

**ST 09-5**

**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**

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

v.

**JOHN DOE as  
Responsible Officer of  
ABC, INC.**

**TAXPAYER**

**No. 08-ST-0000  
IBT No. 0000-0000  
NPL: 0000000  
SSN: 000-00-0000**

**Kenneth J. Galvin  
Administrative Law Judge**

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**RECOMMENDATION FOR DISPOSITION**

**Appearances:** Mr. John Doe, appearing *pro se*; Mr. George Foster, Special Assistant Attorney General, appearing on behalf of the Department of Revenue of the State of Illinois.

**Synopsis:**

This matter comes on for hearing pursuant to John Doe’s protest of Notice of Penalty Liability No. 00000000 (hereinafter “NPL”) as responsible officer of “ABC, Inc.” “ABC, Inc.” is a combination of the names “John Doe” and “Joe Blow.” Tr. p. 38. The NPL represents a penalty liability for retailers’ occupation tax of “ABC, Inc.” due to the Department for the period of April through August, 2006. An evidentiary hearing was held in this matter on February 26, 2009 with Witness A, Witness B, Witness C and John Doe testifying. Following submission of all evidence and a review of the record, it is recommended that the NPL issued to John Doe be cancelled. In support thereof, 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, is established by the admission into evidence of NPL No. 0000000, issued to John Doe, dated February 21, 2008, showing a penalty for sales tax liability of "ABC, Inc." of \$7,344.25 for April through August, 2006. Tr. pp. 5-6; Dept. Ex. No. 1.
2. The REG-1, "Illinois Business Registration" for "ABC, Inc." shows the address of the corporation as "123 Anywhere." "Business Activity" is described as "100% Marketing and Wholesale." The Registration shows a response of "yes" to the question "[A]re all of your sales for resale or otherwise exempt from sales tax?" Step 5 of the Registration requests that the registrant "[C]heck all that apply to your Illinois business activity." Only "wholesale" is checked. Step 7 of the Registration identifies the "President" as "Joe Blow," and "Vice-President" as "John Doe." John Doe signed the Application. Tr. pp. 44-46; Dept. Ex. No. 2.
3. Mr. Witness A testified that he owns property at Anywhere in Chicago. From April, 2006, through August, 2006, Mr. Witness A rented retail space to Joe Blow. Joe Blow, alone, negotiated the rental agreement. Mr. Witness A testified that Joe Blow rented the retail space to sell "XYZ" purses and handbags. Mr. Witness A testified that during the term of the rental agreement, he had no knowledge of, and never met, John Doe. Tr. pp. 7-18.
4. Mr. Witness B testified that he owns a retail store at Anywhere. In the Spring of 2006, Mr. Witness B negotiated a lease for retail space with Joe Blow. The rental period included the period of April through August, 2006. The name of Joe Blow's store was "XYZ's Retail Ventures." Mr. Witness B testified that, during the term of the lease, he had no knowledge of, and never met John Doe. On August 17, 2006, Plaintiff, "Anywhere," filed a "Forcible Entry and Detainer Complaint" against Joe Blow, XXXXX and XYZ Retail Ventures. On January 18, 2007, Plaintiff, "1745 W. Division" filed a "Contract Complaint" against Joe Blow and XYZ

Retail Ventures for \$23,366. Mr. Witness B testified that he is unable to find Joe Blow. Tr. pp. 18-25; Taxpayer's Ex. No. 6.

5. Mr. Witness C is employed by MM & M, LLC, which is a commercial finance company that provides funding to companies based on the factoring of their accounts receivable. Mr. Witness C testified that MM & M provided funding to "ABC, Inc." by factoring their wholesale invoices. Mr. Witness C testified that in March, 2005, Mr. Joe Blow mentioned to him that he wanted to start a retail operation, but John Doe was definitely against the idea. Tr. pp. 25-28.
6. Mr. Witness C testified that he visited "ABC Inc.'s" manufacturing facility at Anywhere several times. The facility was on the 2<sup>nd</sup> floor, above a body shop. There were sewing machines, dyes, leather bags and material. Mr. Witness C testified that he never saw a customer there and never saw anything promoting retail sales. Mr. Witness C testified that "it was clearly a manufacturing facility." Mr. Witness C testified that "ABC, Inc." never asked for financing for a retail operation and Mr. Witness C was only aware of "ABC, Inc." "selling to retailers." Tr. pp. 28-30.
7. In November, 2006, after the period covered by the NPL, Joe Blow and John Doe had a meeting in Mr. Witness C's office. Joe Blow was late in paying "ABC, Inc." for products and bags. Mr. Witness C testified that he worked out an agreement that Joe Blow would make payment for the bags to Mr. Witness C and, after payment, Mr. Witness C would advise John Doe to release the goods so that the goods could be sold in Joe Blow's stores. Tr. pp. 30-31.

