

**ST 12-15**

**Tax Type: Sales 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 and MARY GREEN,  
as responsible officers of  
ANYWHERE CORP.  
TAXPAYERS**

**No. XXXXX**

**Letter ID: XXXXX**

**NPL ID: XXXXX**

**Letter ID: L XXXXX**

**NPL ID: XXXXX**

**Kenneth Galvin  
Administrative Law Judge**

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**RECOMMENDATION FOR DISPOSITION**

**Appearances:** Mr. Jack Black, Black Law, LLC, on behalf of John Doe and Mary Green; Mr. George Foster, Special Assistant Attorney General, on behalf of the Department of Revenue of the State of Illinois.

**Synopsis:**

This matter comes on for hearing pursuant to Mr. John Doe' and Ms. Mary Green's protest of the Notices of Penalty Liability, captioned above (hereinafter "NPL's"), as responsible officers of Anywhere Corporation (hereinafter "Anywhere Corporation"). The NPL's represent a penalty liability for retailers' occupation tax of Anywhere Corporation due to the Department for the periods ending December 31, 2007, December 31, 2008, March 31, 2009, June 30, 2009 and September 30, 2009. An evidentiary hearing was held in this matter on July 20, 2012 with Mr. John Doe and Ms.

Mary Green testifying. Following submission of all evidence and a review of the record, it is recommended that both NPL's be finalized as issued. In support thereof, 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, is established by the admission into evidence of NPL No. XXXXX (issued to John Doe) and XXXXX (issued to Mary Green), both dated February 22, 2011, which show a penalty for sales tax liability of Anywhere Corporation of \$2,597,141.03 for the periods ending December 31, 2007, December 31, 2008, March 31, 2009, June 30, 2009 and September 30, 2009. Tr. pp. 13-16; Dept. Ex. No. 1.
2. Mary Green is John Doe's wife. She is listed on Anywhere Corporation's NUC-1, "Illinois Business Registration," as "Secretary" and "Treasurer." Tr. pp. 16-17, 67; Dept. Ex. No. 2.
3. The Department's "Audit Narrative," dated November 3, 2009, covering the audit period of January 1, 2006 through September 30, 2009, states that "Anywhere Corporation specializes in the retail and wholesale distribution of wireless communication products." "Anywhere Corporation provides competitively priced, quality products from leading manufacturers like Product1, Product2, Product3, Product4, Product5, PRODUCT6 and others." The Narrative noted that Anywhere Corporation had three locations and that "[t]hese business locations were also store locations or retail outlets." Tr. pp. 17-20; Dept. Ex. No. 1.

4. John Doe was the only shareholder and the President of Anywhere Corporation during the existence of the business, from 2003 to 2009. John Doe admitted being a responsible officer of Anywhere Corporation. Tr. pp. 22-23, 64-65; Taxpayer's Ex. No. 1; Dept. Ex. No. 2.

**Conclusions of Law:**

The sole issue to be decided in this case is whether John Doe and Mary Green should be held personally liable for the unpaid retailers' occupation tax of Anywhere Corporation. 35 ILCS 120 *et seq.* The statutory basis upon which any personal liability is premised is Section 3-7 of the Uniform Penalty and Interest Act, which 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 to 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.

It is clear under the statute that personal liability will be imposed only upon a person who (1) is responsible for filing corporate tax returns and/or making the tax payments and (2) "willfully" fails to file returns or make payments.

**John Doe:** 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 over the business affairs of a corporation and whether he or she participates in decisions regarding the payment of creditors and disbursement of funds. Monday v. United States, 421 F.2d 1210 (7<sup>th</sup> Cir. 1970), *cert. denied*, 400 U.S. 821 (1970). Liability attaches to those with the power and responsibility within the corporate structure for seeing that the taxes are remitted to the government. *Id.*

Mr. John Doe was the only shareholder and the President of Anywhere Corporation during the existence of the business, from 2003 to 2009. Tr. pp. 22-23; Taxpayer's Ex. No. 1; Dept. Ex. No. 2. During the course of the evidentiary hearing, Mr. John Doe admitted being a responsible officer of Anywhere Corporation. Tr. pp. 64-65. Accordingly, I conclude that Mr. John Doe was a responsible officer of Anywhere Corporation during the period covered by the NPL.

The second and remaining element which must be met in order to impose personal liability on Mr. John Doe is the willful failure to file tax returns and pay the taxes due. The Department presents a *prima facie* case for willfulness with the introduction of the NPL into evidence. By operation of the statute, proof of the correctness of the penalty, including the willfulness element, is established by the Department's penalty assessment and certified record relating thereto. Branson v. Department of Revenue, 168 Ill. 2d 247, 260 (1995). The Department's *prima facie* case is a rebuttable presumption. After the Department introduces its *prima facie* case, the burden shifted to Mr. John Doe to overcome the presumption of willfulness through sufficient evidence. Branson, 168 Ill. 2d at 262.

