

**IT 15-03**

**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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<b>THE DEPARTMENT OF REVENUE</b>	)	Docket No.	XXXX
<b>OF THE STATE OF ILLINOIS</b>	)	1002D Nos.	XXXX
v.	)		XXXX
<b>JOHN DOE</b> , as	)		XXXX
responsible officer of ABC Business,	)	John E. White,	
<b>Taxpayer</b>	)	Administrative Law Judge	

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**RECOMMENDATION FOR DISPOSITION**

**Appearances:** Alan Segal, Alan Segal & Associates, appeared for John Doe; Ronald Forman, Special Assistant Attorney General, appeared for the Illinois Department of Revenue.

**Synopsis:** This matter involves three notices the Illinois Department of Revenue (Department) issued to John Doe (Taxpayer), to propose to assess personal liability penalties pursuant to § 1002(d) of the Illinois Income Tax Act (IITA), and § 3-7 of Illinois' Uniform Penalty and Interest Act (UPIA). Each notice proposed to assess a penalty that was equal to the amount of the Illinois income taxes that ABC Business (the Corporation) had withheld from the wages of its employees for a certain period, but which taxes were not, thereafter, paid over to the Department. The issues are whether Taxpayer was a responsible person for the Corporation, and, if so, whether he willfully failed to collect, truthfully account for, or pay over such tax, or willfully attempted in any manner to evade or defeat the tax or the payment thereof.

Taxpayer and other witnesses testified at hearing, and Taxpayer also offered documents into evidence. I have reviewed the evidence, and I am including in this recommendation findings of fact and conclusions of law. I recommend that the Director reconsider and cancel the notices, because Taxpayer was not a responsible officer of the Corporation during the periods at issue.

**Findings of Fact:**

**Facts Regarding the Amounts Determined to Be Due from the Corporation**

1. The Department issued three notices to Taxpayer, on different days. Department Group Ex. 1 (Department Ex. 1). Each notice consists of two pages, with the second page containing a statement listing, among other things, the Department’s most recent information regarding the unpaid balance, available credits, or returns not filed by the Corporation. *Id.* (p. 2 of each notice).
2. The first notice, number XXXX, is dated August 31, 2011. Department Ex. 1, p. 1. The statement page of that notice provides, in pertinent part:

IL Withholding Income Tax					Account ID: [ ]	
Period	Tax	Penalty	Interest	Other	Payments/ Credits	Balance
31 Mar 2009	XXXX	XXXX	XXXX	-	(XXXX)	XXXX
30 Jun 2009	XXXX	XXXX	XXXX	-	(XXXX)	XXXX
30 Sep 2009	XXXX	XXXX	XXXX	-	(XXXX)	XXXX
31 Dec 2009	XXXX	XXXX	XXXX	-	(XXXX)	XXXX
31 Dec 2010	XXXX	XXXX	XXXX	-	(XXXX)	XXXX
31 Mar 2011	XXXX	XXXX	XXXX	-	-	XXXX

Department Ex. 1, p. 2.

3. By the date of hearing, the balances due for the periods included within notice number XXXX were as follows:

Period	Tax	Penalty	Interest	Credits	Balance
31 Mar 2009	XXXX	XXXX	XXXX	(XXXX)	0
30 Jun 2009	XXXX	XXXX	XXXX	(XXXX)	0
30 Sep 2009	XXXX	XXXX	XXXX	(XXXX)	0
31 Dec 2009	XXXX	XXXX	XXXX	(XXXX)	0
31 Dec 2010	XXXX	XXXX	XXXX	(XXXX)	XXXX
31 Mar 2011	XXXX	XXXX	XXXX	0	XXXX

Department Ex. 1, p. 7 (updated schedule of the Corporation’s Illinois withholding income tax balances for quarters ending March 31, 2002 through and including December 31, 2013).

4. Notice number XXXX is dated January 11, 2012. Department Ex. 1, p. 3. The statement page of that notice provides, in pertinent part:

IL Withholding Income Tax						Account ID: [ ]
Period	Tax	Penalty	Interest	Other	Payments/ Credits	Balance
30 Jun 2011	XXXX	XXXX	XXXX	-	-	XXXX

Department Ex. 1, p. 4.

5. Notice number XXXX is dated March 13, 2012. Department Ex. 1, p. 5. The statement page of that notice provides, in pertinent part:

IL Withholding Income Tax						Account ID: [ ]
Period	Tax	Penalty	Interest	Other	Payments/ Credits	Balance
30 Sep 2011	XXXX	XXXX	XXXX	-	-	XXXX

Department Ex. 1, p. 6.

6. When taking into account the payments made regarding the periods identified in the first Notice issued to Taxpayer, the only periods for which tax remains unpaid by the Corporation — that is, the only periods at issue in this case — are the fourth quarter of 2010 through and including the third quarter of 2011. Department Ex. 1, pp. 2, 4, 6-7.

