

IT 16-07

Tax Type: Income Tax

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 AND JANE JONES,
Taxpayers

No. **XXXX**
1002D Penalty ID **XXXX**
Period **3/09-12/09**
(*John Doe*)
1002D Penalty ID **XXXX**
Period **3/09-12/09**
(*Jane Jones*)
Ted Sherrod
Administrative Law Judge

RECOMMENDATION FOR DISPOSITION

Appearances: Special Assistant Attorney General Jonathan Pope on behalf of the Illinois Department of Revenue; William Hotopp, Esq. on behalf of *John Doe*; *Jane Jones*, *pro se*.

Synopsis:

This matter comes on for hearing pursuant to protests of section 1002(d) penalties issued by the Illinois Department of Revenue (“Department”) to *John Doe* and *Jane Jones* as responsible officers of *ABC Business Inc.* These penalties arise from unpaid liabilities of *ABC Business Inc.* for payroll withholding taxes for the first, second, third and fourth quarters of 2009. A hearing was held on this matter on November 23, 2015 with *John Doe* and *Jane Jones* testifying and all parties to this matter submitting documentary evidence. Following the submission of all oral testimony and a review of the record, it is recommended that the above-indicated section 1002(d) penalties levied upon *John Doe* and *Jane Jones* be finalized as issued.

Findings of Fact:

Findings regarding *ABC Business Inc.*

1. The Department's *prima facie* case, including all jurisdictional elements, was established by the admission into evidence of the Department's notice of section 1002(d) penalty, 1002D Penalty ID number XXXX and section 1002(d) penalty 1002D Penalty ID number XXXX issued *John Doe* ("*John Doe*") and *Jane Jones* ("*Jane Jones*") for the period 3/09 through 12/09. Department Exhibit ("Ex.") 1, 4. The basis of these penalty liability notices is unpaid withholding taxes due and owing to the State of Illinois by *ABC Business Inc.* ("*ABC Business*"). Tr. p. 17; Department Ex. 1, 4.
2. *ABC Business*, an Illinois domestic subchapter S corporation having its principal place of business in *Anyplace*, Illinois, was founded by *John Doe* and his wife *Jane Jones* in February 2007. Tr. pp. 25, 96; Taxpayers' Ex. 1. *John Doe* and *Jane Jones* were the incorporators of this corporation. Tr. p. 96. During 2007, soon after the formation of this company, *John Doe* transferred his interest in *ABC Business* to *Jane Jones*, the taxpayer's wife at the time, after which *Jane Jones* held a 100% interest in the company. Tr. pp. 39, 127; Department Ex. 2.
3. *ABC Business* was engaged in the sale and installation of roofing to residential and commercial customers. Tr. pp. 96, 122; Department Ex. 2, 3; Taxpayers' exhibit 3, 8, 12. It averaged 30 to 40 roofing jobs per month. Tr. p. 53. This company opened for business in 2007. Tr. p. 58.
4. *ABC Business* was registered with the Department effective February 20, 2007, for the purpose of operating as a service enterprise. Department Ex. 2. Upon registration, it was

issued an Illinois Business Tax number authorizing it to do business in this state. *Id.* The business registration indicated that *Jane Jones* was the President, Secretary, Treasurer and sole shareholder of *ABC Business*. *Id.* The registration also stated that *John Doe* was the vice president of the company. *Id.* *John Doe* was also an employee. Tr. pp. 65, 66.

5. *ABC Business* withheld amounts of Illinois income tax from its employees' wages during 2007, 2008 and 2009. Tr. p. 17; Department Ex. 1, 4. The company filed all required payroll withholding tax returns and paid all payroll withholding taxes due for 2007 and 2008. Tr. p. 58. However *ABC Business* failed to pay withheld payroll taxes due and owing to the State of Illinois for the quarters ending March, June, September and December, 2009. Department Ex. 1, 4. As a result of the company's failure to pay taxes, *John Doe* and *Jane Jones* were determined to be responsible officers and held liable for the unpaid taxes of *ABC Business*. *Id.*
6. *ABC Business* was involuntarily dissolved by the Secretary of State for failure to file its annual report for 2009 on July 9, 2010. Tr. pp. 18, 30; Taxpayers' Ex. 1.

Findings regarding *John Doe*

7. *ABC Business* was engaged in the sale and installation of roofing to residential and commercial customers. Tr. pp. 96, 122; Department Ex. 3; Taxpayers' Ex. 3, 8, 12. *John Doe* held the company's roofing license and was responsible for overseeing the day to day field operations of the company. Tr. p. 19. His duties in this capacity included making roofing sales and preparing bids for contracts to do roofing work, supervising work crews performing roofing installation and checking on the progress of installation work, and collecting the company's accounts receivable. Tr. pp. 18, 42, 43, 122. These responsibilities required *John Doe* to be at jobsites between 60 and 70 hours per week. Tr. p. 53.

