

ALABAMA TAX TRIBUNAL

JOANN M. MOORHEAD,	§	
Taxpayer,	§	DOCKET NO. P. 20-969-JP
v.	§	
STATE OF ALABAMA	§	
DEPARTMENT OF REVENUE.		

OPINION AND FINAL ORDER

This appeal involves a final assessment of the 100 percent penalty entered by the Alabama Department of Revenue against Joann M. Moorhead as a person responsible for payment of local sales tax for November 2018 through September 2019, state sales tax for November 2018 through September 2019, and withholding tax for December 2018 through September 2019, on behalf of WR Holdings Group, Inc. (“WR Holdings”). A trial was held, via videoconference, on June 12, 2023. Duncan Crow represented the Taxpayer, and the Taxpayer was present and testified. David Avery represented the Revenue Department. Priscilla Rivera and John Kuehn testified for the Revenue Department. The parties submitted post-trial briefs.

Issue

It is undisputed that WR Holdings, which operated The Forge Pizzeria, was owned solely by Ms. Moorhead at least until May 2019, at which time, according to Ms. Moorhead, she attempted to sell WR Holdings to Michael Bartshe. It also is undisputed that Ms. Moorhead was an officer of WR Holdings. Moreover, Ms. Moorhead does not dispute that WR Holdings failed to remit state and local sales taxes and withholding tax to the Revenue Department.

The issues are whether Ms. Moorhead was “required to collect, truthfully account for, and/or pay over” state and local sales taxes and state withholding tax on behalf of WR Holdings and whether she willfully failed to do so.

Facts

Mr. Kuehn testified that WR Holdings had failed to remit state and local sales taxes and income withholding tax concerning The Forge Pizzeria. And based on information available to the Revenue Department from the Alabama Secretary of State’s office, Ms. Moorhead was listed as the only officer of the corporation. Mr. Kuehn contacted Ms. Moorhead to determine why the trust-fund taxes of WR Holdings had not been paid. Ms. Moorhead stated that she had invested in WR Holdings and allowed her name to be used in the company documents, but that the person in charge of WR Holdings was Michael Carter and that Mr. Carter had left town. Mr. Kuehn also confirmed that the address on file with the Revenue Department for WR Holdings was Ms. Moorhead’s address and that the tax-delinquency notices that were mailed by the Revenue Department concerning WR Holdings were being mailed to Ms. Moorhead. Based on these facts, Mr. Kuehn determined that Ms. Moorhead was the responsible person who willfully failed to remit trust-fund taxes on behalf of WR Holdings.

Ms. Rivera, who investigated WR Holdings, stated that Ms. Moorhead was listed as the corporate president and that the corporate registration did not indicate that there were any other officers. Ms. Rivera also verified Ms. Moorhead’s mailing address.

Ms. Rivera subpoenaed WR Holdings's bank records and determined that Ms. Moorhead was the only person who could sign checks or use the corporate debit card on behalf of the company. Ms. Rivera also noted that, after May 19, 2019, which was the date that Ms. Moorhead stated she transferred her corporate interest to Mr. Bartshe, there were checks written on the business account that purported to bear Ms. Moorhead's signature. And Ms. Moorhead remained as the sole signatory on the checking account. The bank statements showed that the company's checking account had a sufficient amount in it to pay the delinquent taxes. The statements also showed a recurring transaction from Paychex, Inc., with Ms. Moorhead's name listed next to those transactions.

Ms. Rivera testified that, although Ms. Moorhead claimed that Mr. Carter was in charge of WR Holdings, Mr. Carter's name was not on any company documents. Ms. Rivera opened a case against Mr. Carter as an additional person with responsibility as to these taxes, but she did not pursue an assessment because she did not have an address or social security number for him and he already "had skipped town."

Because Ms. Moorhead was the sole owner and officer of WR Holdings and because Ms. Moorhead was the only person authorized to sign checks and use the debit card, Ms. Rivera believed that Ms. Moorhead was a responsible person who willfully failed to pay taxes on behalf of WR Holdings. Thus, the Revenue Department entered the assessment in issue.

