

IT 00-15

Tax Type: Income Tax

Issue: Responsible Corporate Officer – Failure to File or Pay Tax

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

---

---

<b>THE DEPARTMENT OF REVENUE</b>	)	
<b>OF THE STATE OF ILLINOIS</b>	)	Case No.
	)	FEIN
v.	)	NOD
	)	1/Q/95 – 4/Q/95
<b>JANE DOE,</b>	)	
Resp. Officer of ABC	)	Administrative Law Judge
Control Management	)	Mary Gilhooly Japlon

---

---

**RECOMMENDATION FOR DISPOSITION**

**Appearances:** Special Assistant Attorney General Sean Cullinan, on behalf of the Illinois Department of Revenue; Byrd & Taylor, by Mark A. Byrd, on behalf of JANE DOE.

**Synopsis:**

This matter came on for hearing pursuant to the timely protest by JANE DOE (hereinafter “DOE”) of Notice of Deficiency No. 0000 issued by the Department of Revenue (hereinafter “Department”) on May 28, 1998 in the amount of \$25,654.89 for the 1<sup>st</sup> through 4<sup>th</sup> quarters of 1995 (hereinafter “taxable period” or “period at issue”). The NOD was issued to JANE DOE as a responsible officer of ABC Control Management (hereinafter “corporate taxpayer”) who willfully failed to pay over to the Department Illinois Income Taxes withheld from compensation paid to employees of the

corporate taxpayer as required by law. A penalty was therefore imposed under section 1002(d) of the Illinois Income Tax Act, which is equal to the total amount of tax not paid.

The issues to be resolved are whether JANE DOE was a responsible officer of ABC Control Management, and therefore, required to collect, truthfully account for and pay over the withholding tax for the period at issue, and whether Ms. DOE willfully failed to pay over such taxes for the period at issue. A hearing was held on June 13, 2000. Ms. DOE testified, as did Mr. JOHN DOE, her spouse. Upon consideration of all the evidence elicited in this case, it is recommended that the Notice of Deficiency be affirmed.

**FINDINGS OF FACT:**

1. The Department's prima facie case, inclusive of all jurisdictional elements, was established by the admission into evidence of a certified copy of Notice of Deficiency No. 3272 issued to JANE DOE on May 28, 1998 in the amount of \$25,654.89 for the taxable periods of the 1<sup>st</sup> through 4<sup>th</sup> quarters of 1995. (Dept. Ex. No. 1; Tr. pp. 4-5).
2. ABC Control and Management, Inc., the corporate taxpayer, was incorporated in approximately 1989 by JOHN DOE and RICHARD ROE. (Tr. pp. 7-8; Taxpayer's Ex. No. 1).<sup>1</sup>
3. Mr. DOE was president of the corporation, and Mr. R. DOE was vice-president. (Tr. p. 8).
4. At the time the business was incorporated, JOHN DOE owned 70% of the stock, and RICHARD ROE owned 30% of the stock. (Tr. p. 9).

---

<sup>1</sup> JOHN DOE testified that the business originated as a corporation in "1986 or somewhere around there." (Tr. p. 7). The Articles of Incorporation, however, indicate

5. JANE DOE, spouse of JOHN DOE, was a corporate officer, as well as a director. (Tr. pp. 8-9).
6. RICHARD ROE' wife, MARY ROE, was an officer and director, also. (Tr. pp. 8-9).
7. ABC Management, Inc. issued by-laws wherein officers' duties were set forth. (Tr. p. 10; Taxpayer's Ex. No. 3).
8. The business of the corporate taxpayer was ABC removal. (Tr. p. 11).
9. At its incorporation, the corporation employed five employees. (Tr. p. 11).
10. RICHARD AND MARY ROE left the business in approximately 1991. (Tr. p. 12).
11. In 1993, the corporate officers consisted of JOHN DOE as president and director, and JANE DOE as vice president and secretary. (Taxpayer's Ex. Nos. 4, 5; Tr. pp. 13-15).
12. JANE DOE's duties consisted primarily of secretarial work, such as answering the telephone, typing letters and filing. (Tr. pp. 12, 52-53).
13. Originally, the business operated out of the DOE's home; in 1995 the business operated out of an office outside of the home. (Tr. p. 12).
14. Corporate books and records were kept in the DOE's house and barn when the business operated out of the home. (Tr. p. 49).
15. Just prior to the birth of the DOE's eldest child in March 1993, JANE DOE reduced the amount of time she spent at work. (Tr. pp. 16, 51-52, 61).
16. She then only came into the office when she was needed, as in the event of the illness or absence of one of the employees, or if things were especially busy. (Tr. pp. 62-63).

