

ALABAMA TAX TRIBUNAL

PAUL TRINH,	§	
Taxpayer,	§	DOCKET NO. P. 23-608-LP
v.	§	
STATE OF ALABAMA	§	
DEPARTMENT OF REVENUE.		

MINH HOANG,	§	
Taxpayer,	§	DOCKET NO. P. 23-830-LP
v.	§	
STATE OF ALABAMA	§	
DEPARTMENT OF REVENUE.		

OPINION AND FINAL ORDER

Docket No. P. 23-608-LP involves the entry of a final assessment of trust fund recovery penalty for state sales tax for periods November 30, 2017, through January 31, 2019, entered against Paul Trinh. Docket No. P. 23-830-LP involves the entry of a final assessment of trust fund recovery penalty for state sales tax for periods November 30, 2017, through September 30, 2018, entered against Minh Hoang. A trial was held on April 16, 2024. Paul Trinh appeared and testified both for himself as well as in representation of Minh Hoang. Hilary Parks represented the Revenue Department, and Ashley Hooks, from the Revenue Department's Collections Services Division, appeared and testified.

Facts

Prior to the entry of the two final assessments currently in issue, the Revenue Department issued a final assessment of State sales and use tax for the periods November 2015 through October 2018 solely against Mr. Hoang. Mr. Trinh appealed that final assessment to the Tax Tribunal on Mr. Hoang's behalf (Docket No. S. 19-1231-LP). During that appeal, Mr. Trinh provided the history and details of the operation of the Express Foodmart, Inc., convenience store located in Anniston, Alabama. Mr. Trinh originally owned the convenience store under another name—PT Foodmart, Inc. However, significant financial issues regarding both the convenience store and matters outside of the convenience store left Mr. Trinh in need of financial assistance. In a letter from Mr. Trinh dated July 5, 2022, and included in the Notice of Appeal filed in Docket No. P. 23-830-LP, Mr. Trinh explains that he “had to borrow money from Mr. Hoang to keep the business running[,]” and he then “had to transfer [Mr. Trinh's] business to Mr. Hoang to pay back the loan with the inventory from the business. Mr. Hoang had no choice since that was the only way for [Mr. Trinh] to pay him back the loan.” Notice of Appeal at 3, *Hoang v. State Dep't of Revenue*, No. P. 23-830-LP (Ala. Tax Trib. Sept. 18, 2023).

Despite this change in ownership, though, Mr. Trinh continued managing all aspects of the convenience store. Further, Mr. Trinh, in his capacity as the manager of the convenience store, represented Mr. Hoang in the prior appeal (Docket No. S. 19-1231-LP). The Tax Tribunal's original final order in S. 19-1231-LP fully affirmed the Revenue Department's final assessment of sales tax and a fraud penalty because the taxpayer failed to maintain adequate records, the taxpayer failed to provide

complete records, the taxpayer's retail sales were nearly 50 percent underreported, the taxpayer consistently underreported sales through the audit period, and the taxpayer failed to offer a substantiated explanation for the underreporting. *Hoang v. State Dep't of Revenue*, No. S. 19-1231-LP (Ala. Tax Trib. Nov. 29, 2021). On an application for rehearing from the taxpayer, the Tribunal reversed the Revenue Department's imposition of the fraud penalty included in the original final assessment and Final Order, and ultimately affirmed the remaining components of the sales tax final assessment with a negligence penalty for a total liability of \$67,273.29. *Hoang*, No. S. 19-1231-LP (Final Order on Appl. for Reh'g Nov. 18, 2022). The Revenue Department asserts in its Answer filed in Docket No. S. 23-608-LP that the sales tax amounts affirmed in Docket No. S. 19-1231-LP remain unpaid. Answer at 2, *Trinh v. State Dep't of Revenue*, No. P. 23-608-LP (Ala. Tax Trib. Oct. 24, 2023).

In the appeals at bar, the Revenue Department states that it first entered a final assessment of the trust fund recovery penalty against Mr. Trinh (Docket No. P. 23-608-LP) because he testified at a hearing in the prior case "that he was the person responsible for payment. After the Order from the Tribunal, the amounts remained unpaid for the taxes due." Answer at 2, *Trinh v. State Dep't of Revenue*, No. P. 23-608-LP (Ala. Tax Trib. Oct. 24, 2023). The Department then entered the second, separate final assessment of the trust fund recovery penalty against Mr. Hoang (Docket No. P. 23-0830-LP) because Mr. Hoang "was listed as the president/owner of Express Foodmart during the time of an audit conducted for compliance with the sales tax laws of Alabama[,] and "Mr. Hoang's signature was found on checks written from the business' [sic] account to pay vendors, insurance, property tax, IRS, etc."

