

STATE OF ALABAMA
DEPARTMENT OF REVENUE,

§

STATE OF ALABAMA
DEPARTMENT OF REVENUE
ADMINISTRATIVE LAW DIVISION

§

v.

§

DOCKET NO. P. 87-212

GEORGE T. COCHRAN
an officer of Waterbed Island, Inc.

§

§

Taxpayer.

ORDER

The Revenue Department entered a preliminary assessment of 100% penalty against George T. Cochran ("Taxpayer"), an officer of Waterbed Island, Inc. ("corporation") concerning the period January 1, 1984 through July 31, 1985. The Taxpayer appealed to the Administrative Law Division and a hearing was scheduled for March 21, 1989 in Muscle Shoals, Alabama. The Taxpayer was notified of the hearing by certified mail on March 14, 1989, but failed to appear. The hearing proceeded with assistant counsel mark Griffin representing the Department. Based on the evidence presented in the case, the following findings of fact and conclusions of law are hereby entered.

FINDINGS OF FACT

The subject corporation made retail sales of waterbeds and waterbed accessories during the period in question. The Taxpayer was president of the corporation and in that capacity signed all sales tax and withholding tax returns and also signed all checks issued by the corporation.

The corporation filed withholding tax returns for the quarters ending March and June, 1984. The corporation also filed sales tax

returns for the entire period in question. The taxes reported on said returns have not been paid.

The Department presented numerous checks issued by the corporation and signed by the Taxpayer which were payable to various individuals, suppliers, etc., during the subject period.

The Department contends that those checks establish that the corporation could have paid its tax liabilities during the subject period, but opted to pay other creditors instead.

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 part of 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 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

disbursal of funds". Roth v. U.S., 567 F.Supp. 496, at page 499.

Clearly under the above standard, the Taxpayer in the present case was a responsible party under §§40-29-72 and 40-29-73 in that he was president of the corporation and signed all checks issued by the corporation.

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 signed the corporation's withholding tax and sales tax returns and thus knew that the corporation's taxes were due and unpaid. The Taxpayer also specifically elected not to pay the Department in lieu of various other creditors. Such action constitutes willfulness as a matter of law. Mulee v. U.S., 648 F.Supp. 1181.

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 28th day of March, 1988.

BILL THOMPSON
Chief Administrative Law Judge