**Facts Regarding Taxpayer’s Status, Duties, and Authority for the Corporation**

7. Taxpayer and Barry Blue (Barry Blue) co-founded the Corporation, which was incorporated in 1991 as a minority owned electrical contractor. Taxpayer Ex. 2 (copy of Request for Credit Commitment, dated April 15, 2009, prepared by employee of Quality Bank regarding the Corporation), p. 3.
8. Upon incorporation, Taxpayer owned 51% of the Corporation’s stock, and Barry Blue owned 49%. Tr. p. 139 (Taxpayer); Taxpayer Ex. 3 (copy of Minutes of the Annual Meeting of the Corporation’s Board of Directors), p. 3.

9. When Barry Blue and Taxpayer began the business, they agreed that Taxpayer would be responsible for selling the Corporation's services, and obtaining contracts for the Corporation to perform, and Barry Blue would be responsible for the operational aspects of the work required by the contracts, including the back-office, administrative operations (for example, accounting, payroll, etc.) related to the Corporation's performance under such contracts. Taxpayer Ex. 3, *passim*; Tr. pp. 148-49 (Taxpayer).
10. Robert Doe (Robert Doe), Taxpayer's son, began working at the Corporation in 2002, shortly after graduating from college. Tr. pp. 34, 36-37 (Robert Doe). Robert Doe continued working at the Corporation while attending graduate school, eventually completing an MBA program. Tr. pp. 34, 64 (Robert Doe).
11. Robert Doe began and continued working at the Corporation because it was Taxpayer's and Robert Doe's plan that Robert Doe would take over management of the Corporation when Taxpayer retired. Tr. pp. 36-40 (Robert Doe), 159-63 (Taxpayer); *see* Taxpayer Ex. 2.
12. Also in 2002, Taxpayer purchased Barry Blue's shares of stock in the Corporation, after Barry Blue was injured at work. Taxpayer Ex. 3, pp. 1-2; Tr. pp. 144-46 (Taxpayer).
13. As part of the stock purchase agreement between Taxpayer and Barry Blue, Taxpayer also undertook responsibility for hiring and supervising an employee to take over the administrative duties Barry Blue had previously performed as the Corporation's comptroller. Taxpayer Ex. 3, pp. 1-2; Tr. pp. 148, 185-87 (Taxpayer).
14. The person Taxpayer hired became the Corporation's chief financial officer (CFO). Tr. p. 187 (Taxpayer). Among other things, Taxpayer delegated to the CFO the duties of filing the Corporation's tax returns, and paying its taxes. Tr. pp. 27-30 (Swopes), 148-50, 188-96 (Taxpayer); Taxpayer Ex. 2, pp. 1-4.

15. In 2005 and 2006, Taxpayer became aware that the CFO's actions had led to the Corporation becoming liable for tax delinquencies, as well as other liabilities. Taxpayer Ex. 2, p. 3; Tr. pp. 150-60, 188-93 (Taxpayer).
16. After becoming aware of the Corporation's tax delinquencies, Taxpayer was able, in April 2006, to sell the building from which the Corporation operated. Tr. pp. 44-45 (Robert Doe), 150-60 (Taxpayer); *see* Taxpayer Ex. 2, pp. 3-4.
17. The proceeds realized when Taxpayer sold the building allowed the Corporation to pay all of its tax delinquencies, as well as the amounts remaining due to Barry Blue under the agreement between the Corporation and him. Taxpayer Ex. 2, pp. 3-4; Taxpayer Ex. 3, pp. 3-6; Tr. pp. 44-45 (Robert Doe), 159-60, 188-96 (Taxpayer); *see also* Department Ex. 1, p. 7.
18. In late 2007 through early 2008, Taxpayer finalized plans to retire from the Corporation. Tr. pp. 22-23 (Swopes), 36-40, 47 (Robert Doe), 160-62; *see* Taxpayer Ex. 2, pp. 3-4.
19. As part of Taxpayer's plan to retire, in December 2007, Taxpayer sold 22% of the shares of stock in the Corporation to his son, Robert Doe, and 12% to his (Taxpayer's) brother, Richard. Taxpayer Ex. 1 (copy of Share Purchase Agreement, dated December 7, 2007, between Taxpayer (as Seller) and Robert Doe and Richard (as Purchasers)); Tr. pp. 80-81, 105-07 (Robert Doe), 160-62 (Taxpayer).
20. After the stock sale to Robert Doe and Richard, Taxpayer retained the remaining 66% equity interest in the Corporation. Taxpayer Ex. 1; Tr. pp. 80-81 (Robert Doe).
21. Following his retirement, Taxpayer moved from Chicago to the Dominican Republic. Tr. pp. 23 (Swopes), 46-47, 87 (Robert Doe), 163-65 (Taxpayer).
22. After Taxpayer retired from the Corporation, he no longer had or exercised any day-to-day management or control over the Corporation's operations, including the operations related to

the Corporation's Illinois withholding tax filings or payments. Tr. pp. 24-25, 27-28, 31-32 (Swopes), 47, 65, 82, 100-103 (Robert Doe), 164-65 (Taxpayer); *see* Taxpayer Ex. 2, pp. 3-4.

