

**IT 13-06**

**Tax Type: Income Tax**

**Tax Issue: Responsible Corporate Officer – Failure To File Or Pay Tax**

**STATE OF ILLINOIS  
DEPARTMENT OF REVENUE  
OFFICE OF ADMINISTRATIVE HEARINGS  
CHICAGO, ILLINOIS**

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**THE DEPARTMENT OF REVENUE  
OF THE STATE OF ILLINOIS**

v.

**JOHN DOE,  
Taxpayer**

**No. XXXX  
Account ID XXXX  
1002D Penalty ID XXXX  
Period 12/08-3/09**

**Ted Sherrod  
Administrative Law Judge**

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**RECOMMENDATION FOR DISPOSITION**

**Appearances:** Mehpara Suleman, on behalf of the Illinois Department of Revenue (“Department”); John Doe, *pro se*.

**Synopsis:**

This matter is before this administrative tribunal as the result of a timely protest by John Doe of the Department’s notice of section 1002(d) liability finding that the taxpayer was a responsible officer of ABC Business Inc. The Department’s notice of section 1002(d) liability is for the fourth quarter of 2008 and the first quarter of 2009. A hearing, conducted by telephone, was held in this matter on October 12, 2012 with John Doe testifying. In addition, both parties have introduced documentary evidence into the record in this case. Following the submission of all evidence and a review of the record, it is recommended that the notice of section 1002(d) penalty at issue be finalized as issued. In support of this determination, the following “findings of fact” and “conclusions of law” are made.

**Findings of Fact:**

1. The Department's *prima facie* case, inclusive of all jurisdictional elements, was established by the admission into evidence of the Department's Collection Action Assessment and Notice of Intent issued pursuant to 35 **ILCS** 5/1002(d) on March 23, 2011 as 1002D Penalty ID number XXXX determining that the taxpayer is personally liable for a penalty in the amount of \$5,915.42 with respect to the unpaid liability of ABC Business Incorporated for the period ended December 31, 2008 through March 31, 2009. Department Exhibit ("Ex.") 1.
2. ABC Business Incorporated ("ABC Business"), an Anystate domiciled corporation having its principal place of business in Anystate, is engaged in the business of providing electrical installation services. Tr. pp. 47-49; Department Ex. 3. The Corporation is qualified to do business in Illinois and is registered as an Illinois taxpayer with the Department. Department Ex. 3.
3. ABC Business's business registration with the Department indicates that John Doe is an owner of this corporation and is also this corporation's secretary. *Id.* Jack Black, who is indicated as the President of ABC Business on the Corporation's business registration with the Department, is the taxpayer's father. Tr. pp. 21, 47.
4. The liability at issue arises from the unpaid withholding tax of ABC Business due and owing for the quarter ending December 31, 2008 through the quarter ending March 31, 2009. Department Ex. 1.

### **Conclusions of Law:**

The Department seeks to impose personal liability on John Doe (“taxpayer”) as a responsible officer of ABC Business pursuant to section 1002(d) of the Illinois Income Tax Act, 35 ILCS 5/1002(d). Section 1002(d) reads as follows:

(d) Willful failure to collect and pay over tax. Any person required to collect, truthfully account for, and pay over the tax imposed by this Act who willfully fails to collect such tax or truthfully account for and pay over such tax or willfully attempts in any manner to evade or defeat the tax or the payment thereof, shall, in addition to other penalties provided by law, be liable for the penalty imposed by section 3-7 of the Uniform Penalty and Interest Act.  
35 ILCS 5/1002(d)

Section 3 -7(a) of the Uniform Penalty and Interest Act provides as follows:

Any officer or employee of any taxpayer subject to the provisions of a tax Act administered by the Department who has the control, supervision or responsibility of filing returns and making payment of the amount of any trust tax imposed in accordance with that Act and who willfully fails to file the return or make the payment to the Department or willfully attempts in any other manner to evade or defeat the tax shall be personally liable for a penalty equal to the total amount of tax unpaid by the taxpayer including interest and penalties thereon. The Department shall determine a penalty due under this section according to its best judgment and information, and that determination shall be prima facie correct and shall be prima facie evidence of a penalty due under this section.  
35 ILCS 735/3-7(a) (emphasis added).

