

ST 04-17

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)	Docket No.	03-ST-0000
OF THE STATE OF ILLINOIS)	IBT No.	0000-0000
v.)	NPL No.	0000
JANE DOE , as responsible)		
officer of ABC, Inc.,)	John E. White,	
Taxpayer)	Administrative Law Judge	

RECOMMENDATION FOR DISPOSITION

Appearances: Deborah Petro, appeared for Jane Doe; John Alshuler, Special Assistant Attorney General, appeared for the Illinois Department of Revenue.

Synopsis:

This matter arose when Jane Doe (“taxpayer” or “Doe”) protested a Notice of Penalty Liability the Illinois Department of Revenue (“Department”) issued to her as a responsible officer of ABC, Inc. Notice of Penalty Liability (“NPL”) number XXXX assessed a penalty equal to ABC, Inc.’s unpaid Retailers’ Occupation Tax (“ROT”) and Use Tax (“UT”) liabilities regarding the months of December 2001 through April 2002. The penalty was a personal liability penalty, issued pursuant to § 3-7 of Illinois’ Uniform Penalty and Interest Act (“UPIA”).

Doe was the only person to testify at hearing, and she offered books and records into evidence. I have reviewed that evidence, and I am including in this recommendation findings of fact and conclusions of law. I recommend that the matter be resolved in taxpayer’s favor.

Findings of Fact:

1. On or about May 10, 2001, two individuals entered into a written agreement to

- create ABC Partnership (“ABC”), pursuant to the Illinois Uniform Partnership Act. Taxpayer Ex. 2 (copy of ABC’s General Partnership Agreement), ¶¶ 1-3 (I will cite to this exhibit substituting ordinary numbers for the roman numerals used in the partnership agreement); Hearing Transcript (“Tr.”), p. 23. The two partners in ABC were John Doe and Joe Blow (“Blow”). Taxpayer Ex. 1, ¶ 1.
2. ABC’s business was to operate a restaurant in Anywhere County, Illinois. Taxpayer Ex. 1, ¶ 2.
 3. During the period at issue, Doe was married to John Doe. Tr. p. 23.
 4. During the same period, Doe was employed as a manager of the restaurant. Tr. p. 25.
 5. Doe’s duties included managing the wait staff, including making out their schedules. Tr. p. 25. She also closed the registers at night, and ran a final receipts tape. Tr. pp. 25-26. She put each night’s receipts and cash register tapes in a sealed envelope, put the date on the envelope, and then put it aside to be picked up by Blow. *Id.*
 6. Blow was ABC’s managing partner, who, pursuant to the partnership agreement, had, “full power of management and control of the conduct and operation of the partnership business and affairs.” Taxpayer Ex. 1, ¶ 11(a).
 7. Paragraph 11 of the partnership agreement provided, in part, that, “[a]ll checks, drafts or other withdrawal slips drawn on partnership accounts must be signed by Joe Blow.” Taxpayer Ex. 2, ¶ 11(g).
 8. Blow signed, as taxpayer, each of the returns ABC filed regarding the months at issue. Taxpayer Group Ex. 3 (copies of the restaurant’s five form ST-1’s, sales

- and use tax returns, filed regarding the period at issue).
9. An accountant prepared and signed, as the preparer, each of ABC's ST-1 returns filed for the periods at issue. Taxpayer Group Ex. 3 (preparer's signature on each return); Tr. pp. 35-36 (Doe, identifying accounting firm).
 10. On or about November 7, 2001, the Department received a form NUC-1, Illinois Business Registration Application, regarding the restaurant operated by ABC. Taxpayer Ex. 1 (copy of NUC-1, Illinois Business Registration Application); Tr. pp. 25-26.
 11. That NUC-1 form states that the operator of the restaurant was ABC, Inc. Taxpayer Ex. 1, p. 1. The form identifies the following names as ABC's officers: Blow, president; John Doe, vice-president; and Doe, secretary and treasurer. *Id.*
 12. Doe also signed a section of the NUC-1 form which provided, "I accept personal responsibility for the filing of returns and the payment of taxes due[.]" Taxpayer Ex. 1, p. 2. On the last page of the form, she signed her name under a statement that provided, "Under penalties of perjury, I state that I have examined this application and, to the best of my knowledge, it is true and correct." *Id.*, p. 4.

