

ST 95-5

Tax Type: SALES TAX

Issue: Responsible Corp. Officer - Failure to File or Pay Tax

STATE OF ILLINOIS
DEPARTMENT OF REVENUE
ADMINISTRATIVE HEARINGS DIVISION
SPRINGFIELD, ILLINOIS

```

-----
THE DEPARTMENT OF REVENUE      )
OF THE STATE OF ILLINOIS      )
                               )
                               )
v.                               ) No. XXXXX
                               )
XXXXX                          )
Responsible Officer of        ) Karl W. Betz
XXXXXX                        ) Administrative Law Judge
                               )
-----

```

RECOMMENDATION FOR DISPOSITION

APPEARANCES XXXXX, for the Taxpayer.

SYNOPSIS This matter came on to be heard after XXXXX (hereinafter "Taxpayer") filed a timely protest to Notice of Penalty Liability (NPL) No. XXXXX issued by the Illinois Department of Revenue (hereinafter "Department") on June 20, 1991, for \$32,653.99. The NPL was issued on the grounds XXXXX was a responsible officer of XXXXX XXXXX (hereinafter "XXXXX"), and was based upon various Occupation and Use Tax Notices of Tax Liability that had become final assessments against the corporation.

The NPL was assessed pursuant to Section 13.5 of the Retailers' Occupation Tax Act (35 ILCS 120/13.5) and the issue under this section is if Taxpayer is liable as an officer of XXXXX, XXXXX who was responsible for filing Occupation and Use Tax returns or making payments thereof, and who willfully failed to do so. Also at issue in this matter is the effect of Taxpayer's discharge in individual bankruptcy upon the tax obligations assessed herein.

The Department entered into evidence its record file in this matter

(Department Group Exhibit 1, admitted at Tr. 8) under the certificate of the Director of Revenue. This Group Exhibit (Department No. 1) includes the NPL (pp. 2-3), 38 separately filed sales tax returns signed by Taxpayer (pp. 62-73, 75-88, 90-92, 94-95, 97, 99, 101-106), copies of 38 checks signed by Taxpayer and remitted to the Department to pay various tax liabilities, several of which were for the aforementioned filed returns (pp. 74, 89, 93, 96, 98, 100, 107-138), and ten assessments issued against the corporation for liability periods occurring between September 1987 and May 1989. (pp. 6-46).

Taxpayer entered into evidence its Exhibits 1 through 3 concerning a 1990 bankruptcy proceeding, and these include his petition (Taxpayer No. 2), his discharge (Taxpayer No. 3), and a copy of the notice to creditors (Taxpayer No. 1).

Taxpayer testified about his involvement with the business and his personal bankruptcy case. The Taxpayer attempted to minimize his obligations related to the XXXXX tax filing and payment responsibilities.

After reviewing this matter, including all testimony, exhibits, and arguments of counsel, I recommend the issues be resolved in favor of the Department.

FINDINGS OF FACT

1. Taxpayer was president of the corporation, and owned 250 shares, which is 50% of its stock during the assessment periods. (Tr. 9; Taxpayer Exhibit No. 2).

2. Taxpayer had check signing authority, and his duties included the responsibility for filing and paying Retailers' Occupation and Use Tax returns. (Department Group Exhibit 1).

3. Taxpayer signed 38 sales tax returns for the months of February through December 1986, and February 1987, through April 1989. (Department Group Exhibit 1).

4. Taxpayer signed and remitted as payment for various tax liabilities 38 separate checks. (Department Group Exhibit 1, pp. 74, 89, 93, 96, 98, 100, 107-138)

5. Taxpayer in 1989 requested in writing the opportunity to set up a plan to pay 50% of the Illinois tax owed by XXXXX. (Department Group Exhibit 1, page 5)

6. Each of the ten assessments that serve as the grounds for the NPL liability against Taxpayer involve one or more transaction reporting returns (RR-556's) where money was collected from a customer on the sale of a "manufactured home" (aka mobile home or trailer), but not remitted in full to the Department. (Department Group Exhibit 1, pages 6-46)

7. The dates of the individual transactions upon which XXXXX was required to file a 556 return range from August 1987 through July 1989. (Department Group Exhibit 1)

CONCLUSIONS OF LAW The liability in this matter is predicated upon the responsible officer provisions found in Section 13.5 of the Retailers' Occupation Tax Act (35 ILCS 120/13.5) and incorporated by reference into the Use Tax Act (35 ILCS 105/12).

Section 13.5 states in pertinent part:

"The Department shall determine a penalty due under this Section according to its best judgment and information, and such determination shall be prima facie correct and shall be prima facie evidence of a penalty due under this Section. Proof of such determination by the Department shall be made at any hearing before it or in any legal proceeding by reproduced copy of the Department's record relating thereto in the name of the Department under the certificate of the Director of Revenue. Such reproduced copy shall, without further proof, be admitted into evidence before the Department or any legal proceeding and shall be prima facie proof of the correctness of the penalty due, as shown thereon. (Emphasis Added).