---

that ABC Control Management, Inc. was incorporated in 1989. (Taxpayer's Ex. Nos. 1,

17. A full-time secretary was hired to perform the duties previously performed by JANE DOE. (Tr. pp. 16, 61).
18. JANE DOE never had the responsibility of preparing federal and state income tax and withholding tax returns; they were prepared and filed by JOHN DOE and the corporation's accountant, SUZY DOE. (Tr. p. 17).
19. The accountant, either SUZY DOE, or for a short period of time, BETTY DOE, would assemble the data necessary for the preparation of the Illinois 941 returns, as well as actually prepare them. (Tr. p. 19).
20. JOHN DOE would sign the returns as president of the corporation. (Tr. p. 19).
21. The returns bearing JOHN DOE's signature were filed, while he retained copies stating "President" thereon. (Taxpayer Ex. Nos. 6-11, 13; Tr. pp. 23-24, 28).
22. In April 1994, JOHN and JANE DOE pledged their home as collateral for a line of credit to the corporation in the amount of \$67,429.37. (Taxpayer's Ex. No. 14; Tr. 29-30).
23. JANE DOE signed the mortgage in order to secure the line of credit. (Tr. pp. 30, 31).
24. The DOE's home is owned in joint tenancy. (Tr. p. 31).
25. Most of the borrowed money went towards meeting the corporation's payroll. (Tr. p. 30).
26. The line of credit was repaid in September 1996 and the mortgage on the home was released. (Taxpayer's Ex. No. 15; Tr. p. 31).
27. The corporate taxpayer filed a voluntary petition for chapter 7 bankruptcy on February 8, 1996. (Taxpayer's Ex. No. 16; Tr. pp. 32-33).

---

2).

28. The Department of Revenue was listed as an unsecured priority creditor with a claim in the amount of \$21,724.91. (Taxpayer's Ex. No. 16; Tr. pp. 33-34).
29. JOHN DOE advised JANE of the debts owned by the corporation to the Illinois Department of Revenue, as well as to the Internal Revenue Service, when the bankruptcy petition was being prepared. (Tr. pp. 35, 68).
30. On April 22, 1996, JOHN and JANE DOE filed a chapter 7 voluntary petition in bankruptcy on behalf of themselves as individuals. (Tr. p. 36; Taxpayer's Ex. No. 17).
31. In 1997, pursuant to a plea agreement, JOHN DOE pled guilty to one count of an indictment for violation of various Illinois tax laws; the remaining counts were dismissed. (Tr. pp. 37-38).
32. In addition, an assessment was issued against JOHN DOE by the Department of Revenue for 1995. (Tr. p. 38).
33. JANE DOE received \$30,000 gross income from the corporate taxpayer for the year 1995, even though her duties and presence at the business were diminished. (Tr. pp. 39, 70, 71; Taxpayer's Ex. Nos. 16, 18).
34. Likewise, JOHN DOE continued to draw a salary throughout the period at issue. (Taxpayer's Ex. No. 16).
35. JANE DOE did not have authority to hire or fire employees. (Tr. pp. 40, 63).
36. Pursuant to the Minutes of Annual Meeting of Board of Directors dated July 1, 1993, JANE DOE was authorized, along with JOHN DOE, to sign corporate checks. (Taxpayer's Ex. No. 5).
37. Ms. DOE was a signatory on the corporate checking account. (Tr. p. 50).

38. JANE DOE had access to the books during 1995; she entered into the ledger the checks that she wrote and signed. (Tr. pp. 50, 51).
39. Although there was no corporate resolution regarding her ability to sign checks only at the direction of her spouse, JANE DOE only wrote checks at the direction of JOHN DOE who provided her with invoices that needed to be paid. (Tr. pp. 18, 41, 49-50, 63-64).
40. JANE DOE signed payroll checks if her husband told her to do so, but she did not prepare the checks. (Tr. p. 64).
41. JANE DOE did not prepare any state or federal withholding tax returns during the liability period. (Tr. pp. 65, 74).
42. The business operated out of the DOE home until March 1995, at which time office space was rented in DOE Square. (Tr. pp. 47, 77).
43. The corporate checkbook was kept at the DOE Square office during the time that the space was rented. (Tr. p. 84).
44. Otherwise, corporate books and records were kept in the DOE's house and barn. (Tr. p. 49).
45. JANE DOE had access to the books during 1995; she entered into the ledger the checks that she wrote and signed. (Tr. pp. 50, 51).
46. When Ms. DOE wrote checks she took note of the account balance. (Tr. p. 70).
47. After the birth of her son, Ms. DOE did not monitor to make sure that creditors, such as landlord, utilities and employees, were being paid. (Tr. p. 75).
48. Equipment was stored on a barn on the DOE's residential property. (Tr. p. 48).
49. The corporate taxpayer began to have cash flow problems in 1994. (Tr. p. 46).

