

ST 06-1

Tax Type: Sales 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.

JOHN DOE,
Taxpayer

No. 05 ST 0000
IBT: 0000-0000
NPL: 0000-000-0000

Mimi Brin
Administrative Law Judge

RECOMMENDATION FOR DISPOSITION

Appearances: Marc Muchin, Special Assistant Attorney General, for the Illinois Department of Revenue; John Doe, pro se

Synopsis:

This matter comes on for hearing pursuant to the protest and request for hearing filed by John Doe (hereinafter “Doe” or the “Taxpayer”) pursuant to Notice of Penalty Liability, 0000-000-00 0 (hereinafter the “NTL”) issued against Doe by the Illinois Department of Revenue (hereinafter the “Department”). The penalty assessed therein reflects the Retailers’ Occupation Tax and related tax liabilities of ABC Chicago, a Chicago restaurant and bar business (“hereinafter “ABC” or “Corp.”), for the tax periods of November, 2002 and December, 2002.

The taxpayer appeared on his own behalf. He conceded at hearing that he was the responsible officer for these corp. liabilities, as defined by Illinois law (Tr. pp. 5-6) and, therefore, the only issue at hearing was whether he wilfully failed to pay these liabilities.

Following the submission of all evidence and a review of the record, it is recommended that this matter be resolved in favor of the Department, and in support thereof, I make the following Findings of Fact and Conclusions of Law:

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 Penalty Liability 0000-000-00 0. Department Ex. No. 1 (NPL)
2. The NPL reflects the correct tax liabilities as filed by and due from ABC Chicago for Retailers Occupation Tax and related taxes for the tax periods of November, 2002 and December, 2002. Tr. p. 25 (stipulation by Doe)
3. During the tax periods, the corp. operated as a bar and restaurant in Chicago. Tr. pp. 16-17
4. During the tax periods, Doe was the sole corporate shareholder, and was its President and Secretary. Tr. pp. 17-18
5. During the tax periods, Doe was the legally "responsible" officer for the filing and payment of the pertinent taxes to the State of Illinois. Tr. pp. 5-6
6. During the tax periods, the business manager, Joe Blow (hereinafter "Blow"), was under his authority and direction. Tr. p. 18
7. During the tax periods, the office manager, whom Doe hired, was under his authority and direction. Tr. p. 23
8. After his review, Doe signed the pertinent tax returns for the tax periods. Tr. pp. 24, 26-28; Department Ex. No. 2

9. Doe, along with Blow and the office manager, decided, and Doe authorized, which financial obligations, including those due to the Department, were the “most pressing” and, thus, should be paid. Tr. pp.25, 26
10. The corp. was having financial difficulties in December, 2002. Tr. p. 29
11. On February 17, 2003, ABC no longer functioned as a bar and restaurant following an incident wherein people died at the premises. Tr. p. 15

Conclusions of Law:

The Illinois Uniform Penalty and Interest Act, 35 ILCS 735/3-1 *et seq.*, provides, in pertinent part, as follows:

§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 penalties and interest 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 of computer printout of the Department’s record relating thereto in the name of the Department under the certificate of the Director of Revenue.

35 ILCS 735/3-7

Pursuant to this statute, an officer or employee of an entity such as ABC can be held personally liable to the State for pertinent unpaid taxes if he had the control, supervision or responsibility of filing tax returns and making the payments reflected

thereon and willfully failed to file such returns or make such payments. Prior to this hearing, Doe, a licensed attorney (Tr. pp. 14-15), determined that pursuant to the statute and the case law interpreting it, he had the responsibility for the filing and the payment of the taxes at issue herein. He conceded this at hearing. Tr. pp. 5-6 Since the tax returns for ABC for the tax periods were filed (Department Ex. No. 2; Tr. p. 25), what remains at issue is whether Doe willfully failed to pay the liabilities reflected thereon.

