

ST 01-1

Tax Type: Sales Tax

Issue: Responsible Corporate Officer – Failure to File or Pay Tax

**DEPARTMENT OF REVENUE
STATE OF ILLINOIS
OFFICE OF ADMINISTRATIVE HEARINGS
CHICAGO, ILLINOIS**

**DEPARTMENT OF REVENUE
STATE OF ILLINOIS**

) 00 ST 0000

) NPL 0000

)

v.

) Mimi Brin

) Administrative Law Judge

JOHN DOE, as responsible officer of
ABC Corporation

)

)

RECOMMENDATION FOR DISPOSITION

Appearances: George J. Skontos, for John Doe; John Alshuler, Special Assistant Attorney General, for the Illinois Department of Revenue

Synopsis:

This matter comes on for rehearing as granted by the Illinois Department of Revenue (“Department”) to John Doe (“Taxpayer” or “Doe”). The Department issued Doe a Notice of Penalty Liability 0000 (“NPL”) as a responsible officer or employee of ABC, Corporation (“ABC”). The original hearing in this cause was followed by the recommendation of Administrative Law Judge Robert Lappe, Jr., (“Lappe”) that was issued as a final determination on January 2, 1991. At the rehearing in this matter, accountant Mr. Jones (“Jones”), attorney Mr. Brown (“Brown”), Joe Blow (“Blow”) and John Doe appeared on behalf Doe. Following a review of the entire record in this cause, it is my recommendation that this matter be resolved in favor of the Department, and in support thereof, I make the following findings of fact and conclusions of law:

Findings of Fact:

1. The Department's *prima facie* case, inclusive of all jurisdictional elements, is established by the admission into evidence of the Notice of Penalty Liability No. 0000 issued against John Doe, as responsible officer or employee of ABC Corporation, for the tax periods of 7/82-12/84, 9/87, 12/87-1/88, 3/88-4/88, 11/88 ("tax periods"). Department Ex. No. 1
2. Administrative notice is taken of the final recommendations in the matters of Illinois Department of Revenue v. Ron Doe, dated July 23, 1991, and Illinois Department of Revenue v. Jim Doe¹ and Jane Doe, dated January 2, 1991. Ron Doe did not testify at Jim and Jane's hearing, nor did Jim or Jane testify at Ron's hearing.
3. Taxpayer stipulates to all of the documents admitted at the original hearing regarding this NPL before administrative law judge Robert Lappe, Jr. Tr. pp. 29-30
4. During the tax periods, Doe held 10% of the stock in ABC. Tr. pp. 159

Conclusions of Law:

For the tax periods at issue,² the Retailers' Occupation Tax Act provided, in pertinent part, as follows:

¹ Jim Doe and John Doe are one and the same person. Jane Doe was John's wife during the tax periods.

² The penalties assessed herein are for tax years that range from 1982 through 1988. Pursuant to Sweis v. Sweet, 269 Ill. App.3d 1 (1st Dist. 1995), the pertinent personal penalty liability statute is the one in effect at the time the underlying corporate liability arose. See also, 35 **ILCS** 735/3-9 (b) ("Penalties shall imposed at the rate and in the manner in effect at the time the tax liability became due.")

Any officer or employee of any corporation subject to the provisions of this Act who has the control, supervision or responsibility of filing returns and making payment of the amount of tax herein imposed in accordance with Section 3 of this Act and who willfully fails to file such return or to make such 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 corporation, including interest and penalties thereon... .

Ill. Rev. Stat. ch. 120, sec. 452½

The Notice of Penalty Liability issued herein against Doe establishes the Department's *prima facie* case that he was a responsible officer who willfully failed to pay taxes due from ABC. Branson v. Department of Revenue, 168 Ill.2d 247 (1995) The burden then shifts to the taxpayer to overcome the presumption of liability through sufficient evidence that the person was either not a responsible officer or employee, or that his actions were not willful. Id.