8. Although a divorce proceeding to dissolve *John Doe*'s marriage to *Jane Jones* commenced in early 2009,¹ *John Doe* continued to function in the above-described capacity and to perform the above described functions throughout 2009. Tr. pp. 17, 53.
9. During the tax period in controversy, *John Doe* drew a salary of \$XXXX per week from *ABC Business*. Tr. pp. 65-68. A portion of the salary due *John Doe* in 2009 was not paid during that year. *Id.*
10. During 2009, in addition to checks written naming *John Doe* as the payee, each in the amount of \$XXXX, checks in the amount of \$XXXX and \$XXXX were also written naming *John Doe* as payee during that year. *Id.* All of these checks were cashed by *John Doe*. *Id.*
11. *ABC Business* had a bank account at *Box Bank* to which both *John Doe* and *Jane Jones* had access. Tr. p. 114. *John Doe* had the power to draw funds from this bank account without anyone else's approval throughout the tax period in controversy. Tr. pp. 69, 114. He exercised his authority to write checks drawn on the company's bank account to pay himself a salary and to make payments to vendors and suppliers. Tr. pp. 65-69.
12. *John Doe* had the power to hire and fire corporate personnel. Tr. p. 122. He also possessed the power to enter into binding contracts on the company's behalf including the power to enter into credit agreements, and exercised this power during the tax period in controversy. Tr. pp. 108, 112, 113; Taxpayers' Ex. 7, 8.
13. During 2009, *John Doe* became aware that his personal roofing license had been revoked. Tr. pp. 21-24. He subsequently determined that this action resulted from a letter sent by *Jane*

¹ Various orders entered by the Circuit Court in the divorce proceeding referenced above in this case were the subject of an Illinois Appellate Court decision in *In re Marriage of John Doe*, 2012 IL App (2d) 110272-U, (2012 WL 6967587), an unpublished opinion issued by the Appellate Court of Illinois, 2d District pursuant to Illinois Supreme Court Rule 23. While I am barred by Rule 23 from citing this case as precedent, I have taken judicial notice of various findings of fact enumerated in this decision pertaining to the instant case.

Jones to the Illinois Secretary of State's office fraudulently representing that *ABC Business* no longer needed to use it. *Id.*

14. During the first quarter of 2009, *John Doe* became aware that *Jane Jones* had written letters to *ABC Business's* customers indicating that *ABC Business* no longer wished to perform roofing services for them and was going out of business. Tr. pp. 58-60; Department Ex. 3.

15. *John Doe* learned that *Jane Jones* had failed to timely file payroll withholding tax returns and pay withholding taxes due for 2009 on or about August 20, 2014 when he received the Department's notice of section 1002(d) penalty at issue in this case. Tr. p. 61; Department Ex. 1. *John Doe* offered no evidence that he attempted to use any corporate assets or receipts to pay taxes once he knew taxes were due to Illinois after learning that *Jane Jones* had failed to pay over to the State of Illinois payroll withholding taxes collected from *ABC Business* employees.²

16. On August 20, 2014, the Department issued a notice of section 1002(d) penalty to *John Doe* proposing a total responsible officer penalty of \$XXXX based upon *ABC Business's* failure to pay quarterly payroll withholding taxes for 2009. Department Ex. 1.

Findings of Fact regarding *Mary John Doe Jane Jones*

17. The Department's *prima facie* case, including all jurisdictional elements, was established by the admission into evidence of the Department's notice of section 1002(d) penalty, 1002D Penalty ID number XXXX issued July 17, 2014 for the period 3/09 through 12/09. Department Ex. 4. The basis for this penalty liability notice was unpaid withholding taxes due and owing to the State of Illinois by *ABC Business*. Tr. p. 17; Department Ex. 4.

² By order of the Circuit Court of DeKalb County dated March 11, 2011, *John Doe* received 50% of the assets of *ABC Business* in divorce proceedings adjudicating the dissolution of his marriage to *Jane Jones*. See In re Marriage of *John Doe*,*supra* at ¶35.

18. *ABC Business* withheld amounts of Illinois income tax from its employees' wages during 2007, 2008 and 2009. Tr. p. 17; Department Ex. 1, 4. *Jane Jones* timely filed all required payroll withholding tax returns and paid all withholding taxes due from the company for 2007 and 2008. Tr. p. 58. However she failed to file returns when due and pay taxes due from the company for payroll withholding taxes for the periods ending March 2009 through December 2009. Department Ex. 4. She did not file payroll withholding tax returns for the company for 2009 until March 23, 2013. Tr. p. 124; Department Ex. 5.
19. *Jane Jones* filed quarterly payroll withholding tax returns for 2009 on March 23, 2013. *Id.* She signed IL-941 forms for all four quarters of 2009. Department Ex. 5.
20. As a result of the company's failure to pay taxes, on July 17, 2014, *Jane Jones* was determined to be a responsible officer and held liable for the unpaid taxes of *ABC Business* noted above. Department Ex. 4.
21. During 2009, *Jane Jones* was the sole shareholder of *ABC Business* and owned 100 percent of the company's stock. Tr. p. 39; Department Ex. 2. She, along with her then husband, *John Doe*, incorporated *ABC Business* in 2007. Tr. pp. 25, 96. *Jane Jones* was one of the company's incorporators. *Id.* In 2007, she acquired *John Doe*'s interest in this company and became the company's sole shareholder. Tr. p. 39; Department Ex. 2. See also In Re Marriage of John Doe, 2012 IL App (2d) 110272-U (2012 WL 6967587), an unpublished opinion issued by the Appellate Court of Illinois, 2nd District pursuant to Illinois Supreme Court Rule 23, at ¶5.
22. *ABC Business* obtained an Illinois Business Registration from the Department effective February 20, 2007. Department Ex. 2. The Illinois Business Registration for *ABC Business* lists *Jane Jones* as the corporation's sole shareholder and as its President, Secretary and

Treasurer. *Id.* Moreover, *Jane Jones* is identified in the application as the person agreeing to “accept responsibility for filing returns and paying [withholding] taxes.” *Id.* *ABC Business’s* Illinois Business Registration was prepared and filed electronically by *Jane Jones*. *Id.*

23. *Jane Jones* was responsible for the day-to-day office management of *ABC Business*. Tr. pp. 19, 44, 92. Her duties included handling the company’s payroll and making pension payments to a union pension fund, management of the company’s accounts receivables and general oversight of the company’s financial affairs including the filing of the company’s payroll withholding tax returns and payment of the company’s withholding taxes. Tr. pp. 27-29, 44, 58.

24. *Jane Jones* was authorized to sign and issue checks drawn on the company’s bank account at *Box Bank*. Tr. pp. 28, 113, 114, 122, 123. *Jane Jones* issued checks and signed other corporate documents during the tax period in controversy using a corporate signature stamp with *John Doe’s* name on it. Tr. p. 28. She also authorized and issued check payments to cover the company’s payroll expenses during the tax period in controversy. Tr. pp. 130, 131.

25. *Jane Jones* received compensation from *ABC Business* during 2009; she wrote payroll checks to herself during this period. Tr. p. 130.

26. *Jane Jones* authorized check payments to cover payroll expenses during the tax period in controversy. Tr. pp. 130, 131. During 2009, *ABC Business* made payroll payments to workers while the company’s taxes due to the state remained delinquent. *Id.*

27. The company’s books and records were in the possession of *Jane Jones*. Tr. p. 11. *Jane Jones* never turned over any of the books and records in her possession to *John Doe* even after being ordered by the Circuit Court of DeKalb County to do so. Tr. p. 17.

28. By mutual agreement, *John Doe* and *Jane Jones* shared responsibility for the operation of *ABC Business*. Tr. pp. 19, 44, 92.

29. *Jane Jones* was aware of the company's failure to pay payroll taxes for 2009. Tr. p. 125. She testified that she did not file returns for 2009 because of a court order transferring complete control over *ABC Business* to *John Doe* entered during that year. *Id.*

30. On July 17, 2014, the Department issued a notice of section 1002(d) penalty to *Jane Jones* proposing a total responsible officer penalty of \$XXXX based upon *ABC Business's* failure to pay quarterly payroll withholding taxes for 2009. Department Ex. 4.

Conclusions of Law:

Conclusions regarding *John Doe*

Section 3-7 of the Uniform Penalty and Interest Act ("UPIA"), 35 ILCS 735/3-7 ("section 3-7") provides, in part, as follows:

- (a) 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 735/3-7

The record in the instant case indicates that finalized tax liabilities for unpaid payroll withholding tax were assessed against *ABC Business Inc.* ("*ABC Business*"), an Illinois Subchapter S corporation having its principal place of business in *Anyplace*, Illinois, for 2009. Taxpayers' Ex. 1; Department Ex, 1, 2, 4. The record further indicates that *John Doe* ("*John Doe*") was named as an officer of *ABC Business* on the company's Illinois business registration with the Department, and that he was involved in the operation of this company during that time.

