

ST 14-23

Tax Type: Sales Tax

Tax Issue: Responsible Corporate Officer – Failure To File Or Pay Tax

**STATE OF ILLINOIS
DEPARTMENT OF REVENUE
OFFICE OF ADMINISTRATIVE HEARINGS
HAPPYPLACE, ILLINOIS**

**THE DEPARTMENT OF REVENUE
OF THE STATE OF ILLINOIS**

v.

**JOHN DOE,
Taxpayer**

**No. XXXX
Account ID XXXX
NPL Penalty ID XXXX
Period 11/30/00-
3/21/09**

**Ted Sherrod
Administrative Law Judge**

RECOMMENDATION FOR DISPOSITION

Appearances: Special Assistant Attorney General George Foster on behalf of the Illinois Department of Revenue; Mark Rotert, Esq. of Stetler, Duffy & Rotert, Ltd. on behalf of JOHN DOE.

Synopsis:

This matter is before this administrative tribunal as the result of a request for an initial review pursuant to 86 Ill. Admin. Code, ch. I, section 200.175 by JOHN DOE (“taxpayer”) of a notice of penalty liability issued to him as a responsible officer of ABC Business Inc. (“ABC Business”). The notice of penalty liability assessed the taxpayer a penalty equal to ABC Business’s unpaid Retailers’ Occupation Tax for the period November 30, 2000 through March 21, 2009. The penalty assessed was a personal liability penalty levied pursuant to section 3-7 of the Illinois Uniform Penalty and Interest Act, 35 ILCS 735/3-1 *et seq.*

A hearing on this matter was held on January 14, 2014. While no testimony was presented during this hearing, both parties agreed that testimony given by the taxpayer in United States v. Jack Black and Hossein Obaei, No. 05 CR 254, a transcript of which was admitted into the record, constituted testimony that the taxpayer would have given in the instant case had he appeared at the hearing in this matter. Documentary evidence, including an affidavit given by Daniel Rubenstein, a prosecutor in the aforementioned case, was also presented on behalf of the taxpayer. The Department also presented documentary evidence in support of its assessment determination. I have reviewed the evidence of record, and I am including in this recommendation findings of fact and conclusions of law. I recommend that the notice of penalty liability that has been issued to the taxpayer be affirmed and finalized as issued. In support of this recommendation, the following findings of fact and conclusions of law are made.

Findings of Fact:

1. The Department's *prima facie* case, including all jurisdictional elements, was established by the admission into evidence of the notice of penalty liability NPL Penalty ID number XXX issued to the taxpayer on November 21, 2011. Department Exhibit ("Ex.") 1. This notice of penalty liability arose from unreported and unpaid sales tax liabilities of ABC Business for the period November, 30, 2000 through March 21, 2009. *Id.*
2. ABC Business, an Illinois subchapter S corporation having its principal place of business in Happyplace, Illinois, was formed in 2000 to engage in the retail sale of automobiles. Department Ex. 1, 2; Taxpayer Ex. 4. During the tax period in controversy, ABC Business was engaged in the business of selling automobiles to

- area drug dealers. Transcript of Hearing Proceedings in United States v. Jack Black and Hossein Obaei, Northern District of Illinois, Eastern Division No. 05 CR 254 (“05 CR 254 Hearing Transcript”), pp. 1310, 1313, 1334; Taxpayer Ex.
1. Drug dealers dealt with ABC Business because the company was willing to accept large cash payments in small bills from them without checking their background, determining where the money came from or showing any documentation of the amount of money given as a down payment on automobile purchases. 5 CR 254 Hearing Transcript pp. 1335-1337.
 3. During the tax period in controversy, ABC Business was owned by Jack Black (“Jack Black”) and the taxpayer. 05 CR 254 Hearing Transcript p. 1309. Jack Black owned 95% of the shares of stock in this company and the taxpayer owned 5% of the company’s stock. *Id.*
 4. On the Illinois Business Registration, NUC-1 for ABC Business, filed on November 12, 2000, Jack Black attested to having control over and responsibility for the payment of the corporation’s taxes. Taxpayer Ex. 4 (NUC-1, Illinois Business Registration at item 14). This document also indicates that, at the time ABC Business was formed, both Jack Black and the taxpayer were designated to be the company’s “President.” *Id.*
 5. Jack Black and the taxpayer were the only officers of ABC Business. Taxpayer Ex. 4 (ABC Business Domestic Corporation Annual Reports). During the tax