23. Prior to Taxpayer's retirement, Robert Doe became president of the Corporation, and Richard became vice-president of operations. Tr. pp. 31 (Swopes), 78 (Robert Doe), 196-99 (Taxpayer).

24. Beginning in 2003, the Corporation began a banking relationship, which included a line of credit, with Quality Bank (the Bank). Taxpayer Ex. 2, p. 3; Tr. p. 55 (Robert Doe), 193-94 (Taxpayer).

25. In 2009, Robert Doe, on behalf of the Corporation, requested an extension of the forbearance term in the Corporation's line of credit agreement with the Bank. Taxpayer Ex. 2, pp. 1-4; Tr. pp. 107-110 (Robert Doe). When reviewing that request, a Bank manager prepared a document titled, Request for Credit Commitment (Credit Request), in which he recommended that the Corporation's request be approved, and which recommendation was followed. Taxpayer Ex. 2, *passim*; Tr. pp. 55-56, 107-110 (Robert Doe).

26. The Credit Request included a description of the Corporation's business and history, which provides, in pertinent part:

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2. [Taxpayer] became ill in 2004 and delegated management responsibilities to then CFO. Unfortunately, this set in motion 2-years of mismanagement that resulted in substantial losses in 2005 and 2006.
3. In late 2005, Robert Doe ... (son) was elevated to CEO. Took action to terminate underperforming employees, brought in outside accounting help to correct internal controls, intensified collection efforts and initiated rebuilding the organization.
4. Substantial losses in 2005 and 2006, including \$800M+ AR charge offs in 2006 depleted equity base and our collateral position.
5. Management was able to report a \$211M profit at 12/31/08 and expects to improve upon that in 2009. Backlog remains strong due to successful bidding of University and City jobs. The Company also successfully bid on multi-year CTA project that will be funded by Federal Stimulus dollars.

6. Since 2005 management has operated the business on internally generated cash flow.
7. The Company has also funded roughly \$200M of distributions to [Taxpayer] as “partial payment” on the \$1MM of equity ... put into the firm in 2005 and 2006.
8. Leverage remains high; deficit net worth.
9. The company has also funded roughly \$300M of distributions to [Taxpayer] as “partial payment” on the \$1MM of equity ... put into the firm in 2005 and 2006.
10. Favorable interest/DSCR ratios since 2007, exceeding 2:1 in 2007 and 2008.
11. As of 3/19/09 Guarantor reports personal net worth of \$1.1MM, with liquidity of \$75M.

### **Strategy**

27. SAG strategy has been focused on sustaining principal recapture. Current actions will accelerate this effort.
28. Leverage borrower willingness to accelerate payment with excess cash evidenced by prepayment of term loan in March 2008, and agreeing to increased monthly payment of \$10M principal reduction this quarter.
29. Last meeting (3/29/2009) we discussed the current agreement and next steps. Specifically:
  - 29.1 Extend the previous forbearance agreement as described earlier.
  - 29.2 Continue to look for refinancing sources (no success to date).
  - 29.3 Review 3-year operating plan and determine how to further accelerate debt amortization.
  - 29.4 Limit distributions with need to rebuild balance sheet.
  - 29.5 Borrower conceptually agreed.
30. Advance no new monies.

### **Expectations**

Under Robert Doe’s leadership the firm appears to be making significant progress. Based upon 2008 performance, it appears that sales are ramping up and profitability is improving. Assuming these trends are sustained, [Bank] should be in a position to further accelerate principal reductions in 2009. Given these trends, the RM [i.e., the report writer] is expecting sustained principal reduction, and improving leverage position, profitability and cash flow coverage thru 2009.

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### **DECISION FACTORS:**

#### Strengths

- Improving operating performance
- Good backlog w/newly secured contracts
- Strong management team
- Adequate collateral coverage

- Paid as agreed

**RECOMMENDATION FROM RELATIONSHIP MANAGER:**

Client continues to perform as agreed. During the past 4 years current management has been able to operate on internally generated cash flow, reduce bank debt and improve profitability. Given current performance, pending stimulus opportunities and backlog RM recommend approval as presented.

**RECOMMENDATION FROM PORTFOLIO MANAGER/  
CREDIT:**

Forebearance extension recommended based on Customer's improved financial performance[,] adequate collateral coverage[,] and pay history under forbearance agreement.

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Taxpayer Ex. 2, pp. 3-4; Tr. pp. 108-111 (Robert Doe).

**Facts Regarding the Corporation's Withholding Tax Return Filings and Payments During the Quarters at Issue**

31. For the periods at issue, which began after Taxpayer retired, Robert Doe had and exercised authority regarding the Corporation's quarterly Illinois withholding tax return filings. Tr. pp. 65, 82, 100-102 (Robert Doe) ; Department Ex. 1, p. 7. He personally exercised the duties related to that authority by signing the Corporation's Illinois withholding tax returns, and by filing them electronically with the Department, once that capacity existed, or by mailing such returns to the Department. Tr. pp. 100-102 (Robert Doe).
32. During the periods at issue, Robert Doe had and exercised the authority to decide which of the Corporation's creditors would be paid. Tr. pp. 65, 82, 100-102 (Robert Doe); *see* Taxpayer Ex. 2, pp. 3-4; Department Ex. 1, p. 7.
33. When the Corporation made payments of the amounts shown due on its quarterly withholding tax returns regarding the periods at issue, Robert Doe made such payments to the Department via electronic funds transfer. Tr. pp. 61-63, 100-102 (Robert Doe); *see* Department Ex. 1, p. 7.