Tr. pp. 18, 19, 42, 43, 122; Department Ex. 2. Accordingly, given the mandate of section 3-7, the issue to be decided in this case is whether *John Doe* should be held personally liable as a responsible officer for the company's unpaid payroll withholding taxes for the tax period at issue.

To impose personal liability for the failure to pay withholding tax under section 3-7, it must be shown that the person being penalized is a responsible party and that the failure to pay was willful. 35 ILCS 735/3-7. By introducing the notice of section 1002(d) penalty at issue into evidence, the Department established its *prima facie* case against the taxpayer. *Id.* In Branson v. Department of Revenue, 168 Ill. 2d 247 (1995), the Illinois Supreme Court held that the admission of a notice of liability as a “responsible officer” into evidence established all of the statutory requirements for the imposition of the personal liability penalty, including willfulness. While the Court was addressing Ill. Rev. Stat. 1990, ch. 120, ¶452 ½ which was a provision that preceded section 3-7, a comparison of these provisions reveals that they are almost identical, and both enumerate corporate officer and employee penalty liability. Moreover, both of these provisions address willfulness and responsibility. Therefore, a similar analysis of section 3-7, based on the court's conclusions may be made. Frowner v. Chicago Transit Authority, 25 Ill. App. 2d 312 (1st Dist. 1960).

For guidance in determining whether a person is responsible under section 3-7, the Illinois Supreme Court has referred to cases interpreting section 6672 of the Internal Revenue Code (28 U.S.C. § 6672). See Branson, *supra* at 254-55; Department of Revenue v. Heartland Investments, Inc., 106 Ill. 2d 19, 29-30 (1985). Federal case law states that the critical factor in determining responsibility is whether the person had “significant” control over the corporation's finances. See Purdy Co. of Illinois v. United States, 814 F. 2d 1183, 1188 (7th Cir. 1987) (“It is

sufficient that the person involved have significant control over the disbursement of corporate funds.”). Significant control does not mean exclusive or absolute control over the disbursement of funds. Thomas v. U.S., 41 F. 3d 1109, 1113 (7th Cir. 1994) (“Having significant control does not mean having exclusive control over the disbursement of funds or the final say over whether taxes or bills are paid.”). All that is required is that the person could have impeded the flow of business payments necessary to prevent the corporation from squandering the taxes that it should have paid to the Department. *Id.*

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 a responsible party, or that the person’s actions were not willful. Branson, *supra* 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, i.e. documentary evidence, to support its claim. *Id.*

In the present case, *John Doe* has failed to present sufficient documentary evidence to show that he did not have significant control over the corporation’s finances. To rebut the Department’s *prima facie* case, *John Doe* testified that he was not an owner of *ABC Business* and introduced documentary evidence to show that he was not listed as an officer of *ABC Business* in the Secretary of State’s records of Illinois companies. Tr. pp. 24, 25, 37, 48, 51, 57; Taxpayer’s Ex. 1. While *John Doe* was an incorporator of *ABC Business* (tr. p. 96), the record in this case indicates that he divested himself of his entire ownership interest in this company prior to the company’s registration with the Department. Department Ex. 2 (*ABC Business* Registration with

the Illinois Department of Revenue effective February 20, 2007 showing *John Doe*'s wife, *Jane Jones*, as the sole shareholder of this company).

John Doe also propounded testimony suggesting that he was never a corporate officer of *ABC Business*. Tr. pp. 49-52. However, the record in this case indicates that, on June 2, 2009, *John Doe* signed an application to open a credit account for *ABC Business* with *XYZ Business*, and that, on this application, he signed as, and acknowledged himself to be, the Vice President of the company. Taxpayers' Ex. 7 (attachment marked "Exhibit A"). Based upon this evidence, I conclude that *John Doe* was the Vice President of *ABC Business* during the tax period in controversy and do not find his testimony suggesting a contrary finding to be credible.

From the testimony presented by *John Doe*, I deduce that his claim for relief in this case is that he should not be held liable as a responsible person because he transferred complete ownership and control of *ABC Business* to his wife and had no formal affiliation with the company during the tax period at issue. Tr. pp. 46, 47 ("Q. So your position is that it wasn't your business, and, therefore, you didn't worry about the taxes because that wasn't your business? A. That's correct.").