50. In the late June of 1995, it became apparent that the business was failing and it was not going to recover due to a couple of large projects in Springfield that went bad. (Tr. p. 42).
51. Due to financial troubles, in about September 1995, the business moved back to the DOE's address, working out of the barn. (Tr. pp. 48, 66-67).
52. The business could not even afford to pay the rent for the office space in DOE Square. (Tr. pp. 83-84).
53. JANE DOE was not naïve; she was aware that the business was experiencing problems and that her husband was under pressure as he was not pleasant to be around. (Tr. pp. 26, 49).
54. In about September 1995, JOHN DOE finally acknowledged to JANE DOE that the business was experiencing financial difficulties. (Tr. pp. 66-67, 83).
55. Her husband acknowledged at that point that things were not going well and the business was not going to be able to continue. (Tr. pp. 67, 68).
56. JOHN and JANE DOE would discuss the business's financial state of affairs; JOHN was generally optimistic to JANE. (Tr. p. 70).
57. During the summer of 1995, JOHN DOE spent a total of about five to seven days and nights in Springfield on an asbestos removal job. (Tr. p. 76).
58. The office manager handled the business affairs when JOHN DOE was away, unless she asked JANE to help out by writing checks to creditors or payroll. (Tr. p. 81).
59. During the period at issue, JOHN DOE determined which creditors were paid, and which creditors were not paid. (Tr. p. 82).

60. In order to continue in business, and with the hope that they would “catch up” with tax obligations down the road, JOHN DOE made the conscious decision to continue paying payroll to employees, while neglecting to pay taxes. (Tr. p. 25).
61. JANE DOE realized that as there were cash flow problems, the determination of which creditors were paid was an ongoing process. (Tr. p. 82).
62. During the period at issue, JANE DOE signed checks to creditors, including checks to pay quarterly income tax deposits with Stillman Valley Bank. (Tr. pp. 83, 85; Dept. Ex. No. 5).
63. Ms. DOE was aware that at times her husband would get advances from the bank with receivables as collateral so that he could keep the business running. (Tr. p. 83).

**CONCLUSIONS OF LAW:**

The Department seeks to impose personal liability on JANE DOE pursuant to section 1002(d) of the Illinois Income Tax Act (35 ILCS 5/101 *et seq.*). Said section provides in pertinent part as follows:

(d) 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 the other penalties provided by law, be liable for the penalty imposed by Section 3-7 of the Uniform Penalty and Interest Act.

Section 3-7 of the Uniform Penalty and Interest Act (“UPIA”) provides in pertinent part as follows:

Sec. 3-7. Personal Liability Penalty

(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 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. 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).

An analysis of the above-cited statutory provision results in the determination that an individual is personally liable for the tax owed by the corporate taxpayer when he is found to be both responsible and willful. Regarding the issue of responsibility, the statute mentions "any person required to collect, truthfully account for, and pay over the tax...". Concerning the issue of willfulness, the statute imposes personal liability upon such responsible person "...who wilfully attempts in any manner to evade or defeat the tax or the payment thereof...".

The Department's prima facie case of liability is established once a certified copy of the Notice of Penalty Liability is admitted into evidence. At that point, the burden shifts to the one named as responsible officer to rebut the Department's prima facie case through evidence sufficient to show that he was either not a responsible officer, and/or

that his actions were not willful. (Branson v. Department of Revenue, 168 Ill.2d 247 (1995))

The issues at hearing, therefore, are whether JANE DOE was a responsible officer of ABC Control Management, Inc., who was under a duty to collect the tax, or account for and pay over such tax to the Department, and whether she willfully failed to pay the tax due.

Nowhere in the UPIA, the Illinois Income Tax Act, or the Retailers' Occupation Tax ("ROT") Act (35 ILCS 120/1 *et seq.*, formerly Ill. Rev. Stat., ch. 120, sec. 440 *et seq.*), which also imposes personal liability on responsible corporate officers who willfully fail to file ROT returns or pay the tax due, are the terms "responsible" or "willful" defined. In the case Branson v. Department of Revenue, *supra*, in discussing the willfulness issue, the Illinois Supreme Court reiterated that as section 6672 of the Internal Revenue Code is similar to the ROT Act in that it imposes personal liability upon corporate officers who willfully fail to collect, account for or pay over employees' social security and Federal income withholding taxes, it may be looked to for guidance. Both statutes impose liability for the tax upon the responsible officer. The Branson Court cited Department of Revenue v. Heartland Investments, Inc. (106 Ill.2d 19 (1985)) in defining willful as follows:

[W]illful 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). (168 Ill.2d 247, 255).

