

ST 12-11

Tax Type: Sales Tax

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	)	No.	XXXX
	)	NPL:	XXXX
	)	Letter ID:	XXXX
v.	)	Account ID:	XXXX
)		
JANE DOE, as responsible officer of)		
ABC BUSINESS,	)	Administrative Law Judge	
TAXPAYER	)	Kenneth J. Galvin	

RECOMMENDATION FOR DISPOSITION

Appearances: Jack Black, on behalf of Ms. Jane Doe; Mr. Marc Muchin, Special Assistant Attorney General, on behalf of the Department of Revenue of the State of Illinois.

Synopsis:

This matter comes on for hearing pursuant to Ms. Jane Doe’s protest of Notice of Penalty Liability No. XXXXX (hereinafter “NPL”) as responsible officer of ABC Business. The NPL represents a penalty liability for retailers’ occupation tax of ABC Business due to the Department for February through September, 2009. An evidentiary hearing was held in this matter on March 29, 2012, with Jane Doe testifying. Following submission of all evidence and a review of the record, it is recommended that the NPL be cancelled. 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 NPL No. XXXX dated August 17, 2010, which shows a penalty for sales tax liability of ABC Business of \$xxxx for February through September, 2009. Tr. pp. 5-6; Dept. Ex. No. 1.
2. On February 14, 2011, Jane Doe filed a police report with the Anywhere Police Department alleging "identity theft" by "unlawful use of [her] social security number." According to the report, the "suspect" was her father, John Doe. The report stated that Jane Doe had received collection letters from the Illinois State Lottery "advising a separate service station located in [Anywhere, Illinois] has also been registered to her name and social security number along with a forged signature of Jane Doe ... Jane Doe was referred to the Anywhere Police Department for this incident." Tr. pp. 18-19; Taxpayer's Ex. No. 1.
3. On February 21, 2011, Jane Doe filed an "Incident Report" with the Anywhere Police Department with the "suspect" listed as John Doe. According to the report, Jane Doe was employed by ABC Business as a store manager. "The company was owned and operated by John Doe." In March of 2010, Jane Doe was laid off. "Shortly after, [Jane Doe] received notice ... of a tax lien that was filed against her for \$34,087.95." The report states that "[Jane Doe] has filed police reports in Anyplace, Il. and Anywhere, Il." Tr. pp. 20-22; Taxpayer's Ex. No. 2.

Conclusions of Law:

The sole issue to be decided in this case is whether Jane Doe should be held personally liable for the unpaid retailers' occupation tax of ABC Business. 35 ILCS 120 *et seq.* The statutory basis upon which any personal liability is premised is 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 to 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 under the statute that personal liability will be imposed only upon a person who: (1) is responsible for filing corporate tax returns and/or making the tax payments; and (2) "willfully" fails to file returns or make payments.

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 disbursal of funds. Liability attaches to those with the power and responsibility within the corporate structure for seeing that the taxes are remitted to the government. Monday v. United States, 421 F. 2d 1210 (7th Cir. 1970), *cert. denied*,

400 U.S. 821 (1970). Additionally, the ability to sign corporate checks is a significant factor in determining whether a person is a responsible party because it generally comes with the ability to choose which creditors are paid. Gold v. United States, 506 F. Supp. 473, (E.D.N.Y 1981), aff'd, 671 F.2d 492 (2d Cir. 1982). Individuals who hold corporate office and who have authority to make disbursements are presumptively responsible persons for purposes of 26 USC § 6672, the federal responsible officer statute. Hildebrand v. United States, 563 F. Supp. 1259 (D.C. N.J. 1983).

I am unable to conclude that Jane Doe was a responsible officer of ABC Business. According to Jane Doe's testimony, her mother advised her to "build a relationship" with her father, John Doe, because she rarely talked to him and had, at times, gone four or five years without talking to him. In 2006, she met with him and he suggested that she work for him in his gas stations. She started off as a cashier and was eventually promoted to "assistant manager" over the gas stations located in Anywhere, Local Place and Anywhere. According to her testimony, she supervised staff, recorded and organized inventory shipments and deposited receipts. She was paid \$16.75/hour. Tr. pp. 11-14.

Jane Doe testified that she was not a signatory on checking accounts. All checks were signed either by her father or his wife/girlfriend, Ms. Violet. If a vendor was to be paid, her father or Ms. Violet left the completed and signed check with Jane Doe for pick-up by the vendor or delivery to the vendor. Sales tax information and payroll were processed by an accountant. Jane Doe testified that she never filed or signed a sales tax return and did not have access to the books and records of ABC Business. She testified that she was not a shareholder of ABC Business. Tr. pp. 32-40.