The rehearing in this cause was complicated by the fact that as a result of the passage of about nine years from the time the original final determination of liability was issued against Doe to the request for and the grant of rehearing, necessary documents were no longer available, a fact recognized by the parties. Tr. pp. 13-28 For instance, neither party was able to locate a transcript of the original hearing, nor were all documents admitted at that hearing available at this time.³ The fact that Department documents from the original hearing were destroyed in the normal course of doing business is not unreasonable in this matter since no appeal was taken by Doe from the original January 1991 determination of his liability.

The first matter to be considered is whether Doe was an officer or employee of ABC. At this rehearing, Doe confirmed that he held 10% of the corporate stock, but he

³ See Findings of Fact ¶ 3

testified that he was neither a corporate officer nor a director. Tr. p 159 In fact, he stated that he did not receive a salary after he had his heart attacks, rather, he received only social security disability payments. Tr. pp. 144, 151, 159

This testimony denying officer status is in stark contrast to exhibits, admitted without objection during the original hearing, as well as the findings of fact made by Administrative Law Judge, Lappe, who heard this NPL case in the first instance. At the original hearing, Department Ex. No. 2 included a letter from Doe to the Department wherein he admits that he was an officer of the corporation until early 1988. Lappe Recommendation, p. 2⁴ Further, Doe stated that he “was alternatively either Secretary of the corporation or Secretary/Treasurer of the corporation. (Tr. 37).” Lappe Recommendation, p. 6⁵ Lappe also cited to the original hearing transcript for his finding that John’s wife, Jane, was “only authorized to sign checks at the direction of himself or Ron Doe [John’s father].” Id.⁶

At the hearing before Lappe, Doe stated that in 1984, he procured his wife’s signature and had a facsimile stamp made of it (Lappe Recommendation p. 6),⁷ and that he used that stamp on bills, checks, and tax returns. Id. Lappe also reported that Doe testified that “if he wasn’t available he would direct other employees of the corporation to use the signature stamp.” Id.⁸ Lappe’s recommendation’s findings of fact also detail that Doe provided that his own facsimile signature stamp was “locked in a safe to which the

⁴ During cross-examination of Doe, Department counsel asked:

Q: What if I told you that you said you were an officer and employee of the corporation until 1988, what would you say?

A: I would tell you that that is incorrect.

Tr. p. 174

⁵ See Tr. pp. 174-5 for Doe’s response to cross examination on this point.

⁶ Doe responded “I don’t recall” when cross-examined on the conflict between his previous and current postures on this point. Tr. p. 176

⁷ Doe, on cross-examination in the instant matter, denied this fact. Tr. p. 176

employees did not have a combination.” Id. at 6-7 To this, Doe now responded that there was no safe, but he does not recall whether there was such a stamp. Tr. p. 177

Lappe also found, citing to a specific hearing transcript page, that Doe controlled the payment of creditors and vendors, as well as to the Internal Revenue Service and the Department. Lappe Recommendation, p. 7 Along the same line, he further stated that Doe paid the oldest bills first. Id. To each of these facts, Doe testified at rehearing that these statements were incorrect. Tr. pp. 177-8 The original recommendation also found that Jones, the corporation’s accountant, would present Doe with information about checking account balances. Lappe Recommendation, p. 7⁹

Jones did testify at this rehearing. As to the issue of corporate officers or directors, he stated that Ron Doe was the President and the only one he dealt with (Tr. p. 55-56), and that John did not receive either an officer’s or director’s salary, although he may have received his salary under another classification. Tr. p. 56

The corporate attorney and registered agent during the tax periods, Mr. Brown, testified at both hearings on behalf of Doe. Lappe’s recommendation discusses Brown’s testimony regarding whether Jane Doe was a corporate officer, but does not discourse as to whether Brown gave evidence as to Doe’s specific position as a corporate officer or director. At the rehearing, however, Brown did testify that Doe’s parents contacted him “to set something up so that John can have some income coming in. Mainly, we want to do something so that his medical expenses are going to be paid.” Tr. p. 86 Brown advised a medical reimbursement agreement for all the employees of the company, and

⁸ On cross-examination on this fact, Doe now testified that “I don’t recall.” Tr. pp. 176-7

⁹ It is unclear from Lappe’s recommendation whether Jones testified during the original hearing. Lappe did, however, remark in his recommendation whenever a person appeared to testify, i.e. attorney Mr.

that Doe would have to do some work and be an employee in order to qualify for medical reimbursement. Id.¹⁰

Finally, at the instant hearing, when asked by his counsel “Were you ever terminated as an employee of the corporation?”, Doe answered “In 1988.” Tr. p. 151 As a result of the above, I conclude that John Doe was, at the very least, an employee of ABC, and, therefore, is within the category of persons referenced in §452½ as potentially personally liable for the pertinent corporate tax liabilities.