**Conclusions of Law:**

The sole issue to be decided in this case is whether John Doe should be held personally liable for the unpaid retailers' occupation tax of "ABC, Inc." 35 ILCS 120 *et seq.* The statutory

basis upon which any personal liability is premised is Section 3-7 of the Uniform Penalty and Interest Act, which provides as follows:

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 to 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.

It is clear under the statute that personal liability will be imposed only 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.

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. Monday v. United States, 421 F. 2d 1210 (7<sup>th</sup> 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 taxes are remitted to the government. *Id.*

John Doe testified that “ABC, Inc.” was in the business of manufacturing and wholesale sale of handbags. John Doe and Joe Blow were each 50% shareholders in “ABC, Inc.” John Doe testified that in 2006, “ABC, Inc.” never made any retail sales. According to John Doe, the sales

tax liability at issue in this case was incurred by Joe Blow without John Doe's knowledge. John Doe assumed that the retail sales were made by Joe Blow's company called "XYZ's Retail Ventures," because Joe Blow purchased product from "ABC, Inc." using "XYZ" checks. According to John Doe, the retail sales were made at the locations that Joe Blow rented in 2006, without John Doe's knowledge. Tr. pp. 45-46.

John Doe's testimony appears to be corroborated by the three witnesses he subpoenaed to the evidentiary hearing. Mr. Witness A testified that he owns property at 4728 North Lincoln in Chicago. From April, 2006, through August, 2006, Mr. Witness A rented retail space to Joe Blow. Joe Blow, alone, negotiated the rental agreement. Mr. Witness A testified that Joe Blow rented the retail space to sell "XYZ" purses and handbags. Mr. Witness A testified that during the term of the rental agreement, he had no knowledge of, and never met, John Doe. Tr. pp. 7-18.

Mr. Witness B testified that he owns a retail store at Anywhere. In the Spring of 2006, Mr. Witness B negotiated a lease for retail space with Joe Blow. The rental period included the period of April through August, 2006. The name of Mr. Blow's store was "XYZ's Retail Ventures." Mr. Witness B testified that, during the term of the lease, he had no knowledge of, and never met John Doe. On August 17, 2006, Plaintiff, "Anywhere," filed a "Forcible Entry and Detainer Complaint" against Joe Blow, XXXXX and XYZ Retail Ventures. On January 18, 2007, Plaintiff, "Anywhere" filed a "Contract Complaint" against Joe Blow and XYZ Retail Ventures for \$23,366 for non-payment of rent. Tr. pp. 18-25; Taxpayer's Ex. No. 6. John Doe is not named in either complaint. Mr. Witness B testified that he is unable to find Joe Blow. Tr. p. 20.

Mr. Witness C is employed by MM & M, LLC, which is a commercial finance company that provides funding to companies based on the factoring of their accounts receivable. Mr. Witness C testified that MM & M provided funding to "ABC, Inc." by factoring their wholesale invoices.

Mr. Witness C testified that in March, 2005, Joe Blow mentioned to him that he wanted to start a retail operation, but John Doe was definitely against the idea. Tr. pp. 25-28. Mr. Witness C testified that he visited “ABC, Inc.’s” manufacturing facility at Anywhere several times. The facility was on the 2<sup>nd</sup> floor, above a body shop. There were sewing machines, dyes, leather bags and material. Mr. Witness C testified that he never saw a customer there and never saw anything promoting retail sales. Mr. Witness C testified that “it was clearly a manufacturing facility.” Mr. Witness C testified that “ABC, Inc.” never asked for financing for a retail operation and Mr. Witness C was only aware of “ABC, Inc.” “selling to retailers.” Tr. pp. 28-30.