The gas stations closed in 2009 and 2010. When Jane Doe went to buy a car in 2010, she discovered that she had tax liens filed against her. According to her testimony, she first went to her father's accountant. He contacted her father who said he would file papers that she was not liable for the debt of ABC Business. When her father failed to do this, she filed police reports. Tr. pp. 13-18.

In support of her testimony that she was not a responsible party of ABC Business, Jane Doe offered the following documents into evidence. In the course of investigating the tax liens, Jane Doe received a copy of a W-9, "Request for Taxpayer Identification Number" from the IRS. Jane Doe testified at the evidentiary hearing that the signature of "Jane Joe," on the W-9, listing her as "president/secretary," is not her signature but that she recognizes it as the writing of her father, John Doe. Tr. pp. 23-27; Taxpayer's Ex. No. 3. She was familiar with her father's writing because "he would sign checks and sign invoices and sign all types of documents" at the gas stations. Tr. p. 25. The signature does not appear to be similar to Jane Doe's signature on "Written Interrogatories" submitted to the Department or her signature on the police reports discussed below. Jane Doe testified that she had not seen the W-9 prior to investigating the tax liens. Tr. p. 24.

Jane Doe also cause to be admitted into evidence two police reports that she filed alleging identity theft by her father. On February 14, 2011, Jane Doe filed a police report with the Anywhere Police Department alleging "identity theft" and "unlawful use of [her] social security number." According to the report, the "suspect" was her father, John Doe. Jane Doe had received collection letters from the Illinois State Lottery "advising a separate service station located in [Anywhere, Illinois] has also been registered to her name and social security number along with a forged signature of Jane Doe ... Jane Doe

was referred to the Anywhere Police Department for this incident.” Tr. pp. 18-19; Taxpayer’s Ex. No. 1. On February 21, 2011, Jane Doe filed an “Incident Report” with the Anywhere Police Department with the “suspect” listed as John Doe. According to the report, Jane Doe was employed by ABC Business as a store manager. “The company was owned and operated by John Doe.” In March of 2010, Jane Doe was laid off. “Shortly after, [Jane Doe] received notice ... of a tax lien that was filed against her for \$34,087.95.” The report states that “[Jane Doe] has filed police reports in Anyplace, Il. and Anywhere, Il.” Tr. pp. 20-22; Taxpayer’s Ex. No. 2.

After the Department established its *prima facie* case, the burden shifted to Jane Doe to prove “by competent evidence that the proposed assessment is not correct, and when such evidence is not so inconsistent or improbable in itself as to be unworthy of belief, the burden then shifts to the Department which is required to prove its case by competent evidence.” Young v. Hulman, 39 Ill. 2d 219 (1968). I find Jane Doe’s testimony to be credible. Her testimony is consistent with the documentary evidence that she caused to be admitted at the hearing and the testimony and the documentary evidence is not so improbable as to be “unworthy of belief.” I conclude that the signature on the W-9 is not hers, and together with the police reports that she filed alleging identity theft by her father in using her signature and “unlawful” use of her social security number without her permission, rebut the Department’s *prima facie* case that she was a responsible party of ABC Business during the period covered by the NPL.

After the rebuttal of the Department’s presumption, the burden shifted back to the Department to prove its case by competent evidence. No evidence was admitted by the Department in rebuttal. The Department did not offer into evidence any corporate tax

return that Jane Doe had filed or signed or any evidence that she had the power and responsibility for seeing that ABC Business's taxes were paid. The Department did not offer into evidence any check that Jane Doe had signed or any evidence that she had the ability to sign corporate checks. The Department did not offer into evidence any document showing that Jane Doe had the authority to make or did, in fact, make disbursements for ABC Business. The Department did not offer into evidence ABC Business's "Illinois Business Registration" or any corporate document containing Jane Doe's signature.

In fact, the Department's counsel appeared surprised by Jane Doe's testimony and evidence, commenting in his closing argument that "there was information which was not known before this trial..." Tr. p. 42. Counsel added that the question remains for [this tribunal] to decide whether Jane Doe was "president of her own accord" "or if this was some fraud or something perpetrated upon her." Tr. pp. 43-44. Without competent evidence from the Department in rebuttal, I cannot conclude that Jane Doe was, in fact, either president or a responsible party of ABC Business.

WHEREFORE, for the reasons stated above, it is my recommendation that Notice of Penalty Liability No. XXXX be cancelled.

July 31, 2012

Kenneth J. Galvin
Administrative Law Judge