In determining whether an individual is a responsible person, the courts have focused on whether that person has significant control over the business affairs of a corporation, and whether he or she participates in decisions regarding the payment of

creditors and the disbursement of funds. The duty to withhold taxes and remit them to the Government is generally found in high corporate officials charged with broad control over corporate business affairs who are involved in making these decisions. (See, e.g., Monday v. United States, 421 F.2d 1210 (7<sup>th</sup> Cir. 1970), *cert. denied* 400 U.S. 821 (1970)).

Ms. DOE's position is that as her duties were merely ministerial in nature, she did not have any control over the business affairs of the corporation. Rather, during the liability period she worked on a part-time basis when needed, and paid bills and signed corporate checks only when directed to do so by her husband. There is evidence, however, of Ms. DOE's participation in the financial affairs of the corporation. That is, in 1994 she mortgaged her home with her husband in order to borrow money on behalf of the corporation to help meet its payroll demands. Furthermore, she drew a salary of \$30,000 for the year at issue. In addition, Ms. DOE was an authorized signatory on the corporate checking account, and did in fact sign checks during the liability period, including payroll checks, checks to pay quarterly income tax deposits with the bank and checks to creditors. These duties and functions are certainly indicative of responsibility within the corporate structure.

JOHN DOE testified that as president of ABC Control Management, he determined which creditors should be paid and when. According to both JOHN and JANE DOE, JOHN directed JANE as to what checks she should execute. It was JOHN's responsibility to prepare and file the withholding tax returns. He acknowledges that he made a conscious decision to not pay over withholding tax to the State of Illinois, even though it was withheld from employee's wages. He claims that he had hopes of getting

the business back on track and to “catch up” with the tax obligations. Furthermore, the Department of Revenue issued an assessment against JOHN DOE for tax liability in 1995.

Regardless of whether JOHN DOE was a responsible officer for 1995 is irrelevant. In the case of Gephart v. U.S., 818 F.2d 469 (6<sup>th</sup> Cir. 1987), the court determined that more than one person can be a responsible officer of a corporation. Again, JANE DOE, along with her husband, signed a document to obtain a line of credit for the corporation. The fact that this transpired in 1994 is indicative that the corporation was having cash flow problems prior to the liability period. The money was utilized to mainly finance payroll. Furthermore, JANE DOE had check signing authority and was an authorized signatory on the corporation’s checking account, and she did in fact utilize that authority. Responsibility is a matter of status, duty and authority. (Gephart v. U.S., *supra*).

As the court stated in Monday v. U.S., *supra*,

Corporate office does not, per se, impose the duty to collect, account for and pay over the withheld taxes. On the other hand, an officer may have such a duty even though he is not the disbursing officer. (Citations omitted). The existence of the same duty and concomitant liability in another official likewise has no effect on the taxpayer’s responsibility. (Citations omitted).

Certainly, there is sufficient evidence to conclude that JANE DOE was a responsible corporate officer during the period at issue.

The next issue to consider is whether Ms. DOE willfully failed to pay the taxes due. She acknowledges that by September 1995 she was aware that the corporation was experiencing financial difficulties. Not only did her husband advise of her of this fact,

she was aware that there financial problems because the business could not afford to pay for the office space it was renting, and had to move back into the DOE barn.

However, the business was doing poorly even prior to this point. JANE was not naïve and could tell that something was happening in regard to the corporation due to the tense behavior of her husband. As early as 1994, JANE DOE co-signed a mortgage with her husband to secure a line of credit to help finance payroll. Her husband stated that she reluctantly did so; she would have preferred that he close the business at that point. She further testified that she was aware that her husband would go to Stillman Valley Bank at various times with receivables. He would use the receivables as collateral so that the bank would lend him money in order to keep the business afloat. In addition, JANE DOE testified that she and her husband would discuss the status of the corporation's financial affairs, as one would most certainly assume any husband/wife owners would do.

JANE DOE claims to not be aware that tax obligations were not being met until after the time that her husband told her that the corporation was in financial distress. She asserts that it was not until she was assisting in the preparation of the bankruptcy petition that she was aware that taxes were not being paid. The corporation's bankruptcy petition was not filed until February 1996.

