

**ST 05-9**

**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**

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

v.

***JOHN DOE*, as responsible officer  
of *Doe Automotive Group, Inc.*,  
Taxpayer**

**No. 03-ST-0000  
IBT# 0000-0000  
NPL# 0000  
FEIN: 00-0000000  
NOD# 0000  
Period: 2/Q/01 – 3/Q/01**

**Ted Sherrod  
Administrative Law Judge**

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**RECOMMENDATION FOR DISPOSITION**

**Appearances:** Special Assistant Attorney General George Foster on behalf of the Illinois Department of Revenue; Lester Ottenheimer of Ottenheimer Teplinsky Rosenbloom, LLC, on behalf of *John Doe*.

**Synopsis:**

This matter comes on for hearing pursuant to *John Doe*'s (hereinafter "*Doe*" or "taxpayer") protest of Notice of Penalty Liability number 000 (hereinafter the "NPL") and Notice of Deficiency number 0000 (hereinafter the "NOD") as responsible officer of *Doe Automotive Group, Inc.* (hereinafter the "*Doe Group*"). The NPL represents a penalty liability for Retailers' Occupation Tax of *Doe Group* due to the Department for the periods June, 2001 through October, 2001 and January, 2002. The NOD represents a

penalty liability for withholding taxes for the second and third quarters of 2001. A hearing was held on this matter on January 20, 2005, with *John Doe* providing oral testimony. Following the submission of evidence and a review of the record, it is recommended that the NPL and NOD be finalized as issued. In support thereof, the following “Findings of Fact” and “Conclusions of Law” are made.

**Findings of Fact:**

1. Notice of Penalty Liability number 0000 covering the periods June, 2001 through October, 2001 and January, 2002 was issued to *John Doe* on September 15, 2003. Department (“Dept.”) Ex. 1.
2. Notice of Deficiency number 0000 was issued to *John Doe* on September 16, 2003 and covers the period 2/Q/01 through 3/Q/01. *Id.*
3. The Department’s *prima facie* case, inclusive of all jurisdictional elements, is established by the admission into evidence of the aforementioned NPL and NOD. *Id.*
4. NPL number 0000 relates to use taxes required to be collected and remitted by *Doe* Automotive Group, Inc. (“*Doe* Group”), an Illinois corporation having its principal place of business in *Somewhere*, Illinois. Dept. Ex. 1; Taxpayer Ex. 1, 2.
5. NOD number 0000 relates to Illinois income taxes withheld from wages paid to employees of *Doe* Group for the second and third quarters of 2001. Dept. Ex. 1.
6. NPL number 0000 and NOD number 0000 were issued to *John Doe* as a responsible officer of *Doe* Group responsible for paying over to the Department the Illinois uses taxes collected and Illinois income taxes withheld from corporate employees during the aforementioned tax periods which are at issue in this case. *Id.*

7. Prior to and during the aforementioned tax periods, *Doe* Group operated an automobile dealership engaged in the sale and servicing of Chrysler, Jeep, Mazda and Oldsmobile vehicles located in *Somewhere*, Illinois. During and after 2001, it operated as an authorized Chrysler and Jeep dealer pursuant to a Dealer Agreement with Daimler Chrysler Motor Corporation (hereinafter “Daimler-Chrysler”). Tr. pp. 9, 10; Dept, Ex. 1; Taxpayer Ex. 1, 2.
8. During the tax periods at issue, *John Doe* was the Vice President and general manager of *Doe* Group. Tr. pp. 10, 11; Dept. Ex. 2 (p. 2). In this capacity, *Doe* had authority to write and sign checks. Dept. Ex. 2 (p. 4). He also had responsibility for the supervision and control over the preparation and filing of sales tax returns and payment of sales tax and income tax withholding for the *Doe* Group and had authority to determine which debts would be paid. Dept. Ex. 2 (p. 4).
9. On April 25, 2001, the *Doe* Group entered into an Asset Purchase Agreement with the ABC Investment Group, Ltd., an Illinois corporation, pursuant to which *Doe* Group agreed to transfer control over all of its assets to Investment Group, Ltd. (hereinafter “ABC”) upon ABC’s receipt of authorization to do business as a Chrysler Jeep dealer from Daimler Chrysler. Taxpayer Ex. 1.
10. Simultaneous with the execution of the Asset Purchase Agreement, on April 25, 2001, *Doe* Group also entered into a Management Agreement authorizing ABC to manage the *Doe* Group’s automobile dealership. Subsequent to the execution of this agreement, on May 1, 2001, the *Doe* Group delegated responsibility for the operation of this business to ABC. In consideration for ABC’s management services, and ABC’s agreement to absorb all operating losses from operation of the dealership after May 1,

