

ST 04-5

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.

JOHN DOE,

Taxpayer

**No. 02-ST-0000
IBT: 0000-0000
FEIN: 00-0000000
SSN: 000-00-0000
IBT: 0000-0000
NPL: 00000
NOD: 0000
Charles E. McClellan
Administrative Law Judge**

RECOMMENDATION FOR DECISION

Appearances: George Foster, Special Assistant Attorney General, for the Illinois Department of Revenue (the “Department”); James L. Lasenby, The Lasenby International Group, LLC for John Doe (“Taxpayer”).

Synopsis:

This matter involves a Notice of Penalty Liability and a Notice of Deficiency. The Notice of Penalty Liability was issued by the Department on January 19, 2000 assessing a penalty against Taxpayer as a responsible officer or employee who willfully failed to pay sales taxes for ABC, Ltd., d/b/a/ Mama’s Italian Restaurant (“ABC”), as required by statute for the months of November and December of 1997, and January, February and March of 1998. The record establishes that he was the responsible person and that the

taxes were willfully not paid. Therefore, he is personally liable for the penalty imposed by section 3-7 of the Uniform Penalty and Interest Act. 35 ILCS 735/3-7¹.

This matter also involves a Notice of Deficiency issued by the Department to Taxpayer on January 25, 2000 assessing penalties provided in § 1002(d) of the Illinois Income Tax Act and § 3-7(a) of the Uniform Penalty and Interest Act. The penalties are assessed against Taxpayer as a responsible party for failure to collect and pay over to the Department withholding taxes of employees of ABC, Ltd., for the 4th quarter of 1997 and the 1st quarter of 1998 as required by IITA § 701. The record establishes that he was the responsible party and that he failed to pay over the taxes set forth in the Notice of Deficiency.

Taxpayer failed to timely file protests to either the Notice of Penalty Liability or to the Notice of Deficiency. As a result the notices became final and the Department began collection proceedings against Taxpayer. On August 19, 2002, Taxpayer sent a letter to the Chief Administrative Law Judge requesting that the matter be reopened. The request was granted by letter dated September 23, 2002.

An Initial Status Conference was held in the Department's Office of Administrative Hearings on October 8, 2002. An evidentiary hearing was set by order entered on July 17, 2003. The evidentiary hearing was held on October 8, 2003.

At the conclusion of the hearing, the Taxpayer's counsel stated that he wanted to file a post-hearing brief. A briefing schedule was set by order entered on November 3, 2003 under the terms of which Taxpayer's brief was due on November 24, 2003, and the

¹ Unless otherwise noted, statutory references to the Illinois Income Tax Act, 35 ILCS 5/101, *et seq.*, will be noted as "IITA §". References to the Retailers' Occupation Tax Act, 35 ILCS 120/1, *et seq.*, will be noted as "ROTA §". References to the Uniform Penalty and Interest Act, 35 ILCS 735/3-1 through 11, will be noted as the "UPIA §".

Department's response was due on December 17, 2003. Taxpayer's counsel never filed a brief, so the Department had no brief to respond to. As a result of the failure of the Taxpayer's counsel to file a brief, or ask for additional time in which to do so, I am deeming his opportunity to file a brief to be waived.

I recommend that the Notice of Deficiency and the Notice of Penalty Liability issued in this case be made final.

Findings of Fact:

1. The Department issued Notice of Penalty Liability No. 0000 to the Taxpayer on January 19, 2000 assessing penalties pursuant to 35 ILCS 735/3-7 for the months of November 1997 through March 1998. Dept. Ex. No. 1.
2. The Department issued Notice of Deficiency No. 0000 to the Taxpayer on January 25, 2000 assessing penalties under IITA § 1002(d) for the fourth quarter of 1997 and the first quarter of 1998. *Id.*
3. An Illinois Business Registration form (NUC-1) bearing the signature date of August 8, 1997 for a business operating under the trade name of *Mama's Italian Restaurant* was filed with the Department. Dept. Ex. No. 4.
4. The NUC -1 form listed a business named *ABC, Ltd.* as the corporate name of the business and it bore Taxpayer's signature on the signature affidavit on page 4 of the form and as the person accepting personal responsibility for the filing of tax returns and for the payment of taxes due on page 2 of the form. *Id.*
5. ABC Ltd., d/b/a Mama's Pizzeria, filed Illinois Department Of Revenue Sales and Use Tax Returns (Form ST-1) for the months of July through December of 1997 and February and March of 1998. Each one of these forms bears the signature of

Taxpayer in the attestation clause. No payments were made of the amounts shown to be due on the forms. Dept. Ex. No. 2.

