

STATE OF ALABAMA  
DEPARTMENT OF REVENUE,

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STATE OF ALABAMA  
DEPARTMENT OF REVENUE  
ADMINISTRATIVE LAW DIVISION

§

v.

§

DOCKET NO. P. 91-162

THELMA BLUE, an Officer of  
Courtesy Cab Company, Inc.  
P.O. Box 923  
Daleville, AL 36322,

§

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§

Taxpayer.

FINAL ORDER

The Revenue Department entered a 100% penalty assessment for withholding tax against Thelma Blue, an officer of Courtesy Cab Company, Inc. (Taxpayer) for the quarters ending March and June, 1988, all four quarters of 1989, and the first three quarters of 1990. The Taxpayer appealed to the Administrative Law Division and a hearing was conducted on November 26, 1991. The Taxpayer was notified of the hearing by certified mail, but failed to appear. Assistant counsel Beth Acker appeared for the Department.

FINDINGS OF FACT

Courtesy Cab Company, Inc. (corporation) failed to file Alabama withholding tax returns for the quarters ending March, June, September and December, 1989 and June and September, 1990. The Department computed and assessed the tax owed by the corporation using the best information available - the corporation's prior returns. The corporation subsequently went bankrupt and the Department assessed the Taxpayer individually as a responsible officer of the corporation pursuant to Code of Ala. 1975, §§40-29-72 and 40-29-73. The quarters ending March and June,

1988 and March, 1990 were erroneously included in the assessment and the Department concedes that those quarters should be deleted.

The Department argues that the Taxpayer was a responsible corporate officer and willfully failed to pay the corporation's withholding tax liability based on the following facts: The Taxpayer was president of the corporation and in that capacity applied for an Alabama withholding tax number on February 17, 1988; the Taxpayer reported and paid withholding tax to the Department in her capacity as president; the Taxpayer signed numerous corporation checks paying various other creditors; and finally, the Taxpayer admitted in a document filed in Bankruptcy Court that the corporation owes Alabama withholding tax and also that the corporation paid its employees and various creditors in lieu of the Department.

#### CONCLUSIONS OF LAW

Code of Ala. 1975, §§40-29-72 and 40-29-73 together impose a 100% penalty against any corporate officer that is responsible for payment of the corporation's withholding or sales taxes and willfully fails to do so. See, Schwinger v. United States, 652 F.Supp. 464.

A "responsible" officer is 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." Roth v. U.S., 567 F.Supp. 496, at page 499.

The Taxpayer in this case was clearly a responsible corporate

officer in that as president she applied for an Alabama withholding tax number and filed withholding tax returns on behalf of the corporation.

A responsible corporate officer "willfully" fails to pay tax if the officer knows that tax is due, has the power and responsibility to pay, and fails to do so. Braden v. United States, 442 F.2d 342. Payment of other debts in lieu of taxes is evidence of willfulness. Roth v. United States, supra.

The Taxpayer in this case willfully failed to pay the corporation's withholding tax during the periods in issue because she had check writing authority for the corporation and admitted paying other creditors in lieu of the Department.

The Department also contends that the assessment should be increased to show the liability admitted by the corporation in the bankruptcy proceeding. However, the assessment should not be increased because there is no evidence tying the admitted liability to the quarters covered by the assessment.

The above considered, the Department should make the assessment final after deleting the quarters ending March and June, 1988 and March, 1990.

Entered on December 4, 1991.

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BILL THOMPSON  
Chief Administrative Law Judge