

WYNTER S. BYRD
1844 Montclair Lane
Birmingham, AL 35216,

Taxpayer,

v.

STATE OF ALABAMA
DEPARTMENT OF REVENUE.

STATE OF ALABAMA
DEPARTMENT OF REVENUE
ADMINISTRATIVE LAW DIVISION

DOCKET NO. P. 01-208

FINAL ORDER

The Revenue Department assessed a 100 percent penalty against Wynter S. Byrd (ATaxpayer@), as a person responsible for paying the sales and withholding tax liabilities of Apollo-s, Inc. The assessment includes sales tax for November 1996 through March 1997, and withholding tax for the quarters ending December 1996 and December 1997, and the year 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 September 6, 2001. The Taxpayer attended the hearing with her attorney, Sam Hill. 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 Apollo-s, 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-s brother asked the Taxpayer in mid-1995 if she would be interested in

starting a restaurant in Vestavia, Alabama. The Taxpayer accepted, and agreed to manage the day-to-day operation of the restaurant. Her brother and two of his business partners agreed to finance the venture.

The parties formed Apollo-s, Inc., through which the restaurant would be operated. The Taxpayer was president of the corporation. She also obtained the corporation-s withholding/sales tax license from the Revenue Department, had check signing authority on the corporation-s bank account, and, as indicated, managed the day-to-day operation of the business, which included paying the corporation-s creditors. An accountant prepared the corporation-s sales and withholding tax returns, which the Taxpayer signed. The restaurant opened in mid-1996. Unfortunately, it struggled financially from the beginning. The Taxpayer repeatedly complained to her brother and his two business partners that she needed more money to pay the taxes and the other debts of the business. They instructed her to pay the employees, vendors, and other creditors, and that they would take care of the taxes. With that understanding, the Taxpayer paid the other creditors of the corporation in lieu of the taxes.

The restaurant continued to struggle financially. The Taxpayer-s brother and his business partners failed to pay the corporation-s taxes, or otherwise sufficiently finance the restaurant. Consequently, the Taxpayer closed the restaurant and put the corporation in bankruptcy in July 1997. However, shortly thereafter, she withdrew the bankruptcy petition and reopened the restaurant. Business did not improve, and the Taxpayer closed the restaurant in December 1997.

The Department was unable to collect the unpaid sales and withholding taxes from the

corporation, and consequently assessed the Taxpayer, individually, for the amount due. The Taxpayer appealed.

The Taxpayer does not dispute that she managed the restaurant and was responsible for paying the corporation's bills. She adamantly argues, however, that her brother and his business partners should be liable because they promised her they would take care of the taxes. The Taxpayer has sued those individuals in Jefferson County Circuit Court because they failed to make good on their promise to pay the corporation's taxes.

ANALYSIS

Sections 40-29-72 and 40-29-73 are modeled after the federal 100 percent penalty statute, 26 U.S.C. § 6672. Those statutes 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 (5th Cir. 1983).

A person is a "responsible person" pursuant to the above 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 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 this case, the Taxpayer admittedly was responsible for paying the corporation's bills,

including its taxes. She also knew that the taxes were not being paid, and instead paid other creditors in lieu of the Department.

The Taxpayer argues that her brother and his business partners should be liable because they promised her they would pay the taxes in question. However, the Taxpayer cannot be relieved of liability for the taxes based on promises or guarantees made to her by third parties involved in the business. Those parties may be obligated to indemnify the Taxpayer based on their promises to her, but she remains liable to the government for the taxes in question.

The final assessment is affirmed. Judgment is entered against the Taxpayer for \$12,234.78. Additional interest is also due from the date of entry of the final assessment, January 29, 2001.

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

Entered October 9, 2001.