

ST 97-22

Tax Type: SALES TAX

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

STATE OF ILLINOIS
DEPARTMENT OF REVENUE
OFFICE OF ADMINISTRATIVE HEARINGS
SPRINGFIELD, ILLINOIS

THE DEPARTMENT OF REVENUE)	
OF THE STATE OF ILLINOIS)	
)	Docket #
v.)	IBT #
)	NPL #
TAXPAYER)	
as responsible officer of)	Linda Olivero
CORPORATION)	Administrative Law Judge

RECOMMENDATION FOR DISPOSITION

Appearances: Charles Hickman, Special Assistant Attorney General, for the Department of Revenue of the State of Illinois; TAXPAYER, appearing pro se.

Synopsis:

The Department of Revenue ("Department") issued a Notice of Penalty Liability ("NPL") to TAXPAYER ("TAXPAYER") pursuant to section 13 1/2 of the Retailers' Occupation Tax Act ("ROTA")¹. The NPL alleges that TAXPAYER was an officer or employee of CORPORATION ("corporation") who was responsible for wilfully failing to pay the corporation's retailers' occupation taxes. TAXPAYER timely protested the NPL, and an evidentiary hearing was held. After reviewing the record, it is recommended that a portion of the liability be dismissed and the remaining amount be affirmed.

FINDINGS OF FACT

1. The corporation was in the business of selling mobile homes. (Tr. pp. 17-19).

¹. At the time the NPL was issued, the provision was Ill.Rev.Stat. 1989, ch. 120, par. 452 1/2. This section was replaced by section 3-7 of the Uniform Penalty and Interest Act (35 ILCS 735/3-7) effective January 1, 1994.

2. TAXPAYER had various positions at the corporation: he was the general manager and also secretary/treasurer. He was not a stockholder. (Tr. pp. 17; 26).

3. TAXPAYER admitted that he was responsible for filing the retailers' occupation tax ("ROT") returns and paying the taxes to the Department on behalf of the corporation. (Tr. pp. 16; 27).

4. TAXPAYER did not present documentation showing that he did not wilfully fail to pay the ROT to the Department.

5. While the corporation was in business, TAXPAYER had access to the corporation's books and records. (Tr. pp. 17-18).

6. TAXPAYER was aware that the corporation was having financial difficulties. (Tr. pp. 17-18).

7. The corporation filed a Chapter 7 bankruptcy petition on November 20, 1987. (Taxpayer's Ex. #1).

8. Prior to the filing of the bankruptcy petition, TAXPAYER had access to the corporation's funds and made certain that the tax liability owed to the Internal Revenue Service was paid. (Tr. pp. 18; 22-23).

9. TAXPAYER did not present documentation supporting his assertion that he resigned from his position of secretary/treasurer in February of 1987. (Tr. p. 28).

10. On June 22, 1989, the Department issued NPL No. XXXX to TAXPAYER that proposed a total penalty liability of \$88,332.03 for failure to pay ROT for various months. (Dept. Ex. #1).

11. Since the NPL was issued, the Department received a payment of \$10,107.28 from the bankruptcy trustee that was applied to some of the assessments. The remaining unpaid assessments are as follows:

- (1) XXXXXXXX with a tax of \$433.99;
- (2) XXXXXXXX with a tax of \$748.24;
- (3) XXXXXXXX with a tax of \$2,450.00;
- (4) XXXXXXXX with a tax of \$45,794.00; and

(5) XXXXXXX with a tax of \$870.26. (Dept. Ex. #1, 7; Tr. p. 6).

12. The first assessment, No., is for ROT on the sale of a mobile home based on a return filed by TAXPAYER in August of 1987. The assessment was issued on March 22, 1988. (Dept. Ex. #2, Tr. pp. 6, 14).

13. The second assessment, No., is for ROT for the months of May 1987 to November 1987 and is the result of an office audit that was completed after the corporation filed its bankruptcy petition. The auditor estimated the taxes by averaging figures from the corporation's prior ROT returns. The Notice of Tax Liability for this assessment was issued to the corporation on April 24, 1988. The Department's counsel stated that he did not believe that TAXPAYER wilfully failed to pay this assessment. (Dept. Ex. #3, Tr. pp. 6-7, 14).

14. The third assessment, No., is for ROT on the sale of a mobile home that occurred on August 27, 1987. The ROT return was signed by TAXPAYER on May 17, 1988 behalf of the bankruptcy trustee. The Department's counsel stated that he did not believe that TAXPAYER wilfully failed to pay this assessment. (Dept. Ex. #4, Tr. pp. 7, 15).

15. The fourth assessment, No., is for ROT for the months of October 1985 to November 1987 and is the result of a field audit that was conducted after the corporation filed its bankruptcy petition. The auditor reviewed records received from TAXPAYER in order to complete a tax return for this liability. The Notice of Tax Liability for this assessment was issued on December 21, 1988 to the corporation. (Dept. Ex. #5, Tr. pp. 7-8, 15).

16. The final assessment, No., is the result another office audit that was completed after the corporation filed its bankruptcy petition. The basis for the liability is a sale of a mobile home that occurred on August 17, 1986. The Notice of Tax Liability for this assessment was issued to the corporation on February 20, 1989. The Department's counsel stated that he assumed that this liability was a duplicate liability because it was probably included in the audit. (Dept. Ex. #6, Tr. pp. 8, 16).

CONCLUSIONS OF LAW

Section 13 1/2 of the Retailers' Occupation Tax Act provides in part 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 wilfully 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;" Ill.Rev.Stat. 1989, ch. 120, par. 452 1/2.

An officer or employee of a corporation may therefore be personally liable for the corporation's taxes if (1) the individual had the control, supervision or responsibility of filing the ROT returns and paying the taxes, and (2) the individual willfully failed to perform these duties.

Under section 13 1/2, the Department's certified record relating to the penalty liability constitutes *prima facie* proof of the correctness of the penalty due.² See Branson v. Department of Revenue, 168 Ill.2d 247, 260 (1995). Once the Department presents its *prima facie* case, the burden shifts to the taxpayer to establish that one or more of the elements of the penalty are lacking, i.e., that the person charged was not the responsible corporate officer or employee, or that the person's actions were not wilfull. Id. at 261. In order to overcome the Department's *prima facie* case, the allegedly responsible person must present more than his or her testimony denying the accuracy of the Department's assessment. A. R. Barnes & Co. v. Department of Revenue, 173 Ill.App.3d 826, 833-34 (1st Dist. 1988). The person must present evidence that is consistent, probable, and identified with the taxpayer's books and records to support the claim. Id.

². The relevant portion of section 13 1/2 provides as follows: "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." Ill.Rev.Stat. 1989, ch. 120, par. 452 1/2.

In this case, the Department's *prima facie* case was established when the Department's certified record relating to the penalty liability was admitted into evidence. In response, TAXPAYER does not contend that he was not the responsible corporate officer. In fact he admitted during his testimony that he was responsible for filing and paying the ROT for the corporation. TAXPAYER contends, however, that his actions were not willfull.

For guidance in determining the meaning of "wilfull" under section 13 1/2, the Illinois Supreme Court has referred to cases interpreting section 6672 of the Internal Revenue Code (26 U.S.C. §6672).³ See Branson at 254-56; Department of Revenue v. Heartland Investments, Inc., 106 Ill.2d 19, 29-30 (1985). These cases define wilfull as involving intentional, knowing and voluntary acts or, alternatively, reckless disregard for obvious known risks. Id. Wilfull conduct does not require bad purpose or intent to defraud the government. Branson at 255; Heartland at 30. Wilfullness may be established by showing that the responsible person (1) clearly ought to have known that (2) there was a grave risk that the taxes were not being paid and (3) the person was in a position to find out for certain very easily. Wright v. United States, 809 F.2d 425, 427 (7th Cir. 1987). Furthermore, whether the person in question wilfully failed to pay the taxes is an issue of fact to be determined on the basis of the evidence in each particular case. Heartland at 30; Department of Revenue v. Joseph Bublick & Sons, Inc., 68 Ill.2d 568, 577 (1977).

In the present case, TAXPAYER did not provide sufficient evidence indicating that the failure to pay the taxes was not wilfull. TAXPAYER had access to the corporation's books and records, and he knew that the corporation was having financial difficulties. Although he claims that he was not aware of a tax liability owed to the Department, he did not indicate that he made any effort to investigate whether there was an outstanding liability. Moreover,

³. This section imposes personal liability on corporate officers who willfully fail to collect, account for, or pay over employees' social security and Federal income withholding taxes.

