

STATE OF ALABAMA
DEPARTMENT OF REVENUE,

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DEPARTMENT OF REVENUE
ADMINISTRATIVE LAW DIVISION

v.

DOCKET NO. INC. 87-186

HIRAM H. GILBERT, an officer of
Gilbert Building Services, Inc., a corp.
2143 Montreat Parkway
Birmingham, AL 35216,

Taxpayer.

ORDER

The Department entered a preliminary assessment of 100% penalty against Hiram H. Gilbert ("Taxpayer"), an officer of Gilbert Building Services, Inc. ("corporation") concerning the period January 1, 1985 through September 30, 1985. The Taxpayer appealed to the Administrative Law Division and a hearing was conducted on May 3, 1988. The Taxpayer was present and represented himself. Assistant counsel Mark Griffin and Nancy Cottle appeared on behalf of the Department. Based on the evidence submitted by the parties, the following findings of fact and conclusions of law are hereby made and entered.

FINDINGS OF FACT

The Taxpayer served as president of Gilbert Building Services, Inc. during the period in question. The corporation was engaged in the business of constructing and selling residential and commercial buildings and maintained an average of approximately 15 to 20 employees on payroll.

The corporation filed withholding tax returns with the Department for the

quarters ending March, June, and September, 1985 indicating a liability of 2,803.55, \$3,381.74, and \$3,671.83, respectively.

The returns were completed by Beverly E. Hayes, the corporation's bookkeeper during the subject period. Ms. Hayes testified at the administrative hearing that she also filled out corresponding checks for the taxes due, but that the Taxpayer refused to sign the checks and instructed her to remit the returns without payment.

The Taxpayer and his son, the corporation's vice-president, were responsible for the corporation's financial duties and made the final decision on which bills were to be paid. The Taxpayer testified that the corporation was financially strapped during 1985 and that bills were selectively paid as necessary to allow the corporation to continue operating.

The Department submitted numerous checks into evidence from three separate bank accounts indicating that the corporation paid out over \$350,000.00 to various vendors during 1985. The corporation also wrote numerous checks from a payroll account and issued at least 46 W-2 wage and tax statements to various employees in 1985.

The Taxpayer does not dispute that he was in control of the company's financial affairs during the period in question and that he elected to pay various other creditors in lieu of the Department. However, the Taxpayer argues that the Department could have been paid pursuant to an agreement whereby both the

IRS and the Department would receive a portion of the corporation's equity (profit) from each property closing. The Taxpayer contends that a partial payment plan was proposed to the Department, but was rejected by an unidentified Department employee.

CONCLUSIONS OF LAW

The 100% penalty statutes, Code of Ala. 1975, ' ' 40-29-72 and 40-29-73, were added to the Alabama Revenue Code as the 1983 Tax Reform and Compliance Act ("TECA"). 40-29-73 reads in pertinent part as follows:

(a) General rule. - Any person required to collect, truthfully account for, and/or pay over any tax imposed by sections 40-17-2, 40-17-220, 40-18-71, 40-21-82, 40-23-2, 40-23-61, 40-26-1 and any other local sales, use, and gross receipts taxes collected by the state department of revenue who willfully fails to collect such tax, or truthfully account for, and/or pay over such tax, or willfully attempts in any manner to evade or defeat any such tax or the payment thereof, shall, in addition to other penalties provided by law, be liable for a penalty up to the total amount of the tax evaded, or not collected, or not accounted for and paid over.

Section 40-29-72 defines "person" as follows:

(b)"Person" defined. - The term "person", as used in this article, includes an officer of a corporation, or a member of a partnership, who as such officer, or member is under a duty to perform the act in respect of which the violation occurs.

No Alabama court decisions have been issued concerning the 100% penalty statutes. However, the statutes are identical in substance to the federal 100% penalty statute, 26 U.S.C., ' 6672. In such cases, federal authority should be followed in interpreting the similar Alabama statutes. Best v. State, Department of

Revenue, 417 So.2d 187.