34. When the Corporation filed quarterly Illinois withholding tax returns during the periods at issue without payment, Robert Doe made the decisions to not make such payments. Tr. pp. 100-102 (Robert Doe); *see* Department Ex. 1, p. 7.
35. After Taxpayer retired, the Corporation continued to represent to the City of Chicago, on forms submitted to renew its City of Chicago certification as a minority owned contractor, that Taxpayer was still its CEO. Tr. pp. 67, 91 (Robert Doe), 203-04 (Taxpayer); *but see* Taxpayer Ex. 2, p. 3 (“In late 2005, Robert Doe ... (son) was elevated to CEO.”).
36. In approximately June 2010, Taxpayer returned to the Chicago area from the Dominican Republic. Tr. pp. 22-23 (Swopes), 53-54 (Robert Doe), 169-70 (Taxpayer).

#### **Conclusions of Law:**

When the Department introduced the NODs into evidence under the certificate of the Director, it presented prima facie proof that Taxpayer was personally responsible for the Corporation’s unpaid withholding tax liabilities for the periods at issue. 35 ILCS 735/3-7; Branson v. Department of Revenue, 168 Ill. 2d 247, 260, 659 N.E.2d 961, 968 (1995) (“by operation of the statute, proof of the correctness of such penalty, including the willfulness element, is established by the Department’s penalty assessment and certified record relating thereto.”). The Department’s prima facie case is a rebuttable presumption. Branson, 168 Ill. 2d at 262, 659 N.E.2d at 968. After the Department introduces its prima facie case, the burden shifts to the taxpayer to establish that one or more of the elements of the penalty are lacking. *Id.*

Article 7 of the IITA requires Illinois employers that withhold federal income tax from the compensation (i.e., wages) they pay to employees in Illinois or to Illinois residents, to also withhold Illinois income tax from the wages of such employees. 35 ILCS 5/701. Section 704

requires such employers to file Illinois returns to report, and to pay over to the Department, the amounts of Illinois income tax withheld from such employees. 35 ILCS 5/704. Section 705 provides that any income tax withheld by an employer from its employees is a trust tax, and becomes the tax liability of the employer itself. 35 ILCS 5/705 (“Any amount of tax actually deducted and withheld under this Act shall be held to be a special fund in trust for the Department.”).

Article 10 of the IITA authorizes the Department to impose interest and/or penalties when required returns are not timely filed, or when taxes are not paid when due. 35 ILCS 5/1001-5/1008. Section 1002(d) of the IITA provides for a personal liability penalty to be imposed on an individual, under certain circumstances, when an employer has failed to pay over the amount of income tax it withheld from the wages of its employees. 35 ILCS 5/1002(d). That section provides:

(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 of the UPIA provides that a personal liability penalty may be imposed upon:

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 wilfully fails to file the return or make the payment to the Department or wilfully 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).

## Issues and Arguments:

The first issue is whether Taxpayer was required to collect, truthfully account for, and pay over the Illinois income tax that the Corporation withheld from its employees for the periods at issue. When interpreting the text of UPIA § 3-7's statutory predecessor, Illinois courts have looked at how federal courts construed similar text used in § 6672 of the Internal Revenue Code (the Code). *E.g.*, Branson, 168 Ill. 2d at 254-56, 659 N.E.2d at 965-66. Section 6672 of the Code imposes a penalty against responsible persons of a corporation who have a duty to collect, truthfully account for, and pay over federal social security and withholding taxes, and who willfully fail to do so. *Id.* When considering whether Taxpayer was a responsible officer of the Corporation, therefore, I will take into account those factors federal courts have considered when determining whether one is a "responsible person," under Code § 6672.

One of the better descriptions of the factors to consider when determining whether a person is a responsible person under § 6672 is found in Ghandour v. U.S., 36 Fed. Cl. 53 (1996), in which the court explained as follows:

### *A. Responsible Person*

Before the penalty may be assessed against an individual, he must be found to have been a "responsible person" within the employer organization. A "responsible person" is one who was under a duty to collect, truthfully account for, and pay over the taxes at issue. In order to make this determination, the fact-finder must look for those individuals who had "the power to control the decision-making process by which the employer corporation allocates funds to other creditors in preference to its withholding tax obligations." *Haffa v. United States*, 516 F.2d 931, 936 (7th Cir.1975), *quoted in Godfrey*, 748 F.2d at 1575. Stated slightly differently, a responsible person is one "with ultimate authority over expenditure of funds." *Godfrey*, 748 F.2d at 1575 (quoting *White*, 372 F.2d at 517). This is necessarily a fact-intensive inquiry, and the courts have generally focused on those facts bearing on an individual's "status, duty, and authority" within the employer corporation. *Greenberg v. United States*, 46 F.3d 239, 243 (3rd Cir.1994); *Gephart v. United States*, 818 F.2d 469, 475 (6th Cir.1987); *Mazo v. United States*, 591 F.2d 1151, 1156 (5th Cir.1979); *Sale v. United States*, 31 Fed.Cl. 726, 731 (1994) (describing these concepts as "interrelated"); *Hammon v.*