In addition to and in furtherance of the definition of willful conduct as set forth in Heartland, *supra*, i.e., an intentional, knowing and voluntary failure to make tax payments, and reckless disregard for known or obvious risks, liability can attach to a responsible officer if the individual "(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." (Wright v. U.S., 809 F.2d 425, 427 (7<sup>th</sup> Cir. 1987)).

Also, willfulness may be evidenced by the responsible officer's failure to investigate or correct mismanagement after he or she learned of the tax delinquency. In Mazo v. U.S., 591 F.2d 1151 (5<sup>th</sup> Cir. 1979), the court stated as follows:

Once the [responsible persons] were aware of the liability to the government, they were under a duty to ensure that taxes were paid before any payments were made to creditors. If, after receiving actual notice, corporate officials could once again delegate their responsibility to subordinates, then repeated escape from liability would be possible... (Mazo v. U.S., 591 F.2d at 1157).

In the instant case, JANE DOE was put on actual notice of the corporation's financial problems in September 1995. However, it is my determination that she was put on constructive notice by the beginning of the taxable period. She actively participated in obtaining money to help finance corporate debt, primarily payroll obligations, as early as April 1994. She was also aware of her husband obtaining advances from the bank with receivables as collateral and noticed behavioral changes in her husband that could be attributed to stress due to corporate financial problems. As there is no time reference given for some of the factors leading to constructive notice, I have to assume that they were on going. In fact, when asked whether JOHN DOE decided during the period at issue to pay certain creditors and not pay other creditors, or whether everybody was paid, Ms. DOE replied, "I think that he would decide if there were certain ones that were paid and certain that were not". When asked whether that was an ongoing process, she replied, "[y]es. There were cash flow problems." It is apparent, therefore, that JANE DOE was aware that the corporation was experiencing financial problems and that not all creditors were being paid throughout the period at issue.

As an officer of the corporation and a signatory on the bank account, Ms. DOE had responsibility, as well as the ability, to investigate whether taxes were being paid. She had access to the bank and corporate books and records, and testified that when she wrote checks she took notice of the checking account balance. However, she further stated that after the birth of her eldest, she stopped paying attention to whether creditors were being paid. As the Illinois Supreme Court stated in Branson, *supra*, "...lack of willfulness is not proved simply by denying conscious awareness of a tax deficiency that could have been easily investigated by an inspection of corporate records". (168 Ill.2d at 267). In the recent Illinois Appellate Court case of Estate of Wayne Young et al. v. Department Revenue, (2<sup>nd</sup> Division, August 1, 2000), the court cites Branson by stating,

[a] finding of wilfulness under section 13 ½ does not require a showing of actual knowledge of nonpayment. Reckless disregard for obvious or known risks will suffice. (Citation omitted). If a responsible person in a position to easily discover nonpayment clearly ought to have known of a grave risk of nonpayment but does nothing, a finding of wilfulness is justified. (Citation omitted).

Not only did JANE DOE recklessly ignore the danger that taxes were going unpaid by her failure to investigate at the beginning of the period at issue when various factors indicated that the business were experiencing financial difficulties, she continued to draw a salary throughout the period at issue when those funds could have been used to pay the tax liability. JOHN DOE also drew a salary throughout the period at issue, and checks for payroll and to creditors continued to be written during the taxable period. As the court stated in Peterson v. U.S., 758 F. Supp. 1209, 1216 (N.D. Il. 1990), a person acts willfully if "when after he or she gains actual knowledge that the taxes are delinquent, liquid funds are available from which the taxes can be paid and he having the

ability to pay taxes, fails to do so.” And in Gephart v. U.S., *supra*, the court opined that “[w]illfulness is present if the responsible person had knowledge of the tax delinquency and knowingly failed to rectify it when there were available funds to pay the government”.

As established in Branson, *supra*, the Notice of Penalty Liability establishes the amount of penalty due, as well as the person responsible for paying the taxes and willful failure to do so. In order to rebut the presumption, the person to whom the NPL or Notice of Deficiency was issued must produce evidence sufficient to disprove willful failure to file returns and pay the tax due. In the instant case, it is my determination that JANE DOE has failed to rebut the presumptions attached to penalty assessment issued to her by the Department. The evidence supports the presumption attached to the assessment in that it is clear that Ms. DOE is a responsible officer who willfully failed to pay the tax due.

**RECOMMENDATION:**

Based upon the foregoing, it is my determination that Notice of Deficiency No. 0000 be affirmed in its entirety.

Enter: August 10, 2000

\_\_\_\_\_

Administrative Law Judge