Answer at 2, *Hoang v. State Dep't of Revenue*, No. P. 23-830-LP (Ala. Tax Trib. Dec. 19, 2023). Further, the Revenue Department subpoenaed the bank records for Express Foodmart, which reflected that the signatures of both Mr. Trinh and Mr. Hoang appeared on checks to creditors other than the Revenue Department during the periods assessed.¹

Mr. Trinh appealed the final assessments addressed to him (Docket No. P. 23-0608-LP) and to Mr. Hoang (Docket No. P. 23-0830-LP). In the Notice of Appeal filed for Mr. Hoang's appeal, Mr. Trinh specifically states that he is "fully responsible for this tax assessment as [he had] explained in [a] previous letter that Mr. Hoang was just the owner in name only. [Mr. Hoang] was just helping [Mr. Trinh] since [Mr. Trinh] could not be able to borrow any money[.]" Notice of Appeal at 1, *Hoang v. State Dep't of Revenue*, No. P. 23-830-LP (Ala. Tax Trib. Sept. 18, 2023). In both Notices, Mr. Trinh repeats the arguments he made in the prior appeal (Docket No. S. 19-1231-LP) that neither he nor Mr. Hoang owes sales taxes as they did not underreport or underpay any tax associated with Express Foodmart's sales. This appeal, though, concerns the 100 percent penalty levied by Alabama Code Sections 40-29-73 and -73 for failure to pay trust fund taxes rather than any sales tax.

Law

Alabama Code Sections 40-29-72 and -73 are modeled after 26 U.S.C. § 6672, the federal statute that levies a 100 percent penalty against any person responsible for paying trust fund taxes who willfully fails to do so. *Moody v. State Dep't of*

¹ The Revenue Department's Answer in Docket No. P. 23-0830-LP states that Mr. Hoang's signature did not appear on any check dated after September 30, 2018; thus, the corresponding assessment included a period ending on that date.

Revenue, Nos. P. 14-370, P. 14-371, 3 (Ala. Tax Trib. May 9, 2016) (citing *Morgan v. U.S.*, 937 F.2d 281 (5th Cir. 1991)); *Howard v. U.S.*, 711 F.2d 729 (5th Cir. 1983). The close relationship between the federal and state trust fund penalty statutes allows the Tribunal to follow federal case law on the penalty. *Moody*, Nos. P. 14-370, 14-371, 4 (citing *Nash v. State Dep't of Revenue*, No. P. 98-513, 5-6 (Ala. Dep't of Revenue Admin. L. Div. May 5, 1999)). Alabama's 100 percent penalty statute imposes the following duty:

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.

Ala. Code § 40-29-73(a). The 100 percent penalty statute then defines the term “person” as used within the statute as “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 § 40-29-72(b). The Tax Tribunal has also incorporated the following federal caselaw regarding the 100 percent penalty statute into its analysis of the 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).

Moorhead v. State Dep't of Revenue, No. P. 20-969-JP (Ala. Tax Trib. Dec. 13, 2023) (citing *Taylor v. State of Alabama*, P. 16-103 (Ala. Tax Trib. Dec. 12, 2016)).

On appeal, Mr. Trinh argues that he does not owe the trust fund recovery penalty because the underlying sales tax liability is incorrect, and that Mr. Hoang does not owe the trust fund recovery penalty because Mr. Hoang was not responsible for the sales taxes. The facts show otherwise.

First, Mr. Trinh has consistently confirmed his responsibility for the finances of the Express Foodmart convenience store. Mr. Trinh has specifically stated that he desires to be "fully responsible for any tax liability that the Department may find." Letter dated Dec. 24, 2023, from Paul Trinh at 1, *Trinh v. State Dep't of Revenue*, No. P. 23-608-LP (Ala. Tax Trib. Dec. 28, 2023). Rather than argue that he does not possess this responsibility, Mr. Trinh has instead argued against the validity of the sales taxes assessed and affirmed in Docket No. S. 19-1231 because the Revenue Department did not take into account "stolen groceries and merchandises due to employee's theft and robberies." Notice of Appeal at 1, *Trinh v. State Dep't of Revenue*, No. P. 23-608-LP (Ala. Tax Trib. July 20, 2023). However, the Tax Tribunal disposed of this issue in Docket No. S. 19-1231, where the Tax Tribunal's November 29, 2021, Final Order, October 31, 2022, Second Preliminary Order on Application for Rehearing, and November 18, 2022, Final Order on Application for Rehearing each affirmed the Revenue Department's assessment of sales tax because of the failure of

the taxpayer there (Mr. Hoang being represented by Mr. Trinh) to maintain and produce complete records for the audit period.² There has not been any new evidence submitted to the Tax Tribunal in this appeal that would warrant reconsideration of the disposition reached in Docket No. S. 19-1231. Therefore, by his own admission, Mr. Trinh is a responsible person for the purposes of Alabama's 100 percent trust fund penalty statute.