Ms. Moorhead testified that a neighbor named Michael Carter approached her

and her husband about investing in a cattle business called Whisky Ridge Cattle Company. The Moorheads invested \$8,000 in the company, for which they received a 25% interest represented by 250 shares of stock. Ms. Moorhead and Mr. Carter opened a bank account for the cattle company, and Mr. Carter kept the company checkbook. Ms. Moorhead stated that she had no involvement with the cattle company other than her financial investment.

In 2018, Mr. Carter approached Ms. Moorhead about buying The Forge Pizzeria in Foley, Alabama. To do so, Ms. Moorhead opened a bank account for WR Holdings in her name as sole owner. However, she testified that she did not receive bank statements, because they were mailed to the restaurant, and that she never wrote any checks on the account and never used the business's debit card (which was issued in her name). Instead, Mr. Carter took possession of both the checkbook and the debit card.

Although there were some checks signed by Mr. Carter and other checks purported to have been signed by Ms. Moorhead, she testified that the checks with her name on them were forged. Ms. Moorhead introduced a Forensic Laboratory Report from a forensic document examiner, Mr. Grant Sperry, which concluded that the signatures on the checks written on the account of WR Holdings were not the signatures of Ms. Moorhead.

Ms. Moorhead stated that she had no duties with respect to either WR Holdings or The Forge Pizzeria, she was not involved in the day-to-day operations of the businesses, she did not hire or fire employees, she did not pay the businesses'

bills, nor did she decide which bills to pay. She also did not open tax accounts for the businesses, and she did not receive a paycheck. According to Ms. Moorhead, Mr. Carter decided which bills would be paid, and he paid those bills. Although Ms. Moorhead offered to help with bookkeeping, Mr. Carter informed her that he did not want any help.

According to Ms. Moorhead, most of the mail for WR Holdings, including the bank statements, was delivered to the pizzeria, although she began receiving tax bills addressed to WR Holdings in late summer of 2019. She stated that she talked to Mr. Carter about the delinquent taxes and he assured her that he would take care of them. However, Ms. Moorhead did not contact the Revenue Department about the delinquencies.

Mr. Bartshe was employed by WR Holdings, and he performed some work at the pizzeria. According to Ms. Moorhead, Mr. Bartshe loaned between \$70,000 and \$80,000 to WR Holdings. She attempted to sell her ownership in WR Holdings to Mr. Bartshe in May 2019 for \$100,000, which was to be paid in monthly installments. Mr. Carter guaranteed the payments, but Ms. Moorhead received only two payments in the amount of \$1,250 each. Both Mr. Bartshe and Mr. Carter defaulted on the purchase agreement.

At some point, Ms. Moorhead discovered that Mr. Carter had moved. She and Mr. Bartshe visited the pizzeria thereafter and found many unpaid bills. She also testified that she went to Mr. Carter's residence and found two barrels of ashes in the yard.

Ms. Moorhead sued Mr. Carter for fraud in Baldwin Circuit Court on August 19, 2019. The suit ended with a default judgment being entered against Mr. Carter.

Law

Section 40-29-73(a), Ala. Code 1975, states:

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.

“Person” is defined by statute to include “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.” Ala. Code 1975 § 40-29-72(b).

In 1986, the Revenue Department adopted a rule concerning Alabama’s 100% penalty statute. That rule states as follows:

(1) Any person required to collect, truthfully account for, and/or pay over any tax imposed by §40-17-2 (Motor Fuels Excise Tax), §40-17-220 (Gasoline, Motor Fuels and Lubricating Oil Excise Tax), §40-18-71 (Income Tax Withholding), §40-21-82 (Utility Gross Receipts Tax), §40-23-2 (State Sales Tax), §40-23-61 (State Use Tax), §40-26-1 (State Lodgings Tax), Code of Ala. 1975, as amended, or any other local sales, use, or gross receipts taxes collected by the Alabama 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, be liable for a penalty in an amount not to exceed the total amount (100%) of the tax evaded, or not collected, or not accounted for and paid over. These designated taxes may be referred to as trust-fund taxes since they are collected in a fiduciary capacity on behalf of the Department of Revenue.