- period in controversy, Jack Black served as the company's President while the taxpayer was the company's secretary and treasurer. *Id.*¹
6. Jack Black and the taxpayer first met in 1976 or 1977 and have been "very good" friends and business associates ever since. 5 CR 254 Hearing Transcript pp. 1320, 1321.
 7. The taxpayer was the company's sole manager during the tax period in controversy, and was second in command to Jack Black, the company's President, assuming all of Jack Black's duties and responsibilities when Jack Black was absent. 05 CR 254 Hearing Transcript p. 1325.
 8. Both Jack Black and the taxpayer were authorized to execute checks drawn on ABC Business's accounts at Bank #1, the Bank #2 and Bank #3 and the taxpayer routinely exercised this authority. 05 CR 254 Hearing Transcript pp. 1393, 1394, 1412-1415, 1450, 1488, 1592, 1593. The taxpayer testified that he had unrestricted authority to make deposits and withdrawals. 05 CR 254 Hearing Transcript p. 1393.
 9. On May 7, 2012, the Federal Court of Appeals for the 7th Circuit affirmed a jury conviction of Jack Black of RICO conspiracy money laundering, mail fraud, illegal transaction structuring, bank fraud and aiding and abetting a drug conspiracy. United States of America v. Jack Black and Hussein Obaei, case number 1:05-CR-00254, August 10, 2012. This conviction was based upon evidence that, during the period 1995 through 2005, in the course of his conduct

¹ ABC Business' Domestic Corporation Annual Reports filed with the Secretary of State indicate that the taxpayer was the company's secretary from 2001 through 2004 and was also the company's treasurer in 2003. Taxpayer Ex. 4.

of ABC Business's business, Jack Black accepted large cash payments in small bills from known criminals, extended in house financing to such customers without requiring a credit application, proof of legitimate income or other normal financial paperwork, doctored sales contracts by falsifying purchase prices and social security numbers, and often used the names of straw purchasers. *Id.* The Court also found that Jack Black routinely failed to file forms required by the Internal Revenue Service ("IRS") when a customer pays \$10,000 or more in cash. *Id.*

10. In connection with the prosecution of his business partner Jack Black, the taxpayer was prosecuted for, and pled guilty to deliberately structuring bank deposits to avoid laws requiring IRS notification of transactions in which a customer pays \$10,000 or more in cash. 05 CR 254 Hearing Transcript 1310-1315. The taxpayer was sentenced to 70 months in prison for these offenses. 05 CR 254 Hearing Transcript pp. 1317, 1318.²
11. During the tax period in controversy, ABC Business was registered to file and filed ST-556 sales tax returns reporting tax due on retail sales of motor vehicles. Department Ex. 1; Taxpayer Ex. 4 (Audit History Worksheet).³
12. In March 2005, the taxpayer was the subject of a criminal investigation by agents of the Federal Bureau of Investigation ("FBI") which covered all of the tax period at issue noted above except 3/21/09. *Id.* At the commencement of its

² While the plea agreement quoted by the taxpayer in the transcript indicates that his activities at "XYZ Business" or XYZ Business constituted the basis for his guilty plea and sentence, the transcript of the court proceedings in United States v. Jack Black and Hossein Obaei, No. 05 CR 254 indicate that ABC Business and XYZ Business were the same company. 05 CR 254 Hearing Transcript p. 1321.

