

ST 04-13

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**

v.

**JANE DOE, as
Responsible Officer of
ABC, Inc.,**

Taxpayer

**No. 03-ST-0000
IBT No. 0000-0000
NPL Nos. 0000 and 0000
NOD Nos. 0000 and 0000**

**Kenneth J. Galvin
Administrative Law Judge**

RECOMMENDATION FOR DISPOSITION

Appearances: Ms. Catherine Glenn Joelson appearing on behalf of Jane Doe; Mr. Marc L. Muchin, Special Assistant Attorney General, appearing on behalf of the Department of Revenue of the State of Illinois.

Synopsis:

This matter comes on for hearing pursuant to Jane Doe's (hereinafter "Mrs. Doe" or "Jane") protest of Notice of Penalty Liability Nos. 0000 and 0000 (hereinafter the "NPL's") and Notice of Deficiency Nos. 0000 and 0000 (hereinafter the "NOD's"), as responsible officer of ABC, Inc. (hereinafter "ABC"). The NPL's represent a penalty liability for Retailers' Occupation Tax of ABC due to the Department for various months beginning November, 1998, through October, 2001. The NOD's represents a penalty liability for withholding taxes for various quarters beginning with the second quarter of 1998 through the first quarter of 2002. A hearing was held on

this matter on March 3, 2004, with Mrs. Doe and her husband, John Doe, providing oral testimony and Joe Blow testifying for the Department. Following submission of all evidence and a review of the record, it is recommended that the NPL's and the NOD'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. 0000, dated April 23, 2002, which shows a penalty for sales tax liability of ABC of \$338,363.70 for various months beginning November, 1998, through June, 2001, NPL No. 0000, dated April 28, 2003, for \$89,582.09 for various months beginning July, 2001, through March, 2002, NOD No. 0000 dated April 24, 2002, which shows a total liability due and owing for unpaid withholding tax of \$54,982.15 for the second, third and fourth quarter of 1998, and four quarters of 1999 and NOD No. 0000 dated April 29, 2003, for \$6,136.03 for the third and fourth quarters of 2001 and the first quarter of 2002. Tr. pp. 13-16; Dept. Ex. Nos. 1, 2, 3 and 4.
2. XXX Acquisitions was a holding company formed to be the parent company of several operating subsidiaries including ABC, owner and franchisee of six Good Restaurants, and !!!! Resource ("!!!!"), a professional management company. Tr. pp. 66-68, 90-91.
3. Mrs. Doe was vice-president of !!!! at a salary of \$50,000/year, and John Doe was president. !!!!, founded by Joe and John Blow, provided human resource services and financial and operational leadership for ABC. Mrs. Doe was secretary of ABC, John Doe was president and Joe Blow was vice-president. Tr. pp. 19-20, 52-54, 69; Dept. Ex. No. 5.
4. As vice-president of !!!!, Mrs. Doe identified and solicited candidates for positions at ABC, did pre-screening, and made recommendations on hiring to Leroy. This process was followed for

the hiring of a bookkeeper and controller. Mrs. Doe supervised the bookkeeper. Tr. pp. 79-81, 105, 124.

5. ABC's "NUC-1, Illinois Business Registration" form was completed by Mrs. Doe and signed by her husband, Leroy. The form lists Leroy as president of ABC, Joe Blow as vice-president and Mrs. Doe as secretary. Section 5 of the form requests that all tax forms for sales tax, business income tax, and withholding tax be sent to Jane Doe. Tr. pp. 34-35, 67-68; Dept. Ex. No. 5.
6. The State of Illinois "Domestic Corporation Annual Reports" for 1998, 1999, and 2000, all signed by Leroy show Leroy as president and treasurer, Mrs. Doe as secretary and Joe Blow as director. The 2000 Report was signed on December 21, 1999. Tr. pp. 36-38; Dept. Ex. No. 6.
7. A bank authorization for ABC's account number 0000000000 opened July of 1996 at Bank, lists authorized signatures of John Doe, Jane Doe and Joe Blow. The authorization states that "one" signature is necessary to validate checks/withdrawals. A "Letter of Direction," superceding all previous authorizations, dated July 28, 1997, on the same bank and account number lists the same authorized signers, with authority to sign checks singly in unlimited amounts. Tr. pp. 38-40; Dept. Ex. No. 7.
8. A Bank "Repetitive Funds Transfer Setup," dated July 3, 1996, authorizes the transfer of a maximum amount of \$25,000 from ABC's account number 0000000000000 at First Bank to ABC's account at National Bank. Jane Doe is listed as the "company contact name" on the form. Tr. pp. 40-41; Dept. Ex. No. 8.
9. A Board of Directors "Corporate Resolution" for ABC dated July 3, 1996, signed by Jane Doe as secretary authorizes "any one" corporate officer including the secretary to "sign ... any and all checks, drafts, and other orders for the payment of money, including orders or directions in

informal or letter form, against any funds at any time...” and “issue written, electronic or oral instructions with respect to the transfer of funds” of ABC on deposit with First Bank. Tr. pp. 42-43; Dept. Ex. No. 9.

10. In a letter dated July 26, 1996 from John Doe to Operations Manager, Joe Blow wrote that “[J]ane’s responsibilities will include the record keeping for all human resource areas (e.g., workmen’s comp, unemployment, payroll, policy manuals, fringe benefits) and until a controller can be hired, the processing of all daily accounting functions.” Tr. pp. 28, 43-46; Dept. Ex. No. 10.

Conclusions of Law:

There are two types of taxes at issue here. The Department seeks to impose personal liability on Mrs. Doe pursuant to Section 1002(d) of the Illinois Income Tax Act for the failure to pay withholding taxes. 35 ILCS 5/1002(d). In addition, the Department seeks to impose personal liability on Mrs. Doe for failure to remit Retailers’ Occupation Tax (“ROT”).

The personal liability penalty for both taxes is imposed by 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.

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.

The admission into evidence of the NPL’s and NOD’s establishes the Department’s *prima facie* case with regard to both the fact that Mrs. Doe was a “responsible” officer and the fact that she “willfully” failed to file and/or pay. Branson v. Department of Revenue, 168 Ill. 2d 247, 262 (1995). Once the Department has established a *prima facie* case, the burden shifts to the taxpayer to overcome the case. Masini v. Department of Revenue, 60 Ill. App. 3d 11 (1st Dist. 1978).

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 (7th 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.*

I conclude, based on the testimony and evidence admitted at the evidentiary hearing, that Jane Doe was a responsible officer of ABC. Mrs. Doe was listed as “Secretary” on ABC’s “NUC-1, Illinois Business Registration” form filed on August 15, 1996. Section 5 of the NUC-1 requests that all State of Illinois tax forms, including those for “sales tax, business tax and withholding tax” be sent to Jane Doe. Dept. Ex. No. 5. The State of Illinois “Domestic Corporation Annual Reports” for ABC for 1998, 1999, and 2000 list Jane Doe as secretary. Dept. Ex. No. 6. In addition to her position as secretary of ABC, Mrs. Doe was vice-president of !!!! Resource, at a

salary of \$50,000/year. Tr. pp. 53-54. !!!! provided human resource services and financial and operational leadership for ABC. Tr. p. 69.

Mrs. Doe's testimony minimized her responsibilities and involvement at ABC and !!!!. She "believed" she was corporate secretary at ABC. Tr. p. 20. She described her responsibilities at ABC as "[O]n occasion something for something for the bank; very clerical kind of role." Tr. p. 20. When asked whether her duties at !!!! "entailed any financial responsibilities for ABC" she responded "[O]nly as it related to making decisions about the uniforms needed to be ordered, this is what the cost is going to be; not determining whether or not bills got paid." Tr. p. 22. John Doe, Jane's husband, also minimized her responsibilities: "Well, through her capacity as the VP in human resources of !!!! Resources, her job for the clients was to continue to assist them in all of their personnel activities." When asked if Jane's duties included any "fiscal responsibility for ABC," Mr. Doe responded "[N]o." Tr. p. 72.

