

ST 06-16

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, as responsible
officer of *ABC, Inc.*, d/b/a
John's Restaurant

Taxpayer

No. 00-ST-0000

IBT: 0000-0000

NPL: 0000

SSN: 000-00-0000

NOD: 0000

John E. White,
Administrative Law Judge

RECOMMENDATION FOR DISPOSITION

Appearances: Lester Ottenheimer, Ottenheimer, Teplinsky & Rosenbloom, appeared for *John Doe*; Shepard Smith, Special Assistant Attorney General, appeared for the Illinois Department of Revenue.

Synopsis:

This matter arose when *John Doe (John Doe)* protested a Notice of Penalty Liability and Notice of Deficiency the Illinois Department of Revenue (Department) issued to him as a responsible officer of *ABC, Inc. (the Corporation)*. Notice of Penalty Liability (NPL) number 0000 assessed a penalty equal to the Corporation's unpaid Retailers' Occupation Tax (ROT) liabilities regarding the months of January 2001 through March 2001. Notice of Deficiency number 0000 proposed to assess a penalty equal to the amount of the Illinois income taxes the Corporation withheld from its employees' wages during the first and second quarters of 2001, and which the Corporation did not pay over to the Department.

The hearing was held at the Department's offices in Chicago, at which *John Doe* testified. I have reviewed that evidence, and I am including in this recommendation

findings of fact and conclusions of law. I recommend the penalties be upheld.

Findings of Fact:

1. The Corporation operated a restaurant in Anywhere, Illinois. Department Ex. 2, p. 7 (copy of first page of the Corporation's completed form NUC-1), line 5.
2. The Corporation applied for an Illinois license to conduct business by completing and filing a form NUC-1, Illinois Business Registration, with the Department in July 2000. Department Ex. 2, p. 7.
3. The NUC-1 listed *John Doe* as president, secretary and treasurer of the corporation. Department Ex. 2, p. 7, line 9. It also listed *John Smith* as a vice-president of the Corporation. *Id.*
4. *John Doe* signed a section of the NUC-1 form which provided, "I accept personal responsibility for the filing of returns and the payment of taxes due." Department Ex. 2, p. 8, line 14. On the last page of the form, *John Doe* signed his name under a statement that provided, "Under penalties of perjury, I state that I have examined this application and, to the best of my knowledge, it is true and correct." *Id.*, p. 10.
5. *John Doe* managed the day-to-day operations of the Corporation, including hiring and firing and scheduling of employees. Tr. pp. 11-12. He also had responsibility for the Corporation's payables, including its tax liabilities. Tr. p. 12.
6. *John Doe* had the authority to sign checks for the Corporation, and he could sign a Corporate check if he believed, on his own, that a bill needed to be paid. Tr. p. 13.
7. *John Doe* signed the Corporation's January and February 2001 Illinois Sales and

Use Tax Returns. *Compare* Department Ex. 2, pp. 2-3 (*John Doe's* signature on copies of the Corporation's completed and filed forms ST-1 for, respectively, January and February 2001) *with id.* pp. 8, 10 (*John Doe's* signatures on form NUC-1). The ST-1 return the Corporation filed for March 2001 was not signed, as required. *Id.*, p. 4 (copy of the Corporation's partially completed and filed form ST-1 for March 2001).

8. *John Doe* did not sign the Corporation's Illinois Quarterly Withholding Income Tax Returns. Department Ex. 2, pp. 5-6 (copies of the Corporation's completed and filed Illinois forms IL-941 for the first and second quarters of 2001).
9. In early July 2001, *John Doe* had knowledge that the Corporation had obligations that were not being paid, including tax obligations. Tr. pp. 13-14.
10. The Corporation did not pay the amount shown due on its January through March 2001 forms ST-1. Department Ex. 1, p. 2 (copy of the NPL). Nor did the Corporation pay the amounts shown due on the forms IL-941 that it filed regarding the first and second quarters of 2001. *Id.*, pp. 2-3 (copy of the NOD).

Conclusions of Law:

Here, both the NPL and the NOD were issued pursuant to § 3-7 of Illinois' Uniform Penalty and Interest Act (UPIA). Department Ex. 1; 35 ILCS 735/3-7. Section 3-7 of the UPIA provides that a personal liability penalty liability may be imposed upon:

- [1] Any officer or employee of any corporation ... who has the control, supervision or responsibility of filing returns and making payment of ... the tax[es] ... imposed ... **and** who willfully:
- [2] fails to file such return **or**
- [3] [fails] to make such payments to the Department **or**
- [4] ... attempts ... in any other manner to evade or defeat the tax

35 ILCS 735/3-7 (emphasis and brackets added).

When the Department introduced the NPL and the NOD into evidence under the certificate of the Director, it presented prima facie proof that *John Doe* was personally responsible for the Corporation's unpaid tax liabilities. 35 ILCS 735/3-7; Branson v. Department of Revenue, 68 Ill. 2d 247, 260, 659 N.E.2d 961, 968 (1995) ("by operation of the statute, proof of the correctness of such penalty, including the willfulness element, is established by the Department's penalty assessment and certified record relating thereto."). The Department's prima facie case is a rebuttable presumption. Branson, 168 Ill. 2d at 262, 659 N.E.2d at 968. After the Department introduces its prima facie case, the burden shifts to the taxpayer to establish that one or more of the elements of the penalty are lacking. *Id.* at 260, 659 N.E.2d at 968 ("If the taxpayer offers no countervailing evidence, the Department's prima facie case stands unrebutted and becomes conclusive.").

