

ST 99-23

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.

"GUIDO S. SARDUCCI" *et al.*, as responsible
officers of "ABC Building & Supply Co., Inc."

Taxpayer

No. 98-ST-0000
NPL 0000
IBT No. 0000-0000

Charles E. McClellan
Administrative Law Judge

RECOMMENDATION FOR DECISION

Appearances:

Alan Osheff and Mark Dyckman, Special Assistant Attorneys General, for the Illinois Department of Revenue. Marvin Margolis on behalf of taxpayers "Guido S. Sarducci" and "Al Franken". "Ronald Taylor" appeared *pro se*.

Synopsis:

This matter came on for evidentiary hearing on November 11, 1998, following the filing of a timely protest to Notices of Penalty Liability ("NPL") issued by the Department of Revenue ("Department") on December 30, 1996, as follows:

| Name | NPL No. | Tax Period | Assessment |
|---------------------|---------|-------------------|-------------|
| "Guido S. Sarducci" | 0000 | 7/94 through 9/95 | \$70,080.19 |
| "Ronald Taylor" | 0001 | 7/94 through 9/95 | \$70,080.19 |

| | | | |
|--------------|------|-------------------|-------------|
| "Al Franken" | 0002 | 7/94 through 9/95 | \$70,080.19 |
|--------------|------|-------------------|-------------|

Following the evidentiary hearing, both parties filed briefs. In the Department's post hearing brief, the Department conceded that there is insufficient evidence against "Guido S. Sarducci" to find liability under the Uniform Penalty and Interest Act ("UPIA"). 35 ILCS 735/3-1 *et seq.* Because of this concession, the motion to dismiss "Guido S. Sarducci" is moot. The remaining issue is whether "Ronald Taylor" and "Al Franken" are personally liable as responsible officers or employees for the unpaid sales tax liability¹ incurred by "ABC Building & Supply Co., Inc." during the period beginning with July 1994 through and including September 1995.

Following the submission of all evidence and a review of the record, I recommend that the Department's NPL issued to "Ronald Taylor" and "Al Franken" be made final. The NPL issued to "Guido S. Sarducci" should be canceled.

Findings of Fact:

1. NPL 0000 was issued to "Guido S. Sarducci" as a responsible officer of "ABC Building & Supply Co., Inc." on December 30, 1996. Dept. Group Ex. No. 1.
2. NPL 0001 was issued to "Ronald Taylor" as a responsible officer of "ABC Building & Supply Co., Inc." on December 30, 1996. Dept. Group Ex. No. 2.
3. NPL 0002 was issued to "Al Franken" as a responsible officer of "ABC Building & Supply Co., Inc." on December 30, 1996. Dept. Group Ex. No. 3.
4. The registration number of "ABC Building & Supply Co., Inc." as shown on the NPLs is 0000-0000. *Id.*
5. The amount of the unpaid sales tax liability assessed on each NPL is \$70,080.19. Dept. Group Exs. No. 2, 3.

¹ As used in this recommendation the term "sales tax" refers to taxes imposed by the Retailers' Occupation Tax Act, 35 ILCS 120/1 *et seq.*, and the Use Tax Act. 35 ILCS 105/1 *et seq.*

6. "Ronald Taylor" signed the Department's NUC-1 Illinois Business Registration form for "ABC Building & Supply Co., Inc." thereby accepting personal responsibility for filing the sales tax returns and paying the taxes incurred by the company. Taxpayer Group Ex. No. 1.

7. "Ronald Taylor" understood that in signing the NUC-1 form he accepted personal responsibility for filing the sales tax returns and paying the taxes. Tr. p. 18.

8. "Ronald Taylor" was the president of "ABC Building & Supply Co., Inc.", "Guido S. Sarducci" was its secretary, and "Al Franken" was its vice-president. Taxpayer Group Ex. No. 1, Tr. p. 19.

9. "ABC Building & Supply Co., Inc." was in the business of selling millwork, such as doors, windows and moldings, to residential contractors and homeowners at retail. Tr. p. 12.

10. "Guido S. Sarducci" is the father of "Al Franken" and his older brother, "Ronald Taylor". Tr. p. 14. 19.

