

ST 08-2

Tax Type: Sales Tax

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

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

**THE DEPARTMENT OF REVENUE
OF THE STATE OF ILLINOIS**

v.

**JOHN DOE,
Taxpayer**

**No. 00-ST-0000
IBT# 0000-0000
NPL# 0000-000-00-0**

**Ted Sherrod
Administrative Law Judge**

RECOMMENDATION FOR DISPOSITION

Appearances: Special Assistant Attorney General George Foster on behalf of the Illinois Department of Revenue; Martin Weisenburger, Esq. on behalf of John Doe.

Synopsis:

This matter is before this administrative tribunal pursuant to John Doe's protest of Notice of Penalty Liability ("NPL") number 0000-000-00-0 as responsible officer of ABC Food Mart ("ABC"). The NPL represents a penalty liability for Retailers' Occupation and related taxes for the period July 2002 through October 2002. A hearing was held on this matter on February 21, 2008. During the hearing no testimony was presented by or on behalf of the taxpayer. Following the submission of all evidence and a review of the record, it is recommended that the NPL at issue in this case be finalized as

issued. In support of this recommendation, the following “findings of fact” and “conclusions of law” are made.

Findings of Fact:

1. The Department's *prima facie* case, inclusive of all jurisdictional elements, was established by the admission into evidence of NPL No. 0000-000-00-0 issued on December 6, 2006 to John Doe (“Doe” or “taxpayer”) as responsible officer of ABC, showing a total liability due and owing in the amount of \$3,492.04 for the period July 2002 through October 2002. Department Exhibit (“Ex.”) 1.
2. ABC, a sole proprietorship, was, during the tax period in controversy, engaged in the retail sale of food and related merchandise. Department Ex. 2 (Interrogatory 6). Doe was the sole proprietor of this business during this period. *Id.*; Department Ex. 2 (Interrogatory 10).
3. As sole proprietor of ABC, Doe had complete authority over, and was solely responsible for, the preparation and filing of sales tax returns for the taxable period July 2002 through November 2002 and the payment of taxes pursuant thereto. Department Ex. 2 (Interrogatory 14).
4. As sole proprietor of ABC, Doe had complete possession and control over the funds of ABC and was solely responsible for the disposition of such funds including the payment of the proprietorship’s debts, and the determination of which proprietorship debts would be paid and whether or not debtors would be paid. Department Ex. 2 (Interrogatory 16). Doe used this authority to pay withholding taxes, other taxes, insurance, employee wages and other expenses. Department Ex. 2 (Interrogatory 19).

5. On December 22, 2003, ST-1 Sales and Use Tax Returns were filed on behalf of ABC for the monthly periods July 2002 through October 2002 showing tax due from receipts and purchases of: i) \$624 for the period July 1 through July 31, 2002; ii) \$624 for the period August 1, 2002 through August 31, 2002; iii) \$624 for the period September 1, 2002 through September 30, 2002 and iv) \$624 for the period October 1, 2002 through October 31, 2002. Department Ex. 3. No checks to cover the taxes due and owing accompanied these ST-1 Sales and Use Tax Returns. Tr. p. 5. Ownership of ABC was transferred from the taxpayer to 14 LLC, a limited liability company, prior to the filing of these returns and these returns were prepared and filed by an employee or agent of 14 LLC rather than by the taxpayer. Tr. p. 12; Department Ex. 3.

Conclusions of Law:

The issue in this case is whether Doe was a responsible person who willfully failed to pay retailers' occupation tax for ABC Food Mart ("ABC") as required by statute. The admission into evidence of NPL number 2006-344-09-N establishes the Department's *prima facie* case with regard to both the fact that Doe was a "responsible" officer and the fact that he "willfully" failed to pay taxes that were due. Branson v. Department of Revenue, 168 Ill. 2d 247 (1995). When the Department establishes its *prima facie* case the burden shifts to the taxpayer to overcome the Department's finding. Masini v. Department of Revenue, 60 Ill. App. 3d 11 (1st District 1978). To overcome the Department's *prima facie* case, the taxpayer must present consistent, probable evidence, closely identified with books and records. Copilevitz v. Department of Revenue, 41 Ill. 2d 154 (1968); Central Furniture Mart v. Johnson, 157 Ill. App. 3d 907

(1st District 1987); Vitale v. Department of Revenue, 118 Ill. App. 3d 210 (3d District 1983). Oral testimony without corroborating books and records is insufficient to overcome the Department's *prima facie* case. Mel-Park Drugs v. Department of Revenue, 218 Ill. App. 3d 203 (1st Dist. 1991).

The Department seeks to impose personal liability for failure to remit Retailers' Occupation and related taxes ("ROT") to the Department for the period July 2002 through October 2002. The personal liability penalty for the ROT violation determined by the Department is imposed by section 3-7 of the Uniform Penalty and Interest Act ("section 3-7"), which provides 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

Pursuant to the foregoing, an officer or employee of a taxpaying entity¹ may therefore be personally liable for the corporation's taxes if (1) the individual had the control, supervision or responsibility of filing the sales tax returns and paying the taxes, and (2) the individual willfully failed to perform these duties.

