

ST 95-6

Tax Type: SALES TAX

Issue: Responsible Corp. Officer - Failure to File or Pay Tax

STATE OF ILLINOIS
DEPARTMENT OF REVENUE
ADMINISTRATIVE HEARINGS DIVISION
CHICAGO, ILLINOIS

THE DEPARTMENT OF REVENUE )
OF THE STATE OF ILLINOIS ) Case No. XXXXX
) IBT No. XXXXX
v. ) NPL No. XXXXX
)
XXXXX )
Responsible Officer )

RECOMMENDATION FOR DISPOSITION

APPEARANCES: XXXXX, on behalf of XXXXX; Special Assistant Attorney General Mimi Brin, on behalf of the Illinois Department of Revenue.

SYNOPSIS: This matter comes on for hearing pursuant to the taxpayer's timely protest of Notice of Penalty Liability (hereinafter "NPL") XXXXX issued by the Department on March 10, 1993 for Retailers' Occupation Tax (hereinafter "ROT") liability incurred by XXXXX, d/b/a, XXXXX (hereinafter "corporate taxpayer"). The issue herein is whether XXXXX (hereinafter "taxpayer") was an officer or employee of the corporate taxpayer who had the control, supervision or responsibility of filing returns and making payment of the taxes due, and who willfully failed to file such returns or to pay the tax due. If the answer to both questions in is the affirmative, then in accordance with 35 ILCS 120/13 1/2, XXXXX is personally liable for a "penalty" equal to the total amount of tax unpaid by the corporate taxpayer, including penalty and interest.. Following the submission of all evidence and a review of the record, it is recommended that this matter be resolved in favor of the taxpayer.

FINDINGS OF FACT:

- 1. The Department's prima facie case as to the amount of the penalty

was established by the admission into evidence of Notice of Penalty Liability (hereinafter "NPL") XXXXX, showing a total liability due and owing of \$42,378.90 (interest computed through March 10, 1993). (Dept. Ex. No. 1; Tr. pp. 4-5, 8)

2. The taxable period at issue is March 1986 through September 1988. (Dept. Ex. No. 1).

3. The corporate taxpayer, the XXXXX, d/b/a, XXXXX, operated a grocery store located at XXXXX in XXXXX, Illinois. (Tr. p. 8).

4. The taxpayer was the president of the corporation in March of 1986, as well as a 50 percent shareholder. (Tr. p. 8).

5. The XXXXX leased the premises located at XXXXX from XXXXX, otherwise known as "XXXXX". (Tr. p. 30).

6. The XXXXX employed XXXXX Management to operate the grocery store. (Tr. p. 31).

7. XXXXX ("XXXXX") owned XXXXX Management. (Tr. p. 32).

8. The store at XXXXX had a general manager, as well as a store manager and department heads. (Tr. p. 33).

9. The department heads reported to the store manager, who reported to the general manager, who reported to XXXXX ("XXXXX"). (Tr. p. 34).

10. The general manager or XXXXX were responsible for setting prices in the store. (Tr. p. 34).

11. The store manager or the general manager had the authority to hire and fire employees. (Tr. p. 34).

12. In 1985 the taxpayer was responsible for overseeing the cashiers. (Tr. p. 34).

13. In 1986, based upon the decision of his father, the taxpayer became the head of the liquor department. (Tr. pp. 35-36).

14. As head of the liquor department, the taxpayer supervised two to three employees in three XXXXX grocery stores. (Tr. pp. 30, 36).

15. The taxpayer was paid \$350 per week for working 40 hours per week in the years 1985 and 1986. (Tr. p. 36).

16. Other than salary, the taxpayer received no remuneration in the form of profits, dividends or bonuses in regard to the XXXXX store. (Tr. 37).

17. Regarding the XXXXX store, the taxpayer never prepared or filed any form of tax return, nor did he assist an accountant in the preparation of returns. (Tr. pp. 37, 50).

18. Other than payroll checks that were prepared by an outside service, the taxpayer signed no checks on behalf of the corporation, including the checks that accompanied the sales tax returns filed with the Department. (Tr. pp. 38, 49).

19. During the taxable period, the taxpayer signed three sales tax returns: April 1986, July 1986 and August 1986. (Tr. pp. 53-54).

20. The taxpayer did not authorize anyone to sign sales tax returns on his behalf. (Tr. pp. 19. 38, 54).

21. In 1986 the XXXXX and the corporate taxpayer were indicted for failure to file ROT returns and fraudulent filing of ROT returns. (Dept. Ex. No. 4; Tr. p. 39-40).