Mr. and Mrs. Doe's testimonies were self-serving and not credible. Their testimonies were effectively contradicted by a letter written by Mr. Doe to John Griffiths, Operations Manager for ABC, and by the testimony of Mr. Joe Blow, Vice-President of ABC. In the letter from Mr. Doe, dated July 26, 1996, he states that "[S]heryl's responsibilities will include the record keeping for all human resource areas (e.g., workmen's comp, unemployment, payroll, policy manuals, fringe benefits) and until a controller can be hired, the processing of all daily accounting functions." Dept. Ex. No. 10. Mr. Doe's description of Jane's responsibilities shows clearly that she exercised significant control over the business affairs of ABC. Additionally, I must conclude, based on Jane's responsibility for "payroll" and the "processing of all daily accounting functions," that she participated in decisions regarding the payment of creditors and disbursement of funds and that she was in a position to determine whether taxes were being remitted to the State. Monday, supra.

Mr. Doe testified that Mrs. Doe did not have supervisory authority over the bookkeeper and controller and that he supervised these two positions. Tr. pp. 73-74. This testimony was effectively contradicted by Mr. Blow who testified that Mrs. Doe was involved in the management of ABC and !!!!. "I know she was involved in the human resource areas of – over personnel. I believe she oversaw some bookkeeper that worked for the management companies. So she was probably in charge of things like accounts payable and receivable and keeping the office type stuff running and bookkeeping function in the [human resource] area." Tr. pp. 96-97. "Well, she did do bookkeeping work and people reported to her. She did have bookkeeping experience." Tr. p. 114. Mr. Blow testified that Mrs. Doe was involved with preparing information for tax returns. "Because she, to my knowledge, was involved in supervising the bookkeeping and office areas. They would have been the ones that would have accumulated the information for a return." Tr. pp. 104-105.

According to Mr. Blow, Mrs. Doe could hire and fire people. Tr. p. 97. When asked in cross-examination why he thought the bookkeepers reported to Mrs. Doe, Mr. Blow responded "[B]ecause she hired and fired them." He was then asked "[W]hy did you think Jane hired and fired them?" Mr. Blow responded: "[B]ecause I saw her do it." Tr. p. 124. This testimony goes considerably farther than Mr. Doe's description of Jane's responsibilities with regard to hiring. According to Mr. Doe, Jane merely identified and solicited candidates, did pre-screening and made recommendations to him. Tr. pp. 79-81. Mr. Doe again appears to be minimizing Jane's responsibilities. Mr. Blow also saw Mrs. Doe attend meetings of the "restaurant people who would come in and use our conference room areas for their meetings, you know, restaurant management and stuff." Discussed at these meeting were "... all those kinds of operational things that the individual restaurant managers were responsible for." Tr. p. 115. I conclude based on Mr. Blow's testimony, Mr. Doe's letter dated July 26, 1996, and his apparent attempt to minimize Jane's

involvement in ABC, that her responsibilities were significantly more than simply deciding “about the uniforms needed to be ordered” and “something for something for the bank” which is how she characterized her role.

The NPL’s and NOD’s at issue in this case cover months and quarters in years 1998, 1999, 2001 and 2002. As discussed more fully below, Mrs. Doe had check signing authority for ABC. She testified that her employment with !!!! ended in “either late 1999 or early 2000.” Tr. p. 23. According to Mrs. Doe’s testimony, she did not have check-signing authority for ABC in 2001 and 2002. Tr. pp. 29, 31. She testified that !!!! “stopped operating” because John Doe just stopped the business. Tr. p. 48. She described her role at ABC during 2001-2002, as “[T]he wife of the president. I had no role.” Tr. pp. 31-32. It must be noted that ABC’s “Domestic Corporation Annual Report” effective for the year 2000 listing Mrs. Doe as “secretary” and signed by John Doe was filed on January 6, 2000. Dept. Ex. No. 6.

Not one document supporting her testimony was offered by Mrs. Doe at the evidentiary hearing. No corporate documents for either ABC or !!!! were admitted as evidence showing a corporate dissolution, resignation from office, changes in officers, or minutes of corporate meetings. No document was submitted showing that !!!! “stopped operating” in “either late 1999 or early 2000” as Mrs. Doe testified. No document was admitted showing that Mrs. Doe’s position as “secretary” of ABC ended during the period at issue here. No document was admitted showing that Mrs. Doe’s check-signing authority was curtailed at any time. Mr. Blow testified that “[W]hen we closed, [Mr. and Mrs. Doe] removed all the management company records.” Tr. p. 110. Assuming this is so, it is inconceivable that Mrs. Doe did not have available one document showing that her responsibilities at !!!! or ABC changed or ended over the period covered by the NOD’s and NPL’s. Without any documentary evidence to the contrary, I must conclude that Mrs. Doe held the

position of secretary of ABC and vice-president of !!!! during the entire time period at issue in this hearing.

