

IT 99-19

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**

v.

"JANE DOE", as responsible
officer of "Simple Simon Pie Co., Inc."

Taxpayer

No. 98-IT-0000
Fein: 36-0000000

Christine O'Donoghue
Administrative Law Judge

RECOMMENDATION FOR DISPOSITION

Appearances: Mr. John Alshuler, Special Assistant Attorney General for the Illinois Department of Revenue; Mr. John Boland, Esq. for "Jane Doe".

Synopsis:

This cause comes on for hearing pursuant to the protest filed by "Jane Doe" ("taxpayer") in response to a Notice of Deficiency ("NOD") No. 0000 issued by the Department of Revenue ("Department") on June 8, 1996 in the amount of \$21,712.49. Said NOD was issued to "Jane Doe" as a responsible officer of "Simple Simon Pie Co., Inc." ("Simple Simon") and proposes an assessment against "Doe" for withholding tax not paid by "Simple Simon" for the fourth quarter of 1993 through the first quarter of 1995.

Following submission of all evidence and a review of the record, it is recommended that this matter be resolved in favor of the Department.

Findings of Fact:

1. The Department's *prima facie* case, inclusive of all jurisdictional elements, was established by the admission into evidence of the Notice of Deficiency No. 0000 issued to "Jane Doe" on June 8, 1996 in the amount of \$21,712.49¹ for the fourth quarter of 1993 through the first quarter of 1995. Dept. Group Ex. No. 1.
2. "Jane Doe" was the president of "Simple Simon", a specialty "baking" company. Tr. pp. 12, 38. "Jane" and her ex-husband were the original incorporators. Taxpayer started the business in either 1981 or 1982. Tr. pp. 28, 37, 38.
3. The company hired sub-contractors for most of its work and had approximately five employees. Tr. p. 38.
4. "Jane Doe" hired the company's vice-president and treasurer, "Peter Peterman", in approximately January of 1986. Tr. pp. 12, 22.
5. "Doe" was the sole signatory on the corporate bank account. Tr. p. 12.
6. In approximately December of 1993, "Jane Doe" discovered checks that she had signed in "Peter Peterman's" desk drawer. These checks were made out to both the IRS and the Department of Revenue but were never mailed. Tr. pp. 11, 12, 22.
7. "Doe" hired the corporation's business consultant, "Jack Sanders", in January of 1994. Tr. pp. 15, 22.
8. "Jack Sanders" was never a signatory on the corporation's bank account. Tr. p. 16.
9. After problems with "Sanders" arose, taxpayer hired a second business consultant, "Tom Thompson", a certified financial planner, in May of 1994. Tr. pp. 22, 42.

¹ The interest calculation should be subject to the provisions of the Board of Appeals' Amended Blanket Order No. 98-3001.

10. Thereafter, the taxpayer fired "Peter Peterman" on July 22, 1994. Tr. p. 22.
11. The IL-941s were signed by "Jane Doe" on February 27, 1995 and on April 28, 1995. Tr. pp. 23, 24.
12. Even after finding the old checks made out to the Department of Revenue in "Peter Peterman's" drawer, the taxpayer never called the Department to determine the status of the company's account, nor did she call the bank to determine the account balance. Tr. pp. 31, 32.
13. "Thompson" and his partner, "Anders" reviewed the company's business records in great detail. Tr. p. 35. "Doe" assisted the consultants in this effort. Tr. p. 35. "Thompson" and "Anders" reported their findings to Doe". Tr. p. 35.
14. "Doe" was aware of the obligation to pay withholding taxes to the state of Illinois and the federal government. Tr. p. 39.

Conclusions of Law:

Section 1002(d) of the Illinois Income Tax Act, 35 ILCS 5/101 *et seq.*, provides that a penalty may be imposed by Section 3-7² of the Uniform Penalty and Interest Act ("UPIA") which in turn provides in pertinent 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. 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.

35 ILCS 735/3-7

² Section 3-7 of the UPIA is effective for taxes incurred as of January 1, 1994.

To impose personal liability for the failure to pay withholding taxes, it must be shown that the person is a responsible party and that the failure to pay was willful. By introducing the NOD into evidence, the Department established its *prima facie* case against the taxpayer. In Branson v. Department of Revenue, 168 Ill.2d 247 (1995), the Illinois Supreme Court held that the admission of the Notice of Penalty Liability into evidence established all of the statutory elements required for imposition of the penalty, including willfulness. The court was addressing the Retailers' Occupation Tax Act, however, the holding in Branson should apply equally in this case because not only are the underlying policies of the ROT section and section 1002(d) similar but the language of the two sections encompasses both responsibility and willfulness. Thus, the burden of proof then shifted to the taxpayer to offer competent evidence that successfully rebutted the Department's *prima facie* case.

In determining whether an individual is a responsible person the courts have indicated that the focus should be 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 disbursement of funds. *See, e.g., Monday v. United States*, 421 F.2d 1210 (7th Cir. 1970), cert. denied 400 U.S. 821 (1970). Liability attaches to those with the power and responsibility within the corporate structure for seeing that the withholding taxes are remitted to the Government. *Id.* Thus, the statute does not confine liability to the single most responsible person. *See, Gephart v. United States*, 818 F.2d 469 (6th Cir. 1987).