2001, *Doe* Group agreed that *ABC* would be entitled to all of the profits from the dealership. Tr. pp. 15 – 18; Taxpayer Ex. 2.

**11.** During the period *Doe* Group’s dealership was being managed by of *ABC* pursuant to the Management Agreement, *Doe* never reviewed the books and records of the dealership. *Doe* knew that *ABC* was having financial difficulties during this period. Tr. pp. 26, 27.

**12.** In connection with its proposed acquisition of *Doe* Group assets and permission to operate a Chrysler Jeep dealership from Daimler Chrysler, *ABC* applied to Chrysler Financial Company L.L.C. (hereinafter “Chrysler Financial”) for financing.<sup>1</sup> On August 2, 2001, Chrysler Financial advised *Doe* Group that it would not approve *ABC*’s application for financing and threatened to force the *Doe* Group to close the dealership if *ABC* was not removed from management within one week. Subsequently, on August 8, 2001, *Doe* Group took back management control of the dealership from *ABC*. Tr. pp. 17 – 20, 26; Taxpayer Ex. 7.

**13.** Daimler Chrysler approvals required to consummate the transfer of *Doe* Group assets to *ABC* pursuant to the Asset Purchase Agreement were never received. Tr. p. 17.

**14.** During 1999, the *Doe* Group acquired financing from Chrysler Financial. As a condition of such financing, *Doe* Group signed a letter agreement that authorized a representative of Chrysler Financial to collect all proceeds from vehicle sales immediately upon the consummation of such sales, and agreed to remit all cash or checks from the operation of the dealership’s parts, service, body shop, and all

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<sup>1</sup>Chrysler Financial is engaged in the business of providing financing to Chrysler dealers. This financing is secured by the new and used vehicle inventory of the dealer. Taxpayer Ex. 7.

accounts receivable paid by customers to Chrysler Financial. These revenues were used by Chrysler Financial to pay off indebtedness incurred by *Doe* Group to purchase its inventory of vehicles. Chrysler Financial began to fully enforce this agreement on August 8, 2001 when *Doe* Group filed for bankruptcy. Tr. pp. 11, 27 – 34; Taxpayer Ex. 7.

- 15.** The Asset Purchase Agreement established an escrow account for unpaid taxes in the amount of \$10,000 to be deposited by *Doe* Group to cover any unpaid taxes found to be due and owing after the consummation of the sale of assets to *ABC*. This escrow was to cover all taxes due prior to a date no more than 20 days after the approval of the sale of dealership assets and the receipt of authorization to operate a Chrysler dealership by *ABC* from Daimler-Chrysler. Pursuant to this agreement, the *Doe* Group was required to prepare and file all returns and pay all taxes due for all periods prior to this date. Taxpayer Ex. 1 (pp. 24, 25).
- 16.** *Doe* Group filed for Chapter 11 bankruptcy on or about August 8, 2001, the same day that it reassumed management control over its dealership from *ABC*. Tr. p. 11.
- 17.** On September 4, 2001, the United States Bankruptcy Court for the Northern District of Illinois, Eastern Division, approved the termination of the Management Agreement with *ABC* entered into on April 25, 2001; subsequently, on September 24, 2001, the bankruptcy court approved the termination of the Asset Purchase Agreement with *ABC* which was also entered into on April 25, 2001. Taxpayer Ex. 3 – 6.
- 18.** *Doe* Group continued to operate as a Debtor in Possession until May 14, 2002, at which time the Chapter 11 bankruptcy was converted to a Chapter 7 bankruptcy. Dept. Ex. 2.