Mrs. Doe “believed” she had the power to sign checks for ABC but she didn’t “recall ever having done so.” If she did sign checks, “[I]t would have been because someone was not available and they would have asked me to sign it.” Tr. p. 23. Mr. Doe testified that Mrs. Doe had check signing authority for ABC but he could not recall whether Mrs. Doe ever signed a check. Tr. pp. 69-70. Their testimony is again effectively rebutted by Mr. Blow who testified that Mrs. Doe disbursed funds, and “as far as [he] knew,” paid creditors and wrote checks “at one time or another for all companies.” Tr. pp. 103-104.

The evidence is conclusive that Mrs. Doe had the power to sign checks. A bank authorization for ABC’s account number 5001246483 opened July of 1996 at National Bank, lists authorized signatures of John Doe, Jane Doe and Joe Blow. The authorization states that “one” signature is necessary to validate checks/withdrawals. A “Letter of Direction,” superceding all previous authorizations, dated July 28, 1997, on the same bank and account number lists the same authorized signers, with authority to sign checks singly in unlimited amounts. Tr. pp. 38-40; Dept. Ex. No. 7. A First Bank “Repetitive Funds Transfer Setup,” dated July 3, 1996, authorizes the transfer of a maximum amount of \$25,000 from ABC’s account number 1115000441126 at First Bank to ABC’s account at National Bank. Jane Doe is listed as the “company contact name” on the form. Tr. pp. 40-41; Dept. Ex. No. 8. A Board of Directors “Corporate Resolution” for ABC dated July 3, 1996 signed by “Jane Doe” as secretary authorizes “any one” corporate officer including the secretary to “sign ... any and all checks, drafts, and other orders for the payment of money, including orders or directions in informal or letter form, against any funds at any time...”

and “issue written, electronic or oral instructions with respect to the transfer of funds” of ABC on deposit with First Bank. Tr. pp. 42-43; Dept. Ex. No. 9.

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 titles of vice-president, treasurer or secretary, 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).

No copies of cancelled checks were admitted as evidence at the hearing. It is clear, however, that Mrs. Doe had the authority to write checks singly in unlimited amounts on ABC’s account at American National Bank. Dept. Ex. No. 7. It is also clear that Mrs. Doe had the authority to write checks singly “against any funds at any time” on ABC’s accounts at First Bank. Dept. Ex. No. 8. Mrs. Doe could have written a check on either account for taxes. Although Mrs. Doe shared this authority with Mr. Doe and Mr. Blow, this does not make her less of a “responsible” officer or indicate that she was not responsible. 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 (5th Cir. 1979). Responsibility is a matter of status, duty and authority, not necessarily knowledge. Mazo v. United States. 591 F.2d 1151 (5th Cir. 1979). With the status of secretary of ABC, vice-president of !!!!, and the authority to write checks singly in unlimited amounts and against any funds, Mrs. Doe was a responsible officer.

Mrs. Doe testified that she did not discuss ABC's financial situation with her husband until the end of her employment. Tr. p. 27. Mr. Doe was asked whether he discussed "any of the fiscal issues that ABC was having with Jane Doe at home?" He responded: "No, we did not." Tr. p. 77. According to Mrs. Doe, she did not become aware that ABC was not paying its taxes until October of 1999, "when my husband was resigned from all his positions." Tr. p. 28.

