

IT 15-01

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
SPRINGFIELD, ILLINOIS**

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

v.

**JOHN DOE
As Responsible Officer of ABC Business,
Taxpayer**

**Docket # XXXX
Letter ID # XXXX
NPL 1002D ID # XXXX
Letter ID # XXXX
NPL 1002D ID # XXXX**

RECOMMENDATION FOR DISPOSITION

Appearances: Mr. Matthew Crain, Special Assistant Attorney General, for the Department of Revenue of the State of Illinois; Mr. JOHN DOE, *pro se*.

Synopsis:

The Department of Revenue (“Department”) issued two Notices of Penalty Liability (“NPL’s”) to Mr. JOHN DOE (“Mr. John Doe”) pursuant to section 1002(d) of the Income Tax Act (35 ILCS 5/1002(d)). The NPL’s allege that Mr. John Doe was a responsible partner of ABC Business (the "Partnership") who willfully failed to pay the Partnership's withholding taxes. Mr. John Doe timely protested the NPL’s, and an evidentiary hearing was held on May 3, 2013 before Administrative Law Judge Linda Olivero¹ with testimony from Mr. John Doe and

¹ ALJ Olivero was unable to write this Recommendation.

Mr. Gene Green (“Mr. Gene Green”). After a careful review of the record, it is recommended that the NPL’s be cancelled.

Findings of Fact:

1. The Department’s *prima facie* case, inclusive of all jurisdictional elements, is established by the admission into evidence of two NPL’s, captioned above. NPL No. XXXX, for \$XXXX, dated January 31, 2012, covers the time period December 31, 2008 through June 30, 2011. NPL No. XXXX, for \$XXXX, dated July 3, 2012, covers the period September 30, 2011 through December 31, 2011. Tr. pp. 9-11; Dept. Ex. No. 1.
2. On October 8, 2007, Mr. John Doe and Mr. Gene Green entered into a limited liability partnership agreement. The business of the Partnership was the practice of law in the Metro East Area of Southern Illinois. The principal place of business was Anywhere, Illinois. The Partnership Agreement names Mr. Gene Green as “Managing Partner” and “Tax Matters Partner.” Tr. pp. 9-11, 13-14, 17-18, 27-28, 43; Dept. Ex. No. 1.
3. All IL-941’s, “Illinois Quarterly Withholding Income Tax Returns,” for the period March 31, 2008 through December 31, 2011 were signed by Mr. Gene Green. Tr. pp. 19-20, 46-47; Taxpayer’s Ex. No. 1.
4. All checks written for the Partnership were signed by Mr. Gene Green. Tr. pp. 21-22, 32-33, 47-50; Taxpayer’s Ex. No. 2.
5. Mr. Gene Green is listed as the “Tax Matters Partner” on all Forms 1065, “U.S. Return of Partnership Income,” for 2007 through 2011. Tr. pp. 22-23, 50-51; Taxpayer’s Ex. No. 3.
6. An Affidavit from Mr. Gene Green states that he ran the business, managed it, and made all decisions. He had control over the funds and accounts and was responsible for having the tax returns prepared and filed. The Affidavit states further that Mr.

John Doe was not responsible for filing returns or paying taxes. “[Mr. John Doe] works at two separate locations, one in Somewhere, Illinois and one in Kentucky.” “He [had] no access to our books or funds and [had] no part in managing anything with the business.” Tr. pp. 44-45; Taxpayer’s Ex. No. 6.

7. Mr. John Doe’s resignation from the Partnership was accepted on December 31, 2011. The “Acceptance of Resignation” states that Mr. Gene Green “acknowledges that he is fully responsible for all debts and obligations of the business.” A “Statement of Dissolution,” signed by both Partners, was sent to the Secretary of State on December 31, 2011. Tr. pp. 9-11, 14-15, 39-40, 70-71, 72-73; Dept. Ex. No. 1; Taxpayer’s Ex. No. 4.
8. Mr. Gene Green now operates the law firm as a sole proprietorship. Tr. pp. 60-61, 65.

Conclusions of Law:

Section 1002(d) of the Income Tax Act provides as follows:

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 of the Uniform Penalty and Interest Act provides in part 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; 35 ILCS 735/3-7(a).

A partner may therefore be personally liable for the partnership’s taxes if (1) the individual had the control, supervision or responsibility of filing the tax returns and paying the taxes, and (2) the individual willfully failed to perform these duties.

For guidance in determining whether a person is responsible under section 3-7, the Illinois Supreme Court has referred to cases interpreting section 6672 of the Internal Revenue Code (26 U.S.C. §6672) ². See Branson v. Department of Revenue, 168 Ill. 2d 247, 254-56 (1995); Department of Revenue v. Heartland Investments, Inc., 106 Ill. 2d 19, 29-30 (1985). These cases state that the critical factor in determining responsibility is whether the person had significant control over the corporation's finances. See Purdy Co. of Illinois v. United States, 814 F. 2d 1183, 1186 (7th Cir. 1987). Responsibility is generally found in high corporate officials who have control over the corporation's business affairs and who participate in decisions concerning the payment of creditors and the dispersal of funds. Monday v. United States, 421 F. 2d 1210, 1214-1215 (7th Cir. 1970), cert. denied 400 U.S. 821. Additionally, the ability to sign checks is a significant factor in determining whether a person is a responsible party because it generally comes with the ability to choose which creditors are paid. Gold v. United States, 506 F. Supp. 473, (E.D.N.Y. 1981), aff'd, 671 F. 2d 492 (2d Cir. 1982).