TAXPAYER admitted that he had access to the corporation's funds, and he made certain that the tax liability owed to the Internal Revenue Service was paid prior to the filing of the bankruptcy petition. TAXPAYER gave the owners of the corporation access to the remaining funds without an assurance that the taxes owed to the Department would be paid. Courts have found that giving preferential treatment to other creditors rather than paying the corporation's taxes constitutes wilfull behavior. See Heartland at 29-30. TAXPAYER has therefore failed to show that his actions were not wilfull.

TAXPAYER also argues that he resigned from his position of secretary/treasurer at the corporation in February of 1987, and therefore could not have wilfully failed to pay the taxes for the period from February of 1987 to November of 1987. At the hearing, TAXPAYER failed to present corroborating evidence, such as a resignation letter, to support this contention. TAXPAYER's uncorroborated oral testimony is insufficient to overcome the Department's *prima facie* case. See A. R. Barnes, 173 Ill.App.3d at 833-34.

In addition, TAXPAYER argues that he should not be liable for these taxes because the audits that were the basis of the assessments were incorrect and not presented as evidence. (Tr. pp. 19-20; 23). The merits of a final assessment that is the basis of an NPL may not be reviewed at the hearing on the NPL. See Department of Revenue v. R. S. Dombrowski Enterprises, Inc., 202 Ill.App.3d 1050, 1054 (1st Dist. 1990) (no jurisdiction to review the accuracy of an assessment once it becomes final). TAXPAYER does not claim that he did not receive notice of the liabilities before they became final. It is therefore improper to address the basis of the assessments. Even if it were appropriate to review the merits of the final assessments, TAXPAYER has failed to present any documentary evidence to support this claim. As stated earlier, TAXPAYER's uncorroborated oral testimony is insufficient to overcome the Department's case. See A. R. Barnes, 173 Ill.App.3d at 833-34.

TAXPAYER's last argument is that he should not be liable for these taxes because he received the assessments after the corporation filed its bankruptcy

petition and while the trustee had control of the corporation's assets. All of the assessments that are the basis of the penalty liability, however, are for tax liabilities that were incurred prior to the filing of the bankruptcy petition. As stated earlier, the evidence indicates that TAXPAYER was responsible for filing and paying the ROT taxes for this time period, and he failed to provide evidence that his failure to fulfill these duties was not willfull.

Based on the foregoing, there is sufficient evidence to warrant a recommendation that TAXPAYER be held liable for the assessments in question. Nevertheless, for the following reasons, it is recommended that three of the five assessments be dismissed. During the hearing the Department's counsel expressed concerns about holding TAXPAYER liable on the second, third, and fifth assessments. With respect to the second assessment, he stated as follows:

"I do not believe that the element of willfulness is satisfied where we estimated the liability and the determination of the liability post dates the bankruptcy, because I don't think that Mr. TAXPAYER could have had the requisite knowledge or access to funds at the time that the liability was determined." (Tr. p. 14).

As to the third assessment, which was based on a return signed by TAXPAYER on behalf of the bankruptcy trustee, the Department's counsel stated that "to the extent that that indeed was done on behalf of the trustee *** I don't see how Mr. TAXPAYER could have been willful." (Tr. p. 15). As to the fifth assessment, the Department's counsel stated that "[t]he transaction date is during the audit period, and so it would be my assumption, without conceding, that it was probably picked up by the audit." (Tr. p. 16). The evidence presented at the hearing was insufficient to determine whether the fifth assessment was included in the audit.

Even though counsel stated that he was not conceding liability by making these statements, it would be improper to hold TAXPAYER liable for these assessments given the fact that the Department's representative made these statements on the record while acting on behalf of the Department. By making

these statements, the Department's counsel has effectively conceded that TAXPAYER is not liable for these assessments.

Recommendation

It is therefore recommended that the first and fourth assessments at issue in this case, No. with a tax of \$433.99, and No. with a tax of \$45,794.00, be upheld. It is recommended that the remaining assessments be dismissed.

Linda Olivero
Administrative Law Judge

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