At the evidentiary hearing, Mr. John Doe attempted to rebut the Department's *prima facie* case of willfulness by arguing that the "basis of the audit was erroneous." Tr. pp. 78-79. However, Illinois law is clear that in an action to collect the unpaid tax, the issue of the amount due cannot be retried. The assessments are not subject to collateral attack in a suit to collect the tax. In People ex rel. Scott v. Pintozzi, 50 Ill. 2d 115, 127 (1971), the Court noted that there are two phases to a tax proceeding. The first phase involves imposition of tax liability against the taxpayer. In the instant proceeding, the taxpayer was Anywhere Corporation. Five Notices of Tax Liability ("NTL") were issued to Anywhere Corporation on November 20, 2009 and Anywhere Corporation had the right to request an administrative hearing until January 19, 2010 and litigate the corporate liability as delineated in the NTL's.<sup>1</sup> Dept. Ex. No. 1. There is no evidence in the record that Mr. John Doe protested the NTL's, although as a responsible officer, he had the authority to do so. The first phase of Anywhere Corporation's tax proceeding is completed and the corporate tax liability is final.

The second phase of the tax proceeding is the collection of the tax and in this case, the Department has elected to collect the tax from Anywhere Corporation's responsible officers. In Department of Revenue v. Dombrowski, 202 Ill. App. 3d 1050, 1053-54 (1<sup>st</sup> Dist. 1990), the responsible officer sought judicial review of the corporate tax liability as a defense to his responsible officer case. The Court noted that because the officer had not taken advantage of the statutorily available opportunities to protest the corporate liability, he was foreclosed from reviewing the assessment by way

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<sup>1</sup> There is testimony in the record that Anywhere Corporation declared bankruptcy in September, 2009. Tr. pp. 60-61. Bankruptcy Court would also have been an appropriate forum to litigate the corporate liability as contained in the NTL's. There is no evidence in the record that the corporate liability was challenged in the Bankruptcy proceeding.

of defense in the responsible officer action. The Court noted that it was not “empowered” to review the merits of the final assessment. According to the established case law in Illinois then, Mr. John Doe may not challenge the amount of the tax deficiency in this proceeding as this tribunal is not “empowered” to review the corporate liability. Accordingly, Mr. John Doe’s challenge to the “basis” of the audit does not rebut the Department’s *prima facie* case of willfulness.<sup>2</sup>

35 ILCS 735/3-7 fails to define what constitutes a willful failure to pay or file taxes. In attempting to clarify what constitutes a willful failure to file or pay taxes, the courts have adopted a broad interpretation of the words “willfully fails.” Department of Revenue ex rel. People v. Corrosion Systems, Inc., 185 Ill. App. 3d 580 (4<sup>th</sup> Dist. 1989). Based on the evidence, I must conclude that Mr. John Doe acted willfully. Willfulness can be imputed to Mr. John Doe from the Audit Narrative, which noted that Mr. John Doe was a college graduate and that “it is almost impossible to purchase a \$450,000 home that has over \$8,000.00 in property taxes a year on his income.” No sales tax returns were filed for 1/1/2008 through 9/30/2009 for Anywhere Corporation. During the audit, the Taxpayer presented for review some records but not complete books and records. According to the Narrative, Mr. John Doe “provided inadequate and insufficient books and records during audit.” “The internal controls were not sufficient and there was no control over the records the Taxpayer gave me to review.” “There were a lot of missing records.” “Due to inadequate and/or insufficient books and records, the best

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<sup>2</sup> Assuming, *arguendo*, that Mr. John Doe could litigate the corporate liability in this proceeding, he has not offered sufficient competent evidence to challenge the auditor’s conclusions. He testified that he provided the auditor with all the resale certificates that he had in his possession at the time of the audit, and he offered the resale certificates into evidence in this proceeding. Tr. pp. 33-34; Taxpayer’s Ex. No. 2. However, the auditor noted that “the resale deduction was allowed based upon what appeared to be signed and valid certificates of resale and their corresponding sales amounts in the Taxpayer’s records.” The auditor noted, however, that “all the Taxpayer’s sales are not for resale; Anywhere Corporation made retail sales and had a retail store during the audit.” Dept. Ex. No. 1.

information available was used.” The auditor determined that Anywhere Corporation has underreported its retail sales. The unreported sales were assessed taxes in the amount of \$1,225,380. Based on the large dollar amount of taxes assessed, the underreported sales cannot be characterized as minor or incidental and the underreporting cannot be characterized as inadvertent. Dept. Ex. No. 1.

Mr. John Doe admitted being a responsible officer of Anywhere Corporation. As such, he was responsible for filing tax returns and making payments. During the audit period, Anywhere Corporation was making retail sales and collecting taxes from customers. Thus, at the time tax payments were initially due, sufficient funds were available to satisfy the corporation’s retailers’ occupation tax liability. Mr. John Doe apparently chose to use these funds for other purposes. The evidence clearly supports a finding that Mr. John Doe “knowingly, voluntarily and intentionally” failed to make the required tax payments to the Department, in violation of his statutory obligation and in disregard of his duty to the State to pay Anywhere Corporation’s taxes. The willfulness requirement of the statute is satisfied by this finding. Department of Revenue v. Heartland Investments, 124 Ill. App. 3d 28 (3d Dist 1984), affirmed 106 Ill. 2d 19, 30 (1985); Department of Revenue v. Joseph Bublick & Sons, Inc., 68 Ill. 2d 568 (1977).

