

ST 15-01

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	)	No.	XXXX
	)	NPL:	XXXX
	)	Letter ID:	XXXX
v.	)		
	)		
JOHN DOE,	)		
as responsible officer of	)		
ABC BUSINESS, LLC,	)	Administrative Law Judge	
TAXPAYER	)	Kenneth J. Galvin	

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**RECOMMENDATION FOR DISPOSITION**

**Appearances:** Mr. JOHN DOE, appearing *pro se*; 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’s protest of Notice of Penalty Liability No. XXXX (hereinafter “NPL”) as responsible officer of ABC BUSINESS, LLC (hereinafter “ABC BUSINESS”). The NPL represents a penalty liability for retailers’ occupation tax of ABC BUSINESS due to the Department for November and December, 2011, and January, 2012. An evidentiary hearing was held in this matter on June 17, 2014 with Mr. John Doe testifying. Following submission of all evidence and a review of the record, it is recommended that the NPL 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. XXXX dated February 7, 2014, which shows a penalty for sales tax liability of ABC BUSINESS of \$XXXX for November and December of 2011 and January of 2012. Tr. pp. 5-6; Dept. Ex. No. 1.
2. An e-mail from JOHN DOE to “MN” dated January 30, 2012 states “Mary, go ahead and pay the FUTA [Federal Unemployment Tax] and SUTA (State Unemployment Tax).” Tr. pp. 8-9; Taxpayer’s Ex. No. 1.
3. In an e-mail dated February 24, 2012, “MN” asked Mr. John Doe if she “should do anything” with an attached Sales Tax Notice. Mr. John Doe e-mailed Jack Black on February 25, 2012 and asked for “any advice on what to do about the sales tax.” Mr. Jack Black e-mailed back on February 27, 2012: “We are going to go for an offer and compromise, once we file the final December. The strategy will be to show lack of assets and failure due to business decline. As to timing we plan on dealing with this after the tax season rush.” Tr. pp. 10-13; Taxpayer’s Ex. No. 2.
4. ABC BUSINESS’s sales tax returns were signed with a stamp of Mr. John Doe’s signature. Tr. p. 16.
5. Mr. John Doe was a signatory on ABC BUSINESS’s bank accounts. Tr. p. 21.

### **Conclusions of Law:**

The sole issue to be decided in this case is whether Mr. John Doe should be held personally liable for the unpaid retailers' occupation tax of ABC BUSINESS. 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.

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. Liability attaches to those with the power and responsibility within the corporate structure for seeing that the taxes are remitted to the government. Monday v. United States, 421 F. 2d 1210 (7<sup>th</sup> Cir. 1970), *cert. denied*,

400 U.S. 821 (1970). 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).

The NPL at issue in this case covers the months of November and December, 2011 and January, 2012. Dept. Ex. No. 1. Mr. John Doe testified at the evidentiary hearing that he did “not deny that [he] was one of the responsible parties of ABC BUSINESS prior to November of 2011.” Mr. John Doe was the manager of ABC BUSINESS but testified that he did not have an ownership interest in the LLC. Tr. pp. 7, 16, 19. According to Mr. John Doe, the business began to fail in October of 2011. He testified that the day-to-day control of the business was taken out of his hands. Mr. Jack Black, “who was a “member [of the LLC] and also represented the primary financial group that invested in the business,” “took over ... deciding what bills to pay and what bills not to pay.” “His office filed the returns but did not make the payment.” “All the bills were paid through his office.” Tr. pp. 8-9.

As the above testimony indicates, throughout the hearing, Mr. John Doe tried to put responsibility for the unpaid sales taxes on Mr. Jack Black. However, the statute does not confine liability to only one person or to the person most responsible. 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). Mr. John Doe, as Manager of ABC BUSINESS, could not relieve himself from responsibility for the unpaid taxes by simply assuming that Mr. Jack Black would handle their payment.

Mr. John Doe did not offer any documentary evidence showing that he was not responsible for ABC BUSINESS after November, 2011. He testified that he did not resign from the business. Tr. p. 9. No minutes of the board of directors or LLC members were offered into evidence showing that Mr. John Doe was relieved of managerial responsibility for ABC BUSINESS in October, 2011. In a “Bill of Sale and Reduction of Loan Principal Agreement” dated December 31, 2011, in which ABC BUSINESS conveyed its right, title and interest in all its equipment to “XYZ Business, LLC,” Mr. John Doe signed as “Manager” of ABC BUSINESS.<sup>1</sup> Taxpayer’s Ex. No. 3. I must conclude from Mr. John Doe’s signature as “Manager” of ABC BUSINESS on December 31, 2011, that he was still in a responsible position with ABC BUSINESS at that time.

