

SAMUEL R. WRIGHT
120 Melrose Lane
Dothan, AL 36303,

STATE OF ALABAMA
DEPARTMENT OF REVENUE
ADMINISTRATIVE LAW DIVISION

Taxpayer,

DOCKET NO. P. 00-408

v.

STATE OF ALABAMA
DEPARTMENT OF REVENUE.

FINAL ORDER

The Revenue Department assessed a 100 percent penalty against Samuel R. Wright (ATaxpayer@), as a person responsible for paying the sales and withholding tax liabilities of Shepherds, Inc. The assessment is for sales tax for October 1996 through March 1997, and withholding tax for the quarter ending December 1996. The Taxpayer appealed to the Administrative Law Division pursuant to Code of Ala. 1975, ' 40-2A-7(b)(5)a. A hearing was conducted on November 21, 2000. The Taxpayer attended the hearing. Assistant Counsel Gwen Garner represented the Department.

ISSUE

The issue in this case is whether the Taxpayer is personally liable for the unpaid trust fund taxes of Shepherds, Inc. pursuant to Code of Ala. 1975, ' ' 40-29-72 and 40-29-73.

FACTS

Shepherds, Inc. owned a restaurant in Dothan, Alabama during the period in issue. The Taxpayer owned 24 percent of the corporation, and also managed the restaurant. He signed the corporation's sales and withholding tax returns.

The restaurant lost money during the period in issue. In March 1997, shortly before the restaurant closed and the corporation filed for bankruptcy, the owners sold the kitchen equipment to another restaurant in Dothan. The Taxpayer claims he was told that the corporation received \$40,000 for the equipment, and that part of the sale proceeds were used to pay the Alabama taxes in issue. The evidence indicates, however, that the corporation received \$24,000 for the equipment, and that over \$20,000 of that amount was paid to the IRS. None of the money was paid to the Department.

The corporation failed to pay its sales and withholding tax liabilities for the periods in issue. The Department used the corporation's returns signed by the Taxpayer to assess him individually for the unpaid trust fund taxes. The Taxpayer appealed.

ANALYSIS

Sections 40-29-72 and 40-29-73 are modeled after the federal 100 percent penalty statute, 26 U.S.C. ' 6672. The above statutes levy a 100 percent penalty against any person responsible for paying a corporation's trust fund taxes that willfully fails to do so. A person is a responsible person pursuant to the above statutes if he has the duty, status, and authority to pay the taxes in question. *Gustin v. U.S.*, 876 F.2d 485, 491 (5th Cir. 1989). A responsible person willfully fails to pay the trust fund taxes of a corporation if the person knew that taxes were owed, but paid or acquiesced in the payment of other creditors in lieu of the government. *Roth v. U.S.*, 567 F.Supp. 496 (1983).

The Taxpayer in this case does not dispute that he was responsible for paying the corporation's trust fund taxes, and in that capacity willfully failed to do so. He argues instead that the taxes were or should have been paid from the proceeds of the sale of the

corporation's kitchen equipment. He claims that the other owners of the corporation, all physicians, should also be held personally liable for the taxes.

There is credible evidence that the corporation's kitchen equipment was sold for \$24,000, not the \$40,000 claimed by the Taxpayer, and that over \$20,000 of the proceeds was paid to the IRS. None of the proceeds were used to pay the taxes in issue. It is also irrelevant that the other owners of the corporation may also be personally liable for the taxes. If a person is individually responsible for paying a corporation's taxes, as is the Taxpayer in this case, it is irrelevant that other individuals were equally or even more responsible for paying the taxes. *U.S. v. Rem*, 38 F.3d 634 (2nd Cir. 1994).

The final assessment in issue is affirmed. Judgment is entered against the Taxpayer for \$10,306.15.

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

Entered December 14, 2000.