Because the Department introduced a reproduced copy of the NPL into evidence as part of its Group Exhibit (Department Exhibit No. 1), the prima facie correctness of the penalty liability against Taxpayer was established

on the record. I find the evidence submitted by Taxpayer does not overcome this statutory presumption of correctness.

Section 13.5 and case law also require an element of willfulness be involved with the responsible officer's failure to file and/or pay tax returns. Illinois case law has held that a voluntary, conscious, and intentional failure to file and/or pay is a willful failure, Department of Revenue v. Joseph Bublick and Sons, Inc. (1977), 68 Ill.2d 568, and the State is required to show that the corporate officer knew taxes were due in order to establish willfulness on part of the corporate officer for failure to pay taxes.

I find the evidence in this case shows Taxpayer clearly knew that taxes were due, and the failure to file and pay them was a conscious disregard of that obligation. Because Taxpayer's responsibilities included the filing and paying of Illinois State tax returns (Fact Nos. 3 and 4), Taxpayer knew, or should have known that taxes were due and unpaid.

As the president and 50% co-owner of the business who involved himself in the filing and paying of State tax returns, it was Taxpayer's burden to ensure that the tax debts of the corporation to the Department were met.

Taxpayer's testimony that the other 50% co-owner was really the one responsible for tax duties is self-serving and contrasts sharply with the physical evidence that shows the deep extent to which XXXXX was involved in the tax compliance function of the corporation. I also discount Taxpayer's testimony regarding his leaving the State of Illinois in August, 1989 because such a move would be immaterial regarding the instant responsible officer liability that is based upon assessment periods that are all earlier in time. (Fact No. 7).

I note the written request of XXXXX to enter into a payment plan to pay 50% of the corporate tax liability (Department Group Exhibit 1, p. 5). Also very important here is Taxpayer's acknowledgment on the record that he

is jointly and severally liable for the penalty liability (Tr. 15). In the context of a responsible officer penalty liability situation, such an admission is tantamount to accepting responsibility for the entire debt.

Having found that Taxpayer is an officer responsible for the liability in NPL XXXXX, I now turn to the effect of Taxpayer's individual bankruptcy discharge upon the liability.

After studying the Bankruptcy Code and applicable case law, I find I cannot agree with Taxpayer's argument that the discharge order bars the Department from asserting the liability at issue.

Taxpayer's exhibits show a chapter 7 discharge order on May 2, 1990, (Taxpayer Exhibit 3) and the petition date was January 18, 1990. Because the discharge order states it is being entered under chapter 7, only an individual debtor can receive a discharge for debts (11 U.S.C. Section 727 (a)(1)) and corporate liability is not discharged. Here the debts (i.e. the tax liabilities) on May 2, 1990, existed only as final assessments against the corporation, as the NPL was not issued against XXXXX until June 1991.

While the Department was scheduled as a creditor on the copy of the Schedule A submitted as part of Taxpayer Exhibit No. 2, there is no indication in the record that the Department was notified or filed a proof of claim. Also, Taxpayer acknowledged on the record that there was no payment made by the Bankruptcy Trustee to the Department. (Tr. 17).

At the time of the bankruptcy proceeding, the debts existed as "trust fund" type taxes under Sections 507 and 523 of the Bankruptcy Code (11 U.S.C. Sections 507 and 523) that are excepted from discharge as every one of the ten assessments (Department Group Exhibit 1, pp. 6, 9, 12, 18, 23, 29, 35, 38, 41, and 44), states that it is for "OCCUPATION AND USE TAX" liability. This liability is of a trust fund type because it was Use Tax on the manufactured homes the business was required to collect from the

customers and then send to the Department in conjunction with filing the individual (556) transaction reporting returns. (35 ILCS 105/9 and 120/3).

When a business debtor is required to collect and withhold a tax for which the debtor is liable, such a tax liability (e.g. the Use Taxes on the homes here) is never dischargeable. (In re Torres, Bkrtcy. N.D. Ill. 1990, 117 B.R. 379, 384).

I also note that analyzing the dischargeability of these taxes under the "gross receipts" context yields the same result, namely, that they are not discharged here. This is because all transactions assessed (Fact Nos. 6 and 7) required the filing of the 556 return and payment of the tax three years or less before the January 18, 1990, petition date. (11 U.S.C. Section 507 (a)(7)(A)(i)).

In summary, I find the liability in NPL No. XXXXX to be the responsibility of XXXXX.

RECOMMENDATION Based upon the foregoing findings of fact and conclusions of law, I recommend the Department finalize Notice of Penalty Liability No. XXXXX in its entirety.

Karl W. Betz
Administrative Law Judge

Date: