

STATE OF ALABAMA
DEPARTMENT OF REVENUE,

§

STATE OF ALABAMA
DEPARTMENT OF REVENUE
ADMINISTRATIVE LAW DIVISION

§

v.

§

DOCKET NO. P. 87-235

CHARLES D. FAULK, an officer §
of Frontier Office Supply, Inc.

§

Taxpayer. §

FINAL ORDER

The Revenue Department entered a 100% penalty assessment against Charles D. Faulk, an officer of Frontier Office Supply, Inc. (Taxpayer) for sales tax for the period December, 1983 through July, 1984 and withholding tax for the quarters ending March, 1984 and June, 1984. The Taxpayer appealed to the Administrative Law Division and a hearing was conducted on September 17, 1990. Manley L. Cummins, III, Esq. represented the Taxpayer. Assistant counsel Dan Schmaeling appeared for the Department. This Final Order is based on the evidence and arguments presented by the parties.

FINDINGS OF FACT

The Revenue Department assessed Frontier Office Supply, Inc. (corporation) for State, Baldwin County and City of Fairhope sales tax for the period December, 1983 through July, 1984, and State withholding tax for the quarters ending March and June, 1984.

The corporation failed to pay the tax and the Department subsequently instituted proceedings for assessment of the tax against the Taxpayer individually as a responsible corporate officer pursuant to Alabama's 100% penalty statute., Code of Ala.

1975, 40-29-73. A "Notice and Demand for Payment of the 100% Penalty" was issued by the Department on December 6, 1986. The preliminary assessment in dispute was entered on May 6, 1987 and the Taxpayer appealed to the Administrative Law Division on November 10, 1987.

The Department established at the administrative hearing and the Taxpayer concedes that he was a responsible officer of the corporation and in that capacity willfully failed to pay over the sales and withholding tax in issue so as to be liable under §40-29-73. However, the Taxpayer argues (1) that the 100% penalty was not timely assessed within three years from the due date of the underlying sales tax as required by Code of Ala. 1975, §40-23-18(b); (2) that interest should not be charged from the date of appeal (November 10, 1987) because the Department unreasonably delayed the administrative hearing; and (3) that the month of December, 1983 should not be included in the assessment because the 100% penalty statute was not effective until January 1, 1984.

The Department contends that 540-29-73 contains no statute of limitations and that the 100% penalty can be assessed at any time.

The Department argues in the alternative that even if §40-23-18(b) applies (concerning sales tax) only a notice and demand for the tax must be issued by the Department within the applicable three year period. Finally, the Department maintains that if §40-23-18(b) does not apply, the general five-year statute set out at Code of

Ala. 1975, §6-2-35 should apply.

Concerning the Taxpayer's second and third arguments, the Department contends that interest is required on any delinquent sales tax and cannot be waived. The Department also argues that sales tax for December, 1983 must be included in the assessment because it was not due until January 20, 1984, or after the effective date of §40-29-73.

CONCLUSIONS OF LAW

The primary issue in dispute is what, if any, statute of limitations applies to the assessment of the 100% penalty levied at §40-29-73.

Neither §40-29-73 nor its federal counterpart, 26 U.S.C.A. §6672, contains a statute of limitations provision for entry of the 100% penalty. However, the 100% penalty must be assessed and collected in the same manner as taxes and the statutory limitations periods relating to the underlying trust fund taxes. are controlling. As stated in Bloom v. U.S., 272 F.2d 217, at page 221:

In our view, Section 2707(a) (the predecessor to Section 6672) imposes a separate and distinct liability upon the officer of the corporation who has the duty or is responsible for the collection and payment of the tax and who willfully fails either to collect the tax or to pay it over. While this liability is denominated "penalty" it is "to be assessed and collected in the same manner as taxes are assessed and collected". While it might be said that the assessment made on appellant is derivative of the assessments made on the corporation, and that they both relate to taxes collected and withheld by the corporation, the liability imposed upon appellant by Section 2707(a) is

statutory and in such cases the statutory limitations are controlling.

Section 6672 is controlled by the federal statute of limitations provision at 26 U.S.C.A. §6501 which provides generally at subsection (a) that the tax must be assessed within three years after "the return was filed". The only return that the statute could be referring to is the return filed-by the corporation for the underlying trust fund taxes. Thus, the federal 100% penalty must be assessed within three years from the date the return was filed by the corporation.

Alabama doesn't have a general statute comparable to §6501. Rather, each tax has a separate statute that sets the time limits for beginning assessment proceedings and/or entering assessments. Those individual statutes also control for entry of the 100% penalty levied at §40-29-73. Sales tax is controlled by §40-23-18(b), which provides that the Department must notify a taxpayer of any additional sales tax due within-three years from the due date of the tax. Thus, to enter a 100% penalty concerning sales tax, the Department must notify the responsible corporate officer of the amount due within three years from the due date of the tax.

In this case, a "Notice and Demand-for Payment of 100% Penalty" was issued by the Department to the Taxpayer on December 6, 1986. That notice was issued within three years from the due date of the sales tax in issue and therefore the Department complied with the time provisions of §40-23-18(b).

It should be clarified that §6-2-35 cited by the Department does not set a 5 year statute for the assessment of taxes but rather relates to an action in court for collection after assessment. In any case, §6-2-35 is no longer applicable because it governs "except as otherwise specifically provided . . .". See, §6-2-35(b). Section 40-29-51 was enacted as part of the Tax Enforcement and Compliance Act (TECA) in 1983 and specifically provides that an action in court for the collection of any tax may be begun within 10 years after the final assessment of the tax.

Concerning interest on the tax due, Code of Ala. 1975, §40-23-14 levies a 10% penalty on any tax not timely paid and also requires interest computed from the due date of the tax. The penalty may be waived for cause. However, there is no provision for waiver of interest and interest must be computed on any delinquent tax until it is paid.

Concerning the Taxpayer's liability for December, 1983, §40-29-73 was enacted as a part of TECA and became effective on January 1, 1984. However, tax due for December, 1983 was properly included in the 100% penalty assessment because the tax for that month was not due and the Taxpayer was not required to pay over the tax until January 20, 1984, or after the effective date of the statute.

Based on the above, the Department is hereby directed to make the preliminary assessment in issue final, with interest computed to the date of entry of the final assessment.

Entered on November 28, 1990.

BILL THOMPSON
Chief Administrative Law Judge