As previously noted, *John Doe* has failed to show that he was not an officer. Moreover, even if he could prove that he was not an officer and that he had no formal affiliation with the company, in determining whether a person is responsible, the courts have indicated that liability is not in all cases limited to those who occupy formal corporate status. Fiataruolo v. United States, 8 F. 3d 930, 939 (2nd Cir. 1993) ("It should be noted that a person need not hold any particular position in a business and need not actually exercise authority to be held a responsible party for the payment of withheld taxes."); Adams v. United States, 504 F. 2d 73 (7th Cir. 1974). Rather, liability attaches to those with the power and responsibility within the corporate structure

for seeing that the taxes are remitted to the government. Monday v. United States, 421 F. 2d 1210 (7th Cir. 1970), cert. den. 400 U.S. 821 (1970).

While *John Doe* testified that he never exercised authority over the company's tax compliance (tr. pp. 19, 28-29, 44, 58), he introduced no documentary evidence to show that he possessed no such authority (e.g. corporate by-laws or bank authorizations). Moreover, he introduced no evidence of any kind to explain why his authority would have been limited in this manner even though he was a founder and incorporator of the company, and by virtue of having been a roofer for 20 years (tr. p. 45), presumably possessed more expertise regarding the company's affairs than his wife, the company's only other officer.

Moreover, the record indicates that, after ceasing to be a company shareholder, *John Doe* nevertheless continued to possess and exercise authority to sign corporate checks during the tax period in controversy. Tr. pp. 69, 114. The ability to sign corporate checks is a significant factor in determining whether a person is a responsible party 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). *John Doe's* ability to sign corporate checks leads to the reasonable conclusion that he was connected closely enough to the corporation's finances that he could have paid the taxes the company collected 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 collected taxes paying other bills is indicia of significant control. Thomas, *supra* at 1113. For this reason I conclude that *John Doe* had significant control over the corporation's finances under one of the tests for making this determination enumerated in the federal case law. *Id.*

John Doe also testified that he did not participate in decisions concerning the company's payroll matters, which would include the payment of payroll withholding taxes. Tr. pp. 27. However, the record indicates that *John Doe* was a founder and incorporator of the company (tr. 96), was responsible for hiring and firing company personnel (tr. p. 122), was primarily responsible for generating the company's revenues (tr. pp. 18, 19, 42, 43, 53, 122), and, as previously indicated, presumably had more experience with the operation of a roofing company than his wife. Given the foregoing, I do not find credible *John Doe's* claim that he chose to cede to her complete authority to make all payroll related decisions. Consequently, I have accorded no weight to *John Doe's* claim that he gave his wife complete authority to make all decisions regarding the company's payroll matters.

With the exception of documentary evidence that *John Doe* ceased to be an owner of the company prior to the tax period in controversy (which does not absolve him of liability), the only other evidence supporting *John Doe's* claim that he was not a responsible officer is *John Doe's* own self serving testimony that he was not in control of the company's taxes or payroll tax compliance. This mere testimony is insufficient to overcome the Department's *prima facie* case. Jefferson Ice 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., supra; 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, *John Doe* needed to present corroborating documentation such as corporate by-laws delineating the duties and responsibilities exclusively vested in the company's president, corporate minutes, or bank cards or other bank records showing that *John Doe* did not have the authority to direct the payment of tax bills without the additional authorization of his wife, the company's only other officer, during the tax period at

issue. Without such evidence, it must be found that *John Doe* has not rebutted the Department's finding that he was a responsible officer of *ABC Business* during the tax period at issue.

As previously noted, by Illinois statute, personal liability will be imposed upon a person who: (1) is responsible for filing corporate tax returns and/or making the tax payments; and (2) "willfully" fails to file returns or make payments. 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 person cannot prove lack of willfulness simply by denying awareness of a tax deficiency that could have easily been investigated. *Id.* at 267.

Cases define "willful" as involving intentional, knowing and voluntary acts or, alternatively, reckless disregard for obvious or known risks. *Id.* 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 on February 18, 2009, *John Doe* and his wife *Jane Jones* commenced a contentious divorce proceeding. Tr. pp. 80, 81, 100. The record also indicates that *John Doe* and his wife had agreed that she would handle the office management functions including the filing of the company's tax returns. Tr. pp. 19, 44, 92. Furthermore, the record is replete with evidence that *John Doe* was well aware of his wife's mismanagement of the company's business and financial affairs subsequent to the commencement of their divorce proceedings in a manner that made it very unlikely that the company was filing its payroll tax returns and paying its payroll taxes that were due. Specifically, he learned that his wife had failed to make contractually required retirement pension payments to a union pension fund established to fund pensions for the company's employees. Tr. p. 29. He was also aware that she had failed to pay rent due in payment for the company's office space. Tr. pp. 20, 21.