*United States*, 21 Cl.Ct. 14, 24 (1990). “[A]ny person with sufficient status, duty and authority to avoid the default is a responsible person under § 6672.” *Sale*, 31 Fed.Cl. at 731 (quoting *Heimark v. United States*, 18 Cl.Ct. 15, 21 (1989)). *Cf. White*, 178 Ct.Cl. at 778 (“the authority, powers, and duties exercised by plaintiff” made him a responsible person).

### 1. Status

An individual’s status is to be determined by reference to such things as his title or position within the corporate structure (*e.g.*, an officer or director), as well as his ownership stake in the employer corporation. *Sale*, 31 Fed.Cl. at 731 (“As president, treasurer, chairman of the board, and majority shareholder, plaintiff’s status at [the Corporation] was undeniable.”); *Hammon*, 21 Cl.Ct. at 24-25 (plaintiff who was president, majority stockholder, and director of two employer corporations had sufficient status to be found responsible as to each under I.R.C. § 6672). However, the holding of corporate office alone is not sufficient to trigger liability under I.R.C. § 6672(a). In this connection, the Federal Circuit held in *Godfrey*:

The Claims Court effectively held that Godfrey’s *status* as chairman cum advisor-negotiator-and the respect and deference accorded that status-amounted to “ultimate authority” or “power to control” for purposes of § 6672. The case law will not support that holding.

It is material, but not controlling....

748 F.2d at 1575. Conversely, the absence of any official corporate title will not suffice to remove liability. *See Whiteside*, 26 Cl.Ct. at 568-73 (plaintiff who held no official corporate title, but was listed on bank signatory cards as “Vice President” and exercised significant financial oversight and management, was a responsible person). Accordingly, a party’s status is but one factor bearing on the ultimate issue, *i.e.*, whether the individual had the “power to control” the finances of the employer such that he could have avoided the default.

### 2. Duty

Next, the finder of fact must examine a person’s duties within the employer organization to determine whether he was a responsible person under I.R.C. § 6672. “[A] person’s ‘duty’ under § 6672 must be viewed in light of his power to compel or prohibit the allocation of corporate funds.” *Godfrey*, 748 F.2d at 1576. In this connection, a person’s duties are to be evaluated in terms of those affairs of the Corporation over which that individual had responsibility, *i.e.*, the job description. For instance, duty may be determined by reference to corporate by-laws and resolutions, *Hammon*, 21 Cl.Ct. at 25, or to the duties actually performed by an individual in the course of business. *See, e.g., Sale*, 31 Fed.Cl. at 731; *Whiteside*, 26 Cl.Ct. at 571-72. Ultimately, the crucial inquiry is whether a person had a duty to oversee, manage, or administer the financial affairs of the company, specifically with reference to the paying of creditors and taxes.

### 3. Authority

Finally, a person’s authority within the Corporation is highly relevant in

ascertaining whether an individual was a responsible person for the purposes of I.R.C. § 6672. In this connection, the Federal Circuit noted that-

where a person has authority to sign the checks of the Corporation, or to prevent their issuance by denying a necessary signature, or where that person controls the disbursement of the payroll, or controls the voting stock of the Corporation, he will generally be held “responsible.”

*Godfrey*, 748 F.2d at 1576. The focus here is on “actual authority,” *i.e.*, substance as opposed to form. *Hammon*, 21 Cl.Ct. at 26. *See also Whiteside*, 26 Cl.Ct. at 573. Among the indicia of authority which have been found by the courts to be noteworthy are the powers to vote significant blocks of stock, sign checks, hire and fire employees, control employees’ pay, enter contracts on behalf of the Corporation, make decisions regarding the finances of the Corporation, and prepare corporate tax strategies. *See White*, 372 F.2d at 520; *Sale*, 31 Fed.Cl. at 731-32; *Whiteside*, 26 Cl.Ct. at 573; *Sulger v. United States*, 24 Cl.Ct. 535, 538 (1991); *Hammon*, 21 Cl.Ct. at 26. Again, the ultimate question is whether, in combination with his status and duty, an individual had sufficient authority within the employer company to prevent the default on the Corporation’s withholding tax obligations.

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Ghandour, 36 Fed. Cl. at 60-61.