22. An Order was entered on July 11, 1988 against the XXXXX, providing that the taxpayer pay restitution covering the period of December 1984 through February 1986. (Dept. Ex. No. 4; Tr. pp. 23).

23. Subsequent to the indictment, the taxpayer resigned as a corporate officer from the XXXXX and was no longer employed there. (Tr. p. 42).

24. The taxpayer never had any greater operating authority than that of manager of the liquor department. (Tr. p. 50).

25. The taxpayer always reported to at least two other people the whole time he worked at the store located at XXXXX. (Tr. p. 50).

26. In 1984, the taxpayer invested \$30,000 in the corporation; he never recouped that money. (Tr. pp. 72-73).

CONCLUSIONS OF LAW:

On examination of the record established, this taxpayer has demonstrated by the presentation of testimony and through exhibits, evidence sufficient to overcome the Department's prima facie case of tax liability under the assessment in question. Accordingly, under the reasoning given below, the determination by the Department that XXXXX is subject to the Notice of Penalty Liability as issued to him is reversed as a matter of law. In support thereof, the following conclusions are made.

The Department issued a Notice of Penalty Liability to XXXXX pursuant to section 13.5 of the Retailers' Occupation Tax Act. The pertinent provisions of said section provide as follows:

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; The Department shall determine a penalty due under this Section according to its best judgment and information, and such determination shall be prima facie correct and shall be prima facie evidence of a penalty due under this Section. Proof of such determination by the Department shall be made at any hearing before it or in any legal proceeding by reproduced copy of the Department's record relating thereto in the name of the Department under the certificate of the Director of Revenue. Such reproduced copy shall, without further proof, be admitted into evidence before the Department or any legal proceeding and shall be prima facie proof of the correctness of the penalty due, as shown thereon. ... (35 ILCS 120/13.5).

The evidence has established that during 1986 XXXXX was the president and 50 percent shareholder of the corporate taxpayer. During that year, he signed three sales tax returns. His name appeared on other returns during 1986, but he did not authorize anyone to sign on his behalf. I find that his testimony that he resigned sometimes in 1986, after the indictments, is

credible. After 1986, his W-2s indicate no income earned from the corporate taxpayer, nor was evidence presented that he signed his name to subsequent sales tax returns. Even during 1986, the income earned by the taxpayer was in the form of salary for forty hours work per week; he received no profits or dividends.

The taxpayer managed the liquor department at the grocery store, but had no real decision making authority in terms of hiring and firing employees and setting prices. The general manager and XXXXX XXXXX had the ultimate authority in regard to those functions. As liquor department manager, the taxpayer oversaw two to three employees. He reported to at least two other persons while he worked at the XXXXX store.

It is arguable that the taxpayer was an officer of the corporate taxpayer who had the responsibility of filing returns and making payment of the taxes due based upon his status as president and fifty percent shareholder. However, it is my determination that there is a lack of evidence to indicate that XXXXX willfully failed to file or pay the tax due. The current state of the law is in disaccord regarding whether the Department must prove that the taxpayer willfully failed to file or pay, or whether the introduction into evidence of the NPL by the Department establishes a prima facie case as to all elements of the statute; i.e., the amount of the penalty, as well as the issue of willfulness. (See: Rosetta Griffith v. Department of Revenue (1st Dist., September 19, 1994), No. 1-92-2518, slip. op. at 6; Branson v. Department of Revenue, 4th Dist., December 6, 1994), soon to be published). However, even assuming that the Department established a prima facie case of liability regarding the willfulness issue, the taxpayer herein has succeeded in rebutting the presumption of willfulness. The law is firmly established that the term "willful" as set forth in section 13 1/2 of the Retailers' Occupation Tax Act means a "voluntary, conscious and intentional failure" to pay.

(Department of Revenue v. Joseph Bublick & Sons, Inc., 68 Ill.2d 568, 577, (1977). The taxpayer has succeeded in showing that his involvement with the corporation was limited to 1988, and that during that year he exercised no control over any corporate or financial decisions. Furthermore, this is not a situation wherein the taxpayer fails to pay the tax due, instead using the collected funds to pay other creditors. (See: Department of Revenue v. Heartland Investments, Inc., 106 Ill.2d 19 (1985)).

Based upon the foregoing analysis of the facts and the applicable law, it is my determination that NPL XXXXX issued to XXXXX be cancelled in its entirety.

Administrative Law Judge

Date: