ST 97-26
Tax Type: SALES TAX
Issue: Responsible Corp. Officer - Failure to File or Pay Tax

STATE OF IllINOIS
DEPARTMENT OF REVENUE
ADMINISTRATIVE HEARINGS DIVISION
CHICAGO, ILLINOIS

THE DEPARTMENT OF REVENUE OF THE STATE OF ILLINOIS	)	**No.**
	)	**IBT #**
v.	)	
	)	**NPL #**
TAXPAYER as responsible, officer of CORPORATION, Inc., taxpayer	)	**Charles E. McClellan Administrative Law Judge**

RECOMMENDATION FOR DISPOSITION

Synopsis:

This matter came on for evidentiary hearing on February 25, 1997, following the filing of a timely protest to a Notice of Penalty Liability ("NPL") issued by the Department of Revenue ("Department") on October 7, 1994, to TAXPAYER ("TAXPAYER"). The NPL, in the amount of $15,498.33, was issued to TAXPAYER as a responsible officer of CORPORATION Inc., ("Liquors"), a corporation located at CORPORATION St., Chicago, Illinois 60609. The issue is whether TAXPAYER is liable, as a responsible person, for the penalty assessed him under section 13 ½ of the Retailers' Occupation Tax Act, now § 3-7 of the Uniform Penalty and Interest Act. 35 ILCS 735/3-7.

Following the submission of all evidence and a review of the record, I recommend that the Department's NPL be made final.

Findings of Fact:

1. During the months of March and May through October of 1992, the periods at issue in this case, TAXPAYER was president and 50% owner of Liquors. Tr. p. 11.

2. PARTNER ("PARTNER") owned the other 50% of the corporation. Tr. p. 22.

3. Liquors operated a business consisting of a liquor store, deli and small grocery under the name "CORPORATION on CORPORATION". Tr. p. 8.

4. The business operated from 1986 up to November 1, 1992. Tr. p. 9.

5. TAXPAYER was president of the corporation, worked at the store as a manager half time and received a salary. Tr. pp. 9, 11 14.

6. PARTNER also worked at the store half time. Tr. p. 22.

7. MANAGER ("MANAGER") worked at the store as a manager, was there most of the time, and was responsible for preparing sales and use tax returns. Tr. pp. 9, 10, 22, 23.

8. Liquors went out of business on November 1, 1992, when the Internal Revenue Service forced the business to close. Tr. p. 10.

9. During the periods at issue in this case, Liquors collected sales tax from its customers. Tr. p. 11.

10. TAXPAYER had check signing authority over Liquors' checking account and he signed checks, some of which were checks to suppliers, during the months at issue. Tr. pp. 11, 12.

11. The corporation's books were kept by the bookkeeper. Tr. p. 15.

12. TAXPAYER had access to the books. *Id*.

13. Liquors filed sales tax returns for the months of May, September and October of 1992 showing what purports to be the signature of TAXPAYER but did not pay the tax due as shown on the tax returns. Dept. Exs. No. 2, 3.

14. Liquors filed sales tax returns for the months of March, June, July and August of 1992 showing what purports to be the signature of TAXPAYER and submitted checks in payment of the tax due in each case, but the checks were dishonored by the bank. *Id*.

15. TAXPAYER knew that sales tax was being collected from customers and that sales tax returns had to be filed each month. Tr. pp. 11, 24.

16. TAXPAYER did not check to see if sales taxes were being paid. Tr. p. 25.

Conclusions of Law:

The issue in this case is whether TAXPAYER is a responsible person who willfully failed to file and pay retailers' occupation taxes for Liquors as required by statute, and is, therefore, personally liable for the penalty imposed by section 13½ of the Retailers Occupation Tax Act ("Act")[1] now that Liquors is defunct and Liquors' retailers' occupation taxes for the seven months at issue remain unpaid.

Once the Department introduced into evidence the NPL under the Director's certificate (Dept. Ex. No. 1), its *prima facie* case was made. Branson v. Dept. of Revenue, 168 Ill.2d 247 (1995); 35 ILCS 735/3-7. By operation of the statute, proof of the correctness of the penalty, including the willfulness element of the statute was established. Branson, at p. 260. At that point in the proceedings, TAXPAYER had the burden of proving that the penalty did not apply to him. *Id*. at p. 261. The record shows that he failed to do so.

Taking into account the evidence and testimony of record, for the reasons set forth below, I conclude that TAXPAYER has failed to overcome the Department's *prima facie* case that he is liable for the penalty assessed by the Department.

Section 13 ½ (now 35 ILCS 735/3-7), in relevant part, 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. 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

[1] Ill. Rev. Stat. 1991, ch. 120, ¶ 452½, repealed effective January 1, 1994; replacement provision enacted as § 3-7 of the Uniform Penalty and Interest Act, 35 ILCS 735/7.

> or in any legal proceedings by reproduced copy or computer printout of the Department's record relating thereto in the name of the Department under the certificate of the Director of Revenue.

Whether TAXPAYER is liable for the tax depends in the first instance on whether he is a responsible person under the statute. In applying the penalty tax, the Illinois courts look to federal cases involving § 6672 of the Internal Revenue Code[2] which contains language similar to the Illinois statute. The fact that a person was an officer of a corporation does not, *per se*, mean that he was the person who had the duty to collect, account for and pay over the tax. Monday v. U.S., 421 F.2d 1210, (7th Cir. 1970), cert. den. 400 U.S. 821. However, the fact that another person may have had that responsibility does not mean that the officer was not also responsible. *Id*. The liability attaches to those who have the power and responsibility within the corporation for seeing that tax owed is paid and that responsibility is generally found in high corporate officials charged with general control over corporate business. *Id*. Responsibility is not a matter of knowledge, but rather a matter of status and authority. Mazo v. U.S., 591 F.2d 1151 (5th Cir. 1979)

In the instant case, TAXPAYER was president and 50% owner of Liquors from its inception until it was forced out of business by the Internal Revenue Service on November 1, 1992. He was active in the business functioning as a part time manager working half time. He had check signing authority during this time which he did exercise on occasion. Liquors' by-laws are not in evidence, so the record does not show what duties and responsibilities they vested in the president of the corporation. However, the president of a corporation is customarily charged with overall responsibility for management of the corporation, and there is no reason to assume that not to be the situation in this case. Thus, even if, as TAXPAYER testified, MANAGER was responsible for the preparation and filing of sales and use tax returns and for payment of the tax liability, TAXPAYER had a duty to make sure the retailers' occupation tax returns were timely filed and that the tax due was paid as required by statute. Therefore, Godella's position

[2]. 26 U.S.C. § 6672.

as president and 50% owner of Liquors gave him the status and authority that made him a responsible person under the statute.

Finding that TAXPAYER was a responsible person, the next question is whether he willfully failed to pay over the retailers' occupation tax within the meaning of the statute. The concept of willfulness is not defined in the statute. The court in Monday, *supra*, noted that the concept, when used in criminal statutes, requires "bad purpose or the absence of justifiable excuse". *Id*. at p. 1215. The court then distinguished the meaning of the term when used in civil actions by saying, "Rather, willful conduct denotes intentional, knowing and voluntary acts. It may also indicate a reckless disregard for obvious or known risks." *Id*; Dept. of Revenue v. Joseph Bublick & Sons, Inc., 68 Ill.2d 568 (1977).

The willfulness requirement "is satisfied if the responsible person acts with reckless disregard of a known risk that the trust funds may not be remitted to the Government. . .." Garsky v. U.S., 600 F.2d 86 (7th Cir. 1979) A high degree of recklessness is not required because if it were required, the purpose of the statute could be frustrated simply by delegating responsibilities within a business and adopting a "hear no evil -- see no evil" policy. Wright v. U.S., 809 F.2d 425 (7th Cir. 1987) A "responsible person is liable if he (1) clearly ought to have known that (2) there was a grave risk that withholding taxes were not being paid and if (3) he was in a position to find out for certain very easily." *Id*. at p. 427. Willfulness can be established by showing gross negligence as in a situation in which a responsible party ought to have known of a grave risk of nonpayment and who is in a position to easily find out, but does nothing. Branson, *supra*.

In this case, TAXPAYER functioned in the business of Liquors as a manager working part time. He had access to the company's books and records and his signature appeared on the sales and use tax returns that were filed and that are the basis for the liability asserted in this matter. Although he denied signing these returns, he offered no evidence to prove that his signature was forged and no explanation of why his signature is on the returns if he didn't put it there.

It is inconceivable that as president of the corporation and store manager, he would not have known that the tax liabilities were not being paid. If he did not know he should have.

Taking TAXPAYER' testimony into account as well as the other evidence of record, particularly the sales and use tax returns with his signature affixed and the dishonored checks, his failure to make himself aware of Liquors' tax problems constituted gross negligence. TAXPAYER was a responsible person who knew or should have known that the taxes were not being paid. The company was in a money losing situation. TAXPAYER had access to the books. He was in a position to find out easily if there was a problem or not, yet he did nothing, according to his testimony. He offered no documentary evidence to show that he was not a responsible person. These factors establish willfulness within the context of the statute. They also show that TAXPAYER failed to overcome the Department's *prima facie* case. Therefore, he is a responsible person liable for the penalty assessed.

WHEREFORE, for the reasons stated above, it is my recommendation that the Department's Notice of Denial should be made final.

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Date: June 23, 1999

Charles E. McClellan
Administrative Law Judge