

**IT 04-4**

**Tax Type: Income Tax**

**Issue: Responsible Corporate Officer – Failure to File or Pay Tax**

**STATE OF ILLINOIS  
DEPARTMENT OF REVENUE  
ADMINISTRATIVE HEARINGS DIVISION  
COUNTY OF COOK**

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**THE DEPARTMENT OF REVENUE  
OF THE STATE OF ILLINOIS**

v.

**JOHN DOE, responsible officer  
of John Doe & Associate, Inc.,  
Taxpayer**

**No. 03-IT-0000  
SSN: 000-00-0000  
FEIN: 00-0000000  
Notices of Deficiency No. 0000**

**Charles E. McClellan  
Administrative Law Judge**

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**ORDER ON DEPARTMENT’S MOTION FOR SUMMARY JUDGMENT**

**Appearances:** Deborah H. Mayer, Special Assistant Attorney General, for the Illinois Department of Revenue; Alan F. Segal of Alan F. Segal & Associates, PC, for John Doe.

**Background**

This matter arose from a protest filed to Notice of Deficiency No. 0000 issued by the Illinois Department of Revenue (“Department”) to John Doe (“Taxpayer”). Notice of Deficiency No. 0000 was issued on October 17, 2002 pursuant to Section 904(c) of the Illinois Income Tax Act (“IITA”), 35 ILCS 5/904(c), for the penalty provided by Section 1002(d) of the Act and Section 3-7 of the Uniform Penalty and Interest Act (“UPIA”), 35 ILCS 735/3-7, for the unpaid withholding tax liability of John Doe & Associates, Inc. The unpaid taxes were for all four calendar quarters of 1997, the fourth quarter of 1998,

the first and fourth quarters of 1999, all four quarters of 2000 and the first and second quarters of 2001.

The Department filed a motion for summary judgment on January 22, 2004, shortly before a pre-trial conference set for that date. An order was entered at that pre-trial conference canceling the pre-trial conference and setting a briefing schedule on the Department's Motion for Summary Judgment. In that order, Taxpayer's counsel was given until February 19, 2004 to file a response to the Department's motion for summary judgment. Taxpayer's counsel has not filed a response nor requested additional time in which to do so, so his right to file a response is waived.

I recommend that the Department's motion be granted.

#### **Factual Foundation**

1. The Department issued on Notice of Deficiency No. 0000 was issued on October 17, 2002. Dept. Ex. No. 1.
2. Taxpayer filed his protest to the Notice of Deficiency on December 17, 2002. Dept. Ex. No. 2.
3. The Department served its First Request to Admit on November 25, 2003. Dept. Ex. Nos. 3 & 4.

#### **Analysis**

Summary judgment is a drastic means of disposing of litigation and therefore should be allowed only when the right of the moving party is clear and free from doubt. *Purtill v. Hess*, 111 Ill.2d 229, 489 N.E.2d 867 (1986). In determining the existence of a genuine issue of material fact courts must consider the pleadings, depositions,

admissions, exhibits, and affidavits on file and they must be strictly construed against the movant and in favor of the non-movant. *Id.*

The only documents of record in this case are the Department's four exhibits. Department Exhibit No. 4 contains 26 requests to admit. Each of the first 13 requests is related to a quarterly period for which an assessment was made and it asks Taxpayer if he "was the responsible officer for John Doe & Associates obligated the [sic] pay over the withholding taxes for its employees to the State of Illinois for the [identified quarter]." Each of the remaining 13 requests to admit related to a quarterly period for which an assessment was made and it asks Taxpayer if he "failed to pay over the withholding taxes for employees if for John Doe & Associates to the State of Illinois for the [identified quarter]." Taxpayer failed to respond to the Department's 26 requests to admit.

The statutory provision of the Act that imposes the penalty at issue in this case, in relevant part, provides as follows:

Any person required to collect, truthfully account for, and pay over the tax imposed by this Act who willfully fails to collect such tax or truthfully account for and pay over such tax or willfully attempts in any manner to evade or defeat the tax or the payment thereof, shall, in addition to other penalties provided by law, be liable for the penalty imposed by Section 3-7 of the Uniform Penalty and Interest Act.  
35 ILCS 5/1002(d).

Section 3-7 of the Uniform Penalty and Interest Act, 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.

Supreme Court Rule 216(c) provides that each fact for which admission is requested is admitted unless the party to whom the request is directed responds within 28 days after service of the admission request.<sup>1</sup> *People v. Mindham*, 253 Ill.App.3d 792, 797; 625 N.E.2d 835, 839 (2<sup>nd</sup> Dist. 1994)(holding that the effect of ignoring a request to admit is that the facts contained in the request are automatically admitted). Taxpayer did not respond to any of the Department's requests, so he automatically is deemed to have admitted that he was the responsible officer for John Doe & Associates obligated to pay over the withholding taxes for its employees to the State of Illinois that are assessed in the Notice of Deficiency. He is also deemed to have admitted that he failed to pay those taxes. Taxpayer also made the same admissions in his protest. Dept. Ex. No. 3 at p.3. However in his protest, Taxpayer asserts that his failure to pay the taxes was not willful.

The statute does not define the concept of willful failure. However, in applying the penalty tax, the Illinois courts look to federal cases involving § 6672 of the Internal Revenue Code, 26 U.S.C. §6672, which contains language similar to the Illinois statute. *Branson v. Dept. of Revenue*, 168 Ill.2d 247, 659 N.E.2d 961 (1995) *Joseph Bublick & Sons*, 68 Ill.2d 568 (1977). The issue of willfulness is concerned with the responsible person's state of mind. *Sawyer v. U.S.*, 831 F.2d 755 (7<sup>th</sup> Cir. 1987) "Willful failure to pay taxes has generally been defined as involving intentional, knowing and voluntary acts

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<sup>1</sup> The full text of Supreme Court Rule 216(c), in relevant part, provides as follows:

**Admission in the Absence of Denial.** Each of the matters of fact and the genuineness of each document of which admission is requested is admitted unless, within 28 days after service thereof, the party to whom the request is directed serves upon the party requesting the admission either (1) a sworn statement denying specifically the matters of which admission is requested or setting forth in detail the reasons why he cannot truthfully admit or deny those matters or (2) written objections on the ground that some or all of the

or, alternatively, reckless disregard for obvious or known risks.” *Branson*, 168 Ill.2d at 255.

In this case, Taxpayer admitted that he was the person responsible for paying the taxes assessed and that he failed to do so. Contrary to Taxpayer’s assertion, those admissions establish willfulness.

For the reasons stated above, I recommend that the Department’s motion for summary judgment be granted. I also recommend that the Notice of Deficiency be made final.

Date: 3/3/2004

Charles E. McClellan  
Administrative Law Judge

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requested admissions are privileged or irrelevant or that the request is otherwise improper in whole or in part.