In determining whether an individual is a responsible person, the courts have indicated that the focus should be on whether that person has significant control of the business affairs of a corporation and whether he or she participates in decisions regarding the payment of creditors and the dispersal of funds. See, e.g., Monday v. United States, 421 F. 2d 1210 (7<sup>th</sup> Cir. 1970), cert. denied 414 U.S. 910 (1973). Liability attaches to those persons with the power and responsibility within the corporate structure for seeing that taxes are remitted to the government.

Id.

The Department established its *prima facie* case of personal liability against the taxpayer through the introduction of its Collection Action Assessment and Notice of Intent (“Collection Action Assessment”). Branson v. Department of Revenue, 168 Ill. 2d 247 (1995). Once the Collection Action Assessment was admitted into evidence, the burden shifted to the taxpayer to rebut the Department’s *prima facie* case. *Id.*

The taxpayer claims that he was not responsible for filing tax returns or remitting taxes to the Department. Tr. pp. 11, 12, 27, 34, 42, 43; Taxpayer’s Ex. 1. He also argues that he was not actively involved in the management of the corporation, having as his principal function supervising the performance of services for customers at on-site locations in Illinois and other states. Tr. pp. 11, 12., 34, 35, 50, 53, 54-56, 59, 60.

However, the company’s business registration with the Department contained in the record indicates that the taxpayer was an owner of ABC Business and the Secretary of this company. Department Ex. 3. The sole documentary evidence the taxpayer has presented that directly contradicts the Department’s finding that he was a corporate owner and officer consists of a personal affidavit in which the taxpayer avers, under oath, that he was not a stockholder of the corporation and was not responsible for filing the company’s tax returns or paying its taxes. Taxpayer’s Ex. 1. In addition to his personal affidavit, the taxpayer seeks to support his contentions through the introduction into the record of orders for materials for use at job sites in Illinois and Anystate and credit card statements indicating that the taxpayer purchased items for use at job sites using his personal credit card. Taxpayer’s Ex. 3, 4. During the hearing, the taxpayer asserted that this evidence corroborates his claim that he was an employee and field project manager rather than a company official. Tr. pp. 34, 35. The taxpayer also introduced into the record W-2 forms identifying the taxpayer as an employee of ABC Business.

Taxpayer's Ex. 5. For the reasons enumerated below, the documentary evidence the taxpayer has submitted does not prove the taxpayer's contentions or rebut the presumed correctness of the Department's finding that the taxpayer was a responsible officer of ABC Business.

The taxpayer's personal affidavit denying that he was an owner or responsible person of ABC Business consists of written denials repeating denials made during oral testimony at the hearing in this matter. Neither the testimonial denials nor the affidavit repeating these denials are corroborated by any documentary evidence in the form of the company's books and records.

Pursuant to 35 ILCS 35 ILCS 735/3-7, noted above, the Collection Action Assessment issued by the Department in this case is *prima facie* evidence of the amount of penalty due, as shown therein. *Id.* The taxpayer "must produce competent evidence, identified with ... books and records and showing that [the Department is] incorrect" in order to overcome the Department's case. Masini v. Department of Revenue, 60 Ill. App. 3d 11, 15 (1<sup>st</sup> Dist. 1978). Oral testimony that is not corroborated by any form of such documentary evidence is insufficient to overcome the *prima facie* correctness of the Department's determination. A.R. Barnes & Co. v. Department of Revenue, 173 Ill. App. 3d 826 (1<sup>st</sup> Dist. 1988). In the case at hand, the taxpayer's testimony and written testimonial assertions in the form of his affidavit are uncorroborated by any of the company's books or records and therefore are insufficient to rebut the Department's finding.