At hearing, *John Doe* testified that he had previously been engaged in another business that had owed tax liabilities to the Department. Tr. pp. 18-27. He testified that he sought to arrange for that other business to enter into a pay plan with the Department regarding the amounts owed, and that he was later issued a penalty assessment for the unpaid amount. *Id.* He testified that, following a hearing in that other matter, he was found to be not liable for the company's unpaid taxes. *Id.* He argues that the same result should occur here, since he offered unrebutted testimony that he did all that he could to attempt to get *John Smith*, whom *John Doe* characterized as the person who authorized the Corporation's debt payments, to enter into a pay plan with the Department to pay the Corporation's outstanding tax liabilities. Tr. pp. 17-18, 38.

John Doe's vague testimony regarding his actions with another entity, or the Department's alleged administrative decision in a different contested case involving him, however, do not rebut the Department's prima facie case in this matter. The evidence adduced at the hearing in this case, on the other hand, strongly corroborates the Department's determinations. First, the evidence establishes that *John Doe* was a responsible officer of the Corporation. He was the Corporation's president, secretary and treasurer and general manager. Department Ex. 2, p. 7; Tr. p. 11. *John Doe* signed the Corporation's completed NUC-1 form, under a pre-printed statement that said, "I accept personal responsibility for the filing of returns and the payment of taxes due." Department Ex. 2, p. 8. In another section of that form, he signed his name under a statement that provided, "Under penalties of perjury, I state that I have examined this application and, to the best of my knowledge, it is true and correct." Department Ex. 2, p. 10. Further, *John Doe* actually exercised his responsibility over the Corporation's tax obligations by signing the Corporation's ST-1 forms, and filing such returns. Department Ex. 2, pp. 2-3.

Second, the evidence establishes that *John Doe* acted willfully. On this point, it is important to recall that willfulness does not require a showing of actual knowledge of nonpayment. Estate of Young v. Department of Revenue, 316 Ill. App. 3d 366, 375, 734 N.E.2d 945, 952 (1st Dist. 2000). Reckless disregard for obvious or known risks will suffice. *Id.* But here, the evidence shows that *John Doe* actually signed two of the three ST-1 returns for the Corporation, and filed them with the Department without including in the envelopes in which those returns were mailed checks to pay the amount shown due on those returns. Department Exs. 1, pp. 2-4; 2, pp. 2-3. While no one signed the

Corporation's ST-1 return for March 2001, that return was obviously filed with the Department, and the tax shown due on that return was not paid when that return was also filed. Department Ex. 2, p. 4. *John Doe* further testified that he had personal knowledge, in July 2001, that the Corporation had outstanding tax liabilities due to the Department. Tr. pp. 13-14. The Corporation's first quarter IL-941 return was filed unpaid by that time, and its second quarter return was signed by that time, and later filed unpaid. Department Ex. 2, pp. 5-6. In sum, then, *John Doe* assumed personal responsibility for filing the Corporation's returns (Department Ex. 2, p. 8), and all of the returns at issue were filed without payment. Department Ex. 2, pp. 2-6. By filing the Corporation's Illinois returns unpaid, *John Doe* willfully failed to pay the tax shown due on those returns. 35 ILCS 735/3-7; Branson, 168 Ill. 2d at 262, 659 N.E.2d at 968.

Finally, I reject *John Doe's* argument that he did not act willfully because *Smith*, and not he, was the person who controlled the Corporation's purse. See Tr. pp. 41-43 (closing argument). *John Doe* testified that he had the authority to sign checks for the Corporation, and that he could sign a Corporate check if he believed, on his own, that a bill needed to be paid. Tr. p. 13. *John Doe's* mere testimonial assertion that he did all that he could to get *Smith* to enter into a pay plan for the Corporation's unpaid tax liabilities does not excuse his own willful failure to pay the Corporation's retailers' occupation tax when they were due, or to see to it that the Corporation's withholding tax obligation were timely paid. Balla v. Department of Revenue, 96 Ill. App. 3d 293, 296-97, 421 N.E.2d 236, 239 (1st Dist. 1981) (uncontroverted testimony that was not corroborated with documentary evidence was insufficient to rebut the Department's prima facie case). Perhaps more importantly, the statute and Illinois case law are clear

that there can be more than one officer or employee responsible for filing a corporation's returns, and for paying its taxes. 35 ILCS 735/3-7 ("Any officer or employee ... shall be liable") (emphasis added); Estate of Young, 316 Ill. App. 3d at 375, 734 N.E.2d at 952 (affirming the Department determination that three persons were responsible officers and/or employees for a single corporation). Even if absolutely true, *Smith's* claimed failure to make payments on the Corporation's outstanding tax liabilities does not obviate the facts that *John Doe* assumed personal responsibility for filing the Corporations returns (Department Ex. 2, p. 8), and all of the returns at issue were filed without payment. Department Ex. 2, pp. 2-6.

Conclusion:

I recommend that the Director finalize NPL no. 0000 and NOD no. 0000, pursuant to statute.

Date: 9/6/2006

John E. White
Administrative Law Judge