

ST 01-4

Tax Type: Sales 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)	
OF THE STATE OF ILLINOIS)	Docket No. 99-ST-0000
v.)	NPL No. 0000
JOHN DOE , as responsible)	
officer of 000 Anywhere Adventure,)	John E. White,
d/b/a Doe's on Anywhere Adventure,)	Administrative Law Judge
Taxpayer.)	

RECOMMENDATION FOR DISPOSITION

Appearances: Russell Syracuse appeared for taxpayer; Shepard Smith appeared for the Illinois Department of Revenue.

Synopsis:

This matter involves a Notice of Penalty Liability the Illinois Department of Revenue ("Department") issued to John Doe ("Doe" or "taxpayer"). Notice of Penalty Liability ("NPL") no. 0000 assessed a penalty equal to the unpaid corporate retailers' occupation ("ROT") and related tax liabilities of the 000 Anywhere Adventure, doing business as Doe's on Anywhere Adventure, regarding gross receipts from the corporation's transactions during certain months beginning on May 1, 1994 and ending November 30, 1994.

At hearing, the Department offered into evidence a copy of the NPL, as well as other evidence, including deposition testimony of different witnesses, with the stipulation of taxpayer's counsel. Taxpayer did not appear at hearing, and no evidence was offered on his behalf. I am including in this recommendation findings of fact and conclusions of law. I recommend that the NPL be finalized as issued.

Findings of Fact:

1. 000 Anywhere Adventure (“Adventure” or “the corporation”) conducted business as a restaurant under the name of Doe’s on Anywhere Adventure. The restaurant was located at 000 Anywhere Drive, just northwest of the an area in downtown Anywhere, Illinois. Department Exhibit 1.
2. On the Illinois Business Registration (“NUC-1”) form completed to obtain a certification of registration for Adventure, taxpayer was listed as the corporation’s secretary, and his uncle, Jim Doe [Sr.] (“Jim Sr.”), was listed as Adventure’s president. Department Ex. 4, p. 3.¹ Jim Sr. signed the NUC-1 form as the person who “accept[ed] personal responsibility for the filing of returns and the payment of taxes due.” *Id.*, p. 4.
3. Of the twenty-one tax returns introduced as evidence at hearing, fourteen are dated 1/18/95. Department Ex. 7, pp. 2-8, 15-21. Those returns include the Sales and Use Tax Returns (form “ST-1” or “ROT returns”) regarding the months of 12/93, 1/94, and 4/94 through 8/94, and the Metropolitan Pier and Exposition Authority Food and Beverage Tax Returns (form “ST-4” or “McPier returns”) for the same months. *Id.*
4. Six of the returns introduced as evidence are dated 12/19/94. Department Ex. 7,

¹ The exhibits admitted at hearing were hand-numbered on the lower right-hand part of each page. The pagination used, however, did not take into account any change in exhibits, so that each successive page in each successive exhibit was identified using a sequential number. Thus, Department Exhibit 2 begins not with page 1, but with page 6. For purposes of this recommendation, I am ignoring that rather confusing method, and will refer instead to the particular page of each exhibit where the evidence that supports the finding is found.

- pp. 9-14, 22-24. Those returns include the ST-1s regarding the months of 9/94 through 11/94, and the ST-4s for the same months. *Id.*
5. The other return introduced as evidence, the ST-1 regarding 10/93, is dated sometime in January 1994. Department Ex. 7, p. 1.
 6. Each of the returns admitted shows that Adventure reported, as deductions from its taxable gross receipts, the amounts of tax it collected from its customers. Department Ex. 7, *passim* (line 2 of each return).
 7. The return that reports Adventure's ROT and other tax liabilities for October 1993 was received by the Department on or about February 9, 1994. Department Ex. 7, p. 1.² The returns reporting Adventure's ROT and other tax liabilities for the months of 9/94 through 11/94 were received by the Department on or about December 27, 1994. *See* Department Ex. 7, pp. 22-24. The returns reporting Adventure's ROT and other tax liabilities for the months of 12/93, 1/94, and 4/94 through 8/94 were received by the Department on or about February 9, 1995. Department Ex. 7, pp. 2-8, 15-21. Thus, all but one month's worth of the returns (the only exception being the returns for 11/94) taxpayer caused to have prepared for Adventure were filed late.
 8. None of the tax shown as being due on the returns Adventure filed was ever paid. Department Exs. 1, 7.

² The bar code and the first five numbers above the bar code on the returns admitted as evidence reflect one of the methods the Department uses to keep track of the date on which it received a particular return. The numbers on top of the bar code on Adventure's ST-1 for October 1993 show that the Department received that return on or about the 40th day of 1994, that is, on or about February 9, 1994. Department Ex. 7, p. 1. Since the face of the return shows that it was prepared in the latter half of January 1994, the return was not timely filed. *Id.*; 35 **ILCS**

9. All of the returns filed during the period bear a signed name of Jim Doe, although Jim Doe Sr. expressly denied that the signature on those returns were his. Department Ex. 12, pp. 29-30 (deposition testimony of Jim Doe Sr.).
10. During the course of the Department's investigation of this matter, Jim Doe Sr. presented examples of his signature to the Department for comparison with the signatures affixed to Adventure's monthly tax returns. Department Ex. 8, pp. 1-2.
11. The signatures affixed to the returns filed by Adventure in this matter do not appear to have been signed by Jim Doe Sr. *Compare* Department Ex. 4, p. 3 *and* Department Ex. 8, p. 2 *with* Department Ex. 7. The consistent and significant difference between Jim Doe Sr.'s signature and the signatures affixed on the returns admitted at hearing is discernable by comparing the middle initial, "A". On the signatures Jim Sr. admitted were his, each "A" has a straight or angular star pattern throughout. Department Ex. 4, p. 3; Department Ex. 8, p. 2. Each of the "A's" in the signatures on the returns, however, is uniformly curvy — instead of sharply angular — on the left side of the letter. Department Ex. 7, *passim*.
12. In addition to being Adventure's secretary, taxpayer was Adventure's general manager. Department Ex. 10, pp. 9, 11-12 (deposition testimony of Mr. Smith ("Mr. Smith")); Department Ex. 11, pp. 12, 23-24, 35 (deposition testimony of Mr. Jones ("Mr. Jones")).
13. Doe hired and fired Adventure's employees. Department Ex. 10, p. 20 (Mr. Smith); Department Ex. 11, pp. 12, 23-24, 35 (Mr. Jones).
14. Doe hired Mr. Jones, a certified public accountant, to perform accounting services

120/3 (monthly returns to be filed not later than the 20th day of the month following the month for which the taxpayer is reporting its liability).

- for Adventure. Department Ex. 11, pp. 10, 13, 28 (Mr. Jones).
15. Mr. Jones prepared Adventure's monthly ROT returns (Department Ex. 7, pp. 1, 9, 11, 13, 22-24), prepared Adventure's monthly profit and loss statements, reviewed its quarterly and annual payroll tax returns and trained Adventure's staff to maintain computerized bookkeeping records. Department Ex. 11, p. 13 (Mr. Jones).
 16. When Mr. Jones prepared Adventure's returns and other financial reports, he gave them to Doe. Department Ex. 11, pp. 19-20, 37, 47 (Mr. Jones).
 17. At Doe's express request, Mr. Jones prepared three delinquent monthly ROT returns on 12/19/94. Department Ex. 7, pp. 9-14, 22-24; Department Ex. 11, pp. 35-36, 47 (Mr. Jones). Mr. Jones had previously prepared ROT returns, at or about the time they were due, for the same months for which he prepared returns on 12/19/94. Department Ex. 11, pp. 19-20, 35-37 (Mr. Jones).
 18. After he received returns showing Adventure had collected tax monies from its customers that were required to be turned over to the Department, Doe signed checks to pay Adventure's vendors and for the corporation's other debts. Department Ex. 6 (181 Adventure checks signed by Doe). He also signed the corporation's payroll checks. Department Ex. 10, pp. 17, 19-20 (Mr. Smith).
 19. There was no competent evidence offered to show that anyone other than Doe signed Adventure's checks. *See* Department Ex. 6.