The next point I must address is whether Doe had “the control, supervision or responsibility of filing returns and making payment” of the retailers’ occupation taxes due from the corporation to the State, as personal liability is imposed on one who is responsible for the filing of ROT returns and for the payment of the taxes shown to be due thereon, and who willfully fails to file and/or pay such taxes. The statute defines neither responsible person nor willful conduct. However, the Illinois Supreme Court, in cases wherein it considered personal liability, has referred to interpretations of similar language in section 6672 of the Internal Revenue Code (26 U.S.C. §6672), that imposes personal liability on corporate officers who willfully fail to collect, account for, or pay over employees’ social security and Federal income withholding taxes. Branson v. Department of Revenue, *supra*; Department of Revenue v. Joseph Bublick & Sons, Inc., 68 Ill.2d 568 (1977); Department of Revenue v. Heartland Investments, Inc., 106 Ill.2d 19 (1985)

Brown (Lappe Recommendation, p. 4), Jim Doe (Lappe Recommendation, p. 5), Jane Doe (Lappe Recommendation, p. 7). It is reasonable to conclude that Jones did not appear during the original matter.

¹⁰ The Department never argued that Doe did not have two heart attacks in 1978 and 1979 (Tr. p. 143). The Department further did not challenge that as a result of these heart attacks, the Social Security Administration deemed him to be disabled, a fact also mentioned by Lappe. Lappe Recommendation, p. 5; Tr. pp. 149-50

Federal courts have addressed officer/employee liability with respect to who is considered “responsible” for §6672 purposes. Courts have considered specific facts in determining whether individuals were “responsible” for the payment of employee taxes, to wit: 1) the duties of the officer as outlined by corporate by-laws; 2) the ability of the individual to sign checks of the corporation; 3) the identity of the officers, directors, and shareholders of the corporation; 4) the identity of the individuals who hired and fired employees; and, 5) the identity of the individuals who were in control of the financial affairs of the corporation. Monday v. United States, 421 F.2d 1210 (7th Cir. 1970), cert. den. 400 U.S. 821 (1970); Gephart v. United States, 818 F.2d 469 (6th Cir. 1987); Peterson v. United States, 758 F. Supp. 1209 (N.D. Ill. 1990)

Responsible persons may include those who can borrow money on behalf of the corporation (Peterson v. United States, *supra*), and may be those with check writing authority who may or may not be the ones with the responsibility for accounting, bookkeeping or the making of payments to creditor. Monday v. United States, *supra*; Wright v. United States, 809 F.2d 425 (7th Cir. 1987); Calderone v. United States, 799 F.2d 254 (6th Cir. 1986) There may be more than one responsible person in a corporation. Monday v. United States, *supra*; Williams v. United States, 931 F.2d 805, 810 n.7 (11th Cir. 1991).

Lappe’s findings of fact, based upon the oral and documentary evidence presented at hearing, including the testimony of Doe, were, *inter alia*, that: 1) Doe was an officer and an employee of ABC during all of the tax periods (Lappe Recommendation, pp. 2 (letter from Doe to Department admitted as Department Group Exhibit 2), 5 (Doe’s testimony at hearing), 6 (Doe’s testimony at hearing)).