**Conclusions of Law:**

The issue in this case is whether *John Doe* (“*Doe*”) is a responsible person who willfully failed to file and pay retailers’ occupation tax and withholding tax for the *Doe* Automotive Group, Inc. (“*Doe* Group”) as required by statute. The admission into evidence of Notice of Penalty Liability number 0000 and Notice of Deficiency number 0000 establishes the Department’s *prima facie* case with regard to both the fact that *Doe* was a “responsible” officer and the fact that he “willfully” failed to file and/or pay. Branson v. Department of Revenue, 168 Ill. 2d 247, 262 (1995). Once the Department has established a *prima facie* case, the burden shifts to the taxpayer to overcome the Department’s finding. Masini v. Department of Revenue, 60 Ill. App. 3d 11 (1<sup>st</sup> Dist. 1978). To overcome the Department’s *prima facie* case, the taxpayer must present consistent, probable evidence, closely identified with books and records. Copilevitz v. Department of Revenue, 41 Ill. 2d 154 (1968); Central Furniture Mart v. Johnson, 157 Ill. App. 3d 907 (1<sup>st</sup> Dist. 1987); Vitale v. Department of Revenue, 118 Ill. App. 3d 210 (3d Dist. 1983). Oral testimony without corroborating books and records is insufficient to overcome the Department’s *prima facie* case. Mel-Park Drugs v. Department of Revenue, 218 Ill. App. 3d 203 (1<sup>st</sup> Dist. 1991).

There are two types of taxes at issue in this case. The Department seeks to impose personal liability on *Doe* pursuant to section 1002(d) of the Illinois Income Tax Act for the failure to pay withholding taxes. 35 ILCS 5/1002(d). In addition, the Department seeks to impose personal liability for failure to remit Retailers’ Occupation

Tax (“ROT”). The personal liability penalty for both taxes is imposed by section 3-7 of the Uniform Penalty and Interest Act, which 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. 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. 35 ILCS 735/3-7.

It is clear from this statute that personal liability will be imposed on one who is “responsible” for the filing of returns and for the payment of the taxes shown to be due thereon, and who willfully fails to file and/or pay taxes.

The statute defines neither “responsible” person nor “willful” conduct. However, the Illinois Supreme Court, in cases wherein it has considered personal liability, has referred to interpretations of similar language in section 6672 of the Internal Revenue Code (26 U.S.C. §6672), which imposes personal liability on corporate officers who willfully fail to collect, account for, or pay over employees’ social security and Federal income withholding taxes. Branson, supra; Department of Revenue v. Heartland Investments, Inc., 106 Ill. 2d 19 (1985); Department of Revenue v. Joseph Bublick & Sons, Inc., 68 Ill. 2d 568 (1977).

Federal courts have addressed officer/employee liability with respect to who is considered “responsible” for §6672 purposes. These courts have considered specific facts in determining whether individuals were “responsible” for the payment of employment taxes, to wit: 1) the duties of the officer as outlined by corporate by-laws; 2)

the ability of the individual to sign checks of the corporation; 3) the identity of the officers, directors, and shareholders of the corporation; 4) the identity of the individuals who hired and fired employees; and, 5) the identity of the individuals who were in control of the financial affairs of the corporation. Monday v. United States, 421 F. 2d 1210 (7<sup>th</sup> Cir. 1970), cert. den. 400 U.S. 821 (1970); Gephart v. United States, 818 F. 2d 469 (6<sup>th</sup> Cir. 1987); Peterson v. United States, 758 F. Supp. 1209 (N.D. Ill. 1990).