³ A motor vehicle retailer is required to file a return on form ST-556 reporting each motor vehicle sold. 86 Ill. Admin. Code, ch. I, section 130.540.

- investigation, the FBI seized all of ABC Business's books and records and its entire inventory of unsold vehicles. *Id.*
13. During its investigation, special agents of the FBI obtained and reviewed records pertaining to all of ABC Business's sales during the aforementioned period including deal jackets, sales invoices, copies of ST-556 sales tax returns and copies of vehicle title applications. *Id.*
 14. In the course of its investigation, the FBI determined that ABC Business obtained new titles for some of the vehicles it sold during the tax period in controversy from the Secretary of State's office without filing ST-556 sales tax returns or paying sales taxes to the Department. *Id.*
 15. After completing its investigation, the FBI advised the Department's head of tax litigation that ABC Business had failed to file ST-556 returns reporting all of its motor vehicle sales. *Id.* The FBI also turned over to the Department a list showing 343 vehicle sales that it determined had not been reported as sales on ST-556 forms filed with the Department. *Id.*
 16. The Department's tax litigation section turned over the FBI's report of its investigation of ABC Business to the Department's audit bureau and asked the audit bureau to determine whether ABC Business had underreported its state sales taxes. *Id.*
 17. Mr. Angelo Lolis, an auditor with the Department's audit bureau, was assigned to audit ABC Business for the aforementioned tax period during the summer of 2005. *Id.* During the course of this audit Mr. Lolis examined the FBI's summary of its findings pursuant to its investigation of ABC Business's books and records

including a list of 343 ST-556 returns that were prepared but not filed with the Department. *Id.* During this audit, the Department's auditor did not personally review any of the books and records relied upon by the FBI as a basis for the conclusions indicated in the FBI's list of untaxed sales the auditor reviewed. *Id.* These records were confiscated by the FBI when it commenced its investigation of ABC Business and were not made available to the Department by the FBI. *Id.* As a result of this investigation, Mr. Lolis found that ABC Business had underreported its taxable sales by \$XXXX during the tax period in controversy and that it had over-reported the amount of trade-in vehicles received during this period. *Id.*

18. Mr. Lolis determined ABC Business's Retailers' Occupation Tax liability for underreported sales by comparing vehicle sales shown on ST-556 returns ABC Business filed with the Department to vehicle sales shown on the FBI's list of unreported sales for which ST-556 returns were not filed. *Id.* He adjusted the taxable amount due as shown on the FBI list of unreported and untaxed sales to account for non-taxable taxes and license fees. *Id.* To determine the portion of this tax base to which the City of Happyplace tax rate and the suburban tax rate applied, the auditor determined the percentage of total sales that were to Happyplace residents and the percentage of sales that were made to non-Happyplace residents based on the taxpayer's filing history. *Id.* He arrived at a liability amount by applying the applicable state and local tax rate to the amounts determined in the manner described above. *Id.* Using this methodology, he

determined that the total amount of tax due on ABC Business's unreported and untaxed vehicle sales was \$XXXX. *Id.*

19. Mr. Lolis determined the amount of disallowed trade-ins by comparing the percentage of vehicle sales reported as trade-ins on ST-556 forms with the percentage of vehicle sales determined to be trade-ins by the FBI on vehicle sales that the FBI determined had not been reported to the Department. *Id.* Using this methodology, he determined the total amount of disallowed trade-ins. *Id.* Upon applying the City of Happyplace and suburban tax rates to the portion of disallowed trade-ins attributed to these locations, the auditor determined that the tax due as a result of the disallowed trade-ins was \$XXXX. *Id.*

20. ABC Business was liquidated and dissolved on March 14, 2008. Taxpayer Ex. 4.

21. The taxpayer's notice of penalty liability arises primarily from ABC Business's unpaid tax liabilities for the period 2000 through 2005 determined during the Department's audit of ABC Business described above. Department Ex. 1.