At the rehearing, however, although he conceded that he was a shareholder, Doe denied being an officer of the corporation. Tr. pp. 140-190 passim Rather, he stated that he was his father, Ron's, servant and office boy (Tr. p. 144), that he only did what he was specifically directed to do by his father and whatever he did was done according to how Ron told him to do so. Tr. pp. 140-190 passim Further, while assistance as to the identification of the officers and directors and the duties of various corporate personnel might have come from ABC's annual reports and Articles of Incorporation, none were presented at this hearing even though such were introduced by Doe and admitted as a group exhibit at the first hearing. Lappe Recommendation, p. 5, Taxpayer's Group Exhibit 2

As to the fact of who had check signing authority and who dealt with corporate finances, again, there is sharp conflict between the evidence presented originally and that at this rehearing. According to Lappe's findings, Doe testified that from 1984 through 1988, Jane Doe prepared corporate checks, but was authorized to sign them only at the direction of himself or his father. Lappe Recommendation, p. 6 In addition, Doe testified that in 1984, he took his wife's signature and had a facsimile stamp made of it that he used on bills, checks, and tax returns. Id. He also testified, according to Lappe, that if he was not available, he directed other employees to use that stamp to sign corporate checks. Id. Furthermore, whereas his facsimile stamp was located in a locked safe, to which others did not have the combination, Jane's stamp was accessible to others. Id. at 6-7

In accord with the above, Lappe reported that Doe testified that he controlled the payment of creditors and vendors as well as to the Internal Revenue Service and the

Department (id. at 7) and that the accountant, Jones, gave Doe information about the checking account(s) balance. Id. Lappe also obviously found credible Jane's testimony that money decisions were made by Doe or his parents. Id. at 8 Jane did not testify at the rehearing. Doe, at rehearing, denied all of the above.

Interestingly, the above testimony by Doe as reported by Lappe, coincides with that of Ms. Smith ("Smith"), an ABC office worker who testified at Ron's administrative hearing.¹¹ As reported in his recommendation, the administrative law judge at Ron's hearing wrote that Smith testified that she worked in the office from 1985 through 1989 and Doe was one of her direct supervisors. As reported, she stated that Doe made the financial decisions and signed checks along with his wife, Jane. Smith did not testify at either of Doe's hearings.

Although both Jones and Brown testified at this hearing that they never witnessed Doe make any substantive decisions, it was also made clear during cross examination of these witnesses that they were privy to relatively small amounts of interaction between Doe and his father, that they spent little time at ABC, itself, and that they had little to do with ABC's day to day operations.

For instance, Jones testified that he could not remember if Doe had signature authority on ABC's checking account (Tr. p. 67) nor did he know who signed the monthly ROT returns. Tr. p. 66 He also answered that he did not know how much time Doe spent at ABC on a daily basis. Tr. p. 70 Jones also testified that he did not know of any corporate checks that Doe signed with any facsimile signature stamp (Tr. p. 7) or

¹¹ The ALJ in Ron's administrative hearing recommended that the NPL be finalized against Ron because, *inter alia*, Ron controlled eighty percent of ABC stock, maintained his office of President, fired his son, John, in September 1988, when he became aware that there were financial and tax problems, and put

whether Doe directed any employees to use the signature stamp. *Id.* When asked if Doe was ever in control of creditor/vendor payments, or payments to the IRS or the Department, or whether Doe had a schedule of bill payments, Jones responded to each question, “I wouldn’t know.” Tr. p. 73 Finally, Jones did not know if Doe knew of tax deficiencies asserted against ABC by the Department for 1982-84. Tr. p. 76

Similarly, on cross examination, Brown testified that during 1982-88, he observed interaction between Doe and his father at ABC four or five times (Tr. p. 99), and during that time, observed them in his office five or six times. Tr. p. 100 Nor did he have any knowledge of whether Doe and his father discussed any legal issues outside of his presence, though his communications were with the father. Tr. pp. 107-8 Brown also admitted that while the father dominated their legal discussions, Doe was with his father at these discussions, although Brown did not know why he was there. Tr. pp. 108-10

As a result of the above, I find that Doe was a responsible officer or employee of ABC subject to personal penalty liability. This is based upon Doe’s testimony at the original hearing, wherein he clearly testified that he made financial decisions for ABC and directed its financial matters, including the payment of the taxes at issue, although such testimony is drastically contrary to his testimony at the instant hearing. In addition, on key points such as who had check writing authority, who determined debt payment, who directed debt payment and who had responsibility for the filing and payment of retailers’ occupation taxes, neither Jones nor Brown were competent to testify that Doe did not carry out those functions.