Next, the Tax Tribunal's prior ruling in *Moorhead v. State Dep't of Revenue*, No. P. 20-969-JP (Ala. Tax Trib. Dec. 13, 2023), supports the conclusion that Mr. Trinh's responsibility for the sales taxes associated with Express Foodmart does not absolve Mr. Hoang from his own responsibility for the sales taxes or preclude Mr. Hoang from being subject to the 100 percent penalty statute. In *Moorhead*, the taxpayer argued she was not a responsible person who willfully failed to pay trust fund taxes because another individual, Michael Carter, had solicited investment funds from Moorhead and her husband first for a cattle business and then for a pizzeria. P. 20-969-JP at 3-4. Under their alleged agreement, Moorhead opened a bank account for the pizzeria and Carter took possession of both the checkbook and debit card associated with the account. *Id.* at 4. Moorhead testified she had no duties concerning the pizzeria, and that Carter retained all decision-making authority for the business. *Id.* at 4-5. Eventually, Moorhead began receiving tax bills addressed to the pizzeria. *Id.* at 5. She spoke with Carter about the tax bills, and he assured

² The Tax Tribunal's October 31, 2022, Second Preliminary Order on Application for Rehearing, and November 18, 2022, Final Order on Application for Rehearing, did lead to a reduction of the total final assessment, though, as the 50% fraud penalty included in the original November 29, 2021, assessment was reduced to a 5% negligence penalty.

her that he would take care of them. *Id.* However, Carter never did “take care” of the tax bills, and Moorhead eventually discovered that he had moved, leaving only “two barrels of ashes in the yard.” *Id.*

The Tax Tribunal disagreed with Moorhead’s arguments that she was not responsible for the trust fund taxes for the pizzeria or subject to the 100 percent penalty. Regarding Moorhead’s responsibility for the trust fund taxes, the Tribunal ruled that “[c]learly, [Moorhead] was ‘required to collect, truthfully account for, and/or pay over’ the underlying trust taxes of the [pizzeria]” because she was the sole owner of the pizzeria, the sole signatory on the company’s checking account and listed as the “owner with control of the entity” on the application to open the account, was issued the company’s debit card, and was an officer in the company and a shareholder. *Id.* at 7-8. After next ruling that Moorhead had willfully failed to pay the trust fund taxes, the Tribunal affirmed the Revenue Department’s assessment of the 100 percent trust fund penalty. *Id.* at 9.

Here, as in *Moorhead*, it is clear that Mr. Hoang should be held responsible for the trust fund taxes despite Mr. Trinh’s claims that Mr. Hoang was an owner in name only. As with Ms. Moorhead, Mr. Hoang’s initial involvement in the Express Foodmart convenience store came in the form of financing another person’s venture (Mr. Carter in *Moorhead*, Mr. Trinh here). Mr. Hoang, like Ms. Moorhead, did not work in the convenience store but instead entrusted Mr. Trinh with the daily operations of the store. Also like Ms. Moorhead, Mr. Hoang is the sole member and owner of Express Foodmart, Inc., the corporation operating the convenience store in issue. Mr. Hoang completed and signed Express Foodmart’s certificate of formation

on January 22, 2014, and the documents dissolving Express Foodmart on March 19, 2019. Mr. Hoang signed the “Agreement to Sell Business” executed on December 21, 2018, ostensibly conveying his ownership interest in Express Foodmart. Mr. Hoang opened a bank account for Express Foodmart, listing himself, Mr. Trinh, and a third person on the signature cards for the account. Mr. Hoang signed the associated banking resolution as president of Express Foodmart. Both Mr. Hoang and Mr. Trinh signed checks from Express Foodmart’s business account until September 30, 2018, at which point Mr. Hoang’s signature no longer appeared on any checks. Therefore, given his involvement with Express Foodmart’s finances, it is clear that Mr. Hoang was a responsible person here because he had the duty, status, and authority to collect and pay over the business’s trust fund taxes.

Next, the Tax Tribunal has recognized that “[w]illful,’ as used in the statute, implies an ability to pay and intentional or willful failure to do so.” *Moody*, 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 *Teel 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, the signatures of both Mr. Trinh and Mr. Hoang appear on checks written from Express Foodmart’s business account to pay other creditors despite the outstanding taxes. Thus, both Mr. Trinh and Mr. Hoang willfully failed to account for and pay the trust fund taxes.

Finally, as the Taxpayers here are two distinct individuals, it bears

acknowledging here that both the 100 percent penalty statute and the Revenue Department's former corresponding regulation limit the ceiling of the assessable penalty to "the total amount of the tax evaded, or not collected, or not accounted for and paid over." See Ala. Code § 40-29-72(a); Ala. Admin. Code r. 810-12-1-.01(1) (2023).³ Here, the penalties assessed against Mr. Trinh and Mr. Hoang, taken individually or in aggregate, do not equal or exceed the original sales tax liability assessed and affirmed by the Tax Tribunal in Docket No. S. 19-1231-LP against Mr. Hoang.

Therefore, the final assessments in issue are upheld. Judgment is entered against Mr. Trinh and in favor of the Revenue Department in the amount of \$25,888.07, plus additional interest that continues to accrue from the date of entry of the final assessment until the liability is paid in full. Judgment is entered against Mr. Hoang and in favor of the Revenue Department in the amount of \$19,893.68, 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 June 25, 2025.

/s/ Leslie H. Pitman

LESLIE H. PITMAN

Associate Judge

Alabama Tax Tribunal

lhp:thb

³ Ala. Admin. Code r. 810-12-1-.01 was repealed in its entirety effective October 14, 2024.

cc: Paul Trinh
Minh Hoang
Hilary Y. Parks, Esq.