Conclusions of Law:

There are two issues in this case. The first issue is whether Taxpayer is personally liable for the statutory penalty provided for failure to pay the sales tax collected by ABC during the periods set forth in the Notice of Penalty Liability issued to Taxpayer. The second issue is whether Taxpayer is personally liable for the statutory penalty provided for failure to pay over the withholding tax liability of ABC for the periods specified in the Notice of Deficiency issued to Taxpayer. The operative statutory provision that imposes personal liability for the taxes due under the ROTA and the IITA is Section 3-7(a) of the Uniform Penalty and Interest Act (“UPIA”). In relevant part, it 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 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. Proof of that determination by the Department shall be made at any hearing before it or in any legal proceedings by reproduced copy or computer printout of the Department's record relating thereto in the name of the Department under the certificate of the Director of Revenue
35 ILCS 735/3-7(a)

In this case, once the Department introduced into evidence the Notice of Penalty Liability and the Notice of Deficiency under the Director's certificate, its *prima facie* case was made on the questions of responsibility and willfulness. *Branson v. Dept. of Revenue*, 168 Ill.2d 247, 261-262 (1995). The burden then shifted to the Taxpayer to

overcome the Department's case. *Id.* To rebut the Department's *prima facie* case, Taxpayer had to come forward with sufficient evidence to disprove the Department's case. *Id.* at 262.

Taxpayer offered into evidence the letter he sent to the Chief Administrative Law Judge requesting that this matter be reopened. Dx 1². He also offered into evidence an affidavit signed by Ron Doe, Taxpayer's father, in which the affiant accepted responsibility for filing tax returns and paying taxes. Dx. 2. The affiant did not appear at the hearing, however, even though Taxpayer "believes" that he resides in Anywhere. Tr. p. 44. Therefore, on objection by the Department, the affidavit was excluded as being hearsay. Upon request of Taxpayer's counsel, it was accepted as an offer of proof. *Id.* at 22. Taxpayer offered no additional documentary evidence.

Taxpayer testified at the hearing as follows: He was the manager of the Mama restaurant. *Id.* at p. 7. As such, his duties involved communicating to the third party payroll administrator the hours employees worked. He ordered food and liquor, scheduled employees, and he seated customers. He denied having any responsibility for filing tax returns or paying taxes. *Id.* at p. 8. His father owned the corporation. *Id.* at p. 10. Taxpayer signed documents relating to the business that were presented to him by his father's lawyer. *Id.* at p. 12. He was an authorized check signer on the company's bank account to pay vendors. *Id.* at p. 25. He signed checks paying vendors invoices. *Id.* at pp. 9, 25-26. When he received the correspondence from the Department regarding this matter he gave it to his father who told him that he would "take care of the responsibility." *Id.* at p. 15.

² Taxpayer's counsel identified his two exhibits by the letters "Dx"

On cross-examination, Taxpayer denied that the signatures “John Doe” on the sales tax returns were his signatures. He also denied that the signatures “John Doe” on the business registration form NUC-1 were his signatures. *Id.* at pp. 32-37. He stated further that he never gave anyone permission to sign his name to these documents. *Id.*

The record shows that Taxpayer was the president of ABC. Dept. Ex. No. 4. His signature appears on the Department’s business registration form, NUC-1, as president of ABC, specifically stating on page 2 that, “I accept personal responsibility for the filing of returns and the payment of taxes due.” *Id.* His signature also appears on the sales tax returns for the periods set forth in the Notice of Penalty Liability. Dept. Ex. No. 2.

Taxpayer offered no documents in support of his testimony other than the affidavit of his father, which was not admitted because it was hearsay evidence. He offered no documentary evidence, such as the report of a handwriting expert, to support his testimony that he did not sign the Department’s NUC-1 form and the sales tax returns that are in the record. Therefore, Taxpayer failed to offer sufficient proof to overcome the Department’s *prima facie* case.

For the reasons set forth above, I recommend that the Notice of Deficiency and the Notice of Penalty Liability be made final.

Date: 2/17/2004

Charles E. McClellan
Administrative Law Judge