In the present case, Doe does not contest the Department's determination that he was a responsible officer of ABC who willfully failed to pay taxes due and owing from ABC during the period July 2002 through October 2002. Tr. pp. 6, 7, 14. However, the

¹ ABC Food Mart is registered to collect and remit sales tax pursuant to 35 ILCS120/2a; 86 Ill. Admin. Code, Ch. I, section 130.701 as indicated by the IBT number shown on the Notice of Tax Liability issued to ABC in this case.

taxpayer does contest the amount of taxes determined to be due and owing for this period. *Id.* In support of this contention, the taxpayer has introduced a letter dated November 5, 2006 from Jan Schwartz² to the Illinois Department of Revenue's Collection Services Division. Taxpayer Ex. 1. The taxpayer contends that this letter is evidence that the taxpayer only operated ABC for a portion of the tax period at issue, from August 2002 until November 2002, and did not operate this proprietorship during July 2002. Tr. pp. 12 - 15.

The introduction of the aforementioned letter was objected to as hearsay during the hearing, and was admitted for the limited purpose of showing that the taxpayer received it during discovery. Tr. pp. 9, 10. The record in this case indicates that the letter was deemed inadmissible for the purpose of establishing the truth of the matters asserted in the letter itself. *Id.* The taxpayer's defense requires that the averments contained in the taxpayer's exhibit be accepted as true. Shapiro v. Regional Board of School Trustees, 116 Ill. App. 3d 397 (1st Dist. 1983) (holding that an administrative determination cannot be based on hearsay). Consequently, this letter does not establish the taxpayer's claims.

In addition to lacking evidentiary support, the taxpayer's contention is contrary to evidence contained in the record. This evidence indicates that returns reporting taxes due as a result of ABC's business activities were filed for the entire period assessed including July 2002, the month during which the taxpayer claims ABC conducted no business activities. Department Ex. 3. This evidence flatly contradicts the taxpayer's claim that

² Jan Schwartz is not clearly identified in the record, but appears to have had a relationship to the lessor of the premises occupied by ABC Food Mart, the taxpayer's sole proprietorship, during the tax period in controversy.

ABC did not conduct business during the month of July and therefore owed no tax for that period.

The taxpayer also contends that the amount of tax determined to be due as a result of ABC' business activities is overstated. Specifically, the taxpayer contends that the returns at issue filed on ABC' behalf in 2003 were filed by a Laundromat which obtained ownership of the ABC' business premises after the tax period in controversy. Tr. pp. 6, 7, 27, 28. Doe contends that the amounts reported on these returns were estimates based on receipts from the successor's Laundromat business rather than on ABC' retailing business. *Id.* While no documentary evidence or testimony was presented at the trial to support this claim, an offer of proof was propounded by the taxpayer as follows:

... I would ask an offer of proof, and that is if he were called to testify, he would say that he made no more that \$100.00 a day for the four month period. That is not in the letter. And again, I'm not asking Counsel to – to stipulate to the truth or falsity of it, only that if he were called to testify, that is what he would testify to.
Tr. pp. 10, 11

The *gravaman* of the taxpayer's offer of proof is that the Notice of Tax Liability issued to ABC underlying the NPL in this case is erroneous. With regard to the Notice of Tax Liability issued to ABC, the statute provides that the Notice of Tax Liability becomes final unless the taxpayer files a protest within 60 days after it is issued. 35 ILCS 120/4. Once the Notice of Tax Liability becomes final, the taxpayer has 35 days within which to file an administrative appeal in the circuit court. 735 ILCS 5/3-103. In this case, ABC did not file a protest to the Notice of Tax Liability nor did it file an administrative appeal to the circuit court, so it became final and conclusive as to all questions concerning its merits. Department of Revenue v. Roman S. Dombrowski

Enterprises, 202 Ill. App. 3d 1050 (1st Dist. 1990). Even if the taxpayer could challenge the accuracy and correctness of the Notice of Tax Liability issued to ABC in these proceedings, the taxpayer has not introduced into the record any evidence or testimony that the amounts shown on the returns filed on behalf of ABC which are the basis of the Department's assessment determination, were incorrect.

In sum, the taxpayer has not even attempted to rebut the Department's *prima facie* case that he was a responsible officer of ABC who willfully failed to pay taxes due and owing from ABC to the state. Furthermore, the taxpayer's claim that ABC was not engaged in business throughout the period at issue and its claim that the amount of tax determined to be due is erroneous is not supported by any evidence. Moreover, the merits of a final assessment that is the basis of an NPL may not be reviewed at a hearing on the NPL. Dombrowski, *supra* (holding that a court has no jurisdiction to review the accuracy of an assessment once it becomes final).³

WHEREFORE, for the reasons stated above, it is my recommendation that the Department's Notice of Penalty Liability number 0000-000-00-0 be affirmed in its entirety.

Ted Sherrod
Administrative Law Judge

Date: April 11, 2008

³ The taxpayer has questioned whether the NPL is erroneously based upon business activities conducted at Anywhere, Illinois, a location where ABC has never engaged in business. Tr. p. 5. The record shows that the assessment at issue is not based on any business conducted at the foregoing address, but rather is based on business activities conducted at Anywhere in Anywhere, Illinois (Department Ex. 3) which the taxpayer admits was ABC' business address during the tax period at issue. Tr. p. 6.