The statute does not define “willful” conduct. However, the Illinois Supreme Court, in cases wherein it considered personal liability, has referred to interpretations of similar language in section 6672 of the Internal Revenue Code (26 U.S.C. §6672), which imposes personal liability on corporate officers who willfully fail to collect, account for, or pay over employees’ social security and Federal income withholding taxes. Branson v. Department of Revenue, 168 Ill. 2d 247 (1995); Department of Revenue v. Heartland Investments, Inc., 106 Ill. 2d 19 (1985); Department of Revenue v. Joseph Bublick & Sons, Inc., 68 Ill. 2d 568 (1977)

The courts have made determinations of “willfulness” based on a variety of facts. The Illinois Supreme Court stated that “if a responsible officer uses collected retailers’ occupation taxes to pay other creditors of the corporation, while knowing that he or she was obligated to file the returns and remit the taxes”, that individual acts willfully under the statute. Department of Revenue v. Heartland Investments, supra In this case, Doe testified that he, along with employees under his direction and authority, prioritized which financial liabilities, including those to the State, needed to be paid and made payments according to that determination. The November tax liabilities at issue were due on December 20, 2002. The tax liabilities at issue for December, 2002 were due to the

State on January 21, 2003. Department Ex. No. 2 ABC remained an active business until February 17, 2003. Id. It is reasonable to conclude that bills were being paid by the corp. at a time when these liabilities were due to the State. Thus, creditors were being preferred over the State by Doe during the pertinent times. This sufficiently establishes that Doe willfully failed to pay these taxes to Illinois.

The record does provide that some of the corp.'s State tax liabilities were paid during the tax periods. Department Ex. No. 1 (i.e., only part of the tax remains due for the period 2002/11 as reported on corp. returns filed (Department Ex. No. 2)) Doe stated that at least some of the payments on ABC's liabilities for these periods were made through one of Blow' bank accounts (Department Ex. No. 2 (Blow Ind. Ltd. checks # 4452, 4539, 4540 returned "N.S.F.)) because in December, 2002, ABC was having financial problems-the business was "invited out of the bank" because too many checks did not clear. Tr. p. 28 He also stated that he was unable to resolve the problem of the N.S.F. checks because of the subsequent closing of the business in February, 2003.

These facts, however, do not mitigate a legal finding that Doe willfully failed to pay the tax liabilities at issue. Federal courts and the Illinois Supreme Court accept as indicia of willfulness a showing of "reckless disregard for obvious or known risks" as set forth in cases dealing with section of 6672 of the Internal Revenue Code. Branson v. Department of Revenue, supra; Department of Revenue v. Heartland Investments, 106 Ill. 2d 19, 29 (1985); Monday v. United States, 421 F. 2d 1210, 1215 (7th Cir. 1987) I have found no authority to support a finding that a responsible officer's hope that delinquencies could be resolved at a later date legally precludes a finding that the officer willfully failed to pay the taxes due. The taxes were collected by ABC during the times

of its operation as evidenced by its own returns. These were trust fund monies collected by ABC for the State. Brown v. Zehnder, 295 Ill. App. 3d 1031 (1st Dist. 1998) In order to stay in operation, the corp. used these funds to pay other creditors pursuant to the authority and direction of Doe, who was well aware of the corp.'s financial difficulties in December, 2002. Department of Revenue v. Heartland Investments, supra (a person acts willfully in failing to pay delinquent taxes if he prefers other creditors to the State) The courts do not allow a person to avoid the personal penalty liability for these taxes by ignoring serious risks that the taxes would not be paid, especially when the funds for these taxes were collected by the business from its customers for the purpose of remittance to the State.

Doe's defenses in this matter against a finding of willfulness are that because of the catastrophic event of February 17, 2003, the corp. is unable to pay the liabilities. He also represented that because of that event and his resulting legal and financial problems, he is not able to personally pay this NPL assessment. However, these equitable defenses have no effect on the conclusion required by the law in this matter.

The Notice of Penalty Liability issued herein against Doe establishes the Department's *prima facie* case that he was a responsible officer who willfully failed to pay taxes due from the corp. Branson v. Department of Revenue, supra The burden then shifts to the taxpayer to overcome the presumption of liability through sufficient evidence that the person was either not a responsible office or employee, or that his actions were not willful. Id. He readily conceded that he was a legally "responsible" officer of the corp. during the tax periods, and his defenses are not legally sufficient to negate an otherwise clear finding that he also willfully failed to pay the tax liabilities at issue at a

time when ABC was actively engaging in business and was responsible for turning over these funds to the State.

WHEREFORE, for the reasons stated above, it is my recommendation that the Notice of Penalty Liability issued against John Doe at issue herein be finalized as issued.

Date: 1/6/2006

Mimi Brin
Administrative Law Judge