Responsible persons may include officers who can borrow money on behalf of the corporation (Peterson v. United States, *supra*), and may be those with check writing authority who may or may not be the ones with the responsibility for accounting, bookkeeping or making of payments to creditors. Monday v. United States, *supra*; Wright v. United States, 809 F. 2d 425 (7<sup>th</sup> Cir. 1987); Calderone v. United States, 799 F. 2d 254 (6<sup>th</sup> Cir. 1986). There may be more than one responsible person in a corporation. Monday v. United States, *supra*; Williams v. United States, 931 F. 2d 805, 810 n. 7 (11<sup>th</sup> Cir. 1991).

Using criteria followed by the federal courts in addressing officer liability for taxes, and accordingly applicable in construing Illinois “responsible officer” statutes, *Doe* was a responsible officer during the income tax and sales tax periods in controversy. During these tax periods, he was the Vice President and general manager of the *Doe* Group. Tr. pp. 10, 11; Dept. Ex. 2. Serving in this capacity, he ran the day-to-day operations of the business, had the authority to decide which bills would be paid and had responsibility for, and control over the preparation and filing of tax returns and payment of sales tax and income tax withholding for this corporation. Dept. Ex. 2. Moreover, he admitted that he was a signatory on the corporation’s operating account during the tax

periods in controversy. *Id.* In light of these facts, there is no doubt that *Doe's* relationship with the *Doe* Group was such that he was ultimately responsible for filing the *Doe* Group's Retailers' Occupation Tax and withholding tax returns and making payments for those taxes.

*Doe* has submitted no evidence contesting his status as a responsible officer prior to May 1, 2001 or after August 8, 2001. On April 25, 2001, the Hager Group entered into an Asset Purchase Agreement and a Management Agreement with *ABC* Investment Group, Ltd. ("*ABC*"), an Illinois corporation. Taxpayer Ex. 1, 2. The intent of these agreements was to initiate the process of transferring ownership of all of the *Doe* Group's assets, including its Chrysler Jeep automobile dealership and turning over the operation of this dealership to *ABC*. Pursuant to the Management Agreement, *ABC* agreed to manage the sales and service operations of the dealership pending *ABC's* assumption of ownership and control upon Daimler Chrysler's approval of this ownership change *Id.* However, Daimler-Chrysler never approved this ownership transfer and therefore the change of ownership and control from *Doe* Group to *ABC* was never completed. Tr. p. 17. Accordingly, the *Doe* Group reassumed management of the dealership on August 8, 2001, after receiving notification that the sale of the dealership to *ABC* would not be approved. Tr. pp. 11, 19, 20, 26.

Based on the aforementioned facts, *Doe* asks the fact of finder to conclude that *ABC* acquired *de facto* control over the dealership between May 1, 2001 (the effective date of the Management Agreement transferring management of the dealership to *ABC*) and August 8, 2001, the date the *Doe* Group reassumed management control over its dealership operations. Since *Doe* was not a responsible officer of *ABC*, this finding

would support a determination that *Doe* was not responsible for the reporting and payment of taxes arising from dealership operations between May 1, 2001 and August 8, 2001. However, the evidence in this case does not support such a conclusion.

There is no evidence in the record that *Doe* ever ceased to be the Vice President and general manager of *Doe* Group at any time during the tax periods in controversy. No corporate documents, annual reports or minutes of corporate meetings were admitted as evidence to show that he resigned, or to indicate that any *ABC* manager ever replaced him as manager of *Doe* Group. Without any evidence to the contrary, I must conclude that *Doe* held the position of Vice President and general manager of *Doe* Group during the entire time period covered by the NPL and NOD including the period from May 1, 2001 to August 8, 2001. Moreover, the record indicates that *Doe* exercised the authority attendant to this office throughout this period. See Dept. Ex. 2, *John Doe's* Answer to Department's First Set of Interrogatories ("Indicate the name(s) , address(es) and title(s) of the person(s) who had the responsibility for supervising, and/or controlling the preparation, filing and payment of sales tax returns and income tax withholding ... during the taxable period ... ANSWER: ... *John Doe*").

*Doe* also argues that he did not become aware of *ABC's* failure to pay taxes until after *Doe* Group resumed management of the dealership, and could not have been aware of *ABC's* failure to pay taxes prior to that time since he did not have access to *ABC's* accounting records for the *Doe* Group. Tr. pp. 26, 27. However, his failure to keep abreast of the day to day affairs of the *Doe* Group while *ABC* managed the dealership operations of this company did not make him any less of a responsible officer of *Doe* Group. Responsibility is a matter of status, duty and authority, not necessarily

knowledge. Mazo v. United States, 591 F. 2d 1151 (5<sup>th</sup> Cir. 1979). For the foregoing reasons, I find that *Doe* was a responsible officer of the *Doe* Group throughout the tax periods in controversy.

*Doe* also contests the Department's finding that he willfully failed to pay taxes during the tax periods in controversy. The Illinois statutes do not define the concept of willful failure for purposes of applying Section 3-7 of the Uniform Penalty and Interest Act, 35 ILCS 735/3-7. However, as previously noted, in applying the penalty tax, the Illinois courts look to federal cases involving § 6672 of the Internal Revenue Code which contains language similar to the Illinois statute. Branson, *supra*; Joseph Bublick & Sons, *supra*. Federal case law indicates that the issue of willfulness concerns the responsible person's state of mind and thus requires a voluntary and knowing act or omission. Sawyer v. U.S., 831 F. 2d 755 (7<sup>th</sup> Cir. 1987). The key factor in finding liability for willful conduct under § 6672 is control of finances within the employer corporation including the power to control the allocation of funds to other creditors in preference to tax obligations. Brown v. United States, 591 F. 2d 1136 (5<sup>th</sup> Cir. 1979); Haffa v. U.S., 516 F. 2d 931 (7<sup>th</sup> Cir. 1975). A voluntary, conscious and intentional act sufficient to constitute willfulness includes reckless disregard of a known risk that trust funds might not be remitted. Brown, *supra*. In sum, "(W)illful failure to pay taxes has generally been defined as involving intentional, knowing and voluntary acts or, alternatively, reckless disregard for obvious or known risks." Branson, *supra* at 255.

*Doe* argues that he did not willfully fail to pay taxes during the period from May 1, 2001 to August 8, 2001, because this function was under the complete control of *ABC* during that period pursuant to the April 25, 2001 Management Agreement. Tr. pp. 53-

55. However, there is no documentary evidence in the record to support this conclusion. The only evidence in the record to support this claim is *Doe*'s assertion that after the Management Agreement went into effect, "(M)y function at the dealership really didn't exist anymore." Tr. p. 17. Again, it must be noted that mere testimony is insufficient to overcome the Department's prima facie case. Mel Park Drugs, *supra*. Moreover, contrary to the taxpayer's claims, the documentary evidence plainly indicates that *Doe* Group, rather than *ABC*, was responsible for taxes during this period. The Asset Purchase Agreement states as follows:

- (a) ... Seller (*Doe* Group) shall place in escrow ten thousand (\$10,000) dollars for the payment of all taxes, interest and penalties, due or to become due the State of Illinois from Seller through the Closing Date. Such amount will be held pursuant to an Escrow Agreement ...
- (b) ... Seller shall endeavor to file all tax returns and make all payments and deposits for taxes, interest and penalties due or to be due through the Closing Date ...
- (c) ... In the event that Seller (*Doe* Group) fails to discharge its obligations to pay those taxes, interest and penalties due or to be due the State of Illinois and produce a certificate showing that such taxes, interest and penalties have been paid ... twelve (12) months after the Closing Date, Buyer (*ABC*) may direct the Escrow Agent to pay all of the amount held in escrow to the Illinois Department of Treasury in payment of any taxes, interest and penalties which may be due or which may become due from the Seller (*Doe* Group) to the State of Illinois.

Taxpayer Ex. 1 (pp. 24, 25).

The closing date is defined in the Asset Purchase Agreement as a date to be determined occurring within 20 days after the receipt of all necessary Daimler Chrysler approvals related to the transfer of assets to *ABC*. See Taxpayer Ex. 1 (pp. 11, 12). Since this transfer was never approved, *Doe* Group remained responsible for taxes throughout the period that *ABC* managed the dealership pursuant to the Management Agreement.

Moreover, even if one assumes that the Management Agreement did delegate bookkeeping duties and tax compliance responsibilities to *ABC*, the Illinois and federal courts have repeatedly held that responsible officers are liable for willfully failing to remit taxes if they delegate such responsibilities but fail to inspect corporate records or otherwise fail to keep informed of the status of tax returns and payments. Branson, *supra* at 267; Thomsen v. United States, 887 F. 2d 12 (1<sup>st</sup> Cir. 1989); Dougherty v. United States, 18 Cl. Ct. 335 (1989). The record indicates that *Doe* was aware that *ABC* was having financial problems. Tr. p. 27. However, there is no evidence in the record that *Doe* ever attempted to see to it that any tax compliance and payment responsibilities delegated to *ABC* were not compromised by *ABC*'s financial position and were being carried out. A responsible person cannot escape his obligation to ensure that taxes are paid simply by delegating responsibility to others in this manner. Wright, *supra*.

*Doe* also contends that he did not willfully fail to pay taxes after August 8, 2001, when Chrysler Financial Company L.L.C. ("Chrysler Financial") began to enforce the terms of a letter agreement (Taxpayer Ex. 7) entered into in 1999 requiring the *Doe* Group to turn over all of its revenues to a Chrysler Financial representative if demanded to do so by this lender. Tr. pp. 29 – 34. *Doe* contends that, pursuant to this agreement, he was required to deposit all of the *Doe* Group's revenue into a Chrysler Financial account over which *Doe* had no control, to prevent Chrysler Financial from enforcing a lien covering *Doe* Group inventory. Tr. pp. 30, 33, 34; Taxpayer Ex. 7.

The courts have indeed held that where a lender has complete control over an debtor's funds under a "lock box" or similar agreement and the lender is aware of the tax obligations of the debtor but prefers other creditors in disbursing the debtor's funds, it is

the lender who is willfully failing to pay over the taxes due. See U.S. v. Vaccarella, 735 F. Supp. 1421 (S.D. Ind. 1990), *aff'd sub nom. U.S. v. Security Pacific Business Credit, Inc.*, 956 F. 2d 703 (7<sup>th</sup> Cir. 1992). However, there is insufficient evidence in the record to apply this precedent here.

In the instant case, when *Doe* Group began having financial difficulties and filed for bankruptcy, Chrysler Financial began to enforce its 1999 letter agreement. Tr. pp. 11, 27 – 34. However, there is no evidence in the record that *Doe* ever told Chrysler Financial that it was taking money earmarked for sales and income tax withholding taxes, or that *Doe* ever requested that the payments required by Chrysler Financial be reduced so that its taxes could be paid. Such evidence is essential to come within the holding in Vaccarella, *supra*, since the debtor's officers absolved in that case made numerous efforts to get the lender to meet the debtor's tax obligations. Vaccarella, *supra* at 1424 – 1428.

