

**ST 01-30**

**Tax Type:**

**Sales Tax**

**Issue:**

**Unreported/Underreported Receipts (Fraud Application)**

**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.**

**"ORLEANS FOOD & LIQUOR, INC.",  
"DHARMA & GREGG WILSON",  
TAXPAYER**

**No. 00-ST-0000  
00-IT-0000  
00-IT-0000**

**Kenneth J. Galvin  
Administrative Law Judge**

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**RECOMMENDATION FOR DISPOSITION**

**Appearances:** Mr. Akram Zanayed appearing on behalf of "Orleans Food & Liquor, Inc." and "Dharma & Gregg Wilson"; Mr. John Alshuler appearing on behalf of the Department of Revenue of the State of Illinois.

**Synopsis:**

This matter comes on for hearing pursuant to "Orleans Food and Liquor's" (hereinafter "Orleans") protest of Notice of Tax Liability No. SF 20000000000000 (hereinafter the "NTL") and Notice of Deficiency (hereinafter "corporate NOD") issued June 30, 2000, for taxable years December 31, 1997 and 1998, and "Dharma & Gregg Wilson's" protest of Notice of Deficiency (hereinafter "individual NOD") issued June 30, 2000, for taxable years December 31, 1995, 1997 and 1998. The NTL represents a liability for Retailers' Occupation Tax of "Orleans" due to the Department for the periods January, 1997, through March 31, 1999, and includes a fraud penalty of

\$25,617. A hearing was held on this matter on August 8, 2001, with "Gregg Wilson" and accountant, "Jesus Gutierrez", (hereinafter "Gutierrez") providing oral testimony. At the hearing, Mr. "Wilson" conceded the tax liability on the NTL and on the corporate and individual NOD's, leaving the fraud penalty as the only remaining issue in this case. Tr. p. 50. Following submission of all evidence and a review of the record, it is recommended that the NTL be finalized with the fraud penalty revised to reflect a penalty for negligence and the corporate and individual NOD's finalized as issued. In support thereof, the following "Findings of Fact" and "Conclusions of Law" are made.

**Findings of Fact:**

1. The Department's *prima facie* case, inclusive of all jurisdictional elements, is established by the admission into evidence of NTL No. SF 2000000000000000, issued March 27, 2000, to "Orleans Food & Liquor, Inc." showing sales tax liability of \$51,233 and a fraud penalty of \$25,617 for the period of January 1, 1997 through March 31, 1999; an NOD issued June 30, 2000, to "Orleans Food & Liquor" showing a statutory deficiency of \$4,215 for the taxable years ending December 31, 1997 and December 31, 1998; and an NOD issued June 30, 2000, to "Dharm and Gregg Wilson", showing a statutory deficiency of \$8,553 for taxable years ending December 31, 1995, 1997 and 1998. Tr. pp. 9-10; Dept. Ex. No. 1.
2. "Orleans" was a food and liquor store, located at (Someplace) Avenue, in Chicago. "Wilson" opened the store in 1994. Tr. pp. 14, 27.
3. "Gutierrez" began preparing monthly sales tax returns, corporate tax returns and personal income tax returns for "Orleans" and "Dharma and Gregg Wilson" in 1994. "Gutierrez" relied on "Wilson" for a breakdown of sales between food and liquor, which are taxable at different rates. Tr. pp. 14-16.

4. After "Gutierrez" prepared the sales tax return, he gave it to "Wilson". "Gutierrez" explained the sales tax forms to "Wilson". Tr. pp. 16-17.
5. "Gutierrez" advised "Wilson" that, in accordance with Department regulations, "Wilson" was required to keep daily sales records. Tr. pp. 24-26.
6. "Wilson" provided "Gutierrez" with either monthly sales totals or sales tax receipts. At times, "Wilson" estimated sales for "Gutierrez" based on previous month's sales. Tr. pp. 28-29.
7. In July of 1997, "Wilson" entered into a contract to sell the business to "Julius Fahrquahr". "Fahrquahr" applied for a City of Chicago liquor license, but operated "Orleans" under "Wilson's" license while waiting for approval. In February, 1998, "Fahrquahr's" request for a license was rejected. "Fahrquahr" reapplied and was again rejected. In August of 1998, "Wilson" again began operating the business. Tr. pp. 30-32, 43; Taxpayer's Ex. No. 1.
8. "Wilson" continued to sign sales tax returns and sent the returns to the Department during the time that "Orleans" was under contract. Tr. p. 32.
9. In October of 1998, "Wilson's" brother and cousin began operating "Orleans". In June of 1999, "Wilson" again began operating "Orleans". He operated the business until January of 2001, when he closed it, unable to find another buyer. Tr. pp. 33-34.

**Conclusions of Law:**

The fraud penalty at issue in this case is imposed under Section 3-6 of the Uniform Penalty and Interest Act, which states as follows :

If any return or amended return is filed with intent to defraud, in addition to any penalty imposed under Section 3-3 of this Act, a penalty shall be imposed in an amount equal to 50% of any resulting deficiency.  
35 ILCS 735/3-6.

A fraud penalty of \$25,617, equal to 50% of the sales tax liability of \$51,233 was assessed against "Orleans Food and Liquor, Inc."

In order to sustain a fraud penalty, the Department must prove fraud by clear and convincing evidence. Puleo v. Department of Revenue, 117 Ill. App. 3d 260 (4<sup>th</sup> Dist. 1983). The Department failed to meet this burden. "Gutierrez" testified credibly that he explained the sales tax form to "Wilson", but that "Wilson" did not understand how the form was "filled out and filed." Tr. pp. 16-17. "Wilson's" education consisted of three years of high school, completed in 1988. Tr. p. 27. "Wilson" testified that he knew that he had to fill out sales tax returns so he hired "Gutierrez". Tr. p. 28. "Wilson" testified that he "knew how much money went into the cash register," but he did not know how much was taxable at 2% and 8%. Tr. p. 35. He testified that at the time he signed the returns, he thought that he was paying the right amount of tax. Tr. p. 34. The NTL covers the period from January, 1997 through March, 1999. During much of this period, "Orleans" was under contract. "Wilson" continued to sign the sales tax forms, although he was not actively involved in operating the business. Tr. p. 32.

"Gutierrez" testified that he had experience accounting for approximately nine food and liquor stores over a period of fifteen years. Tr. p. 20. According to "Gutierrez", the gross profit margin for food and liquor stores is usually 25% to 30%. Tr. p. 18. He has never seen a food and liquor store with a gross profit margin of 50%. Tr. p. 20. The tax returns for "Orleans" showed a gross profit margin of 50%, and "Gutierrez" told "Wilson" that the margin was too high. "Gutierrez" testified that he calculated gross margin based in part on the purchase receipts provided to him by "Wilson". He did not believe that he was given all the purchase receipts, apparently due to poor record keeping. "Wilson" told "Gutierrez" that there were more purchase invoices, but he did not

ask "Gutierrez" to add purchases to the purchase category. Tr. pp. 18-20. "Gutierrez" testified that he "basically has to go with what [he] had" in filling out the tax returns. Tr. p. 19.

The Department did not produce documentation in any form to substantiate the allegations of fraud for the period in question. Based on the evidence presented, I conclude that "Wilson" did not keep adequate book and records in accordance with Department regulations. I am unable to conclude that "Wilson" intended to defraud the Department.

WHEREFORE, for the reasons stated above, it is my recommendation that Notice of Tax Liability No. SF 2000000000000000 be finalized with the fraud penalty revised to reflect a penalty for negligence, and Notice of Deficiency issued June 30, 2000 to "Orleans Food & Liquor, Inc." and Notice of Deficiency issued June 30, 2000 to "Dharma and Gregg Wilson" be finalized as issued.

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Kenneth J. Galvin  
Administrative Law Judge

September 24, 2001