IT 07-2
Tax Type: Income Tax
Issue: Responsible Corporate 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

v.

JOHN DOE

Respondent

Docket # 03-IT-0000
FEIN 00-0000000
NOD # 0000
SS # 000-00-0000

RECOMMENDATION FOR DISPOSITION

Appearances: Kent Steinkamp, Special Assistant Attorney General, for the Department of Revenue of the State of Illinois; ***John Doe***, appearing *pro se*.

Synopsis:

The Department of Revenue ("Department") issued a Notice of Deficiency ("NOD") to ***John Doe*** ("respondent") pursuant to section 1002(d) of the Income Tax Act (35 ILCS 5/1002(d)). The NOD alleges that the respondent was an officer or employee of ***Doe*** Electric, Inc. ("corporation") who was responsible for wilfully failing to file and pay the corporation's withholding taxes for the second quarter of 2002. The respondent timely protested the NOD, and an evidentiary hearing was held. After reviewing the record, it is recommended that the liability be affirmed.

Findings of Fact:

1. The corporation was in the business of installing fiberoptic cable. (Tr. pp. 11-12)
2. The respondent was the president of the corporation. (Dept. Ex. #3)
3. The respondent signed the corporation's withholding tax returns for the third and fourth quarters of 2001, and the first quarter of 2002. (Dept. Ex. #2)
4. On September 12, 2003, the Department issued NOD number 4650 to the respondent that proposed a total penalty liability of $11,041.89 for failure to pay withholding taxes for the second quarter of 2002. The NOD was admitted into evidence under the certificate of the Director of the Department. (Dept. Ex. #1).

Conclusions of Law:

With respect to withholding taxes, the Income Tax Act ("Act") (35 ILCS 5/101 *et seq*.) provides in part as follows: "Any amount of tax actually deducted and withheld under this Act shall be held to be a special fund in trust for the Department." 35 ILCS 5/705. Section 1002(d) of the Act provides as follows:

> Willful failure to collect and pay over tax. Any person required to collect, truthfully account for, and pay over the tax imposed by this Act who willfully fails to collect such tax or truthfully account for and pay over such tax or willfully attempts in any manner to evade or defeat the tax or the payment thereof, shall, in addition to other penalties provided by law, be liable for the penalty imposed by Section 3-7 of the Uniform Penalty and Interest Act. (35 ILCS 5/1002(d)).

Section 3-7 of the Uniform Penalty and Interest Act provides in 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 wilfully fails to file the return or make the payment to the Department or wilfully 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 735/3-7(a)).

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 tax returns and paying the taxes, and (2) the individual willfully failed to perform these duties.

Under section 3-7, the Department's certified record relating to the penalty liability constitutes *prima facie* proof of the correctness of the penalty due.[1] 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 respondent to establish that one or more of the elements of the penalty are lacking, i.e., that the person charged was not a 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 respondent's books and records to support the claim. *Id*.

In the present 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, the respondent presented his testimony and the testimony of the corporation's office manager, but he did not present any documents to support a finding that the penalty should not be imposed. He and the office manager testified that a "turnaround consultant" from U.S. Bank took over the corporation sometime during the spring of 2002. They stated that they believed that the consultant was controlling the corporation and the taxes should have been paid by U.S. Bank.

[1] The relevant portion of section 3-7 provides as follows: "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 proceeding 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. * * * That certified reproduced copy or certified computer print-out shall without further proof, be admitted into evidence before the Department or in any legal proceeding and shall be prima facie proof of the correctness of the amount of tax or penalty due." 35 ILCS 735/3-7(a).

As previously mentioned, the testimony alone is not sufficient to overcome the Department's *prima facie* case. See A.R. Barnes & Co., *supra*; Mel-Park Drugs, Inc. v. Department of Revenue, 218 Ill. App. 3d 203, 217 (1st Dist. 1991); Sprague v. Johnson, 195 Ill. App. 3d 798, 804 (4th Dist. 1990). The respondent must present corroborating documentation to support his claim that he was not responsible for filing the corporation's returns or that he did not willfully fail to pay the liability. Because the respondent has failed to do this, it cannot be found that the liability should be dismissed.

In addition, even if a turnaround consultant was present during the months in question, this does not necessarily mean that the respondent was no longer responsible for filing the returns or paying the taxes. From the testimony, it is not clear whether the consultant had authority to write checks for the corporation. (Tr. p. 18) Having a consultant oversee the operations of the corporation does not necessarily mean that the respondent was not able to ensure that the taxes were paid.

The respondent notes that the corporation's payment history shows that all payments were made prior to the quarter at issue, and they were made in a timely fashion. The respondent also indicates that the corporation filed a bankruptcy petition in June 2002, and the Department was notified of the bankruptcy filing. The respondent maintains that the Department should have collected these taxes during the bankruptcy.

The Administrative Procedure Act (5 ILCS 100/1 *et seq*.) provides that "Notice may be taken of matters of which the circuit courts of this State may take judicial notice." 5 ILCS 100/10-40(c). Judicial notice may be taken of public documents that are included in the records of other courts. Metropolitan Life Insurance Company v. American National Bank and Trust Company, 288 Ill. App. 3d 760, 764 (1st Dist. 1997). Although the respondent did not provide a copy of the corporation's bankruptcy petition, judicial notice may be taken of the fact that the corporation filed a Chapter 7 bankruptcy petition on June 5, 2002 in the Central District of Illinois, case number 02-72401.

The filing of the bankruptcy petition, however, does not necessarily indicate that the respondent did not willfully fail to pay the taxes. The amount that was withheld from the employees' salaries was to be held in trust for the Department. See 35 ILCS 5/705. The petition was filed on June 5, 2002, so the amount that was withheld for the second quarter (April, May, and June) until the filing of the petition was to be held in trust for the Department. The bankruptcy petition requires the disclosure of all property that is held by the debtor but is owned by another person. If the amount withheld was being held in trust for the Department, then this amount should have been disclosed on the bankruptcy petition.

Although judicial notice may be taken of the fact that the corporation filed a bankruptcy petition, it may not be taken of facts that are included in the petition. See Vulcan Materials Company v. Bee Construction, 96 Ill. 2d 159, 166 (1983) (judicial notice is improper if the facts are derived from pleadings in a case not involving the same parties and the facts are not proved). The respondent must prove that the amount that was withheld was held in trust for the Department until the filing of the bankruptcy petition. If the corporation did not have the amount that was owed to the Department at the time the petition was filed, then it would be difficult to find that the respondent did not willfully fail to pay the taxes. See Department of Revenue v. Heartland Investments, Inc., 106 Ill. 2d 19, 29-30 (1985) (giving preferential treatment to other creditors rather than paying the corporation's taxes constitutes wilfull behavior). Because the respondent has not presented evidence indicating that he did not willfully fail to pay the taxes, the liability must be upheld.

Recommendation

For the foregoing reasons, it is recommended that the Notice of Deficiency be upheld.

Linda Olivero
Administrative Law Judge

Enter: December 27, 2006