Further, *John Doe* testified extensively about his wife's efforts to terminate his roofer's license which would have made it impossible for the company to operate. Tr. pp. 21-24. Moreover, testimony during the hearing indicates that *John Doe* was aware that the company's supplier and vendor invoices were not being paid by his wife, making it necessary for him to pay using cash because the company's vendors and suppliers would not extend credit to the company. Tr. p. 67.

Even with the knowledge that his wife was engaging in practices that *John Doe* believed were intended to "destroy" the company (tr. p. 84), the record contains evidence that *John Doe* never asked *Jane Jones* if any tax bills were not being paid during the tax period in controversy. Tr. pp. 46, 47. Rather, as he would have one believe, during the tax period at issue, he simply allowed her to make decisions regarding creditor payments and did not demand that tax delinquencies be revealed or addressed. The fact that *John Doe* may have adopted a "hear no

evil – see no evil” policy does not relieve him of liability. Wright, supra. On the contrary, his failure to see that the company’s tax obligations were met when he knew that the company’s business affairs were being poorly handled and that the company’s creditors’ invoices were not being paid is sufficient to establish willfulness within the context of the statute.

John Doe attempts to rebut the presumption of willfulness through testimony that his wife exercised complete responsibility for payment of the company’s taxes. Tr. pp. 44, 45. 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 delegating this responsibility to others. Purcell v. U.S., 1 F. 3rd 932 (9th Cir. 1993).

The Courts have also found that giving preferential treatment to other creditors rather than paying the corporation’s tax liabilities constitutes willful behavior. In identifying such conduct as a basis for finding “willfulness” the court, in Heartland Investments, supra, states as follows:

In a provision similar to section 13 ½. [predecessor of section 3-7], section 6672 of the Internal Revenue Code of 1954 ... imposes personal liability on a corporate officer if he “willfully fails to collect or truthfully account for and pay” a corporate employee’s social security and Federal income withholding taxes. In Bublick, the court found that cases arising under section 6672 of the IRC provided guidance in determining the meaning of the “willful failure” requirement of section 13 ½ [Ill. Rev. Stat. 1979, ch. 120. par. 452 ½ (§ 13 ½)]. A reading of such cases indicates that a 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. [citations omitted]. These Federal cases specifically find that according other corporate creditors preferential treatment over governmental tax obligation constitutes willful behavior.

Heartland, supra at 29-30.

See also Department of Revenue v. Joseph Bublick & Sons, 68 Ill. 2d 568 (1977); Ruth v. United States, 823 F. 2d 1091 (7th Cir. 1987).

The record indicates that *John Doe* had the authority to issue corporate checks and was, therefore, in a position to direct that the taxes be paid. Tr. pp. 69, 114. There is also evidence in the record that *John Doe* paid a salary to himself and paid other bills with the available funds rather than the company's taxes. Tr. pp. 65-69.

While *John Doe* testified that he had no access to the company's books and records (tr. pp. 17, 18, 20, 21, 30), implying that it was impossible for him to know that the company's taxes had not been paid, given *John Doe*'s continuing involvement in the company's operations after ceasing to be a shareholder of the company, I do not find this testimony to be exculpatory. *John Doe*'s responsibility for the company field operations brought him into direct connection with the company's vendors and suppliers and allowed him to learn from them of the company's precarious financial condition. Tr. p. 67. Based upon this information, he knew, or should have known that there was a grave risk that the company's payroll withholding taxes were not being paid. During the hearing *John Doe* produced no evidence other than his own self serving testimony denying any knowledge of unpaid taxes to negate the obvious inference from the record that his preferential payment of funds to other creditors while taxes remained unpaid amounted to willfulness. See Heartland, *supra*.

Moreover, the only evidence supporting *John Doe*'s claim that he did not know, and could not have known, taxes were due and therefore did not act willfully is *John Doe*'s own testimony. As previously noted, a taxpayer has the burden to produce more than his own self serving testimony denying the Department's assessment to rebut the Department's *prima facie* case. Jefferson Ice 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 *John Doe*

had limited authority) that would substantiate a finding that *John Doe* did not know and could not have known that the company's taxes were unpaid when he preferred other creditors over the company's tax obligations. Consequently, *John Doe* has failed to show that he did not act willfully when he paid other creditors rather than the Department. For the foregoing reasons, I find that the evidence adduced by *John Doe* is insufficient to rebut the Department's *prima facie* case establishing willfulness.