Conclusions of Law:

In the instant case, the Department seeks to impose personal liability for unpaid trust taxes of ABC Business Inc. ("ABC Business") upon JOHN DOE ("taxpayer") pursuant to section 3-7(a) of the Uniform Penalty and Interest Act ("UPIA"), 35 ILCS 735/3-7. Section 3-7(a) states, in pertinent part, 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.
35 ILCS 737/3-7(a)

Section 3-7(a) does not define who has the responsibility for filing returns and making payments, or what constitutes willful failure to pay. However, in applying the penalty tax, the Illinois courts look to federal cases involving section 6672 of the Internal Revenue Code (“IRC”) which contains language similar to the aforementioned Illinois statute. Branson v. Department of Revenue, 168 Ill. 2d 247 (1995); Department of Revenue v. Joseph Bublick & Sons, 68 Ill. 2d 568 (1977). The key to liability under IRC section 6672 is control of finances within the taxpaying corporation including the power to control the allocation of funds to other creditors in preference to the company’s tax obligations. Haffa v. U.S., 516 F. 2d 931 (7th Cir. 1975). The issue of willfulness is concerned with the state of the responsible person’s mind. Sawyer v. U.S., 831 F. 2d 755 (7th Cir. 1987). “Willful failure to pay taxes has generally been defined as involving intentional, knowing and voluntary acts or, alternatively, reckless disregard for obvious or known risks.” Branson, *supra* at 255.

During the evidentiary hearing in this case, the Department introduced a notice of penalty liability assessing tax pursuant to section 3-7 of the UPIA. Department Ex. 1. When the Department introduced this notice of penalty liability into evidence under the certificate of the Department’s Director of Revenue, it presented *prima facie* proof of all of the elements necessary for a determination that the taxpayer was personally liable for the unpaid taxes due and owing from ABC Business, a company where he served as an officer (Taxpayer Ex. 4). Branson, *supra* at 260.

The Department's *prima facie* case is a rebuttable presumption. *Id.* at 262. After the Department introduces its *prima facie* case, the burden shifts to the taxpayer to establish that one or more of the elements required for the imposition of the penalty are lacking. Branson, *supra* at 261-62. A taxpayer cannot overcome the Department's *prima facie* case by merely denying the accuracy of the Department's assessment, or by merely denying conscious awareness that the tax was due from the corporation. Branson, *supra* at 267. Instead, the taxpayer must present evidence that is consistent, probable, and closely identified with its books and records. A.R. Barnes & Co. v. Department of Revenue, 173 Ill. App. 3d 826, 833 (1st Dist. 1988).

ANALYSIS OF THE STATUS OF THE TAXPAYER AS A RESPONSIBLE OFFICER

As previously noted, in the present case, the Department's *prima facie* case with respect to the taxpayer's status as a responsible officer was established when the Department's certified record relating to the notice of penalty liability at issue was admitted into evidence. Branson, *supra*. In response, the taxpayer presented a record of testimony he gave in United States v. Jack Black and Hossein Obaei, number 05 CR 254 (Taxpayer Ex. 5), which the parties have agreed is testimony he would have given in the instant case had he appeared at the hearing in this matter. Transcript of hearing on January 14, 2014 in the instant case ("Tr.") pp. 40-45. However, the taxpayer presented no documentary proof that he did not have any control over ABC Business's finances or over the payment of ABC Business's tax liabilities.

