

ST 98-1

Tax Type: SALES TAX

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

STATE OF 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 resp. officer  
of XYZ CORPORATION,

Taxpayer

No.  
IBT:

C. O'Donoghue  
Admin. Law Judge

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**RECOMMENDATION FOR DISPOSITION**

**Appearances:** Mr. David A. Hughes & Mr. Jordan M. Goodman of Horwood, Marcus & Braun for JOHN DOE; Mr. James Dickett & Mr. Mark Dyckman, Special Assistant Attorney Generals, for the Illinois Department of Revenue.

**Synopsis:**

This matter comes on for hearing pursuant to the taxpayer's timely protest of the Notice of Penalty Liability issued by the Department for the period of June 1, 1992 through August 30, 1993 ("tax period"). Such Notice of Penalty Liability was issued to JOHN DOE (hereinafter "taxpayer") as a responsible officer of XYZ CORPORATION ("XYZ") pursuant to Section 13.5 of the Retailers' Occupation Tax Act.

The issues to be resolved are 1) whether the taxpayer was a responsible officer of XYZ CORPORATION and thereby required to collect, truthfully account for and pay over the retailers' occupation tax and 2) whether the taxpayer willfully failed to collect, truthfully account for and pay over such taxes.

A hearing was held on January 17, 1997. Upon consideration of all the evidence, it is recommended that this matter be resolved in favor of the Department.

**Findings of Fact:**

1. The Department's *prima facie* case was established by the admission into evidence of the Notice of Penalty Liability dated November 1, 1994 to JOHN DOE for the period June 1992 through August 1993 showing an amount due and owing of \$31,831.31. Dept. Ex. No. 1; Tr. pp. 9, 10.
2. During the entire tax period, DOE was the Treasurer and Secretary of XYZ CORPORATION. Tr. p. 97; Dept. Ex. No. 2. MRS. DOE was the president of XYZ CORPORATION during the entire tax period. Taxpayer Ex. No. 8 & 9; Dept. Ex. No. 2; Tr. p. 18. In addition, DOE and his wife each owned one-third of XYZ CORPORATION's stock. Tr. p. 18; Taxpayer Ex. No. 8 & 9.
3. During the entire tax period, FICTITIOUS TAXPAYER owned the remaining one-third interest in XYZ CORPORATION. Tr. pp. 18, 123.
4. XYZ Inc. operated ABC Restaurant ("ABC'S ") in Franklin Park, Illinois. Tr. p. 17.
5. JIM DOE was the general manager of ABC'S . Tr. p. 18. JIM DOE drew a salary of approximately \$600 per week. Tr. p. 23. FICTITIOUS TAXPAYER was the assistant manager of ABC and worked at the restaurant daily. Tr. pp. 22, 123.
6. On August 19, 1991, DOE signed the Illinois Business Registration Application form and accepted personal responsibility for filing returns and paying taxes due by XYZ CORPORATION Dept. Ex. No. 2; Tr. p. 102.
7. Taxpayer prepared, signed and filed the sales tax returns for the period of June, 1992 through August, 1993, excluding April of 1993, but did not remit any tax. Tr. pp. 31-32, 104-105, 114-116; Dept. Grp. Ex. No. 3 The sales tax returns for June, 1992 through December, 1992 were filed on April 15, 1993. The returns for January, 1993 through March, 1993 were filed May 14, 1993. The April 1993 return was filed June 10, 1993 and the returns for the period of May, 1993 through August, 1993 were filed on December 31, 1994. Dept. Grp. Ex. No. 3.
8. During the entire tax period, DOE was a signatory on XYZ's checking account at Maywood Proviso Bank. Tr. p. 101. These checks required only one signature. Tr. p. 101. JIM DOE would deposit the