Conclusions of Law:

Under former section 13½ of the Retailers' Occupation Tax Act ("ROTA") and current section 3-7 of the Uniform Penalty and Interest Act ("UPIA"), a responsible

officer penalty liability may be imposed upon:

- (1) Any officer or employee of any corporation ... who has the control, supervision or responsibility of filing returns and making payment of ... the tax[es] ... imposed ... **and** who willfully:
- (2) fails to file such return **or**
- (3) [fails] to make such payments to the Department **or**
- (4) ... attempts to in any other manner to evade or defeat the tax

35 **ILCS** 120/13.5; 35 **ILCS** 735/3-7. When the Department introduced the NPL into evidence under the certificate of the Director, it presented prima facie proof that John Doe was personally responsible for Adventure's unpaid tax liabilities. 35 **ILCS** 120/13.5 (in effect until 12/31/93); 35 **ILCS** 735/3-7 (effective 1/1/94); Branson v. Department of Revenue, 68 Ill. 2d 247, 259-60, 659 N.E.2d 961, 967-68 (1995). 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. Branson, 168 Ill.2d at 262, 659 N.E.2d at 968. A taxpayer cannot overcome the Department's prima facie case merely by denying the accuracy of its assessments. Instead, evidence must be presented which is consistent, probable, and identified with its books and records. A.R. Barnes & Co. v. Department of Revenue, 173 Ill. App. 3d 826, 833-34, 527 N.E.2d 1048, 1053; Balla v. Department of Revenue, 96 Ill. App. 3d 293, 296-97, 421 N.E.2d 236, 239 (1st Dist. 1981).

Taxpayer offered no evidence at hearing, and, since he was not present at hearing, he offered no explanation why he should not be considered a responsible officer and employee of Adventure who willfully failed to file Adventure's monthly tax returns

and/or to pay Adventure's monthly tax liabilities. Instead, counsel for taxpayer, in a brief filed following hearing, argues, in effect, that the evidence admitted following the Department's NPL shows that Jim Doe Sr., and, to a lesser degree, the other financial backers of the Adventure, were more responsible than he was for Adventure's unpaid tax liabilities. *See* Brief of the Respondent ("Taxpayer's Brief"), (unnumbered) pp. 5-6.

Taxpayer's argument must be rejected for two fundamental reasons. First, the Illinois General Assembly intended to impose a penalty upon "[a]ny responsible officer ..." who it determines has willfully failed to act appropriately when discharging his tax reporting and/or paying responsibilities for the corporation. 35 ILCS 120/13.5; 35 ILCS 735/3-7 (emphasis added). The plain and clear text of former § 13½ of the ROTA and current § 3-7 of the UPIA reflects that there may be more than one "responsible officer or employee" for a given corporation. Estate of Young v. Department of Revenue, 316 Ill. App. 3d 366, 734 N.E.2d 945 (1st Dist. 2000) (responsible officer penalty upheld against two brothers who were officers and employees of the same corporation); *see also*, Roth v. United States, 779 F.2d 1567, 1571 (11th Cir. 1986) ("There is no dispute ... that more than one person may be a 'responsible person' for an employer.").³

That is why Jim Doe Sr.'s signature on Adventure's Illinois business registration form does not get his nephew off the hook in this case. Neither the ROTA nor the UPIA

