

ST 15-10

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

THE DEPARTMENT OF REVENUE	)	No.	XXXX
OF THE STATE OF ILLINOIS	)	NPL:	XXXX
	)	Letter ID:	XXXX
	)		
v.	)		
JACK BLACK, as responsible officer of	)		
ABC BUSINESS,	)	Administrative Law Judge	
TAXPAYER	)	Kenneth J. Galvin	

**RECOMMENDATION FOR DISPOSITION**

**Appearances:** Mr. Jack Black, 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. Jack Black’s protest of Notice of Penalty Liability No. XXXX (hereinafter “NPL”) as responsible officer of ABC Business, Inc. (hereinafter “ABC Business”). The NPL represents a penalty liability for retailers’ occupation tax of ABC Business due to the Department for the period ending June 30, 2008. An evidentiary hearing was held in this matter, by telephone at Mr. Jack Black’s request, on August 20, 2014, with Mr. Jack Black 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 November 16, 2012, which shows unremitted sales tax liability of ABC Business in the amount of \$XXXX plus penalty of \$XXXX plus interest for a total of \$XXXX for the period ending June 30, 2008. Tr. pp. 4-6; Dept. Ex. No. 1.
2. Mr. Jack Black, "as Managing Member" of XYZ Business, admitted signing a "Stock Purchase Agreement" dated June 28, 2007, in which XYZ Business agreed to purchase ABC Business Industries, Inc. Tr. pp. 21-24, 30; Dept. Ex. No. 2.

### **Conclusions of Law:**

The sole issue to be decided in this case is whether Mr. Jack Black 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. 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.

A “Stock Purchase Agreement” dated June 28, 2007, in which XYZ Business agreed to purchase ABC Business, Inc. was signed by Jack Black as “Managing Member” of XYZ Business. Tr. pp. 21-24, 30; Dept. Ex. No. 2. Mr. Jack Black admitted signing the Stock Purchase Agreement as “Managing Member” of XYZ Business. Tr. p. 23. But Mr. Jack Black had difficulty recalling the circumstances surrounding the Stock Purchase Agreement. According to his testimony, he did not “believe” that the “issuing of the stock was ever followed through on.” “I don’t remember the documents being filed.” The Department’s Counsel then asked “but [the sale of ABC Business to XYZ Business] may have gone through. You are just not certain that it did. Is that your testimony?” He responded “Yes, sir.” Tr. p. 23. “The process was supposed to be a stock transfer, but, as far as I can tell, it was never completed.” Tr. p. 28. No documentary evidence was offered by Mr. Jack Black showing that XYZ Business’ purchase of ABC Business did not go through, and without any documentary evidence to the contrary, I must conclude that Mr. Jack Black was the Managing Member of XYZ Business which owned ABC Business during the period covered by the NPL.

Mr. Jack Black similarly had difficulty recalling his responsibilities at ABC Business during the period covered by the NPL. “I can’t honestly recall what I was doing at that time.” Tr. p. 24. “I don’t recall involvement at that time.” Mr. Jack Black finally admitted that he was an investor in ABC Business. Tr. p. 28. When asked what percentage he owned, he responded: “Um, I believe that I was the only investor.” The Department’s Counsel then asked “So you owned 100% of the company?” Mr. Jack Black responded: “Well, I was supposed to.” Tr. p. 29. No documentary evidence was offered by Mr. Jack Black showing that there were other investors in ABC Business. Mr. Jack Black did not “remember” if he was a member of the Board of Directors of ABC Business. Mr. Jack Black was “not aware” if he had any other titles beside “Managing Member.” Tr. p. 30.

Mr. Jack Black did not offer any documentary evidence showing that he was not responsible for ABC Business. No minutes of the meetings of the Board of Directors or LLC members were offered into evidence showing that Mr. Jack Black, as sole owner, was not responsible for managing ABC Business. The record of this case shows then that Mr. Jack Black was the Managing Member of XYZ Business at the time it purchased ABC Business. The Stock Purchase Agreement was signed by Mr. Jack Black during the period covered by the NPL. Mr. Jack Black was the only investor. Accordingly, I must conclude that Mr. Jack Black was a responsible officer of ABC Business. As Managing Member, Mr. Jack Black had significant, if not total, control over the business affairs of ABC Business and the power and responsibility for seeing that the taxes were remitted to the government.