- daily cash receipts in the bank. Tr. p. 28. DOE, his wife and FICTITIOUS TAXPAYER also made deposits. Tr. p. 28.
9. DOE received the Maywood Proviso bank statements at his home during the entire tax period. Tr. p. 94. DOE reviewed these statements as he received them. Tr. p. 42.
  10. ABC restaurant opened business on approximately August 15, 1991. The taxpayer, DOE and JIM DOE met weekly to discuss various aspects of the business including: sales, business costs and decisions regarding the payment of creditors. Tr. pp. 21, 28-30, 127. During the period of August, 1991 through the end of May, 1992, DOE visited the restaurant approximately once or twice a week. Tr. p. 22.
  11. During the period August, 1991 through May 1992, decisions regarding the payment of creditors were made jointly by FICTITIOUS TAXPAYER, the taxpayer and JIM DOE. Tr. pp. 30, 118. DOE, his wife or FICTITIOUS TAXPAYER wrote checks on the Maywood checking account to pay the creditors. Tr. p. 28. JIM DOE did not write checks on the Maywood account. Tr. p. 28.
  12. During the period June 1, 1992 through March 16, 1993 (the time of the taxpayer's daughter's illness) DOE continued to visit the restaurant approximately once per week. Tr. pp. 107, 131. During this period, DOE also called the restaurant. Tr. pp. 107, 131. He spoke to FICTITIOUS TAXPAYER regarding the restaurant, approximately once a day, but at least three times a week, during this period. Tr. p. 131.
  13. XYZ CORPORATION paid creditors other than the Department during the period June, 1992 through August, 1993. Taxpayer Ex. Nos. 2, 4-6; Tr. pp. 105, 108.
  14. DOE signed a check for payment of sales tax for the month of April, 1993 to the Department. This check was returned NSF. Dept. Grp. Ex. No. 3; Tr. pp. 104-105.
  15. On or after the middle of May of 1993, taxpayer wrote checks for the payment of vendors. Tr. p. 99.
  16. During the period of March 16, 1993 through August 30, 1993, DOE participated in decisions regarding the payment of creditors at weekly meetings. Tr. pp. 63-65, 118-119. During this period, DOE prepared and signed checks to XYZ CORPORATION's suppliers. Tr. pp. 63-65, 118-119.

17. The Maywood Bank checking account statement reflects that for the months of June, 1992 through November, 1992 and June, 1993 through August, 1993, total deposits were approximately \$57,000.00. Taxpayer Ex. No. 2.
18. On March 16, 1993, DOE filed a police report with the Franklin Park Police Department and stated that XYZ CORPORATION had not paid Illinois sales tax for the previous nine months. Taxpayer Ex. No. 7; Tr. p. 63.
19. DOE received \$26,623.03 from the sale of XYZ CORPORATION on August 30, 1993. Tr. p. 120; Taxpayer's Ex. No. 8.

### **Conclusions of Law:**

The Department seeks to impose personal liability upon DOE pursuant to Section 13.5 of the Retailers' Occupation Tax Act which provides:

Any officer or employee of any corporation subject to the provisions of the Act who has the control, supervision or responsibility of filing returns and making payment of the tax herein imposed in accordance with Section 3 of this Act and who willfully fails to file such return or to make such 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 corporation, including interest and penalties thereon.

35 ILCS 120/13.5 (*formerly* Ill. Rev. Stat. 1991, ch. 120, para. 452 1/2).<sup>1</sup>

During hearing, the taxpayer presented several different arguments as to why he is not a responsible officer under the statute depending on the period of time involved. Taxpayer maintains that he was not involved in the daily operations of the business because throughout the tax period, he was employed as a full-time sales manager with another company and specifically with regards to the period of June, 1992 through January, 1993, all of his time was spent with his daughter who was terminally ill. Further, he claims that his failure to remit the tax was not willful because of his agreement with JIM DOE, the general manager, who had agreed to assume all tax liabilities upon his purchase of the taxpayer's share of the business.

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<sup>1</sup> The Uniform Penalty and Interest Act, 35 ILCS 735/3-7, which provides for personal liability penalty, is effective for taxes incurred as of January 1, 1994.

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. *See, e.g., Monday v. United States*, 421 F.2d 1210 (7th 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.* Thus, the statute does not confine liability to the single most responsible person. *See, Gephart v. United States*, 818 F.2d 469 (6<sup>th</sup> Cir. 1987).

During the period of June, 1992 through December, 1992, (the time he was engaged in caring for his daughter), taxpayer kept in touch with JIM DOE through phone calls and weekly visits to the restaurant. It is quite understandable that the taxpayer would be engrossed in caring for his daughter prior to her death and perhaps business matters took second stage. Taxpayer's actions subsequent to this traumatic time, however, establish that he held the requisite degree of responsibility within the corporation and moreover, that he willfully failed to remit sales tax to the Department.