Mr. John Doe offered into evidence several e-mails, apparently to show that at some point, he was no longer responsible for ABC BUSINESS. The e-mails, however, show the opposite. An e-mail from Mr. John Doe to “MN” dated January 30, 2012 states “Mary, go ahead and pay the FUTA [Federal Unemployment Tax] and SUTA (State Unemployment Tax).” Tr. pp. 8-9; Taxpayer’s Ex. No. 1. As of January 30, 2012, which

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<sup>1</sup> According to the “Bill of Sale and Reduction of Loan Principal Agreement,” the Agreement would be null and void if not completed by March 31, 2012. There is no documentary evidence in the record as to if and when the transaction was completed.

is the last month covered by the NPL, Mr. John Doe was still in a responsible position and directing the payment of taxes. In an e-mail dated February 24, 2012, “MN” asked Mr. John Doe if she “should do anything” with an attached Sales Tax Notice.” Mr. John Doe e-mailed Mr. Jack Black on February 25, 2012 and asked for “any advice on what to do about the sales tax.” Mr. Jack Black e-mailed back on February 27, 2012: “We are going to go for an offer and compromise, once we file the final December. The strategy will be to show lack of assets and failure due to business decline. As to timing we plan on dealing with this after the tax season rush.” Tr. pp. 10-13; Taxpayer’s Ex. No. 2. As of February 25, 2012, then, Mr. John Doe was still participating in decisions regarding the payment of creditors and disbursal of funds.

Mr. John Doe testified that ABC BUSINESS’s sales tax returns were signed with a stamp of his signature. Tr. p. 16. He also testified that he was a signatory on ABC BUSINESS’s bank accounts. Tr. p. 21. There is no evidence in the record as to when or whether Mr. John Doe stopped being a signatory on the bank accounts and when or whether his stamped signature stopped being used for the sales tax returns. As Manager of ABC BUSINESS, with the ability to sign corporate checks, Mr. John Doe could have written a check to the State of Illinois for unpaid taxes.

The testimony shows then that Mr. John Doe was in a responsible position with ABC BUSINESS through February, 2012, in which he knew or should have known whether 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 Mr. John Doe to overcome the presumption of responsibility through documentary evidence. Branson v. Dept. of Revenue, 168 Ill. 2d 247 (1995). No documentary evidence was offered by Mr. John Doe at the hearing showing that he ceased being responsible for ABC BUSINESS and the date that his responsibility ended. Without competent documentary evidence, I must conclude that Mr. John Doe has failed to rebut the Department's *prima facie* case that he was a responsible party of ABC BUSINESS during the 3 month period covered by the NPL.

The second and remaining element which must be met in order to impose personal liability 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.

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). Willfulness includes "failure to investigate or to correct mismanagement after having notice that withholding taxes have not been remitted to the Government." Peterson v. United States, 758 F. Supp. 1209 (N.D. Ill. 1990). "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).

Mr. John Doe's conduct was willful under each of the above benchmarks. Mr. John Doe testified that the business began to fail in October, 2011. However, Mr. John

Doe offered no evidence showing that he tried to “correct mismanagement” of ABC BUSINESS after he became aware that the business was failing and that taxes were not being remitted to the State. In a “Bill of Sale and Reduction of Loan Principal Agreement” dated December 31, 2011, ABC BUSINESS conveyed its right, title and interest in all its equipment to “XYZ Business, LLC,” with Mr. John Doe signing as “Manager” of ABC BUSINESS. Taxpayer’s Ex. No. 3. But this Bill of Sale makes no provision for ABC BUSINESS’s unpaid sales taxes. The omission of a provision for unpaid sales taxes evidences a “reckless disregard” for the known risk that taxes would remain unpaid. I must conclude that Mr. John Doe, as “Manager” of ABC BUSINESS on the Bill of Sale, could have insisted that a provision be included for ABC BUSINESS’s unpaid sales taxes. Each of the e-mails dated January 30, 2012, February 24, 2012, February 25, 2012 and February 27, 2012, shows not only a failure to correct mismanagement on Mr. John Doe’s part but also a reckless disregard for the continuing risk that the taxes were not being paid.

WHEREFORE, for the reasons stated above, it is my recommendation that Notice of Penalty Liability No. XXXX be finalized as issued.

Kenneth J. Galvin  
Administrative Law Judge

January 20, 2015