**Mary Green:** Mary Green is listed on the NUC-1, “Illinois Business Registration,” as “Secretary” and “Treasurer” of Anywhere Corporation. Tr. pp. 16-17, 67; Dept. Ex. No. 2. Ms. Mary Green testified that she “had access to” and was an authorized signer on Anywhere Corporation’s corporate bank account. Tr. p. 68.

The ability to sign corporate 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). Individuals who hold corporate office and who have authority to make disbursements are presumptively responsible persons for purposes of 26 USC § 6672, the federal responsible officer statute. Hildebrand v. United States, 563 F. Supp. 1259 (D.C. N.J. 1983). Ms. Mary Green held corporate office and had authority to make disbursements for Anywhere Corporation.

Ms. Mary Green testified that it was a “misstatement of fact” that she was listed on the NUC-1 as “Secretary” and “Treasurer” of Anywhere Corporation. According to her testimony, she never had a discussion with Mr. John Doe about listing her as an officer of Anywhere Corporation. Tr. pp. 69-70. At the same time, she knew that she had access to Anywhere Corporation’s corporate bank account and that she was an authorized signer. Tr. pp. 67-68. No explanation was offered as to how she knew she was an authorized signer on the account but did not know she was an officer of Anywhere Corporation. No evidence was offered that Ms. Mary Green contacted the Secretary of State regarding the “misstatement.” Ms. Mary Green testified that she is “currently” married to John Doe. Tr. pp. 66-67.

As Secretary and Treasurer with the ability to sign corporate checks, Ms. Mary Green could have written a check to the State of Illinois for unpaid sales tax. The evidence shows then that Ms. Mary Green was in a responsible position with Anywhere Corporation in which she knew or should have known whether Anywhere Corporation’s returns were filed and taxes paid. In order to overcome the Department’s *prima facie* case, evidence must be presented which is consistent, probable and identified with the corporation’s books and records. Central Furniture Mart, Inc. v. Johnson, 157 Ill. App. 3d

907 (1<sup>st</sup> Dist. 1987). When the Department established its *prima facie* case, the burden shifted to Ms. Mary Green to overcome the presumption of responsibility through sufficient evidence. Branson, *supra*. No documents were admitted on behalf of Ms. Mary Green. She testified that she did not sign checks but no check registers were offered into evidence. Without any documentary evidence, I conclude that Ms. Mary Green has failed to rebut the Department's presumption that she was a responsible party of Anywhere Corporation during the period covered by the NPL.

The second and remaining element which must be met in order to impose personal liability on Ms. Mary Green is the willful failure to pay the taxes due. The Department presents a *prima facie* case for willfulness with the introduction of the NPL into evidence. Branson at 260. The burden, then, is on the responsible party to rebut the presumption of willfulness.

As stated previously, 35 ILCS 735/3-7 fails to define what constitutes a willful failure to pay or file taxes. Responsible officers are liable if they fail to inspect corporate records or otherwise fail to keep informed of the status of the retailers' occupation tax returns and payments. Branson, *supra*. "Willfulness" as used in the statute may indicate a reckless disregard for obvious or known risks. Monday v. United States, 421 F. 2d 1210 (7<sup>th</sup> Cir. 1970) *cert. denied* 400 U.S. 821 (1970).

Ms. Mary Green's conduct was willful under each of the above benchmarks. She testified that she did not have any decision-making responsibilities with regard to how Anywhere Corporation's day-to-day operations were run and that she was not employed by Anywhere Corporation. Tr. p. 67. No documentary evidence, such as an organizations chart, payroll register, or delegation of authority, was offered to support this testimony.

If her testimony is true, it was her choice to not be involved with Anywhere Corporation and to leave the day-to-day operations to her husband. All responsible persons owe a fiduciary obligation to care properly for the funds that are entrusted to them. “A fiduciary cannot absolve himself merely by disregarding his duty and leaving it to someone else to discharge.” Hornsby v. Internal Revenue Service, 558 F. 2d 952 (5<sup>th</sup> Cir. 1979). One does not cease to be a responsible person merely by delegating that responsibility to others. Gustin v. United States, 876 F.2d 485 (5<sup>th</sup> Cir. 1989). As Secretary and Treasurer, with the ability to sign corporate checks, Ms. Mary Green could have inspected corporate records including tax returns and made tax payments to the State. If she chose not to participate, her inaction exhibits willfulness. If she failed to inspect Anywhere Corporation’s records, while able to do so, it also indicates a reckless disregard for the risk that her husband would not remit taxes to the State, further exhibiting willfulness under the Statute.

WHEREFORE, for the reasons stated above, it is my recommendation that Notices of Penalty Liability Nos. 1880304 and 1080329, issued to John Doe and Mary Green, respectively, be finalized as issued.

Kenneth J. Galvin

Administrative Law Judge

November 8, 2012