Taxpayer argues that, during the periods at issue, he had already retired from the Corporation, and no longer had or exercised any authority to perform or supervise any of the Corporation’s day-to-day operations, including any duties related to the Corporation’s tax filings or payments. The Department responds that Taxpayer held a 66% interest in the Corporation, and, for purposes of the Corporation’s status as a minority business enterprise with the City of Chicago, Taxpayer remained listed as the Corporation’s CEO, on the documents submitted to the City to renew that status. Department’s Post-Hearing Brief (Department’s Brief), pp. 6, 9 (“The Department believes based on the Taxpayer’s position as Chairman, CEO and majority shareholder during the tax periods at issue, the Taxpayer is a responsible officer of [the Corporation].”); Tr. pp. 7-8 (opening statement). The Department further argues that Taxpayer’s corporate status, when Robert Doe became president, shows that Taxpayer was the person who hired his son to take that office, and to perform such duties, for the Corporation. Those same

facts, the Department reasons, show that Taxpayer had and exercised the authority to manage and run the Corporation's operations during the periods at issue. Department's Brief, pp. 6-9.

But Taxpayer's status with the Corporation is only one of three criteria to consider when determining whether he was a responsible person. The other two criteria require the fact finder to take into account the person's actual authority and duties regarding the corporation's operations during the period at issue. Ghandour, 36 Fed. Cl. at 60-61; McLean v. Department of Revenue, 326 Ill. App. 3d 667, 674-75, 761 N.E.2d 226, 234 (1<sup>st</sup> Dist. 2001).

Here, there was a significant amount of credible testimony that, in late 2007 or early 2008, shortly after he turned 65, Taxpayer retired from the Corporation, and moved to the Dominican Republic. Tr. pp. 22-23 (Swopes), 36-40, 46-47 (Robert Doe). After Taxpayer retired, he no longer had an office at the Corporation. Tr. p. 27 (Swopes). Roughly contemporaneous with his retirement, Taxpayer sold 22% of the outstanding shares of the Corporation to his son, Robert Doe, and 12% to his brother, Richard. Taxpayer Ex. 1; Tr. pp. 80-81, 105-07 (Robert Doe), 160-62 (Taxpayer). Taxpayer sold the stock to his son and his brother because his son would be taking over managerial control of the Corporation. Taxpayer Ex. 1; Tr. pp. 36-41 (Robert Doe), 159-63 (Taxpayer); *see* Taxpayer Ex. 2, pp. 3-4. Both Taxpayer and Robert Doe testified that Taxpayer had wanted to sell all of the stock in the Corporation to Robert Doe, Richard, and to Robert Doe's brother, but they were unable to obtain funds to make such a purchase. Tr. pp. 40-41, 105-06 (Robert Doe), 160-62 (Taxpayer). After Taxpayer's sale of Corporate stock to Robert Doe and Richard, Taxpayer retained 66% of the equity in the Corporation. Taxpayer Ex. 1.

Taxpayer also offered evidence which shows that, after Taxpayer retired and moved outside of the United States, he no longer had or exercised any actual duties or authority

regarding the Corporation's day-to-day operations. Tr. pp. 24-25, 27-28, 31-32 (Swopes), 47, 65, 82, 100-103 (Robert Doe); Taxpayer Ex. 2, pp. 2-4. By that I mean that the evidence tends to show that, after Taxpayer retired, he no longer actually performed any of the Corporation's day-to-day operations, nor did he actually supervise or manage any of the persons who were performing the Corporation's day-to-day operations, including those operations regarding the Corporation's tax filings or payments. Tr. pp. 24-25, 27-28, 31-32 (Swopes), 47, 65, 82, 100-103 (Robert Doe); Taxpayer Ex. 2, pp. 2-4.

The evidence further shows that, at or about the time Taxpayer retired, Robert Doe became president of the Corporation, and Richard became vice president of the Corporation's operations. Taxpayer Ex. 3, pp. 3-4; Tr. pp. 31 (Swopes), 46-47, 78 (Robert Doe), 196-99 (Taxpayer). As president, Robert Doe delegated the duty of preparing the Corporation's tax returns, and he personally signed them, once completed. Tr. pp. 100-03 (Robert Doe). He also signed the checks drawn to pay the Corporation's tax and other liabilities, or arranged to have such taxes paid via electronic transfer. Tr. pp. 100-101 (Robert Doe); *see* Taxpayer Ex. 2, pp. 2-3. The Department makes no argument, and there was no evidence offered to show, that Taxpayer signed any checks for the Department regarding the quarters at issue. *See* Department's Ex. 1; Department's Brief, *passim*.

Both the evidence tending to show that Taxpayer had retired prior to the periods at issue, and the evidence tending to show that, after Taxpayer's retirement, he no longer exercised any actual management of the Corporation's operations, are corroborated by documentary evidence, including documentary evidence prepared by a disinterested third party. Taxpayer Exs. 1-3. What the Department focuses on, however, are the corporate duties generally presumed to be authorized or wielded by persons holding certain corporate titles, like CEO and Chairman,

coupled by Taxpayer's actions undertaken well before the periods at issue, at a time when he was actually exercising managerial oversight of the Corporation. Department Brief, pp. 6-9; *see also* Department Ex. 1, p. 7. After taking into account the evidence admitted at hearing, however, the only way to uphold the Department's determination that Taxpayer was a responsible person during the periods at issue would be to either ignore the credible and corroborated evidence that Taxpayer had retired from the Corporation, prior to such periods, or to conclude that corporate status alone (that is, corporate title(s) and amount of shares held) is sufficient proof of responsibility, for purposes of IITA § 1002(d) and UPIA § 3-7. Department Brief, pp. 6, 9; *but see Ghandour*, 36 Fed. Cl. at 60-61; McLean v. Department of Revenue, 326 Ill. App. 3d 667, 761 N.E.2d 226 (1<sup>st</sup> Dist. 2001).

