

IT 99-18

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**

THE DEPARTMENT OF REVENUE)	
OF THE STATE OF ILLINOIS)	Case No.98 IT 0000
)	NOD 0000
v.)	Period: 4/Q/89 – 2/Q/90
)	
‘ARMAND LAUTREC’)	Administrative Law Judge
Resp. Off.)	Mary Gilhooly Japlon

RECOMMENDATION FOR DISPOSITION

Appearances: Special Assistant Attorney General Rickey A. Walton on behalf of the Illinois Department of Revenue; Cornelison & Van Gelderen, LLP, by Rex P. Cornelison III, Esq., for “Armand Lautrec”

SYNOPSIS:

This matter came on for hearing pursuant to the timely protest by “Armand Lautrec” (hereinafter “Lautrec”) of Notice of Deficiency (hereinafter “NOD”) No. 0000, issued by the Illinois Department of Revenue (hereinafter “Department”) on February 22, 1993 in the amount of \$8,703 for the period of the 4th quarter of 1989, and the 1st and 2nd quarters of 1990 (hereinafter “taxable period” or “period at issue”). The NOD was issued to Mr. “Lautrec” as responsible officer of “ABC Construction, Inc.”. (hereinafter “ABC” or “corporate taxpayer”) who willfully failed to pay over to the Department Illinois Income Taxes withheld from compensation paid to employees of “ABC Construction” 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 Leslie “Lautrec” was a responsible officer of “ABC” and required to collect, truthfully account for and pay over the withholding tax for the period at issue, and whether “Lautrec” willfully failed to pay over such taxes for the period at issue.

A hearing was held on August 30, 1999 at the offices of the Illinois Department of Revenue in Chicago, Illinois. As reflected in the prehearing order dated June 3, 1999, “Taxpayer requested, and the Department did not object, to conducting the hearing in this matter by telephone”. Mr. “Lautrec” was present in “Somewhere”, North Carolina, and his attorney, Mr. Cornelison was present in Atlanta, Georgia. Therefore, this hearing was conducted via telephone, with the court reporter present at the Illinois Department of Revenue in Chicago. Upon consideration of all the evidence elicited in this case, it is recommended that the Notice of Deficiency be revised, and that the Notice as revised be affirmed as to part of the taxable period.

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. 0000 issued to “Armand Lautrec” on February 22, 1993 in the amount of \$8,703 for the taxable periods of the 4th quarter of 1989, and the 1st and 2nd quarters of 1990. (Dept. Ex Nos. 1, 2; Tr. pp. 21-22).
2. The taxable period at issue, otherwise known as the audit period, is the 4th quarter of 1989, and the 1st and 2nd quarters of 1990. (Dept. Ex. Nos. 1, 2).

3. "Armand Lautrec" began working for the corporate taxpayer, "ABC Construction", near the beginning of 1989. (Tr. p. 10).
4. He was President of the business. (Tr. p. 10).
5. His responsibilities included managing the company and its employees, and appropriating business for the company. (Tr. p. 10).
6. The company had between 1 and 3 employees, one of whom was the bookkeeper/secretary, and the others were project managers. (Tr. pp. 10, 11).
7. When "Lautrec" left the corporation, there were 2 employees. (Tr. p. 10).
8. "Lautrec" hired the bookkeeper alone, but hired the project managers together with "Joe Doakes", the Chairman of the Board of Directors. (Tr. pp. 12-13).
9. During the period at issue, "Lautrec" had check signing authority, and did in fact sign the payroll checks and withholding tax returns. (Tr. pp. 13-14; Dept. Ex. No. 4).
10. There were two directors of "ABC Construction", "Joe Doakes" and "Armand Lautrec". (Tr. p. 16).
11. "Lautrec" owned 35 percent of the stock of "ABC Construction". (Tr. p. 16; Dept. Ex. No. 4).
12. "Lautrec" paid approximately \$100 for the stock he owned, and he received \$100 in payment for the stock upon his resignation. (Tr. pp. 16-17, 18-19; Dept. Ex. No. 6).
13. "Lautrec" became aware of "ABC Construction's" withholding tax liability when he received a notice from the State of Illinois in 1992. (Tr. p. 19).
14. "Lautrec" responded to the notice, explaining when he left the company. (Tr. p. 19).
15. While at "ABC Construction", "Lautrec" reviewed the company's balance sheets. (Tr. p. 19).