Unfortunately, the taxpayer, who bears the burden of proof sufficient to rebut the Department's *prima facie* case, submitted insufficient evidence to support his claim. As

noted above, the taxpayer must present evidence that is supported by the taxpayer's books, records or other documents showing that the taxpayer did not have control over the payment of taxes. The only documentary evidence presented that has any bearing on the taxpayer's responsibilities during the tax period at issue is ABC Business's Illinois Business Registration, which shows that Jack Black, ABC Business's President, rather than the taxpayer attested to having control over and responsibility for the payment of the corporation's taxes on this document. Taxpayer Ex. 4 (NUC-1, Illinois Business Registration at item 14). However, in a corporation there may be more than one responsible officer. Monday v. United States, 421 F. 2d 1210 (7th Cir. 1970), cert. den. 400 U.S. 821 (1970). Section 3-7 of the UPIA does not confine liability to only one person in the corporation or to the person most responsible. Consequently, the aforementioned documentary evidence only proves that Jack Black was a responsible officer, and fails to prove that the taxpayer was not also a responsible officer of ABC Business.

Moreover, the record in this case indicates that the taxpayer possessed the authority to sign corporate checks during the tax period in controversy and that he routinely exercised this authority. Tr. pp. 1393, 1394, 1412-1415, 1450, 1488, 1592, 1593. It further indicates that this authority was unrestricted. 05 CR 254 Hearing Transcript p. 1393. The ability to sign corporate checks is a significant factor in determining whether a person is a responsible officer 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). The taxpayer's ability to sign corporate checks leads to the reasonable conclusion that the taxpayer was connected

closely enough to the corporation's finances that he could have paid the taxes that were due and owing and thereby prevented the company's failure to pay taxes from occurring. The ability to prevent the corporation from squandering the corporation's resources paying other bills while neglecting its tax obligations is indicia of significant control. Thomas v. United States, 41 F. 3d 1109 (7th Cir. 1994). For this reason, I conclude that the taxpayer had significant control over the corporation's finances under one of the tests for making this determination enumerated in the federal case law. *Id.*

The record also identifies the taxpayer as the company's secretary, treasurer and only manager. 05 CR 254 Hearing Transcript p. 1325; Taxpayer Ex. 4 (Annual Reports for 2001 through 2005). It also indicates that he was one of only two company officers and was exceeded in authority over the company's affairs only by its President. 05 CR 254 Hearing Transcript p. 1325. Specifically, he exercised complete control over the company's affairs when its President was absent. *Id.* The secretary and treasurer of a corporation is ordinarily responsible for the company's books and records and financial affairs and has complete access to the company's financial records and other information concerning the company's business conduct and results. Moreover, the manager of a corporation generally has significant control over a corporation's affairs and the taxpayer's testimony that he ran the company in the President's absence and was second in command to the President confirms that this was the case at ABC Business. 05 CR 254 Hearing Transcript p. 1325. The record contains no evidence to negate the inference to be drawn from the taxpayer's role as an officer and as manager of ABC Business that he had significant knowledge of ABC Business's business operations, and significant authority over the company's business affairs.

The taxpayer urges this Tribunal to ignore ABC Business's Annual Reports contained in the record evidencing that he was an authority figure at ABC Business by virtue of his status as the company's only manager, secretary, treasurer and only officer other than the President. Tr. p. 6. In support of this claim, he introduced an Affidavit of Daniel Rubenstein ("Rubenstein"), one of the prosecutors in United States v. Jack Black and Hossein Oabaei, 05 CR 254, in which Rubenstein states that the taxpayer was incorrectly identified as an officer on ABC Business's Annual Reports in order to facilitate his co-owner's fraudulent money laundering operation of this business. Taxpayer Ex. 1 (Affidavit of Daniel Rubenstein, at paragraph 7). However, the record contains no explanation why making the taxpayer an officer and giving him apparent authority over the company's business affairs was necessary to achieve this objective. Nor does the record contain any testimony by the taxpayer denying that he held high office in the company. Consequently, I do not find credible the taxpayer's claim that the annual reports incorrectly identify him as an officer and reject the inference the taxpayer seeks to draw from this claim that the taxpayer had no authority at ABC Business.