(2) 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.

(3) The penalty imposed by this section is not assessed against the corporation or partnership which has the primary liability for the taxes required to be collected, accounted for, and/or paid over to the Department of Revenue. The 100% penalty is assessed against any corporate officer(s) or member(s) of a partnership who is under a duty on behalf of the corporation or partnership to collect, account for, and/or pay over the tax to the State of Alabama.

Ala. Admin. Code r. 810-12-1-.01.

There also have been rulings in administrative appeals concerning the question of personal liability pursuant to the penalty statute.

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 F2d 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).

Ty P. Taylor v. State of Alabama, P. 16-103 (Ala. Tax Tribunal, Dec. 12, 2016).

On appeal, the Taxpayer argues that (1) she was not a responsible person pursuant to the statute, and (2) she did not willfully fail to pay the taxes. The facts show otherwise.

Here, as stated, Ms. Moorhead was the sole owner of WR Holdings and was the

sole signatory on the company's checking account. On the application to open that account, Ms. Moorhead was listed as "owner with control of the entity." She also was issued the company's debit card, although she states that Mr. Carter took possession of it. Ms. Moorhead also was an officer in the company and a shareholder. Clearly, she was "required to collect, truthfully account for, and/or pay over" the underlying trust fund taxes of the company.

Concerning the element of willfulness, Ms. Moorhead was aware that the taxes were delinquent because she had received delinquency notices from the Revenue Department by mail. When she questioned Mr. Carter about the delinquencies, he said that he would "take care of it," but Ms. Moorhead did not follow up with Mr. Carter or the Revenue Department to ensure that the delinquencies had been satisfied. And when Mr. Bartshe and Ms. Moorhead executed a purchase agreement for the sale of her stock in WR Holdings to Mr. Bartshe, the parties listed delinquent taxes as "loans which are personally guaranteed by the Seller [Ms. Moorhead]" that were to be paid as the first priority item. (The Revenue Department persuasively argued that this provision also was an acknowledgement of responsibility by Ms. Moorhead.)

Further, Mr. Kuehn from the Revenue Department contacted Ms. Moorhead about the need to satisfy the delinquencies but, again, Ms. Moorhead failed to do so. Instead, the bank records of WR Holdings subpoenaed by the Revenue Department showed that others were being paid in lieu of the Revenue Department. And, as stated by Ms. Moorhead during the trial, she received two payments of \$1,250 each

pursuant to the purchase agreement with Mr. Bartshe. But Ms. Moorhead did not pay any of the \$2,500 toward the trust-fund delinquency.

“Willful,’ as used in the statute, implies an ability to pay and intentional or willful failure to do so.” *Oliver T. and Teresa T. Moody v. State of Alabama Department of Revenue*, 14-370 and 14-371 (Ala. Tax Tribunal May 9, 2016). “The payment of other creditors in lieu of the government constitutes a willful failure to pay – ‘. . . a voluntary, conscious, and intentional act to prefer other creditors over the United States constitutes willful failure to pay over.’” *Id.* (quoting *Teal v. U.S.*, 529 F. 2d 903, 905 (9th Cir. 1976), quoting, in turn, *Sorenson v. U.S.*, 521 F.2d 325, slip opinion at 5 (9th Cir. 1975)).

Here, Ms. Moorhead willfully failed to account for and pay the trust fund taxes. Therefore, the final assessment in issue is upheld. Judgment is entered against Ms. Moorhead and in favor of the Revenue Department in the amount of \$32,929.14, plus additional interest that continues to accrue from the date of entry of the final assessment until the liability is paid in full.

It is so ordered.

This Opinion and Final Order may be appealed to circuit court within 30 days, pursuant to Ala. Code 1975 § 40-2B-2(m).

Entered December 13, 2023.

/s/ Jeff Patterson

JEFF PATTERSON

Chief Judge

Alabama Tax Tribunal

jp:ac

cc: Duncan Crow, Esq.
Joann Moorhead
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