

ST 07-1

Tax Type: Sales Tax

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

STATE OF ILLINOIS  
DEPARTMENT OF REVENUE  
OFFICE OF ADMINISTRATIVE HEARINGS  
SPRINGFIELD, ILLINOIS

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THE DEPARTMENT OF REVENUE  
OF THE STATE OF ILLINOIS

v.

*JOHN DOE* and *JIM DOE*  
as Responsible Officers of *ABC*<sup>1</sup>, Ltd.,  
Respondents

Docket No. 06-ST-0000  
NPL Nos. 0000-000-00-0  
0000-000-00-0  
NOD Nos. 0000-000-00-0  
0000-000-00-0

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**RECOMMENDATION FOR DISPOSITION**

**Appearances:** Mr. Kent Steinkamp, Special Assistant Attorney General for the Illinois Department of Revenue

**Synopsis:**

The Illinois Department of Revenue's (hereinafter referred to as the "Department"), issued Notices of Penalty Liability and Notices of Deficiency (hereinafter referred to as the "Notices") to *John* and *Jim Doe* (hereinafter referred to as the "Respondents") pursuant to section 3-7 of the Uniform Penalty and Interest Act (hereinafter referred to as the "UPIA"). The notices allege that the respondents were officers or employees of *ABC*, Ltd. who were responsible for willfully failing to pay *ABC*'s Retailers' Occupation and Use Tax liabilities from October 2004 through February 2005 and Withholding Tax liabilities for the third quarter of 2004. The respondents were granted a late discretionary hearing. It is recommended that the

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<sup>1</sup> The documents of record spell this word as both *ABC* and *ABC*. For consistency, "*ABC*", will be used in this

notices issued to *Jim Doe* be upheld and the notices issued to *John Doe* be dismissed. In support thereof, I make the following findings of fact and conclusions of law in accordance with the requirements of Section 100/10-50 of the Administrative Procedure Act (5 ILCS 100/10-50).

**FINDINGS OF FACT:**

1. The Department's *prima facie* case was established by admission into evidence of Department's Exhibits 1 through 3. (Tr. p. 7)

2. *ABC, Ltd.* was a restaurant in Anywhere, Illinois that operated until February 2005. (Tr. p. 10)

3. *Jim Doe* was the general manager of *ABC, Ltd.* (hereinafter referred to as the "Corporation"). (Tr. p. 11)

4. *Jim Doe* was the sole investor of the corporation. (Tr. p. 8)

5. *Jim Doe* wrote checks, was responsible for paying employees and filing sales tax and withholding tax returns for the corporation. (Tr. p. 11)

6. *Jim Doe* accepts full responsibility for the liabilities of the company. (Tr. pp. 8, 12)

7. *John Doe* signed the Illinois Business Registration form as president of the corporation and as the person responsible for the filing of returns and payment of taxes due. (Dept. Ex. No. 3)

8. *John* and *Jim Doe* are brothers. The restaurant needed a liquor license. *Jim* had been convicted of a felony and was unable to get the liquor license. *John* filed the Illinois Business Registration as the president so that the corporation could get the liquor license. (Tr. pp. 12-14)

9. *John* had nothing to do with the corporation other than to visit as a guest. (Tr. pp. 8-9, 13-14)

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recommendation.

9. The corporation also incurred federal tax liabilities. *John Doe* was determined to be relieved of any trust fund recovery penalty taxes for *ABC, Ltd.* by the Internal Revenue Service for the tax periods September 2003 through December 2004. (Taxpayer's Ex. No. 1; Tr. pp. 8-9)

### **CONCLUSIONS OF LAW:**

Under the Uniform Penalty and Interest Act a personal liability penalty may be imposed against:

(a) 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

An officer or employee of a corporation may therefore be personally liable for the corporation's taxes if (1) the individual had the control, supervision, or responsibility of filing the returns and paying the taxes, and (2) the individual willfully failed to perform these duties.

In determining whether an individual is a responsible person the courts have indicated that the focus should be on whether that person has significant control over the business affairs of a corporation and whether he or she participates in decisions regarding the payment of creditors and disbursement of funds. Monday v. United States, 421 F. 2d 1210 (7<sup>th</sup> Cir. 1970), *cert. denied* 400 U.S. 821 (1970). Liability attaches to those with the power and responsibility within the corporate structure for seeing that the taxes are remitted to the Government. *Id.*

The Department's certified record relating to the penalty liability constitutes *prima facie* proof of the correctness of the penalty due.<sup>2</sup> Branson v. Department of Revenue, 168 Ill. 2d 247,

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<sup>2</sup> The relevant portion of §3-7 states:

260 (1995). Once the Department presents its *prima facie* case, the burden shifts to the taxpayer to establish that one or more of the elements of the penalty are lacking, i.e., that the person charged was not the responsible corporate officer or employee, or that the person's actions were not willful. *Id.* at 261. In order to overcome the Department's *prima facie* case, the allegedly responsible person must present more than his or her testimony denying the accuracy of the Department's assessment. A. R. Barnes & Co. v. Department of Revenue, 173 Ill. App. 3d 826, 833-34 (1<sup>st</sup> Dist. 1988). The person must present evidence that is consistent, probable, and identified with the taxpayer's books and records to support the claim. *Id.*

In this case the Department's *prima facie* case was established when the Department's certified record relating to the penalty liabilities was admitted into evidence. In response, *Jim Doe* admitted that he was responsible for the liabilities of the corporation. The respondents also asserted that *John Doe* was not a responsible officer. To substantiate that assertion, they produced competent evidence from the Internal Revenue Service that *John Doe* was not responsible for the Trust Fund Recovery Penalty taxes for *ABC, Ltd.*

As the Illinois Supreme Court had referred to cases interpreting Section 6672 of the Internal Revenue Code (26 U.S.C. §6672)<sup>3</sup> to define willful. Branson v. Department of Revenue, at 254-55; Department of Revenue v. Heartland Investments, Inc., 106 Ill. 2d 19, 29-30 (1985).

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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 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 print-out 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.

<sup>3</sup> This section imposes personal liability on corporate officers who willfully fail to collect, account for, or pay over employees' social security or federal income withholding taxes.

It is also appropriate to use an Internal Revenue determination in this matter to find that *John Doe* is not responsible for the liabilities at issue.

It is therefore recommended that NPL number 0000-000-00-0 dated November 4, 2005 in the amount of \$8,006.44 and 1002D number 0000-000-00-0 in the amount of \$154.57, issued to *JIM DOE* be upheld in their entirety. It is also recommended that NPL 0000-000-00-0 dated July 15, 2005 in the amount of \$7,945.93 and 1002D number 0000-000-00-0 in the amount of \$153.79, issued to *JOHN DOE* as personally liable for taxes owed by *ABC, Ltd.* be dismissed.

Barbara S. Rowe  
Administrative Law Judge  
January 4, 2007