With the exception of the NUC-1 Illinois Business Registration noted above wherein Jack Black accepts personal responsibility for ABC Business's tax compliance (Taxpayer Ex. 4), the only other evidence supporting the taxpayer's claim that he was not a responsible officer is the taxpayer's own testimony and testimonial assertions contained in the affidavit of Rubenstein that the taxpayer was not in control of the company's finances or tax preparation and filing. 05 CR 254 Hearing Transcript pp. 1321, 1322, 1405, 1427; Taxpayer Ex. 1. This evidence is insufficient to overcome the Department's *prima facie* case. Jefferson Inc. Co. v. Johnson, 139 Ill. App. 3d 626 (1st Dist. 1985);

Mel-Park Drugs v. Department of Revenue, 218 Ill. App. 3d 203 (1st Dist. 1991); A.R. Barnes & Co. v. Department of Revenue, 173 Ill. App. 3d 826 (1st Dist. 1988); Masini v. Department of Revenue, 60 Ill. App. 3d 11 (1st Dist. 1978); Copelivitz. V. Department of Revenue, 41 Ill. 2d 154 (1968). To prove his claim, the taxpayer needed to present corroborating documentation such as corporate by-laws or the taxpayer's employment agreement delineating the duties and responsibilities vested in the company's manager, or bank cards or other bank records showing that the taxpayer's apparent authority to direct the payment of bills during the tax period at issue was limited by the President's authority or in some other manner. Without such evidence, it must be found that the taxpayer has not rebutted the Department's finding that he was a responsible officer of ABC Business during the tax period at issue. *Id.*

WHETHER THE TAXPAYER WILLFULLY FAILED TO FILE RETURNS AND/OR PAY TAXES

As previously noted, by Illinois statute, personal liability will be imposed upon a person who: (1) has control or supervision over, or responsibility for filing corporate tax returns and/or making the tax payments; and (2) "willfully" fails to file returns or make tax payments. UPIA section 3-7. The Department's *prima facie* case presumes willfulness. Branson, *supra* at 262. To rebut this presumption, the person defending against the penalty must adduce sufficient evidence to disprove willful failure to file returns and pay taxes. *Id.* A responsible officer cannot prove his lack of willfulness simply by denying conscious awareness of a tax deficiency that could have been easily investigated by an inspection of corporate records. *Id.* at 267.

Cases define “willful” as involving intentional, knowing and voluntary acts or, alternatively, reckless disregard for obvious or known risks. Branson, *supra* at 254-56; Heartland, *supra* at 29-30. Willful conduct does not require bad purpose or intent to defraud the government. Branson, *supra* at 255; Heartland, *supra* at 30. Rather, the willfulness requirement “is satisfied if the responsible person acts with reckless disregard of a known risk that the trust funds may not be remitted to the Government[.]” Garsky v. United States, 600 F. 2d 86, 91 (7th Cir. 1979). A high degree of recklessness is not required because if it were, the purposes of the statute could be frustrated simply by delegating responsibilities within a business and adopting a “hear no evil – see no evil” policy. *See* Wright v. United States, 809 F. 2d 425, 427 (7th Cir. 1987) (A responsible person is liable “if he (1) clearly ought to have known that (2) there was a grave risk that withholding taxes were not being paid and if (3) he was in a position to find out for certain very easily.”). Willfulness can be established by a showing of gross negligence as in a situation in which a responsible party ought to have known of a grave risk of nonpayment and is in a position to easily find out, but does nothing. *See* Branson, *supra*.