The rationale and requirements for application of the 100% penalty were succinctly set out in Schwinger v. United States, 652 F.Supp. 464, at page 466, as follows:

If the employer fails to make the required payments, section 6672 provides an alternative method for collecting the withheld taxes: the government may assess a penalty, equal to the full amount of the unpaid tax, against a person responsible for paying over the money who willfully fails to do so. The penalty provision reflects a congressional judgment that because amounts withheld from employees salaries are "treated as a trust fund..... persons responsible for their paying over should be individually liable, as well as the corporation, for their diversion." Spivak V. United States, 370 F.2d 612, 615 (2d Cir.) cert. denied, 387 U.S. 908, 87 S.Ct. 1690, 18 L.Ed.2d 625 (1967). The assessment of the tax creates a prima facie case of liability, see Lesser v. United States, 368 F.2d 306, 310 (2d Cir. 1966), and the person against whom the penalty is levied bears the burden of establishing by a preponderance of the evidence that at least one of the two elements of section 6672 liability does not exist, see *id.*

The two requirements are: 1) that the plaintiff was under a duty to collect, account for, and pay over the taxes; and 2) that plaintiff's failure to do these things was willful.

A "responsible party" has been defined as "any person with significant control over the corporation's business affairs who participates in decisions concerning payment of creditors or disbursement of funds". (cites omitted). Roth v. U.S., 567 F.Supp. 496, at page 499.

Clearly under the above standard, the Taxpayer was a responsible party under ' ' 40-29-72 and 40-29-73 in that he was president of the corporation, had check signing authority, had control of the corporation's financial affairs, and was

admittedly responsible for payment of the corporation's liabilities.

The second requirement of the 100% penalty statute is that the responsible party must also be 'willful' in his failure to pay the tax. If a taxpayer is aware that taxes are unpaid and due and has the power and responsibility to pay them, his failure to pay constitutes willfulness notwithstanding a lack of malice. Braden v. United States, 442 F.2d 342, cert denied, 404 U.S. 912, 92 S.Ct 229 (1971); Schwinger v. United States, supra. In Roth v. U.S., supra, at page 499, "willfully" was defined as follows:

The term "willfully" as it applies to Code ' 6672 means "a voluntary, conscious and intentional failure to collect, truthfully account for and pay over the taxes withheld from the employees." Harrington v. United States, 504 F.2d 1306 (1st Cir. 1974); Monday v. United States, supra; Braden v. United States, 318 F.Supp. 1189 (S.D. Ohio 1970); Bloom v. United States, 272 F.2d 215 (9th Cir. 1959). If the responsible person was aware of the fact that the taxes were unpaid and possesses the power to pay them and possessing the power to pay the taxes, he instead pays other creditors, then he is deemed to have acted willfully. Kalb v. United States, supra; Harrington v. United States, supra; Newsome v. United States, 431 F.2d 742 (5th Cir. 1970). It is not necessary that bad motives or wicked designs be shown. The willfulness requirement is satisfied with a showing that the responsible person made the conscious and deliberate choice to pay other creditors instead of paying the Government. Monday v. United States, supra. Payment of net wages in circumstances where there are no available funds in excess of net wages from which to make withholding is a preference to other creditors constituting a willful failure to collect and pay over under Code ' 6672. Sorenson v. United States, 521 F.2d 325 (9th Cir. 1975).

In the present case, the Taxpayer knew that the corporation's withholding taxes were owed and unpaid, and specifically elected not to pay the Department in lieu of various other creditors. There could be no clearer example of a willful failure to

comply with a known legal obligation.

In defense, the Taxpayer argues that the Department could have received payment of the subject taxes by agreeing to accept partial payments from each of several property closings. The Taxpayer asserts that an unidentified Revenue Department employee had negotiated with- his son, the corporation's vice-president, but had refused to accept partial payment in deference to the IRS's superior lien.

However, the Taxpayer could not identify the Department employee that had allegedly negotiated with the corporation, and no evidence of any agreement to pay the Department was presented. Mrs. Joan Crumbley, the assessment officer in charge of the case for the Department, testified that she had no personal knowledge of any offer or agreement between the Department and the Taxpayer to make partial payments and that no such information is contained in the Taxpayer's file. The Department did not refuse to accept payments from the corporation.

In any case, the assessment in issue would not be affected even if the corporation had tried and failed to make an agreement with the Department. The taxes were clearly not paid. if the "responsible party" and "willful" elements of the 100% penalty statutes are met, then application. of the penalty is appropriate.

The above considered, the Revenue Department is hereby directed to make final the preliminary assessment as entered, with interest as required by statute.

Done this 12th day of May, 1988.

BILL THOMPSON
Chief Administrative Law Judge