While the taxpayer has produced no books or records to support his claim that he was not an owner or officer of ABC Business, and was not involved in this company's management, he did introduce information showing that the taxpayer made purchases on behalf of the company, using his personal credit card, to purchase items used to perform electrical installation services at on-site work locations in Illinois and Anystate. Taxpayer's Ex. 3, 4. The taxpayer has also

presented W-2 forms for a portion of the tax period in controversy indicating that he was an ABC Business employee. Taxpayer's Ex. 5.

While the evidence the taxpayer presented supports his claim that he was an employee of the company, and that he functioned as an on-site project manager as he claims, it fails to in any way prove that he was not also an owner of the company and corporate officer as the documentary evidence introduced by the Department states. See Department Ex. 3. Hence, the evidence of the taxpayer's status as an employee that is contained in the record does not negate the Department's finding that the taxpayer was also a corporate owner and officer.

In sum, the taxpayer has offered insufficient evidence to corroborate his contentions. Nothing the taxpayer has introduced into the record rebuts the presumption that the taxpayer had the power and responsibility within the company for ensuring that taxes were remitted. Consequently, I find that the taxpayer was a responsible officer to whom the penalties enumerated in section 1002(d) of the Illinois Income Tax Act, and section 3-7 of the Uniform Penalty and Interest Act apply.

For liability to attach under the statute, it must also be determined whether the taxpayer "willfully" failed to remit withholding taxes due to the Department. The phrase "willful failure" is not defined by any Illinois tax statute. However, the Illinois courts have held that the Illinois responsible officer provisions are analogous to the provisions of the Internal Revenue Code, section 6672 and, as such, Illinois law may be interpreted in a similar manner. See Branson, *supra* at 254.

As indicated by the pertinent federal case law, willfulness in regard to the statute is not merely limited to "intentional, knowing and voluntary acts." Monday, *supra* at 1215. Willful conduct also encompasses a reckless disregard for obvious or known risks. *Id.* Furthermore

willful conduct does not require “bad purpose or intent to defraud the government.” Department of Revenue v. Heartland Investments, 106 Ill. 2d 19, 30 (1985).

In Branson, *supra*, the Illinois Supreme Court held that the introduction of the notice of liability as a responsible officer is sufficient to establish a *prima facie* case of willful failure to pay taxes due and owing to the state. Thus, the burden is on the taxpayer to rebut the presumption that has been created by the introduction of the Department’s Collection Action Assessment. To meet this burden, the taxpayer must present competent evidence. A.R. Barnes, *supra* at 835. Case law in Illinois clearly indicates that merely denying the accuracy of the Department’s determination does not overcome Department's *prima facie* case. Mel-Park Drugs v. Department of Revenue, 218 Ill. App. 3d 203 (1<sup>st</sup> Dist. 1991). The Department’s determinations are rebutted only after a taxpayer introduces documentary evidence which is consistent, probable and identified with the taxpayer’s books and records, showing that Department’s determination is incorrect. A.R. Barnes, *supra*.

As noted above, the only evidence the taxpayer has introduced other than the taxpayer’s denials (Taxpayer’s Ex. 1) consists of evidence that the taxpayer was a company employee and acted primarily as a field project manager. See Taxpayer’s Ex. 3-5. This evidence does not disprove “willfulness” because it is not bolstered or corroborated by any evidence that, irrespective of his primary function, the taxpayer was not involved in the payment of creditors or the handling of tax matters in his capacity as a corporate officer. The only evidence that the taxpayer did not engage in willful conduct that contributed to the company’s failure to pay taxes is the taxpayer’s own self serving denial of culpability.

In sum, the taxpayer has introduced no evidence other than his own denials to rebut the Department's *prima facie* determination of "willfulness." Consequently, he has not successfully rebutted the presumption of correctness attendant to this Department determination.

Wherefore, for the reasons discussed above, I find that the taxpayer has not successfully rebutted the Department's *prima facie* case, and, therefore it is my recommendation that the Department's Collection Action Assessment at issue in this case be finalized is issued.

**Ted Sherrod**  
**Administrative Law Judge**

**Date: April 9, 2013**