Conclusions of Law:

When the Department introduced the NPL into evidence under the certificate of the Director, it presented prima facie proof that Doe was personally responsible for ABC's unpaid tax liabilities. 35 ILCS 735/3-7; Branson v. Department of Revenue, 68 Ill. 2d 247, 260, 659 N.E.2d 961, 968 (1995) ("by operation of the statute, proof of the correctness of such penalty, including the willfulness element, is established by the Department's penalty assessment and certified record relating thereto."). 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. *Id.*

Section 3-7 of the UPIA provides that a personal liability 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 ... in any other manner to evade or defeat the tax

35 ILCS 735/3-7 (emphasis and brackets added).

Here, Doe contests the Department's determination that she was an officer or employee who had the control, supervision or responsibility for filing returns for the corporation, or for paying the corporation's taxes. She initially claims that she was not an employee or officer of any corporation, because ABC never, in fact, incorporated. Tr. pp. 24-25 (Doe), 45-46 (closing argument). Doe, however, failed to corroborate that testimony with documentary evidence. Such evidence could have easily been obtained through the Illinois Secretary of State's Office, by requesting a search of its corporate database. Thus, taxpayer has not rebutted the presumptive correctness of the Department's determination that she was an officer of ABC.

Doe also argues that she was not a *responsible* officer of ABC. Tr. pp. 27-30, 32-33 (Doe), 46-48 (closing argument). Specifically, Doe argues that she lacked any actual responsibility or control over filing the corporation's returns or for paying the

corporation's tax liabilities, nor did she supervise those who had such authority. Tr. pp. 46-48 (closing argument). This argument is somewhat corroborated by the partnership agreement. Taxpayer Ex. 2. It is corroborated more by the fact that she did not sign any of the returns that ABC filed regarding the period at issue. Taxpayer Group Ex. 3.

But Doe's argument that she was not a responsible officer is utterly dashed by her own signatures on the NUC-1 form. *See* Taxpayer Ex. 1. Doe, and not the Department, offered that document into evidence. Tr. pp. 23-24. In one section of the form, Doe printed her name, address, telephone number, social security number and corporate title, and then wrote her signature under a pre-printed statement that said, "I accept personal responsibility for the filing of returns and the payment of taxes due[.]" Taxpayer Ex. 1, p. 2. In another section of that form, she signed her name under a statement that provided, "Under penalties of perjury, I state that I have examined this application and, to the best of my knowledge, it is true and correct." Taxpayer Ex. 1, p. 4.

When answering questions at hearing about her prior statements on that form — statements that are so obviously inconsistent with her position at hearing — Doe testified that she signed the NUC-1 form without reading it. Tr. p. 24. That testimony is incredible. Basic logic requires me to conclude that, at a minimum, she had to read the form to know which sections to complete, and where to sign it. Doe simply could not have completed the various sections of the form without reading it. She also testified that she prepared the form pursuant to the specific directions of Blow, to whom she spoke during a cell phone call, while he and her husband were meeting with a contractor. Tr. pp. 23-24. But that testimony makes it only clearer that Doe must have read at least some parts of the form to Blow, i.e., the parts she needed help with, to obtain directions on how

to complete it.