In sum, in the instant case, *John Doe* 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.

Conclusions regarding *Mary John Doe Jane Jones*

The Department avers that *Jane Jones* was a responsible officer of *ABC Business* throughout the existence of the company who willfully failed to pay payroll withholding taxes due from the company during the tax period in controversy. Accordingly, it contends that *Jane Jones* is liable for the responsible officer penalty assessed based upon the aforementioned unpaid taxes in the instant case.

As previously noted, for guidance in determining whether an officer or employee is responsible under section 3-7, the Illinois Supreme Court has referred to cases interpreting section 6672 of the Internal Revenue Code. See Branson, *supra* at 254-55; Heartland, *supra* at 29-30. These cases state that the critical factor in determining responsibility is whether the person had significant control over the corporation's finances. Monday, *supra*; Purdy Co. of Illinois, *supra*. Responsibility is generally found in high corporate officials who have control over the corporation's business affairs and participate in decisions concerning the payment of creditors and the disbursement of funds. Monday, *supra* at 1214-15.

The evidence contained in the record clearly shows that, from the inception of the company, *Jane Jones* assumed responsibility for the day to day operation of the company's bookkeeping and office functions including filing the company's tax returns and paying the taxes reported on these returns to be due. Tr. pp. 19, 27-29, 44, 58, 92, 124; Department Ex. 5.

The record further reveals that, in fulfillment of the duties she assumed at the commencement of the company, *Jane Jones* prepared and filed the company's payroll withholding tax returns for every year during which the company conducted business operations prior to its dissolution in 2010. Tr. pp. 44, 58, 124. Her signature appears on each of the quarterly returns for 2009, which were not filed until March 23, 2013. Tr. p. 124; Department Ex. 5.³

Additional evidence of *Jane Jones*'s status as a responsible officer of *ABC Business* is found in the company's Illinois Business Registration which *Jane Jones* submitted to the Department when the company commenced its business in 2007. Tr. p. 51; Department Ex. 2. This document identifies *Jane Jones* as the President, Secretary, Treasurer and sole shareholder of the company. *Id.* Moreover, in this document, *Jane Jones* identified herself as the person accepting personal responsibility for the filing of returns and payment of taxes due. *Id.*

Unfortunately, *ABC Business*'s by-laws and delegations of authority were not offered into evidence, and the record does not show what duties and responsibilities were vested in the office of president of the company. However, the president of a corporation is usually charged with the responsibility for the overall management of the corporation (Kranz v. Oak Park Trust & Savings Bank, 16 Ill. App. 2nd 331 (1st Dist. 1958); Brown v. Fire Insurance Co. of Chicago, 274 Ill.

³ I assume from the fact that a deficiency was assessed *ABC Business* for 2009 that taxes shown to be due on the returns *Jane Jones* filed were never paid.

App. 414 (1934)), and, without evidence to the contrary, there is no reason to assume that this was not true of *Jane Jones* as President of *ABC Business* in the instant case.

Indeed, the record in this case supports a finding that *Jane Jones* exercised significant control over the corporation's financial affairs. Specifically, *Jane Jones* admitted at the hearing that she had unfettered authority to issue corporate checks drawn on the company's bank account at *Box Bank*. Tr. pp. 113, 114, 122, 123. As previously noted, the ability to sign corporate checks is a significant factor in determining whether a person is a responsible party because it generally comes with the ability to choose which creditors are paid. Gold, *supra*. Individuals who hold corporate office and who have the authority to make disbursements are presumptively responsible persons for purposes of 26 U.S.C. section 6672, the federal responsible officer statute. Hildebrand v. United States, 563 F. Supp, 1259 (D.C.N.J. 1983). As President, with the ability to issue checks, *Jane Jones* could have written checks to the State of Illinois for the unpaid payroll withholding taxes. The aforementioned evidence shows that she was in a position with *ABC Business* to exercise significant authority over the corporation's financial affairs and that she exercised control over the company's decisions regarding the payment of creditors and the disbursement of funds.

In order to overcome the Department's *prima facie* case, evidence must be presented which is consistent, probable and identified with the corporation's books and records. Central Furniture Mart Inc. v. Johnson, 157 Ill. App. 3d 907 (1st Dist. 1987). When the Department established its *prima facie* case, the burden shifted to *Jane Jones* to overcome the *prima facie* correct presumption of responsibility through the presentation of sufficient evidence. Branson, *supra*.