In the case at hand, the evidence clearly proves that "Doe" had significant control over the corporation's daily business operations and its employees. "Doe" was the president of the corporation during the entire audit period and incorporated the business

along with her ex-husband. "Doe" hired and fired company personnel including the vice-president, a CPA firm and enlisted the services of two separate business consultants.

"Doe" was the sole signatory on the corporate bank accounts during the entire audit period. Thus, in addition to the sales responsibilities that the taxpayer contends she fulfilled, the taxpayer must have been involved in the company's finances and accounts payable since only she could sign the checks to pay corporate bills and/or remit taxes to either the State of Illinois or the Internal Revenue Service.

Based on the foregoing, I believe sufficient evidence was presented to establish that "Doe" wielded sufficient power within the corporate structure to establish her as a responsible person under the statute.

It must also be determined whether "Doe" willfully failed to remit the withholding taxes to the Department. Willfulness in regards to Section 1002(d) is not merely limited to "intentional, knowing and voluntary acts." Monday, 421 F.2d at 1215. Willful as applied in Section 6672 of the Internal Revenue Code, and hence 1002(d), encompasses a reckless disregard for obvious or known risks.³ Id.

The evidence of record proves that the taxpayer willfully failed to pay the tax under the statute. "Doe" had direct knowledge that the payroll taxes were not paid in December of 1993 when she found the checks in her vice president's desk drawer. She knew that the corporation was having serious tax and financial difficulties and accordingly hired a business consultant to handle these matters. Taxpayer suggests that she did not act willfully since she sought outside business advice, however, the facts in this matter establish that her conduct was nonetheless willfull under the statute.

³ The Illinois Supreme Court accepted that cases arising under § 6672 of the IRC provided guidance in determining the meaning of willful in the personal liability section of the Retailers' Occupation Tax Act. 35 **ILCS** 120/13.5 (*formerly* Ch. 120 ¶ 452 1/2). *See, Department of Revenue v. Heartland Investments*, 106 Ill.2d 19, 29 (1985)

Given her admitted knowledge of the tax difficulties, her position within the company required that she investigate further. Merely delegating these tax issues to outside consultants without personally ensuring that this liability was met certainly constitutes a reckless disregard for the payment of a known tax liability. The taxpayer acknowledged that the consultants apprised her of their work, in fact, she assisted them in their assessment of the company's financial difficulties. Further, as the sole signator she knew that she alone could write the check to the Department of Revenue to satisfy this liability. As president, more was demanded of her than simply handing off these tax difficulties to her business consultants. At no time did she independently attempt to discover the nature and extent of the liability or make arrangements for payment. Tr. p. 49. "Doe" may not simply delegate the responsibility that is inherently hers alone. Adopting a "hear no evil - see no evil" policy does not relieve her of liability. Wright v. United States, 809 F.2d 425 (7th Cir. 1987), accord, Calderone v. United States, 799 F.2d 254, 260 (6th Cir. 1986), quoting Bolding v. United States, 565 F.2d 663, 674 (1977) ("Thus, it cannot be that 'a responsible officer may immunize himself from the consequences of his actions by wearing blinders which will shut out all knowledge of the liability for the nonpayment of [the corporation's] withholding taxes.'").

The taxpayer testified at length about how not one but two consultants took money from the corporation, however, she did not offer any documentary evidence to support her contentions. She maintained that "Sanders", although not a signatory, wrote a letter to her bank, which thereafter froze the corporate funds, although upon her recovery of such funds, she chose not to write a check to the Department. Tr. p. 17. Instead, as the corporate president she hired a second consultant, "Tom Thompson" and his partner, "Ralph Anders", and despite past difficulties with "Sanders", she drew a check made to

the order of "Tom Thompson's" company, "Fantasy Financial Inc.", in the amount of \$8,219.00. She produced a copy of this check at hearing and argued that it was not payment for services rendered, but rather it was to be placed in escrow for the payment of taxes. Tr. pp. 18, 19, 25, 42; Taxpayer Ex. No. 1. Supposedly "Ralph Anders" deposited this check into his personal bank account rather than paying the taxes due. However, "Doe" offered no evidence that "Anders" was in trouble with the FBI as claimed, there is no endorsement on the check and she failed to show that the check was deposited into an improper account. Even if one were to believe all of her contentions, despite the lack of documentary support, it would only prove that once again she failed to wield effective control over the company's finances by choosing to write the check for payment of withholding taxes to the order of "Fantasy Financial" rather than to the Department directly. Given the past difficulties with "Sanders" and her direct knowledge of the delinquent taxes, this conduct falls far short of what is expected of a responsible officer.

Lastly, the taxpayer testified that she recovered the money as a result of filing a suit against the bank that allowed "Anders" to negotiate the check. Tr. p. 43. No explanation was given as to why she did not remit the back taxes at this time.

As the president and sole signatory on the bank account, she had ready access to bank records and any documents necessary to prove any of her claims outlined above. Mere allegations without corroborating documentary evidence are insufficient and do not rebut the presumption that she willfully failed to file and pay the withholding tax.

WHEREFORE, for the reasons stated above, it is my recommendation the Notice of Deficiency be finalized with interest calculated pursuant to Amended Blanket Order 98-3001.

Date: July 13, 1999

Christine O'Donoghue
Administrative Law Judge