Moreover, completing a NUC-1 form is the only way to obtain a business registration number from the Department. *See* Taxpayer Ex. 1, p. 1, § 9. That registration number, in turn, is required to conduct a retail business in Illinois. 35 **ILCS** 120/2a. The Department makes many decisions based on the contents of a completed form NUC-1, pursuant to its statutory obligations to efficiently and effectively administer Illinois' tax acts. *Id.*; 20 **ILCS** 2505/2505-25 (power to enforce the provisions of the ROTA); 20 **ILCS** 2505/2505-380 (power to issue and revoke certificates of registration); Taxpayer Ex. 1, *passim* (questions asked on form). The Department decided to issue a business registration number to ABC, here, based on Doe's sworn statements on that form. *See* Department Ex. 1; Taxpayer Group Ex. 3 (registration number shown). Doe cannot dismiss the effect of her own written statement that she was a responsible officer of ABC, merely by testifying that she did not read the form before she signed it.

As a final note on this particular issue, Doe's assertion that she was not a responsible officer seems to be premised primarily on her understanding that there can be only one person responsible for filing a corporation's tax returns or paying its taxes. The books and records admitted here certainly tend to support Doe's implied argument that Blow may have been *more* responsible than she may have been for such actions. But the statute and Illinois case law are clear that there can be more than one officer or employee responsible for filing a corporation's returns, and for paying its taxes. 35 **ILCS** 735/3-7; Estate of Young v. Department of Revenue, 316 Ill. App. 3d 366, 734 N.E.2d 945 (1st Dist. 2000) (affirming the agency's determination that three persons were responsible officers and/or employees for a single corporation). Doe's knowing acts of signing

ABC's registration application under oath, and naming herself as the person who "accept[ed] personal responsibility for the filing of returns and the payment of taxes due" have profound relevance to the issue of whether she was a responsible officer and/or employee of ABC. In re Cook County Treasurer, 166 Ill. App. 3d 373, 379, 519 N.E.2d 1010, 1014 (1st Dist. 1988) ("Contradictory statements of a party constitute substantive evidence against the party of facts stated."). The documentary evidence strongly supports the Department's determination that Doe was a responsible officer of ABC.

Doe's last argument is that the penalty should not be assessed against her because she did not willfully fail to file ABC's returns, or willfully fail to pay ABC's Illinois sales and use tax liabilities. Tr. pp. 34-36. She begins this argument by stressing that she had no basis for knowing that ABC's taxes were not being paid. A finding of willfulness, however, does not require a showing of actual knowledge of nonpayment. Estate of Young, 316 Ill. App. 3d at 375, 734 N.E.2d at 952. Reckless disregard for obvious or known risks will suffice. *Id.*

The question of willfulness was addressed in both Estate of Young and in Branson. In Estate of Young, the evidence showed that:

... there was a system in place for paying taxes, as well as a policy of paying taxes first. At some point it may have been reasonable to rely on that system. However, by 1991, it was common knowledge that the company was in serious financial difficulty and bills were going unpaid. Although [the corporation's] system for paying taxes may have been good on paper, Alan[, the corporation's vice-president,] knew that the accounting was "screwed up" and that the comptrollers they hired could not seem to straighten things out.

Estate of Young, 316 Ill. App. 3d at 376-77, 734 N.E.2d at 953. Based on those facts, the Illinois appellate court concluded that "it was not clear error for the Department to find

that, by 1991, the [taxpayers] were on notice and that they had a duty at that time to insure that ROT returns were filed and the taxes paid.” *Id.*

Similar facts existed in Branson. There, the taxpayer named as a responsible officer owned a restaurant. Branson, 68 Ill. 2d at 250, 659 N.E.2d at 963. He had a bookkeeper who handled the restaurant’s finances, including the payment of taxes. *Id.* at 252, 659 N.E.2d at 964. During the summer of 1986, the restaurant had cash flow problems, but the situation improved in the fall, when seasonal customers returned. *Id.* In December, the bookkeeper went on vacation and the taxpayer took over the finances. *Id.* Soon after, a bank official contacted him to inform him that the restaurant’s bank account was overdrawn. *Id.* Suppliers began to complain that the restaurant's checks were being returned for insufficient funds. *Id.* Taxpayer discovered a drawer of unpaid bills and discovered that the bills had not been paid in three months, although, at that time, he had not found any evidence of unpaid taxes. *Id.* The business operated for a short time on a cash-only basis and then ceased operations in January 1987. *Id.* The Department of Revenue then informed taxpayer that there was a tax deficiency. *Id.* Based on these facts, the Court held that, “[W]hen [taxpayer] learned that the corporate account was overdrawn and unpaid bills were piling up, [taxpayer] was on notice that the corporation’s finances were seriously compromised. [Taxpayer] had a concomitant obligation to insure that the retailers’ occupational tax returns were filed and the taxes remitted from that time forward, as he wound down the business.” *Id.* at 264, 659 N.E.2d at 969.