While *Jane Jones* testified that she was not a responsible officer, the company's Illinois Business Registration filed by *Jane Jones* wherein *Jane Jones* identifies herself as the person responsible for the company's tax compliance including payment of taxes, appears to refute this claim. Moreover, *Jane Jones* introduced no documents that support this claim⁴ and thus *Jane Jones's* defense rests solely upon her own testimony. Testimony of a taxpayer denying responsibility alone is insufficient to show that the taxpayer was not a responsible officer. Mel-Park Drugs Inc. v. Department of Revenue, 218 Ill. App. 3d 203, 217 (1st Dist. 1991). Given the evidence noted above that *Jane Jones* exercised significant control over *ABC Business's* financial affairs, in the absence of documentary evidence indicating that *Jane Jones* was not a responsible officer, I must conclude that *Jane Jones* has failed to rebut the Department's presumption that she was a responsible party.

The second element that must be met in order to impose personal liability is the willful failure to pay taxes due. The Department presents a *prima facie* case for willfulness with the introduction of the section 1002(d) penalty issued *Jane Jones* (Department Ex. 4) into evidence. Branson, *supra*. The burden thus shifted to *Jane Jones* to rebut the presumption of willfulness. Id.

As indicated above, *Jane Jones* was the President, Secretary and Treasurer and, by virtue of her assumption of responsibility for filing the company's returns and paying its taxes indicated on the company's business registration, was, by her own admission responsible for the company's tax compliance. Moreover, as has been shown, she had the authority to issue checks drawn on the company's bank account. Given such authority, *Jane Jones* was clearly in a position to direct that taxes be paid, or to use the corporation's checkbook to pay them herself.

⁴ While *Jane Jones* introduced numerous documents into the record (Taxpayers' Ex. 2-18), none of these documents indicate whether or not *Jane Jones* was a responsible officer.

Yet, after admittedly having knowledge of *ABC Business's* withholding tax delinquencies (tr. p. 125), she failed to make sure that the company paid what she knew were the company's payroll tax obligations. Instead, she signed or authorized checks to pay herself, employees and creditors other than the Department when she knew that the company was not paying its payroll tax liabilities. Tr. pp. 130, 131. In preferring other creditors over the state in this manner, *Jane Jones* willfully failed to pay *ABC Business's* unpaid payroll withholding taxes that became due in 2009. Heartland, *supra* at 29-30. Based upon the aforementioned conduct, I find that *Jane Jones*, by preferring other creditors to the Department during the tax period in controversy, willfully failed to pay taxes that became due and owing from *ABC Business* in 2009.

During the hearing *Jane Jones* admitted that she knew that *ABC Business's* withholding taxes for 2009 had not been paid. Tr. p. 125. She testified that she did not pay them because she was barred from doing so by a court order ceding complete control over *ABC Business's* business affairs to *John Doe*. *Id.* The record shows that *ABC Business* failed to pay quarterly withholding taxes for the first, second, third and fourth quarters of 2009 which were due no later than April 30, 2009, July 31, 2009, November 30, 2009 and January 31, 2010, respectively. 35 ILCS 5/704A(b), (c)(4). While the court order granting *John Doe* control over *ABC Business* *Jane Jones* testified to is not in evidence, from the appellate court's decision in In re Marriage of John Doe, *supra*, I deduce that such a court order was issued on or about December 29, 2009. In re Marriage of John Doe, *supra* at ¶15 through ¶21. Accordingly, this court order was entered after the due date for *ABC Business's* returns and tax payments for the first three quarters of 2009 and would not have affected *Jane Jones's* ability to pay taxes due for these quarters.

More importantly, the appellate court's decision in In re Marriage of John Doe, *supra* indicates that the lower court's order to cede control of *ABC Business* to *John Doe* was

superseded by a subsequent lower court order on January 26, 2010 making both *John Doe* and *Jane Jones* jointly responsible for assisting an accountant appointed by the court in straightening out the company's financial affairs. *Id.* at ¶23. A copy of this court order is contained in the record. See Taxpayer's Ex. 17. Based upon this court order, I conclude that *Jane Jones* shared sufficient control over *ABC Business's* affairs with *John Doe* to direct the company's court appointed accountant to pay the taxes due. Consequently, I do not find *Jane Jones's* claim to have been barred by the circuit court's December 29, 2009 order from performing the tax compliance functions she had always performed to be a sufficient basis for concluding that she was not liable as a responsible officer for willfully failing to file the company's returns and pay the company's taxes.

Conclusion

WHEREFORE, for the reasons stated above, it is my recommendation that the Department's 1002(d) penalties issued *John Doe* and *Jane Jones* discussed herein be finalized as issued.

Ted Sherrod
Administrative Law Judge

Date: April 14, 2016