During the entire tax period, DOE was the Treasurer and Secretary of XYZ CORPORATION which operated ABC Restaurant, and held a one-third interest in XYZ's stock. Corporate documents indicate his wife also held a one-third interest in the corporation. Taxpayer has not produced any documentary evidence at hearing to prove that he held another full-time position as was claimed. Under some circumstances, title alone may be insufficient to constitute a finding of responsibility; however, it is clear from both testimony and documentary evidence that DOE's control, supervision and responsibility over the filing of tax returns and the payment of taxes due was sufficient to establish him a responsible officer for the entire tax period.

All of the Illinois sales tax returns for the tax period were prepared and signed by DOE, except for April of 1993, which was filed unsigned. DOE was also the only officer to sign the Illinois Business Registration Application which included a statement accepting personal responsibility for filing sales tax returns and paying taxes for XYZ CORPORATION. Throughout the tax period DOE was a signatory on the Maywood Proviso Bank checking account and maintained control of this checkbook. This account only required one signature and

the record specifically indicates that DOE prepared and signed checks to creditors during the period of March 16, 1993 through August 30, 1993. DOE also received the Maywood account's bank statements at his home throughout the tax period and, furthermore, he reviewed these statements as he received them in the mail.

It must also be determined whether DOE willfully failed to remit the withholding taxes to the Department. Willfulness in regards to Section 13.5 is not merely limited to "intentional, knowing and voluntary acts". Monday, 421 F.2d at 1215. It also encompasses a reckless disregard for obvious or known risks. *Id.*

In Branson v. Department of Revenue, 168 Ill.2d 247 (1995), the Illinois Supreme Court held that the introduction of the Notice of Penalty Liability was sufficient to establish a *prima facie* case of willful failure to pay retailers' occupation taxes. In the present case, however, there is evidence showing DOE acted willfully. Even assuming, *arguendo*, that he was not aware of the restaurant's failure to file and pay until January, 1993, taxpayer's actions subsequent to this time establish that he was responsible for filing the sales tax returns and that he participated in decisions regarding the prioritizing the payment of creditors. After January, 1993, weekly meetings with FICTITIOUS TAXPAYER and JIM DOE were held, as was the custom, to discuss the business and to prioritize creditors. Taxpayer maintains that he was not in control of the finances during this period of time because JIM DOE had wrested control of the cash receipts and was depositing them into his own checking account, an account which the taxpayer had no check writing authority.

DOE contends that JIM DOE was evicted from the restaurant sometime around March 16, 1993 and yet DOE made no attempts to pay the Department the tax monies owed. The Maywood bank statement, an account which DOE was a signatory on, reflects that deposits were made during the period of June, 1993 through August, 1993 and creditors were paid during this time. DOE was aware that ABC owed tax monies not only because he stated this in his police report filed March 16, 1993 but also because he filed most of the delinquent tax returns on April, 1993, May, 1993 and December of 1994.

Taxpayer indicated that he felt no obligation to remit the tax due along with the returns because JIM DOE was to assume all obligations to the Department upon buying DOE' and FICTITIOUS TAXPAYER' share of the business. This agreement does not serve to relieve him of the liability to the Department, nor is DOE' belief that it would absolve him of any liability relevant. Agreements such as this do not impact the

Department's ability to proceed against any responsible officer for unpaid corporate sales tax. DOE along with JIM DOE and FICTITIOUS TAXPAYER made a conscious decision to pay creditors other than the Department in an attempt to keep the restaurant open and operating, thus, protecting their own investment in the business. Reasoning such as this is unsound and unlawful, since this act of diverting state funds is blatantly willful. In fact, the Illinois Supreme Court has indicated that the underlying purpose behind the imposition of personal liability against corporate officers is to deter officers from using the tax monies collected for the State to satisfy corporate obligations. Imposing personal liability against responsible parties works to safeguard the funds collected from the public on behalf of the State and it is not within an officer's power to divert the funds entrusted to his or her care for any reason whatsoever. *See, Department of Revenue v. Joseph Bublick and Sons, Inc., 68 Ill. 2d 568 (1977).*

WHEREFORE, for the reasons stated above, it is my recommendation the Notice of Penalty Liability be finalized as issued.

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Christine O'Donoghue  
Administrative Law Judge