The record in this case indicates that the taxpayer was well aware of business practices at ABC Business that made it impossible for the company to file all of its ST-556 returns that were due or properly calculate the correct amount of tax due on the ST-556 forms that were filed. Specifically, the taxpayer testified that in many instances initial sales contracts were prepared showing no taxes due on automobile sales that were clearly subject to tax. O5 CR 254 Transcript pp. 1404-1407. On such contracts it was, by the taxpayer’s own admission, impossible to verify whether taxes were ever computed, determined or paid. *Id.* The taxpayer was also aware that sales contracts were

prepared that deliberately understated remuneration received by ABC Business on automobiles sales and, implicitly, would have resulted in the preparation of ST-556 forms showing less than the amount of tax that was actually due on such sales. 05 CR 254 Hearing Transcript pp. 1335-1337. The taxpayer further testified that, as a result of customer requests that paperwork not be filed, it is unlikely that all required ST-556 forms were filed with the Secretary of State. Tr. pp. 1505, 1506. This testimony is consistent with the FBI's finding that ABC Business failed to file ST-556 returns reporting all of its motor vehicle sales. Department Ex. 1; Taxpayer Ex. 4 (Audit History Worksheet).

Even with the knowledge that ABC Business was engaging in business practices that made the proper computation and payment of taxes problematic and even, in some instances, impossible, the record contains no evidence that the taxpayer ever asked Jack Black if any tax bills were not being paid during the tax period in controversy. Rather, as he would have one believe, during the tax period at issue, he simply allowed Jack Black to make decisions regarding whether or not to pay taxes and did not demand that tax delinquencies be revealed or addressed. Nor is there any evidence that during the tax period in controversy, he inspected the corporation's records (which, as the company's secretary and treasurer he clearly had the authority and ability to do) or insisted upon being kept informed of the company's tax situation. The fact that the taxpayer may have adopted a "hear no evil – see no evil" policy does not relieve him of liability. Wright, *supra*. On the contrary, given his capacity as a responsible officer, his failure to see that the company's tax obligations were met when he was well aware that the company was engaging in business practices as part of its illegal activities that compromised its ability

to comply with the Illinois tax laws, is sufficient to establish willfulness within the context of the statute.

The taxpayer attempts to rebut the presumption of willfulness through testimony and affidavit testimony that Jack Black exercised complete control over the company's affairs, including over the payment of the company's taxes. 05 CR 254 Hearing Transcript p. 1405. However, the courts have consistently rejected such evidence as a defense to a finding of willfulness by holding that a responsible person cannot escape an obligation to ensure that taxes are paid by relinquishing this responsibility to others. Wright, supra; Mazo v. United States, 591 F. 2d 1151 (5th Cir. 1979).

Moreover, while the taxpayer testified that he had no knowledge whether the company's taxes were being properly managed, given the taxpayer's managerial responsibilities, I do not find this testimony to be credible. The taxpayer's connection with the business and to the President of the company, a close friend and business associate for over 35 years (05 CR 254 Hearing Transcript pp. 1320, 1321), indicates that he was clearly in a position to know of both the company's nefarious business practices and that they created a very grave risk that the taxes were not being paid. Moreover, the only evidence supporting the taxpayer's claim that he did not know that taxes were not being handled properly and therefore did not act willfully is the taxpayer's testimony denying that he had anything to do with the company's taxes. As previously noted, the taxpayer had the burden to produce more than his own self serving testimony to rebut the Department's *prima facie* case. Documentary evidence was needed to carry the taxpayer's burden. Jefferson Inc. Co., supra; Mel-Park Drugs, supra; A.R. Barnes & Co., supra; Masini, supra; Copelivitz., supra. In the instant case, the record contains

no documentary evidence (e.g. the corporation's by-laws, corporate minutes or other documentation) indicating that the taxpayer had limited authority that would substantiate the taxpayer's claim that he had no control over or knowledge of the company's tax situation. For the foregoing reasons, I find that the evidence adduced by the taxpayer is insufficient to rebut the Department's *prima facie* case establishing willfulness. In sum, in the instant case, the taxpayer has failed to produce any evidence other than his own testimony that his actions were not willful. Accordingly, the Department's *prima facie* case for willfulness stands un rebutted.

WHEREFORE, for the reasons stated above, it is my recommendation that the notice of penalty liability at issue in this case be affirmed and finalized as issued.

Ted Sherrod
Administrative Law Judge

Date: September 25, 2014