Regarding the latter option, the general facts here, at least those relevant to a responsible person determination, are similar to the facts described in McLean v. Department of Revenue, 326 Ill. App. 3d 667, 761 N.E.2d 226 (1<sup>st</sup> Dist. 2001). There, a 65% shareholder and chief executive officer was assessed a penalty for a corporation's unpaid sales tax liabilities. At an administrative hearing before the Department, and during administrative review, the taxpayer argued that, while he may have been responsible for a certain period after he actually became involved in the day-to-day management of the corporation, before that time, he was a mere investor who was not actually engaged in any aspect of the corporation's tax filings or payments. Both the circuit and appellate courts agreed with taxpayer's argument. More specifically, the appellate court wrote:

During the first tax period, March 1991 through January 1992, plaintiff was an investor in the Corporation, as well as the chairman of its board. However, he was uninvolved in the day-to-day business of the Corporation and signed only two checks during this period. Plaintiff seldom visited the corporate site and never prepared, signed or filed the retailers' occupation tax returns during either tax period. *Branson*, 168 Ill.2d at 255, 213 Ill.Dec. 615,

659 N.E.2d at 965. We find that defendant's determination that plaintiff was a "responsible person" in the first tax period was clearly erroneous. Therefore, we affirm the decision of the circuit court holding that plaintiff was not a "responsible person" within the meaning of the ROTA for the first period.

During the second tax period, which was February to April 1992, Umans told plaintiff of the Corporation's financial troubles, and plaintiff became involved in discussions with Canac in February 1992 to save the Corporation's distributorship agreement. Plaintiff also signed checks to creditors and payroll checks during the months of February, March and April 1992. Although plaintiff did not participate in the preparation, signing or filing of retailers' occupation taxes, he was significantly more involved in the day-to-day business of the Corporation and knew of the Corporation's financial troubles. At this point he was no longer merely an investor in the Corporation but became a responsible person. *Branson*, 168 Ill.2d at 255, 213 Ill.Dec. 615, 659 N.E.2d at 965. The defendant's determination that plaintiff was a "responsible person" in the second tax period was not clearly erroneous. We, therefore, affirm the decision of the circuit court holding that plaintiff was a "responsible person" within the meaning of ROTA for the second period.

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McLean, 326 Ill. App. 3d at 674-75, 761 N.E.2d at 234. The Department neither cites nor addresses the McLean decision in its Brief. Department's Brief, *passim*.

Here, there was credible evidence offered to show that Taxpayer had retired from the Corporation prior to the periods at issue, and that after Taxpayer retired, he was no longer involved in the day-to-day management of the Corporation's operations, including the duties related to the Corporation's tax filings and payments. Tr. pp. 24-25, 30-32 (Swopes), 46-47, 100-03 (Robert Doe); *see* Taxpayer Ex. 2, pp. 3-4. The testimonial evidence on this point was offered by different witnesses, it was corroborated by documentary evidence of a disinterested third party, and it is not so improbable as to be incredible.

The documentary evidence that corroborates the credible testimony Taxpayer and other witnesses offered to show that Taxpayer had retired from the Corporation, prior to the periods at issue, reflects that others recognized and accepted that, prior to the periods at issue, Robert Doe had taken over managerial control of the Corporation's finances and operations. Taxpayer Ex. 2, pp. 3-4. This evidence was prepared by a bank manager, and documents the Bank's investigation

and the bases for its ultimate approval of the Corporation's 2009 request to extend one of the terms of its line-of-credit agreement with the Bank. *Id.*, *passim*. This document, moreover, shows that Robert Doe was the person who made the request on the Corporation's behalf, and it repeatedly refers to Robert Doe's management of the Corporation, both prior to and at the time of the Corporation's 2009 request to the Bank. *Id.* This documentary evidence was not prepared in anticipation of hearing, and it is consistent with the credible evidence offered to show that Taxpayer, after his retirement, was no longer involved in the actual, day-to-day management of the Corporation's operations.

Finally, the credible testimony and documentary evidence Taxpayer offered at hearing is not so incredible as to be beyond belief. It is not unreasonable to give weight to documentary evidence that was prepared by a disinterested person, and which corroborates the credible testimony of different witnesses offered to show that the management of a family business had been transferred from one generation to another, as part of the founder's plan to retire from the business.