11. "Ronald Taylor" and "Al Franken" each owned 50% of the stock of "ABC Building & Supply Co., Inc." Tr. p. 21.

12. "Ronald Taylor" ran the day to day business of the company. Tr. p. 12.

13. "Ronald Taylor" was responsible for collection and payment of sales taxes to the state. Tr. p. 13.

14. "Ronald Taylor" supplied the company's accountant, "Count On It Management", the information necessary to prepare the sales tax returns. *Id.*

15. "Count On It Management" was located in "Someplace", Illinois. *Id.*

16. "Al Franken", who was out of the office making sales calls, would pick up the completed sales tax returns from the accountant, sign the returns and mail them. Tr. p. 14.

17. "Ronald Taylor" decided, for the most part, which bills would be paid on the basis of which creditor called most often and which creditor called first. Tr. p. 15.

18. "Ronald Taylor" and "Al Franken" had check writing authority. Tr. p. 21.
19. "Al Franken" wrote checks from time to time and signed the sales tax returns. *Id.*
20. "Al Franken" could write checks without obtaining the approval of "Ronald Taylor" to write checks. Tr. p. 22.
21. "ABC Building & Supply Co., Inc." went out of business in 1995. Tr. p. 25.
22. Both "Ronald Taylor" and "Al Franken" were aware of the fact that during the periods at issue "ABC Building & Supply Co., Inc." was not paying sales tax. Tr. p. 26.
23. "Al Franken" was employed as a salesman and estimator from when the company started in 1990 through the audit period and he signed all of the tax returns during that period. Tr. p 33, 34.
24. "Al Franken" knew he was mailing sales tax returns without paying the taxes. Tr. p. 35.
25. "Al Franken" could have written a check at any time making it payable to the Illinois Department of Revenue. Tr. p. 36.
26. During the audit period, "Al Franken" wrote payroll checks payable to himself that he signed. Tr. p. 37.
27. "Al Franken" made checks payable to himself during the audit period when funds were available to pay taxes to the Department of Revenue. Tr. p. 41.

Conclusions of Law:

The issue in this case is whether "Ronald Taylor" and "Al Franken" are responsible persons who willfully failed to file and pay sales taxes for "ABC Building & Supply Co., Inc." as required by statute, and are, therefore, personally liable for the penalty imposed by section 3-7 of the UPIA now that "ABC Building & Supply Co., Inc." is out of business and its sales tax liability remains unpaid.

The UPIA provides, in part, as follows:

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 or computer printout of the Department's record relating thereto in the name of the Department under the certificate of the Director of Revenue. . . . That certified reproduced copy or certified computer printout shall without further proof, be admitted into evidence before the Department or in any legal proceeding and shall be prima facie proof of the correctness of the amount of tax or penalty due.

35 ILCS 735/3-7(a).

Once the Department introduced into evidence the NPLs 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). By operation of the statute, proof of the correctness of the penalty, including the willfulness element of the statute was established. *Id* at 260. At that point in the proceedings, "Ronald Taylor" and "Al Franken" each had the burden of proving that the penalty did not apply to him. *Id.* at 261. The record shows that they failed to do so.

The personal liability of an officer or employee of a business is established under section 3-7(a) of the UPIA, which in relevant part, 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 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.

35 ILCS 735/3-7(a).

Whether "Ronald Taylor" and "Al Franken" are liable for the tax depends in the first instance on whether they are responsible persons under the statute. In applying the penalty tax, the Illinois courts look to federal cases involving § 6672 of the Internal Revenue Code², which contains language similar to the Illinois statute. Branson, *supra*. The fact that a person was an officer of a corporation does not, *per se*, mean that he was

² 26 U.S.C. § 6672.

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 addressing the situation of "Ronald Taylor", the first question is whether he was a responsible officer. The record shows that he was president and 50% owner of "ABC Building & Supply Co., Inc." He had check signing authority, he agreed to be responsible for paying the sales tax when he signed the Department's form U C-1, and he admitted that he had the responsibility to pay the taxes. These facts establish that he was a responsible officer.

The next question is whether his actions satisfy the willfulness requirement of the statute. He admitted that he knew the taxes were not being paid, and he admitted that he authorized payment to other creditors when he could have paid the Department. The reason he did not give the Department precedence was that the Department did not call him requesting payment. By his own admission, "Ronald Taylor" willfully failed to pay the taxes owed. Therefore, he is personally liable for the unpaid taxes.