Regarding the question of willfulness in this case, Doe testified that she understood that an accounting firm would prepare ABC’s sales tax returns, and that Blow would be the person to actually file them. Tr. pp. 35-36. That is exactly what happened.

Taxpayer Group. Ex. 3. She testified that, at no time during her employment at the restaurant was she asked anything about the returns by either Blow or by ABC's accountant, and that neither the accountants nor Blow ever asked her to sign those returns or to pay the taxes shown due on them. *Id.* Additionally, Doe testified that during the course of her duties, she knew that she and her staff were being paid. Tr. p. 34. She also testified that she knew that vendors were delivering goods to the restaurant and continuing to accept business checks as payment for those goods. Tr. pp. 30-31. Finally, she testified that the first time she found out that the corporation's taxes were not paid was about nine months after she stopped working for the restaurant, when she received a certified letter from the Department. Tr. pp. 34, 36. Her testimony regarding these points was clear, unchallenged and not so improbable as to be unworthy of belief. *See Fillichio v. Department of Revenue*, 15 Ill. 2d 327, 334, 155 N.E.2d 3, 7 (1958).

The returns that ABC filed are consistent with Doe's testimony regarding why, during the period at issue, she did not know, or have any reason to believe, that ABC's returns were not being filed, or that the tax shown due on them was not being paid. Those returns corroborate Doe's description of a system in which Blow, ABC's president and ABC's managing partner, would supervise the preparation and filing of ABC's tax returns. Taxpayer Group Ex. 3. Similarly consistent with Doe's testimony on these points is the partnership agreement, which provides that only a managing partner was authorized to sign checks drawn on partnership bank accounts, to pay partnership business debts. *See Taxpayer Ex. 2*, ¶¶ 11(g), 12(i). Further, the period at issue was only five months long. Department Ex. 1; Taxpayer Group Ex. 3. It does not seem unreasonable, at least for the first few months ABC conducted business, for Doe to have

relied on ABC's president to perform the duties he assumed as managing partner. *See* Taxpayer Ex. 2. The evidence does not support a conclusion that Doe, during the period at issue, was confronted with facts showing that ABC was not paying its taxes, or its other obligations.

Finally, in Branson, 68 Ill. 2d at 267, 659 N.E.2d 971, the Illinois Supreme Court noted that it did "not intend to imply that a corporate officer who is responsible for filing retailers' occupation tax returns and remitting the collected taxes may avoid personal liability ... merely by delegating bookkeeping duties to third parties and failing to inspect corporate records or otherwise failing to keep informed of the status of the retailers' occupation tax returns and payments." But there is no evidence, in this case, that Doe, ABC's secretary/treasurer, delegated to Blow, ABC's president, the duties to file ABC's returns, or to pay its taxes. Similarly, no evidence shows that Doe knew, or recklessly disregarded a known or obvious risk, that ABC was not paying its Illinois tax liabilities. Thus, I conclude that she did not willfully fail to pay the tax due on ABC's returns.

Conclusion:

Based on the documentary evidence admitted at hearing, and on those credible parts of Doe's testimony that were closely associated with those books and records, I conclude that Doe rebutted the Department's prima facie correct determination that she willfully failed to pay ABC's Illinois tax liabilities. Therefore, I recommend that the Director cancel NPL No. XXXX.

Date: 10/14/2004

John E. White
Administrative Law Judge