

TY P. TAYLOR
4820 MARYLAND AVENUE
IRONDALE, AL 35210-3246,

Taxpayer,

v.

STATE OF ALABAMA
DEPARTMENT OF REVENUE.

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STATE OF ALABAMA
ALABAMA TAX TRIBUNAL

DOCKET NO. P. 16-103

FINAL ORDER

The Revenue Department assessed Ty P. Taylor (“Taxpayer”) for a 100 percent penalty, as a person responsible for paying the State sales tax for the periods of May and October 2012, January and June 2013, and October 2013 through January 2014; local sales tax for the periods of July 2012, September 2012 through November 2012, April 2013, May 2013, August 2013, and November 2013 through January 2014, and the withholding tax for the quarter ending December 2012, on behalf of Pinches Anaya V, LLC (“Company”). The Taxpayer appealed to the Tax Tribunal pursuant to §40-2A-7(b)(5)(a), Code of Ala. 1975. A hearing was conducted on October 18, 2016. Attorneys Sam McCord and Sam McCord, Jr. represented the Taxpayer. Assistant Counsel Ralph Clements represented the Department.

The Company operated a restaurant, Pinches Taco, in Homewood, Alabama during the periods in issue. The Company failed to pay its State and local sales tax and its withholding tax for the periods. The Department assessed the Company for the unpaid taxes. The Company failed to pay. The Department investigated and determined that the Taxpayer was a “responsible person” for paying the company’s unpaid trust fund taxes, as that term is defined in §40-29-73, Code of Ala. 1975. It consequently assessed the Taxpayer, individually.

The Taxpayer appealed, asserting that he was merely an employee of the Company, and that he had no decision-making authority regarding which of the Company's creditors were paid.

The 100 percent penalty is authorized in §40-29-73. The Alabama penalty statute is generally modeled after the federal 100 percent penalty statute, 26 U.S.C. §6672. That federal statute levies a 100 percent penalty against any person responsible for paying a corporation's trust fund taxes that willfully fails to do so. *See generally, Morgan v. U.S.*, 937 F.2d 281 (5th Cir. 1991); *Howard v. U.S.*, 771 F.2d 729 (5th Cir. 1983). Under federal law, a person is a "responsible person" pursuant to the statute if he or she has the duty, status, and authority to pay the taxes in question. *Gustin v. U.S.*, 876 F.2d 485 (5th Cir. 1989). If a person was responsible for paying the business's trust fund taxes, it is irrelevant that other individuals were equally or even more responsible for the taxes. *U.S. v. Rem*, 38 F.3d 634 (2nd Cir. 1994). A responsible person willfully fails to pay a business's trust fund taxes if the person knew that the taxes were owed, but paid other creditors in lieu of the government. *Malloy v. U.S.*, 17 F.3d 329 (11th Cir. 1994).

As discussed, Alabama's 100 percent penalty statute is generally modeled after the federal 100 percent penalty statute. However, there is a significant difference between the two statutes regarding who is a responsible person. Specifically, while a responsible person under federal law is any person with the duty, status, and authority to pay the trust fund taxes in issue, including an employee, under Alabama law, a "person" for purposes of the 100 percent penalty is limited to an officer of a corporation, or a member of a partnership, who as such officer or member is under a duty to collect and pay over the tax

on behalf of the corporation or partnership. §40-29-72(b), Code of Ala. 1975. See Ala. Tax Reg. 810-12-1-.01 (specifying that the term “person” means “an officer of a corporation or a member of a partnership who by virtue of such position held, is charged with a duty to perform the act of collecting, truthfully accounting for, and/or paying over any trust fund tax to which this penalty relates.”).

At the hearing, the Department established that the Taxpayer had check signing authority, and that he frequently signed checks paying creditors of the Company. It is undisputed that the Taxpayer knew that the taxes in issue were unpaid, and that he issued checks to other creditors in lieu of the Department during the periods in issue. It is also undisputed that the Taxpayer was not a member of the Company.

The Department argued at the hearing that the Taxpayer held himself out as a member of the Company. The Taxpayer testified that he and his father invested in the company and that he worked for the company as an employee, but that he had no ownership interest in the company and that he had no decision-making authority other than to resolve day-to-day issues with guests and to manage day-to-day operations at the restaurant. The Taxpayer testified that the members of the Company, specifically Miguel Anayas, Jr., Jorge Anayas, and Javier Anayas, retained sole decision-making authority, including the payment of creditors. The Taxpayer admitted he that he frequently signed checks paying the Company’s creditors, but clarified that he only had the authority to pay the creditors as directed by the members of the Anayas family. The Taxpayer also admitted that he advertised that he was the operator and co-owner of the business, but explained that he was advised to do so as part of a strategy developed by a public relations firm to advertise the Company as locally owned.

The fact that the Taxpayer advertised that he was a co-owner and operator of the Company alone does not make the Taxpayer a responsible person under §40-29-72(b). There is no evidence to indicate that the Taxpayer was in fact an officer of the Company with the duty to collect and pay over the trust fund taxes to which the 100 percent penalty relates as required by the statute. Absent such evidence, the statute does not levy a 100 percent penalty against the Taxpayer.

The Final Assessment is voided.

This Final Order may be appealed to circuit court within 30 days pursuant to Code of Ala. 1975, 40-2A-9(g).

Entered December 12, 2016.

CHRISTY O. EDWARDS
Associate Tax Tribunal Judge

cc: Ralph M. Clements, III, Esq.
Samuel R. McCord, Esq.