

# Plain Talk ABOUT YOUR Tax Liability...

As a business owner or official, can I be held personally liable for payment of business-related taxes such as income tax withholding and sales tax?

Can my personal assets be taken for payment of business-related taxes which go unpaid to the state or local governments?

*Know Your Liabilities...  
Get the facts*

Unfortunately, some Alabama business owners find themselves faced with such questions. Business failures are a reality, and it is important that you become aware of potential tax liabilities which could result from a business failing to pay certain taxes.

Most businesses have employees from whom they will be required to withhold income taxes each time a payroll is met. In addition, many businesses are required to collect state and local sales taxes from their customers. Once these taxes are withheld or collected, they are held "in trust" by the business until the tax return and payment become due. Because of this, these taxes are known as "trust fund" taxes. This means that you, as a business owner, act in a fiduciary capacity for the state. You are charged with the legal duty to withhold and/or collect taxes

for the state and hold them in trust until the law requires their payment on either a monthly or quarterly basis.

Most businesses regularly pay these trust fund taxes in a timely manner as the law requires. However, for a small minority of business owners, under-capitalization leads to mounting financial problems which, in turn, leads to the temptation to "borrow" from these trust fund taxes to pay other business creditors. Such temptation may have serious consequences for the taxpayer. The tax statutes provide stiff criminal sanc-

tions for failure to pay over these trust fund taxes to the state. Equally important are the civil sanctions which can be applied against a business. Civil sanctions include injunctions and entry of assessments which, when final, have the weight and legal authority of judgments.

If you are a sole proprietor or a partner in a partnership, your personal assets may eventually be seized if it becomes necessary to assess you with unpaid business-related taxes. Since all debts of sole proprietorships and partnerships follow their owners' assets, this fact is not surprising to most people. However, you may not be aware that since 1984, **the trust fund tax liabilities of corporations may be assessed to corporate officers and certain other key individuals within the corporation.**

Many people purposely choose to incorporate their businesses for the protection afforded them under the limited liability concept. However, in 1984 the legislature passed a statute which gives the Alabama Department of Revenue the authority to directly assess a penalty equal to the unpaid tax to those individuals who are responsible for collecting, accounting for, and/or paying over the trust fund taxes to the state and who willfully fail to do so.

For example, if you occupy a position within a corporation in which you have authority and control over payment of creditors and you choose to pay other creditors while trust fund taxes remain unpaid, you may find yourself personally assessed with the corporation's tax liability. This procedure, commonly referred to as a "100% Penalty Assessment," has been used by the Internal Revenue Service since 1954. Its purpose is to ensure that tax revenues are not lost if a corporation becomes defunct or has insufficient assets from which the taxes can be collected. Members of newer types of businesses such as L.L.C.s and Limited Liability Partnerships may also be assessed this penalty.

Should you find yourself facing the prospect of being unable to pay all of the debts of your business as they become due, we encourage you to make paying over these trust fund taxes your number one priority. Nothing is worse than having your business fail and still having to face the responsibility of repaying trust fund taxes to the state. **Even filing a personal bankruptcy will not wipe out this type of liability.**



## The 10 Most Commonly Asked Questions Concerning 100% Penalty Assessments

### 1. If I am assessed with the 100% Penalty, do I have to pay an additional 100% of the business' tax liability?

No, there is no additional amount assessed to the individual. Rather, it is a transfer of exactly what the business owes to the person or persons who had responsibility for collecting, accounting for, and/or paying over the taxes on behalf of the business and who willfully failed to do so.

### 2. If the business is still operating and I am assessed the penalty, is the amount collected twice?

No. The department is only interested in collecting the amount owed by the business in full one time. If the liability is collected from the business, the responsible person will be given credit on his/her assessment.

### 3. Under what authority can the department make a 100% penalty assessment?

Sections 40-29-72 and 40-29-73, *Code of Alabama 1975* provide for these assessments.

#### 4. Who can be assessed this penalty?

Anyone who participated in the operation of the business to the extent that he had authority and control over business funds and participated in the decision to prefer other creditors while taxes went unpaid.

#### 5. For which taxes can a responsible person be held personally liable?

Trust fund taxes include income withholding, sales taxes (state and local), lodgings tax, motor fuels tax, gasoline tax, utility gross receipts tax, and use tax.

#### 6. Does the business have to be already out of business for an individual to be assessed?

No. An assessment can be initiated against an individual as soon as the business' failure to pay has been established. However, normally these assessments are initiated when a request for payment from the business has gone unanswered.

#### 7. What if more than one person is responsible?

The department makes every effort to assess all individuals who were responsible for paying the taxes and who willfully failed to do so. If more than one per-



son is assessed, each one is individually and severally liable, but the total due is collected in full only one time.

#### 8. What happens if the business files bankruptcy?

Generally, the filing of bankruptcy by the business will not prevent the assessment of the 100% penalty to the responsible persons.

#### 9. What happens if I file bankruptcy?

If the responsible person has already been assessed, the department will be barred from trying to collect the assessment while the bankruptcy case is pending. If an assessment has not been finalized, the department may proceed with issuance of a final assessment, but no attempts will be made to collect it. The department usually will, however, file a claim in the individual's bankruptcy case. If payment is not received from the court, collection action will resume or begin as soon as the case is closed.

#### 10. What if I am assessed with the 100% penalty, but cannot pay?

If you are assessed, the department will have to pursue collection if you do not voluntarily make arrangements for payment. These cases are handled by Revenue Compliance Officers in the department's Collection Services Division.

Good luck in your new endeavor, and remember, the Alabama Department of Revenue is here to help you in every way possible to ensure that you will be successful.

If after reading this document you have any questions, you may contact the Alabama Department of Revenue's Collection Services Division at

(334) 242-1220.



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