I am unable to conclude from the record of this case that Mr. John Doe was a responsible person under the statute. On October 8, 2007, Mr. John Doe and Mr. Gene Green entered into a limited liability partnership agreement. The business of the Partnership was the practice of law in the Metro East Area of Southern Illinois. The principal place of business was Anywhere, Illinois. The Partnership Agreement names Mr. Gene Green as “Managing Partner” and “Tax Matters Partner.” Tr. pp. 9-11, 13-14, 17-18, 27-28, 43; Dept. Ex. No. 1. Mr. Gene Green testified at the evidentiary hearing and described Mr. John Doe as a “silent” partner. Tr. p. 68.

According to Mr. John Doe, he practiced law in Kentucky and Somewhere, Illinois. He never practiced law in Anywhere, where the Partnership was located. Mr. John Doe testified that

² This section imposes personal liability on corporate officers who willfully fail to collect, account for, or pay over employees' social security and Federal income withholding taxes.

he never met any of the clients of the Partnership. “I’ve never advised them and I’ve never taken any of their money. I’ve never written a receipt [for] one of them. I’ve never made a deposit. I’ve never made a withdrawal.” Tr. p. 18. According to Mr. John Doe, he did not get any remuneration from the Partnership. “There was never a distribution or a paycheck or anything to me ever.” Tr. p. 38. Mr. John Doe testified further that Mr. Gene Green paid the bills and salaries and supervised a bookkeeper. Tr. pp. 21-22.

Mr. John Doe offered an Affidavit by Mr. Gene Green into evidence, without objection by the Department, stating that Mr. Gene Green ran the business, managed it, and made all decisions. Mr. Gene Green had control over the funds and accounts and was responsible for having the tax returns prepared and filed. The Affidavit states further that Mr. John Doe was not responsible for filing returns or paying taxes. “[Mr. John Doe] works at two separate locations, one in Anywhere, Illinois and one in Kentucky.” “He [had] no access to our books or funds and [had] no part in managing anything with the business.” Tr. pp. 44-45; Taxpayer’s Ex. No. 6. Mr. Gene Green testified that when the Partnership was formed, it was the intention of the Partners that Mr. Gene Green file and pay the taxes. It was “clearly” his “responsibility.” He testified further that he is not trying to evade payment of the taxes and that he “personally paid or the office paid over \$XXXX of that liability already and through levies, I think there’s been another \$XXXX paid.” Tr. pp. 53-54. Mr. Gene Green noted that Mr. John Doe owned the building where the Partnership, now a sole proprietorship operated by Mr. Gene Green, was/is located. Mr. John Doe is not charging the sole proprietorship the monthly rent of \$XXXX in order to “free up dollars for [Mr. Gene Green] to pay taxes.” Tr. pp. 56-58.

The testimony and the Affidavit are backed up by other evidence admitted at the hearing. All IL-941’s, “Illinois Quarterly Withholding Income Tax Returns,” for the period March 31,

2008 through December 31, 2011 were signed by Mr. Gene Green. Tr. pp. 19-20, 46-47; Taxpayer's Ex. No. 1. All checks written for the Partnership were signed by Mr. Gene Green. Tr. pp. 21-22, 32-33, 47-50; Taxpayer's Ex. No. 2. Mr. John Doe testified that "every single check for every single month is signed by Mr. Gene Green and there will be none that were signed by me." Tr. p. 21. Neither Mr. John Doe nor Mr. Gene Green could remember if Mr. John Doe was an authorized signatory on the Partnership's bank account. Mr. Gene Green only recalled the bank asking for the Partnership Agreement. Tr. pp. 32-33, 48-49. Mr. Gene Green is listed as the "Tax Matters Partner" on all Forms 1065, "U.S. Return of Partnership Income," for 2007 through 2011. Tr. pp. 22-23, 50-51; Taxpayer's Ex. No. 3.

The admission into evidence of the NPLs establishes the Department's *prima facie* case with regard to the fact that Mr. John Doe was a "responsible" person under the statute. Branson v. Department of Revenue, 168 Ill. 2d 247 (1995). Once the Department has established a *prima facie* case, the burden shifted to Mr. John Doe to overcome the case. Masini v. Department of Revenue, 60 Ill. App. 3d 11 (1st Dist. 1978). I conclude that Mr. John Doe has rebutted the Department's *prima facie* case that he was a responsible party of the Partnership. He was not involved with the day-to-day business of the Partnership. He did not physically work in the Partnership office. The documentary evidence shows clearly that he did not sign checks, IL-941's or Forms 1065. It would not be reasonable to conclude, based on the record of this case, that Mr. John Doe was a responsible partner of John Doe & Gene Green. Because Mr. John Doe was not a "responsible person" during the periods at issue, he cannot be found to have been willful and thus liable under Section 3-7 of the Uniform Penalty and Interest Act. [See *e.g.* McLean v. Department of Revenue, 326 Ill. App. 3d 667 (1st Dist. 2001)].

Recommendation

It is therefore recommended that the Notices of Penalty Liability, captioned above, be cancelled.

Kenneth Galvin
Administrative Law Judge

February 24, 2015