³ The Illinois supreme court has regularly analogized terms and phrases used in § 13½ of the ROTA with judicial interpretations of similar terms and phrases used in federal "responsible person" tax penalty statutes. Branson, 68 Ill. 2d at 261-62, 659 N.E.2d at 967; Department of Revenue v. Heartland Investments, 106 Ill. 2d 19, 29, 476 N.E.2d 413, 417-18 (1977); Department of Revenue v. Joseph Bublick & Sons, Inc., 68 Ill. 2d 568, 576, 369 N.E.2d 1279, 1283 (1968). Without expressly saying so, the Illinois appellate court in Estate of Young impliedly affirmed the Department's administrative determination that the phrase "[a]ny responsible officer or employee ...", as used in § 13 ½ of the ROTA, and in § 3-7 of the UPIA, meant that more than one officer or employee might be subject to a responsible officer penalty.

requires a fact finder to choose which particular officer or employee is more responsible, or ultimately responsible, for a corporation's tax liabilities. If more than one person is found to be a responsible corporate officer or employee who acted willfully, the Illinois legislature intended that a penalty be assessed against them all (35 **ILCS** 735/3-7; Estate of Young, 316 Ill. App. 3d 366, 734 N.E.2d 945), the implied limit being that the state may collect only up to the full amount of the unpaid corporation liability. See Klein Town Builders, Inc. v. Department of Revenue, 36 Ill. 2d 301, 304, 222 N.E.2d 482, 484 (1967).

Second, the documentary evidence the Department chose to introduce in this matter, with the stipulation of taxpayer, is not inconsistent with the Department's determination that he is subject to the penalty issued here. For example, taxpayer was Adventure's secretary (Department Ex. 8, p. 3), and its general manager who was in charge of the company's day to day affairs. Department Ex. 6 (copies of 181 Adventure checks taxpayer signed); Department Ex. 10, p. 13 (Mr. Smith); Department Ex. 11, pp. 12, 23-24, 35 (Mr. Jones). The evidence also shows that, as Adventure's secretary and general manager, he was a person who had "... the control, supervision or responsibility of filing returns and making payment of ... the tax[es] ... imposed ..." by the tax acts at issue here.

Specifically, taxpayer personally hired Adventure's accountant, Mr. Jones, to prepare the corporation's monthly tax sales tax and other returns. Department Ex. 11, pp. 10, 13 (Mr. Jones). After Mr. Jones prepared Adventure's monthly returns, he gave them to taxpayer. *Id.*, pp. 28, 37 (Mr. Jones). All of the returns prepared during the applicable period reflect that Adventure had collected taxes from Adventure's customers, and the

amount of those collected taxes was taken as a deduction from Adventure's taxable gross receipts. Department Ex. 7, *passim*. Thus, the evidence confirms that taxpayer had personal knowledge that Adventure had monthly tax liabilities, as well as personal knowledge that the corporation had taken custody of the amounts of use tax Adventure collected from its customers. Department Ex. 7, *passim*; Department Ex. 11, p. 37 (Mr. Jones).

After taxpayer received those returns, however, they were, as a rule, never timely filed, and none of the tax monies shown due on those returns, or on the returns later prepared for the same months, were ever paid to the state. *See* Department Ex. 1. Nor were any of the tax monies Adventure previously collected from its customers ever paid over to the Department. *Id.* Finally, and despite having actual personal knowledge of Adventure's tax deficiencies and delinquencies, the evidence shows that taxpayer continually preferred others over the Department, by signing checks to pay Adventure's other creditors (Department Ex. 6), instead of paying the taxes he knew were due. "Under Illinois law, if a responsible officer uses collected [use] taxes to pay other creditors of the corporation, while knowing that he or she was obligated to file the returns and remit the taxes, the willful element of section 13½ is satisfied." Branson, 68 Ill. 2d at 259, 659 N.E.2d at 967. Taxpayer, therefore, acted willfully in this case.

Conclusion:

I conclude that John Doe has failed to rebut the prima facie correctness of the Department's determination that he is liable for the penalty authorized by former § 13½ of the ROTTA, and by current § 3-7 of the UPIA. Therefore, I recommend that the

Director finalize NPL no. 0000 as issued.

1/17/01
Date

Administrative Law Judge