

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 93-8458
Summary Calendar

IN THE MATTER OF PATRICK NEAL RILEY,

Debtor,

PATRICK NEAL RILEY,

Appellee
Cross-Appellant,

versus

INTERNAL REVENUE SERVICE,

Appellant
Cross-Appellee.

Appeals from the United States District Court for the
Western District of Texas
(A-92-CA-53-JN)

(February 28, 1994)

Before JOLLY, WIENER, and EMILIO M. GARZA, Circuit Judges.

PER CURIAM:*

This appeal is taken from the district court's judgment affirming a bankruptcy court decision. At issue is a penalty that the IRS assessed against Patrick Neal Riley, as an individual

*Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that Rule, the court has determined that this opinion should not be published.

business operator, for his failure to remit payroll taxes that had been withheld from his employees' wages. The bankruptcy court and the district court found that Riley should be required to pay one hundred percent of the withheld taxes except for those of the first quarter, which ended on December 31, 1983. We held that Riley is liable with respect to all fiscal quarters in issue, including the last quarter of 1983. Accordingly, we affirm in part and reverse in part and remand for entry of judgment.

I

Austin Plumbing, Inc. ("Austin") was a Texas corporation that began business as a plumbing subcontractor in June of 1983. Patrick Neal Riley, who was at the time a full-time home builder and real estate broker, provided the capital to finance the business. He was made the president of the company and a director, and was issued seventy percent of the stock. The other incorporator of the company was Ed Cook, who had a master plumber's license. He ran the day-to-day operations of Austin, was the vice-president, a director, and a thirty percent shareholder. Riley's wife at the time, Nelda Riley, was the secretary of Austin, and a woman who worked in Riley's home building company, Kathleen Tate, was the treasurer.

Austin apparently experienced financial difficulties from the outset, and in February 1984, Riley was informed by Cook that the company was delinquent in paying over the federal income and social security (withholding) taxes that had been withheld from the wages

of Austin's employees. Austin was delinquent at that time only with respect to the taxes withheld during the quarter ending on December 31, 1983. Riley's response to the problem was to hire Thomas Tweedel to assume responsibility for Austin's financial affairs. Though the company never again paid its withholding taxes, Riley and his employee, Kathy Tate, continued to pay creditors and net wages to Austin's employees throughout the corporation's existence.

Cook left Austin in September 1984. Tweedel became the general manager of Austin, assuming the duties of bidding on and running the plumbing subcontracting jobs in addition to the day-to-day financial duties of the business. Riley and Kathy Tate, however, continued to write checks to pay general creditors of Austin and net wages to Austin's employees. The business finally ceased operations on May 30, 1985. It had collected approximately \$500,000 in gross receipts during the two years it was operating, but had failed to pay over withheld taxes for six of the eight quarters it had operated.

On March 21, 1988, the IRS assessed a penalty against Riley in the amount of \$51,979.61 pursuant to section 6672 of the Internal Revenue Code as a responsible officer of Austin. The amount of the assessment was equal to the amount of the unpaid withholding taxes owed by Austin. When Riley filed for bankruptcy protection on March 21, 1990, the government filed a proof of claim seeking payment of the one hundred percent penalty assessment

together with statutory interest thereon. Riley filed this adversary proceeding to have the Government's claim set aside.

II

Riley filed this adversary proceeding on February 22, 1991, in the United States Bankruptcy Court for the Western District of Texas to set aside its proof of claim filed by the government against him in his underlying Chapter 13 bankruptcy proceeding. The government asserted that Riley was liable for a 100 percent penalty for the six quarters ending as follows: December 31, 1983, March 31, 1984, September 30, 1984, December 31, 1984, March 31, 1985, and June 30, 1985.

A trial was held before the Bankruptcy Court on October 17, 1991. At the conclusion of trial, the court issued oral findings of fact and conclusions of law determining that Riley was a responsible person of the delinquent corporation with respect to all six quarters in issue, and that Riley's failure to pay over the taxes due the government was willful as to all the quarters except the first quarter in issue, which ended December 31, 1983. Its determination that Riley was not willful as to that quarter was based on its finding that Riley did not become aware of the withholding tax delinquency until February 1984. Both Riley and the United States appealed to the district court, and the district court affirmed the bankruptcy court. The government filed a motion to alter or amend, contending that the undisputed evidence established that Riley's failure to pay over the withholding taxes

due for the last quarter of 1983 was willful within the meaning of Section 6672 as a matter of law. The district court, however, denied the government's motion to amend its judgment.

The government and Riley have such appealed to this court.