additional monies into the business to pay bills. He did not find credible Ron’s testimony that he gave up complete control of ABC to his son. Mangiamele Recommendation

As to the willful element, although the pertinent statute fails to define willful conduct, Illinois courts have provided guidance for its determination beginning with Department of Revenue v. Joseph Bublick & Sons, Inc., 68 Ill.2d 568 (1977). Pursuant to Doe's testimony before Lappe, there is simply no question that he willfully failed to pay ABC's correct tax due to the State. As Lappe found, Doe admitted that he directed the payment of bills and taxes, including what creditors and vendors were to be paid, paying the oldest bills first. This control extended to payments to the Internal Revenue Service and the Department. Lappe Recommendation, p. 7 All of this was done, according to Doe, with his knowledge of the fiscal state of the corporation. Lappe Recommendation, pp. 6-7

Additionally, Lappe found that Doe signed Retailers' Occupation Tax returns for ABC. Lappe Recommendation p. 7 Lappe also provided, citing to specific transcript pages to support all of these findings (*id.*), that Doe was aware of the tax deficiencies asserted by the Department against ABC for 1982-84, and that he was aware that taxes were due and unpaid to the Department.¹²

This conduct is substantively the same voluntary, conscious and intentional actions that led to a finding of personal liability in Department of Revenue v. Heartland Investments, Inc., 106 Ill. 2d 19 (1985). See also, Department of Revenue v. Joseph Bublick & Sons, Inc., *supra* Therefore, based upon Lappe's findings of fact, Doe clearly satisfies the willful conduct aspect of the pertinent personal liability statute.

Because the disparity is so great between Doe's current testimony and his testimony at the original hearing, it is clear that if I conclude that Doe's latest testimony is correct, I must also conclude that Lappe either was not present at the original hearing

on this NPL or that he totally misread the transcript and evidence from that proceeding. I cannot make those conclusions for several reasons.

First, there has never been any indication that Lappe was neither present at nor that he presided over the original Doe hearing. There is also no argument made or evidence that Lappe did not make his recommendation pursuant to a complete review of the transcript of the original proceedings and of the evidence admitted therein, as cited by him in that recommendation.

Additionally, it is noted that Doe did not appeal Lappe's determination pursuant to the Administrative Review Act, although that statute was in place at that time (Ill. Rev. Stat. ch. 110, sec. 3-101 *et seq.*) and he was advised of same on the face of the Notice of Decision that was sent to his counsel. As noted above, the request for rehearing was made some nine years after the issuance of Lappe's recommendation as a final decision by the then Director of the Department.

Finally, Doe's responses to cross examination questions regarding his prior testimony before Lappe (Tr. p. 174) were not credible. At the instant hearing, Department counsel asked Doe:

- Q. At that time [prior hearing before Lappe], Mr. Doe, your testimony was quite different from your testimony today; isn't that a fact?
- A. Well, I made a mistake.
- Q. You made a mistake?
- A. Mmh-hmm. People are entitled to do that.

As his cross examination continued, Doe answered questions specifically focused on his prior testimony regarding both his role at ABC as well as that of his wife, Jane, with either "I would tell you that that is incorrect" or "I don't recall". Tr. pp. 174-9

¹² At this hearing, Doe denied these facts. Tr. pp. 176-9

I do not doubt that Doe's father, Ron, was both domineering and difficult, as testified to by all who appeared on Doe's behalf. However, as strained as Doe's relationship with his father was, that does not translate to a finding that Doe is not personally liable for the penalty assessed in the NPL at issue. At his first hearing, Doe testified, under oath, to facts that lead to the conclusion, made by Lappe, that he is liable pursuant to well established case law. Because Doe's testimony in this matter is so diametrically opposite to his testimony at his original hearing, and because of the length of time that has elapsed from that original determination of personal liability, without any action, whatsoever, from Doe, I cannot reasonably accept as credible Doe's current testimony regarding his complete lack of responsible involvement in ABC financial matters.

WHEREFORE, for the reasons stated above, it is my recommendation that Notice of Penalty Liability 0000 be finalized, as issued.

1/12/01

Mimi Brin
Administrative Law Judge