Throughout the hearing, Mr. Jack Black tried to place responsibility for the unpaid sales taxes on other parties. Mr. Jack Black caused to be admitted into evidence ABC Business’s REG-1, “Illinois Business Registration Application,” filed February 9, 2006. The REG-1 does

not list Mr. Jack Black as the responsible officer or as an owner or officer of ABC Business. Tr. pp. 13-14; Taxpayer's Ex. No. 3. It must be noted, however, that the REG-1 predates the Stock Purchase Agreement. According to Mr. Jack Black, "Ms. Jane Doe" "handled and controlled all aspects of this audit." Tr. p. 12. An EDA-123, "Notice of Proposed Liability" was sent to Ms. Jane Doe. Taxpayer's Ex. No. 2. "Jane Doe" was listed by the Auditor as the "contact" for the audit. Taxpayer's Ex. No. 2. The audit results were presented to Ms. Jane Doe. Dept. Ex. No. 1. Mr. Jack Black did not subpoena Ms. Jane Doe for the evidentiary hearing.

The personal liability statute, 35 ILCS 735/3-7, 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. Jack Black, as 100% owner and Managing Member, could not relieve himself from responsibility for the unpaid taxes by simply assuming that Ms. Jane Doe was handling it.

The evidence shows then that Mr. Jack Black was in a responsible position with ABC Business 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. Jack Black 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. Jack Black at the hearing showing that he was not responsible for ABC Business. I am forced to conclude that Mr. Jack Black has failed to rebut the Department's *prima facie* case that he was a responsible party of ABC Business during the months 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. Jack Black's conduct was willful under each of the above benchmarks. Mr. Jack Black testified that he did not "recall making any effort" to see if taxes were paid. He admitted that "at some point" he learned that there was a liability owed for the period. He testified that he did not make any effort to get this liability paid. He did not believe that the liability was his. According to his testimony, when he finally got access to the checks, "it appeared that the

liability was paid.”<sup>1</sup> Tr. p. 31. Mr. Jack Black offered no evidence showing that he tried to “correct mismanagement” of ABC Business after he learned that there was liability owing for the period. In not making an effort to pay the liability, Mr. Jack Black showed a “reckless disregard” for the known risk that taxes would remain unpaid. Mr. Jack Black cannot prove a lack of willfulness on his part simply by denying conscious awareness of a tax deficiency that could have been easily investigated by an inspection of corporate records. Branson v. Dept. of Revenue, 168 Ill. 2d 247, 267 (1995). I must conclude that Mr. Jack Black has failed to rebut the Department’s *prima facie* case that he willfully failed to pay the taxes due.

WHEREFORE, for the reasons stated above, it is my recommendation that Notice of Penalty Liability No. 780627 be finalized as issued.

August 12, 2015

Kenneth J. Galvin  
Administrative Law Judge

---

<sup>1</sup> Throughout the hearing, Mr. Jack Black argued that the taxes in the NPL had been paid. Mr. Jack Black caused to be admitted into evidence a listing of eight checks that he claimed were “nearly equal to the claimed Illinois sales tax deficiency.” Tr. pp. 15-16, 32-33; Taxpayer’s Ex. No. 3. The tax assessment was not reviewable in this proceeding. Department of Revenue v. R.S. Dombrowski Enterprises, Inc., 202 Ill. App. 3d 1050 (1<sup>st</sup> Dist. 1990). If the assessment had been reviewable in this proceeding, Mr. Jack Black did not provide sufficient documentary evidence to prove that the NPL overstated the amount due. Department’s Counsel stated at the hearing that “as best as I can tell, all these checks were applied.” The Department had determined that there were additional, unpaid liabilities. “It wasn’t a question of any checks not applied.” Tr. p. 32. My own review of the account showed conclusively that all eight checks were applied but leaving the unpaid balance as detailed in the NPL.