In addition to the evidence showing that Taxpayer had retired from the Corporation during the periods at issue, Robert Doe testified, credibly, that, after Taxpayer retired, and when he (Robert Doe) was president of the Corporation, he was the person who was responsible for all of the Corporation's administrative and financial affairs. Tr. pp. 46, 99-103 (Robert Doe). More specifically, Robert Doe testified that he was the person who actually signed and filed all of the Corporation's tax returns during the periods after he took over managerial control of the Corporation, including the periods covered by the notices issued to Taxpayer. Tr. pp. 99-103 (Robert Doe); Department Ex. 1, *passim*. Further, Robert Doe was the person who decided whether any payments would be made to the Department regarding the quarterly returns he filed.

Tr. p. 100 (Robert Doe). He explained how the Corporation incurred the withholding tax delinquencies for the periods at issue, and by the same testimony, that he was the person who had decided to file the Corporation's returns without payment. Tr. pp. 61-63, 100-03 (Robert Doe); *see also* Buckley v. Cronkhite, 74 Ill. App. 3d 487, 492, 393 N.E.2d 60, 65 (2d Dist. 1979) ("The clearest example of a declaration against pecuniary interest is an acknowledgment that the declarant is indebted."). Finally, Robert Doe testified that he had been issued a notice for the Corporation's unpaid withholding tax liabilities, and that liens had been issued regarding that assessment. Tr. pp. 100-03 (Robert Doe).

I had an opportunity to observe Robert Doe at hearing, and I found him to be a credible witness. He displayed personal knowledge of the events he described, as well as the willingness and ability to describe his own responsibility for, and his actual performance of the duties related to, the Corporation's tax filings and payments during the periods at issue. The inference I draw is that he would not offer such testimony if it were not true. Cronkhite, 74 Ill. App. 3d at 492, 393 N.E.2d at 65.

But just because the evidence shows that Robert Doe was the person most responsible for the Corporation's unpaid tax liabilities during the periods at issue, does not eliminate the possibility that Taxpayer might have also been a responsible officer of the Corporation for the periods at issue. *E.g.*, Williams v. United States, 931 F.2d 805, 810 n.7 (11<sup>th</sup> Cir. 1991) ("A company may have more than one responsible person within the meaning of section 6672."); Estate of Young v. Department of Revenue, 316 Ill. App. 3d 366, 734 N.E.2d 945 (1<sup>st</sup> Dist. 2000) (personal liability penalties upheld against three individuals determined to be responsible officers or employees of a corporation). However, the only way to conclude that Taxpayer was also a responsible person of the Corporation would be if I could either presume or find that,

during the periods at issue, he actually had or exercised some management authority over, or duties regarding, the Corporation's operations. McLean, 326 Ill. App. 3d at 674-75, 761 N.E.2d at 234; *see also* Ghandour, 36 Fed. Cl. at 60-61.

Here, however, after the Department presented its prima facie case, Taxpayer presented credible evidence showing that he had retired from the Corporation before the periods at issue, and that, during such periods, another person had taken over all of the authority and duties regarding the Corporation's tax filings and payments. The evidence Taxpayer presented was corroborated by documentary evidence, and, rather than being so improbable as to be incredible, it was perfectly consistent with the transfer of control many family businesses experience when the founder retires. In sum, Taxpayer offered credible and corroborated evidence that is sufficient to rebut the Department's determination that he was a person who was required to collect, truthfully account for, and pay over the tax imposed by the IITA, during the periods at issue. 35 ILCS 5/1002(d); 35 ILCS 735/3-7; *see* Branson, 168 Ill. 2d at 262, 659 N.E.2d at 968.

After Taxpayer offered evidence which rebutted the Department's determination on the issue of responsibility, the burden shifted back to the Department to prove its case by a preponderance of the evidence. *See e.g.*, Novicki v. Department of Finance, 373 Ill. 342, 346, 26 N.E.2d 130, 132 (1940). No such evidence was offered. In particular, the Department offered no evidence to show that, after Taxpayer returned to the Chicago area, he began to reassert or to once again exercise managerial authority, or perform any duties, regarding the Corporation's operations. To the contrary, the credible evidence showed that, after Taxpayer retired from the business, he stayed retired, and Robert Doe took over. Tr. pp. 23-25, 27-28 (Swopes), 53-54, 89-91, 100-03 (Robert Doe), 164-65 (Taxpayer); Taxpayer Ex. 2, pp. 3-4.

Once a taxpayer has rebutted the issue of responsibility, there is no need to discuss the

second issue of willfulness. The applicable statutes do not impose a penalty on an individual who is not a responsible officer or employee. 35 ILCS 5/1002(d); 35 ILCS 735/3-7; McLean, 326 Ill. App. 3d at 676, 761 N.E.2d at 235 (“Plaintiff was not a ‘responsible person’ during this period and, therefore, cannot be found to have been ‘willful’ and thus liable under ROTA.”).

**Conclusion:**

I recommend that the Director cancel the notice issued to Taxpayer, because he was not a responsible person of the Corporation during the periods at issue.

March 27, 2015

John E. White  
Administrative Law Judge