The State of Illinois "Domestic Corporation Annual Report" effective for year 2000 was filed with the Secretary of State on January 6, 2000. It lists Jane Doe as secretary and is signed by John Doe as president. Mrs. Doe described her role at ABC during 2001-2002 as "the wife of the president." Apparently, Mr. Doe did not resign as president of ABC in October of 1999. With Mr. Doe remaining in his position as president and with Mrs. Doe aware after October, 1999, that taxes were not being paid, it is inconceivable that she never once questioned whether sales and withholding taxes were being paid, never once checked ABC's bank statements to see if taxes had been paid, and never once asked her husband if he knew whether tax returns were being filed and taxes paid during years 2001 and 2002, which are included in the NPL's and NOD's. No documentary evidence was admitted showing that Mrs. Doe's authority to sign checks was abrogated. In years 2001 and 2002, aware that taxes were not being paid and with the authority to write checks, Mrs. Doe could have written a check for taxes.

The evidence shows then that Mrs. Doe was in a responsible position with ABC and !!!! in which she 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 (1st Dist. 1987). When the Department established its *prima facie* case, the burden shifted to Mrs. Doe to overcome the presumption of responsibility through

sufficient evidence. Branson, supra. Not one document was admitted by Mrs. Doe in support of her position. Without any documentary evidence to support her case, and because the testimony from Mrs. and Mr. Doe with regard to her responsibilities in the business is contradictory and not credible, Mrs. Doe has failed to rebut the Department's presumption that she was a responsible party under the statute.

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's and NOD's into evidence. Branson v. Dept. of Revenue, 168 Ill. 2d 247 (1995). 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 (4th Dist. 1989). Under this broad interpretation, 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 also 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 (7th Cir. 1970) *cert. denied* 400 U.S. 821 (1970).

Mrs. Doe's conduct was willful under each of the above benchmarks. Section 5 of ABC's "NUC-1, Illinois Business Registration" form filed on August 15, 1996, requests that all State of

Illinois tax forms, including sales tax, business tax and withholding tax be sent to Jane Doe. Dept. Ex. No. 5. This request is consistent with Mr. Doe's description of his wife's responsibilities as "payroll" and the "processing of all daily accounting functions." Dept. Ex. No. 10. The request is also consistent with Mr. Blow's testimony that Mrs. Doe supervised the bookkeeper and did bookkeeping work herself. Tr. pp. 104-105, 114.

With these responsibilities, Mrs. Doe was certainly in a position to inspect corporate records and keep informed of the status of the tax returns and payments. Mrs. Doe's failure to do so constitutes willfulness under the statute. If Mrs. Doe delegated her responsibilities to the bookkeepers she supervised, her conduct was still willful. Responsible officers are liable if they delegate bookkeeping duties to third parties and fail to inspect corporate records or otherwise fail to keep informed of the status of the tax returns and payments. Branson, *supra* at 267. If the taxes were not paid by a bookkeeper that Mrs. Doe supervised, then I must conclude that they were not paid with her approval which satisfies the willful requirement under the statute. A responsible person cannot escape his obligation to ensure that taxes are paid simply by delegating the responsibility to others. Wright v. United States, 809 F.2d 425 (7th Cir. 1987).

Mrs. Doe testified that she became aware that ABC was not paying its taxes in October of 1999. Tr. p. 28. The NPL's and NOD's at issue in this case cover, among other years, 2001 and 2002. There was no testimony or documentary evidence showing any positive steps that Mrs. Doe took to pay the taxes. No documentary evidence was presented showing that she resigned her positions at ABC or !!!!, and her testimony alone is not sufficient for me to conclude that she did, in fact, resign. No documentary evidence was presented showing that Mrs. Doe's check signing authority was curtailed at any time. In years 2001 and 2002, as the unpaid taxes continued to accumulate, Mrs. Doe could have written a check for taxes. After October of 1999, Mrs. Doe failed

to investigate or correct mismanagement when she was on notice that taxes were not being remitted to the Government. In failing to do so, she disregarded the obvious risk that taxes were not being paid. Mrs. Doe's failure to take action is sufficient to find willfulness under the statute and I conclude that she has failed to rebut the Department's presumption that she willfully failed to pay ABC's sales and withholding taxes.

WHEREFORE, for the reasons stated above, it is my recommendation that Notice of Penalty Liability Nos. 0000 and 0000 and Notice of Deficiency Nos. 0000 and 0000 issued against Jane Doe be finalized as issued.

Kenneth J. Galvin
Administrative Law Judge

May 10, 2004