024 English Village Lane  
Birmingham, AL 35223,

Taxpayer,

v.

STATE OF ALABAMA  
DEPARTMENT OF REVENUE.

STATE OF ALABAMA  
DEPARTMENT OF REVENUE  
ADMINISTRATIVE LAW DIVISION

DOCKET NO. P. 01-167

### FINAL ORDER

The Revenue Department assessed a 100 percent penalty against George B. Howard, III (ATaxpayer@), as a person responsible for paying the 1995 withholding taxes of Phoenix Printing Group, Inc. (APhoenix Printing@). 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 May 8, 2001. The Taxpayer attended the hearing. Assistant Counsel Jeff Patterson represented the Department.

### ISSUES

The primary issue in this case is whether the Taxpayer was a person responsible for paying the withholding taxes of Phoenix Printing during 1995, and in that capacity willfully failed to do so. If so, the Taxpayer is liable for the corporation's unpaid 1995 withholding tax pursuant to Alabama's 100 percent penalty statute, Code of Ala. 1975, ' 40-29-73(a). A second issue is whether the Taxpayer is relieved of liability for the subject taxes because the Department failed to file a claim in bankruptcy for the taxes against Howard Graphic Arts and Engraving, Inc., the successor corporation of Phoenix Printing.

### FACTS

Phoenix Printing was formed in 1994. The Taxpayer was president and treasurer of the corporation. He also operated the business. The corporation failed to pay all of its withholding taxes in 1995. Phoenix Printing subsequently merged into Howard Graphic Arts and Engraving, Inc. in 1996. That successor corporation filed a bankruptcy petition in November 1997. The corporation listed the Revenue Department as a creditor in the bankruptcy action. The Department filed a claim for various taxes owed by Howard Graphic Arts and Engraving, but not for the 1995 withholding tax owed by Phoenix Printing.

The Department assessed Phoenix Printing for the unpaid 1995 withholding taxes, but was unable to collect the amount due. Consequently, the Department assessed the Taxpayer, personally, for the tax.

### 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 concedes he was a person responsible for paying the trust fund taxes of Phoenix Printing. He also concedes that he signed or authorized numerous checks issued to other creditors of

Phoenix Printing in lieu of paying the Department. Consequently, the Taxpayer wilfully failed to pay the taxes, and thus is personally liable for the 1995 withholding tax in issue.

The Taxpayer argues that Howard Graphic Arts and Engraving had sufficient assets when it filed for bankruptcy to pay the taxes in question, and that the Department should have filed a claim in the bankruptcy proceeding. The Department is correct, however, that it is not required to first attempt to collect any trust fund tax from a bankrupt corporation before proceeding against a responsible officer. See generally, *Nash v. State of Alabama*, P. 98-513 (Admin. Law Div. 5/5/99), and cases cited therein.

The final assessment is affirmed. Judgment is entered against the Taxpayer for \$16,471.31. Additional interest is also due from the date of entry of the final assessment, January 4, 2001.

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

Entered June 21, 2001.