Moreover, the federal courts have held that the voluntary cession of financial authority by a debtor to a creditor, in a manner that prevents a responsible officer of the debtor from paying taxes, does not excuse the responsible officer from liability under § 6672 when taxes are not paid. See Bradshaw v. United States, 83 F. 3d 1175 (10<sup>th</sup> Cir. 1995). Pursuant to the debtor's agreement with the bank creditor in Bradshaw, the bank was ceded complete control over the debtor's account and assets. All payments from the debtor's account required the approval of the bank, and the bank refused to allow the debtor to use any of these funds to pay withholding taxes. Based on these facts, the Court in Bradshaw concluded: "(T)he government asserts that this voluntary cession of financial authority cannot absolve the taxpayer of his responsibility under § 6672. We agree." Bradshaw, *supra* at 1180. See also Kalb v. United States, 505 F. 2d 506, 510 (2d

Cir. 1974)<sup>2</sup> (“Appellants concede that any power the bank may have had to select which creditors should be paid was granted by appellants as part of the consideration for the bank’s continuing financing ... To permit corporate officers to escape liability under section 6672 by entering into agreements which prefer other creditors to the government would defeat the entire purpose of the statute.”).

In the instant case, the *Doe* Group voluntarily agreed to turn over all sales proceeds to Chrysler Financial, including amounts required to be set aside for the payment of taxes and separately identified as such (Tr. p. 28). At the same time, *Doe* either knew or could easily have determined from amounts being credited against *Doe*’s indebtedness, that trust funds (collected taxes) were being misappropriated to reduce the *Doe* Group’s indebtedness and not being remitted to the government. These facts support a finding that *Doe* acted willfully. Wright, *supra* at 428 (“Willfulness is present whenever a responsible person acts or fails to act consciously and voluntarily and with knowledge and intent that as a result of his action or inaction trust funds belonging to the government will not be paid over but will be used for other purposes.”). See also Smith v. United States, 894 F. 2d 1549, 1554 n. 5 (11<sup>th</sup> Cir. 1990) (“(T)he willfulness requirement is ... met if the responsible officer shows a “reckless disregard of a known or obvious risk that trust funds may not be remitted to the government ...[.]” [quoting Thibodeau v. United States, 828 F. 2d 1499, 1505 (11<sup>th</sup> Cir. 1987)] ).

Furthermore, *Doe*’s decision to turn over trust funds (collected taxes) to Chrysler Financial implicitly delegated to Chrysler Financial tax compliance and payment responsibilities the collection of such funds entails. 86 Ill. Admin. Code, Ch. I, sec.

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<sup>2</sup> Cert. denied, 421 U.S. 979 (1975)

150.901.<sup>3</sup> Again, the courts have held that a person acts “willfully” when it delegates authority in this manner but takes no steps to see to it that delegated responsibilities for tax compliance and payment are carried out. Branson, *supra*. Accordingly, *Doe*’s de facto delegation of tax compliance responsibilities to Chrysler Financial, by virtue of its 1999 letter agreement, does not rebut the Department’s *prima facie* case that he willfully failed to pay the sales and withholding taxes at issue.<sup>4</sup>

**WHEREFORE**, for the reasons stated above, it is my recommendation that Notice of Penalty Liability number 0000 and Notice of Deficiency number 0000 be finalized as issued.

Ted Sherrod  
Administrative Law Judge

Date: March 30, 2005

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<sup>3</sup> Illinois sales and use tax regulations authorize the delegation of tax compliance responsibilities. See 86 Ill. Admin. Code, ch. I, sec. 130.1801.

<sup>4</sup> The *Doe* Group’s letter agreement with Chrysler Financial (Taxpayer Ex. 7) does not cover payroll taxes. However, *Doe* has not attempted to explain why payroll taxes were not remitted after the *Doe* Group’s agreement with Chrysler Financial began to be enforced in August, 2001. Moreover, payment of employee wages during this period (Tr. p. 35) clearly suggests that funds within *Doe*’s control were available to pay taxes during this period but were used for other purposes.