16. Pursuant to an Agreement executed May 3, 1990 between “Lautrec” and “Joe Doakes”, “Lautrec” resigned as President and Director of “ABC Construction” effective May 3, 1990. (Dept. Ex. Nos. 5 & 6; Tr. pp. 18, 22).
17. “ABC Construction” did not file a withholding tax return for the quarter ending June 1990. (Dept. Ex. No. 3; Tr. p. 22).
18. “Lautrec” never received certain amounts set forth in the May 3, 1990 agreement that the corporation was supposed to pay upon “Lautrec’s” resignation. (Tr. p. 23; Dept. Ex. No. 6).
19. “Lautrec” signed the checks that were remitted with the returns. (Tr. p. 34).
20. At the time of “Lautrec’s” resignation, employees of “ABC Construction” were leaving the company. (Tr. p. 33).
21. Therefore, there were fewer employees when “Lautrec” resigned than during earlier periods. (Tr. p. 33).
22. The corporation’s bookkeeper mailed the IL-941 returns and the accompanying check to the Illinois Department of Revenue. (Tr. p. 34).
23. “Lautrec” does not know when the corporate taxpayer ceased operations. (Tr. p. 33).
24. It was “Lautrec”’s understanding that any filing/payment of taxes for the 2nd quarter of 1990 would have been taken care of by the people operating the company after his resignation. (Tr. p. 24).

CONCLUSIONS OF LAW:

The Department seeks to impose personal liability on “Armand Lautrec” pursuant to Section 1002(d) of the Illinois Income Tax Act. 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 other penalties provided by law, be liable to a penalty equal to the amount of the tax evaded, or not collected, or not accounted for and paid over. ... For purposes of this subsection, the term “person” includes an individual, corporation or partnership, or an officer or employee of any corporation (including a dissolved corporation), or a member or employee of any partnership, who as such officer, employee or member is under a duty to perform the act in respect of which the violation occurs. (Ill. Rev. Stat. 1991, ch. 120, sec. 10-1002(d)).¹

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 willfully attempts in any manner to evade or defeat the tax or the payment thereof...”.

The issues at hearing, therefore, are whether “Armand Lautrec” was a responsible officer or employee of “ABC Construction” who was under a duty to collect the tax or account for and pay over such tax to the Department, and who willfully failed to pay the tax due.

Nowhere in the Illinois Income Tax Act, or even the Retailers’ Occupation Tax (“ROT”) Act (35 ILCS 120/1 *et seq.*, formerly Ill. Rev. Stat., ch. 120, sec. 440 *et seq.*),

¹ As the taxable period at issue herein is the 4th quarter of 1989, and the 1st and 2nd quarters of 1990, the applicable statute is Ill. Rev. Stat. 1991, ch. 120, sec. 10-1002(d). The Uniform Penalty and Interest Act

which also imposes personal liability on responsible corporate officers who willfully fail to file ROT returns or pay the tax due, is the term “willful” defined. In the seminal case dealing with the willfulness issue, Department of Revenue v. Joseph Bublick & Sons, 68 Ill.2d 568 (1977), the Illinois Supreme Court accepted that as section 6672 of the Internal Revenue Code is similar to the ROT Act in that it imposes personal liability upon corporate officers responsible for the willful failure to pay tax, it may be looked to for guidance. Both statutes impose liability for the tax upon the responsible officer. Adopting the definition emanating from federal cases, the Court in Bublick determined that “willful failure means a voluntary, conscious and intentional failure to pay the taxes.” Subsequent cases have cited Bublick for its acknowledgement and adoption of federal cases concerning the interpretation of willful failure. For example, in the case of Department of Revenue v. Heartland Investments, 106 Ill.2d 19 (1985), the Illinois Supreme Court likewise accepted that cases arising under section 6672 of the Internal Revenue Code provide guidance in determining the meaning of the “willful failure” requirement set forth in the ROT Act.

The Department established its prima facie case of liability when the certified copy of the Notice of Deficiency was entered into evidence. (35 ILCS 5/904; Branson v. Department of Revenue, 168 Ill.2d 247 (1995)). The presumption of willfulness is rebuttable, however, by evidence sufficient to disprove that the corporate officer was responsible and/or willful. “Lautrec” proffered testimonial and documentary evidence to indicate that he resigned from the corporate taxpayer on May 3, 1990. It is his position, therefore, that he had no responsibility concerning the filing of returns or payment of

(“UPIA”), 35 ILCS 735/3-7, which also provides for a personal liability penalty, is applicable for taxes incurred January 1, 1994 and later.

withholding tax for the second quarter of 1990 which ended June 30, 1990, since he was no longer with the corporation. In addition, “Lautrec” claims that as employees were leaving the company, the tax liability should be even lower than previous quarters, whereas the NOD indicates that for each of the quarters at issue, the liability is in the amount of \$2,901.