With regard to "Al Franken", the record shows that he was an officer of the corporation and a 50% owner, as was his brother "Ronald Taylor". He admitted that he signed the sales tax returns, that he paid other creditors, including himself as an employee, when the corporation had cash that could have been used to pay the taxes owed. Although "Ronald Taylor" generally decided which creditors would be paid, "Al Franken" testified that he sometimes wrote checks without the approval of "Ronald Taylor". These factors establish "Al Franken" as a responsible officer.

The next question is whether he willfully failed to pay over the retailers' occupation tax within the meaning of the statute. In this case, "Al Franken" knew that the taxes were not being paid because he mailed the tax returns with no checks attached. He also admitted that he knew the taxes were not being paid. Even though "Ronald Taylor" usually decided which creditors would be paid, "Al Franken" was an equal owner of the company with his brother, he was an officer as was his brother, and he was an adult, responsible for his own actions. He had check signing authority and he wrote checks.

There is nothing in the record to indicate that he ever cautioned his brother that the taxes ought to be paid or that he took any other steps to see that the taxes were paid even though he knew they were due and that there was money to pay the taxes from time to time. These factors at minimum demonstrate gross negligence and reckless disregard of the fact that other creditors were being given precedence over the Department of Revenue. They are sufficient to establish willfulness within the context of the statute. Therefore, "Al Franken" is equally liable for the penalty assessed.

"Al Franken" argues that because he was the younger brother of "Ronald Taylor" he deferred to "Ronald Taylor"'s authority and that the decision not to pay the taxes was strictly that of "Ronald Taylor". There is no evidence that "Al Franken" ever objected to not paying the taxes, however. His complicity and acquiescence in the situation which spanned a fourteen month period is at least gross negligence and reckless disregard of the fact that other creditors were being given precedence over the Department of Revenue and that the taxes were not being paid. As the court stated in Branson, *supra*, gross negligence and reckless disregard satisfy the statutory willfulness requirement. 168 Ill.2d at 255.

"Al Franken" argues in his reply brief that the salient issue is whether he had the authority and the power to decide what debts would be paid and whether he had the authority, power and responsibility to pay the delinquent taxes. As noted above, "Al Franken" was an adult, an officer, an equal partner with his brother, and he knew that the taxes were not being paid. He was writing checks paying creditors other than the

Department of Revenue. Having full knowledge of the situation, he did nothing about it. There is no evidence that he ever tried to do anything about it. "Al Franken"'s acquiescence and complicity in not paying the delinquent taxes constituted gross negligence and a reckless disregard of the obligation to pay and that satisfies the willfulness test in section 3-7(a) of the UPIA. Branson, *supra*.

Finally, "Al Franken" argues that the cases cited by the Department regarding the requirement of documentary evidence to overcome the Department's *prima facie* case are inapplicable because they all involve tax returns corrected by the Department and there are no such tax returns involved in this case. These cases, Copilevitz v. Department of Revenue, 41 Ill.2d 154, 242 N.E.2d 205 (1968); Mel-Park Drugs, Inc. v. Department of Revenue, 218 Ill.App.3d 203, (1st Dist. 1991); A.R. Barnes & Co. v. Department of Revenue, 173 Ill. App. 3d 826, 833-34 (1st Dist. 1988), all stand for the long standing rule regarding the burden of proof in state tax cases which is that once the Department establishes its *prima facie* case, the burden of proof is on the taxpayer. These cases all support the proposition that to satisfy that burden of proof, oral testimony of the taxpayer is not enough. Documentary evidence from the taxpayer's books and records is required to overcome the Department's case. Taxpayers' assertion that these cases are inapplicable is erroneous. However, in this case, "Al Franken" testified to each and every power he had and action he did or did not take. This testimony, admitting each pertinent fact, is sufficient to support the *prima facie* correctness of the Departments NPL.

For the above reasons, I recommend that the NPL issued to "Guido S. Sarducci" be canceled and that the NPLs issued to "Ronald Taylor" and "Al Franken" be made final.

July 1, 1999

ENTER:

**Charles McClellan
Administrative Law Judge**