

STATE OF ALABAMA
DEPARTMENT OF REVENUE,

§

STATE OF ALABAMA
DEPARTMENT OF REVENUE
ADMINISTRATIVE LAW DIVISION

§

v.

§

DOCKET NO. P. 90-235

J.R. VINES, an officer of All South
Plumbing, Inc.
1260 Littlebrook Lane
Birmingham, AL 35235,

§

Taxpayer.

§

FINAL ORDER

The Revenue Department entered a 100% penalty assessment against J. R. Vines, an officer of All South Plumbing, Inc. (Taxpayer) for withholding tax for the quarters ending September and December, 1987. The Taxpayer appealed to the Administrative Law Division and a hearing was scheduled for September 10, 1990.

The Taxpayer was notified of the hearing by certified mail on July 18, 1990, but failed to appear. The hearing proceeded as scheduled with assistant counsel Dan Schmaeling representing the Department. This Final Order is entered based on the evidence presented by the Department.

FINDINGS OF FACT

The Taxpayer was president of All South Plumbing, Inc. (corporation) during the quarters ending September and December, 1987 and filed withholding tax reports with the Department on behalf of the corporation for those quarters. No tax was remitted along with the returns.

The Department subsequently entered final assessments for withholding tax against the corporation based on the returns filed

by the corporation. The 100% penalty assessment in issue was entered against the Taxpayer individually based on the assessment previously entered against the corporation.

The Department established at the hearing that the Taxpayer as president and majority stockholder had check writing authority for the corporation and had written numerous checks on checking accounts for both personal and the corporation's checking accounts for both personal and business expenses during the subject quarters.

CONCLUSIONS OF LAW

Code of Ala. 1975, §§40-29-72 and 40-29-73 were passed as part of the 1983 Tax Enforcement and Compliance Act (TECA) and are generally known as the 100% penalty statutes. 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.

The above statutes are identical in substance to the federal 100% penalty statute, 26 U.S.C.A., §6672. In such cases, federal authority should be followed in interpreting the similar Alabama laws. Best v. State, Department of Revenue, 417 So.2d 187.

The intent of the 100% penalty statutes. is to make a corporate officer personally liable for the corporation's trust fund taxes if the officer is responsible for payment of the taxes and willfully fails to do so. The court stated 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 (3d 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.

The Taxpayer in the present case was clearly a responsible party under §§40-29-72 and,40-29-73 in that he was president of the corporation, filed tax returns on behalf of the corporation, and signed 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" is 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. UnitedStates, 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 returns and also acknowledged that withholding tax was due and unpaid for the subject period. The Taxpayer also elected not to pay the corporation's taxes in lieu of various other debts both personal and business. Such action constitutes willfulness as a matter of law, see *Mulee v. U.S.*, 648 F.Supp. 1181.

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

Done this 12th day of September, 1990.

BILL THOMPSON
Chief Administrative Law Judge