Regarding the 4th quarter of 1989 and the 1st quarter of 1990, it is clear that “Lautrec” was still President of “ABC Construction”, as well as a Director and shareholder. “Lautrec” asserts, however, that the amounts set forth on the Notice of Deficiency are incorrect. The IL-941 returns offered into evidence as Taxpayer’s Group Ex. No. 1 indicate lower amounts of tax liability than indicated on the NOD; i.e., for the 4th quarter of 1989, the IL-941 indicates a tax due of \$955, and for the 1st quarter of 1990, the IL-941 indicates a tax due of \$1,085.

“Lautrec” also asserts that he received a Notice of Deficiency issued by the Department of Revenue on May 10, 1993 for the 2nd quarter of 1990 in the total amount of \$4,689.99 (tax liability of \$2,901, plus penalty) (Taxpayer’s Ex. No. 4). It is his position that as this Notice was issued subsequent to the one at issue; it prevails over the previously issued Notice. “Lautrec” contends that since the Notice issued May 10, 1993 concerns only the 2nd quarter of 1990, any prior periods are no longer at issue.

It must be noted that the May 10, 1993 Notice of Deficiency was issued to “ABC Construction”, Inc., the corporate taxpayer. It was sent in care of Leslie “Lautrec”, presumably because he was the President of the corporation pursuant the Department’s information. This Notice has no bearing on the NOD at issue and is irrelevant. Furthermore, the May 10, 1993 NOD pertains to the 2nd quarter of 1990, as does the

NOD as issue. But, what “Lautrec” seems not to realize is that as the May 10, 1993 NOD includes penalties along with the tax deficiency, he is better off undertaking the NOD at issue as it assessed the tax amount, only.

As the IL-941 returns which are part of Taxpayer’s Ex. No. 1 were derived from the Department, it can be presumed that they were in fact filed. The NOD was apparently estimated. However, Taxpayer’s Ex. No. 1 contains IL-941 returns for the 1st three quarters of 1989, as well as for the subsequent two quarters. Those returns indicate amounts due of \$249 for the 1st quarter of 1989, \$764 for the 2nd quarter of 1989 and \$931 for the 3rd quarter of 1989. These tax liabilities are less than the amounts indicated on the IL-941 returns for the subsequent two quarters, and are nowhere near the amount of \$2,901 as determined by the Department.

It is my determination that “Lautrec” has rebutted the amounts set forth on the Notice of Deficiency at issue for the 4th quarter of 1989 and the 1st quarter of 1990 by the submission into evidence of the returns themselves. However, it is also my determination that “Lautrec” has not rebutted the issue of responsibility and willfulness regarding these quarters. “Lautrec” was the President of the corporate taxpayer, as well as Director and 35 percent shareholder. He offered no evidence to indicate that he did not have the responsibility to make certain that returns were filed and taxes were paid. He acknowledged that he signed the checks. “Lautrec” testified that the bookkeeper mailed the returns and payment to the Department; however, he offered no evidence to rebut the issues of responsibility and willfulness. In fact, he acknowledged that he reviewed the corporate balance sheets. He cannot insinuate that he can avoid personal liability by the delegation of bookkeeping duties to third parties. As President of a small, closely held

company, he had a duty to keep advised of the status of tax return filings and payments. An inspection of corporate records would have revealed a debt due the State. (Branson, id).

Concerning the 2nd quarter of 1990, it is my determination that “Lautrec” has successfully rebutted the Department’s prima facie case. Documentary evidence indicates that “Lautrec” resigned from the corporation as of May 3, 1990. As he no longer had any involvement with “ABC Construction”, he did not have the responsibility to see that the return for that quarter was filed and paid. Moreover, he did not willfully fail to file or pay, as he had no responsibility to do so.

RECOMMENDATION:

Based upon the foregoing, it is my recommendation that the Notice of Deficiency be revised in the amounts set forth on the IL-941 returns regarding the 4th quarter of 1989, and the 1st quarter of 1990. It is my recommendation that the revised NOD be affirmed as to those two quarters.

Concerning the 2nd quarter of 1990, it is my recommendation that the penalty be canceled as issued to Leslie “Lautrec”.

Enter: November 23, 1999

Administrative Law Judge