According to John Doe’s testimony, Joe Blow decided to go into retail selling XYZ products in March, 2005. John Doe testified that he refused to be a part of the retail operation because he “had no prior experience in retail.” Joe Blow set up a company called “XYZ Retail Ventures.” Joe Blow was buying product from “ABC, Inc.” and selling the product in his retail stores. Tr. pp. 34-35. John Doe caused to be admitted into evidence at the hearing a “Purchase Order” from XYZ Retail Ventures, Inc. for purchases from “ABC, Inc.” The Purchase Order was e-mailed from XXXXX, who was named in the Forcible Entry and Detainer Complaint, mentioned above. Taxpayer’s Ex. No. 5. John Doe also caused to be admitted into evidence at the hearing checks from the account of Joe Blow, payable to “ABC, Inc.,” for the purchase of product. The August 8, 2006 check drawn on Joe Blow’s account was returned to “ABC, Inc.,” marked “account closed.” Taxpayer’s Ex. Nos. 6 and 7. John Doe testified that Joe Blow started defrauding the bank account of “ABC, Inc.” John Doe testified that he filed a police report against Joe Blow. Tr. p. 35; Taxpayer’s Ex. No. 9.

On December 28, 2006, John Doe received a “10-Day Demand” from the Illinois Department of Revenue for approximately \$6,500 in unpaid taxes. John Doe testified that he

replied to the Illinois Department of Revenue on February 25, 2007 stating as follows in the letter: “ABC, Inc” is a wholesale business and it’s not related in any way to any sales tax. “This account was established by a customer of mine without my knowledge or permission. This person owns two retail stores under the name of ‘XYZ Retail Venture.’ ” Tr. pp. 35-36; Taxpayer’s Ex. Nos. 12 and 13.

John Doe testified that in February, 2007, his attorney wrote a letter to the Illinois Department of Revenue, stating as follows: “There have been allegations that Mr. Joe Blow has been using the name ‘ABC, Inc.’ without the permission of the management. As ABC Inc. is engaged in strictly wholesale sales we are very interested in the derivation of the 10-day letter. It is the claim of my clients that their name may have been used without their permission.” Tr. pp. 36-37; Taxpayer’s Ex. No. 15. John Doe testified that in March, 2007, his attorney wrote a letter to the State’s Attorney of Cook County, Illinois, stating as follows: “I am the attorney for Mr. John Doe who in my opinion [is] a victim of fraud perpetrated by Joe Blow.” Tr. p. 37; Taxpayer’s Ex. No. 16. John Doe testified that in March, 2007, his attorney also wrote a letter to Detective Coffey of “Area 5 Property Crimes” concerning “alleged unauthorized access of my client’s bank accounts at the Charter One Bank, and using my client’s credit.” “Charter One Bank has made restitution to our clients as it recognized that Mr. Blow’s averred actions were unauthorized. I assume that Charter One has reported the incident to the appropriate authority.” Tr. p. 37; Taxpayer’s Ex. No. 17.

I am unable to conclude from the testimony of the witnesses, the testimony of John Doe and the documentary evidence admitted at the hearing that John Doe was responsible for the retail sales at issue or that he participated in decisions regarding the sale of “XYZ” handbags at retail. John Doe’s testimony at the evidentiary hearing is consistent with his first letter to the Department in

response to the “10-Day Demand” in which he stated that “ABC, Inc.” is a wholesale business and it’s not related in any way to sales tax. “This account was established by a customer of mine without my knowledge or permission.” Taxpayer’s Ex. No. 13. Nothing in the cross-examination of John Doe would indicate that his direct testimony was not credible. The Department’s counsel waived both opening and closing statements at the hearing in this case, and offered no evidence or testimony in rebuttal to John Doe’s case. The Department’s counsel stated specifically that “based on the evidence that the Taxpayer put in in response to the Department’s *prima facie* case,” “the Department is going to waive closing argument.” Tr. p. 50. I conclude that the testimony of the witnesses and of John Doe and the documentary evidence admitted at the hearing rebutted the *prima facie* correctness of the NPL.

WHEREFORE, for the reasons stated above, it is my recommendation that Notice of Penalty Liability No. 0000000 be cancelled.

ENTER:

Kenneth J. Galvin  
Administrative Law Judge

March 30, 2009