III

The Internal Revenue Code requires employers to withhold from employee's wages federal income taxes and social security contributions. 26 U.S.C. §§ 3102, 3402. The employer holds these funds "in trust" for the United States. 26 U.S.C. § 7501(a). If these trust funds are not then paid over to the United States, section 6672(a) of the Code imposes a penalty, equal to the unpaid taxes, on any person required to collect, account for, and pay over the withheld taxes, who willfully fails to do so. Barnett v. I.R.S., 988 F.2d 1449, 1453 (5th Cir. 1993); Turnbull v. United States, 929 F.2d 173, 178 (5th Cir. 1991). Liability is established if a person is a "responsible person" who "willfully" failed to pay over the withheld taxes. Barnett, 988 F.2d at 1453 (citing Turnbull, 929 F.2d at 178).

As previously noted, the courts below found that Riley was a responsible person of the delinquent corporation with respect to all six quarters in issue. The courts also held that Riley's failure to pay over the taxes was willful as to all the quarters except the first quarter in issue, which ended December 31, 1983. The courts apparently concluded that Riley was not willful as to

that quarter because he did not become aware of the withholding tax delinquency until February 1984.

The government argues on appeal that the district court erred in affirming the finding of the bankruptcy court that Riley did not act willfully, within the meaning of Section 6672 of the Internal Revenue Code, in failing to pay over the taxes with respect to the last quarter of 1983. The government asserts that Riley was found by the court to be a responsible person. Moreover, the undisputed evidence established that Riley used the company's funds to pay other creditors after he became aware of the withholding tax delinquency. The court was therefore bound by law, the government argues, to find also that Riley was willful in failing to pay over the taxes due the government. We agree.

We have addressed a very similar question in Barnett v. I.R.S., 988 F.2d 1449 (5th Cir. 1993). In Barnett, "[t]he IRS contend[ed] that the undisputed evidence presented at trial establishe[d] that Barnett [was] a `responsible person' who `willfully' failed to pay withholding taxes. In particular, the IRS assert[ed] that . . . his failure to pay overdue taxes was willful because he was responsible for making payments to creditors other than the United States after he learned that the withholding taxes were past due." Id. at 1453. We held that "[o]nce he became aware of the tax liability, Barnett had a duty to ensure that the taxes were paid before any payments were made to other creditors." Id. at 1457 (citing Mazo v. United States, 591 F.2d 1151, 1154

(1979)). "[U]ndisputed evidence that he failed to do so would ordinarily establish willfulness as a matter of law." Id. (citing Howard v. United States, 711 F.2d 729, 735 (5th Cir. 1983)).

Similarly, in Turnbull, 929 F.2d 173, we made an analogous ruling. In that case, defendant Foster argued that he could not be held liable for taxes due from the first half of 1981 because he did not know about the unpaid taxes before October of that year. We stated that "[e]ven if the trust funds for the other quarters had already been dissipated by the time Foster learned that [the company] had not paid the payroll taxes for the previous quarters, Foster nevertheless had a duty to apply any available unencumbered funds to reduce the payroll tax liability." Id. at 180 (citing Mazo, 591 F.2d at 1154). This court went on to hold Foster liable because he "paid other creditors with knowledge that the payroll taxes were due." Id.

In the present case, Riley was clearly a "responsible person" for the purposes of I.R.C. § 6672 throughout the entire period in question.¹ The undisputed evidence shows that after Riley became aware of the tax delinquency in February of 1984, he continued to

¹Riley was a seventy percent stockholder of Austin as well as a director and president of the company. Riley had signatory authority over one of Austin's two checking accounts at all times during the two years Austin was in business, and Riley signed checks to pay general creditors of Austin as well as payroll checks throughout that two-year period. Riley also had authority to hire and fire Austin personnel, to obtain financing for Austin, and to make all corporate decisions generally in his capacity as majority shareholder, director, and president of Austin.

sign checks, payable to other creditors, even though the company remained delinquent in remitting the payroll taxes to the government. Accordingly, we hold that Riley acted willfully with respect to every fiscal quarter in issue, including the last quarter of 1983. The district court erred in affirming the bankruptcy court's holding to the contrary.²

IV

We hold that Patrick Neal Riley was a "responsible person" for the purposes of I.R.C. § 6672, and that he also acted "willfully" in failing to pay over to the government the delinquent payroll taxes of his company, Austin. The evidence is undisputed that Riley made payments to creditors other than the United States even after he had knowledge that the withholding taxes were past due. Accordingly, under the clear precedents of this court, we hold that the government was entitled to judgment as a matter of law, with respect to every fiscal quarter at issue. The judgment of the district court is therefore

AFFIRMED in part, REVERSED in part and
REMANDED for entry of judgment.

²On cross-appeal, Riley asserts, first, that any action by the IRS is barred by limitations. Because of a previous bankruptcy proceeding that was filed by Riley, however, any limitations period that applied was tolled, see 26 U.S.C. § 6503(h), and the government's claim is not barred. Second, Riley complains that the bankruptcy court abused its discretion in admitting government evidence that was untimely filed with the court, and that without such evidence, the remaining evidence was insufficient to find in favor of the IRS. We find that the bankruptcy court did not abuse its discretion.