

**ST 12-16**

**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**

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

v.

**Mary Doe,  
Taxpayer**

,

**No. XXXXX  
Account ID XXXXX  
NPL Penalty ID XXXXX  
Period XXXXX**

**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; Mary Doe, *pro se*.

**Synopsis:**

This matter involves a Notice of Penalty Liability issued to the taxpayer, Mary Doe, for the period March through July, 2010. An evidentiary hearing in this matter was set by pre-trial order entered April 26, 2012. Pursuant to the pre-trial order, the issues to be decided are set forth as follows: “The issues are whether Taxpayer was a responsible officer/employee of the underlying corporation, and whether she acted willfully in any of the manners described in 35 ILCS 735/3-7.” An evidentiary hearing was held on July 20, 2012 during which the taxpayer submitted testimony and both parties submitted documentary evidence.

The Notice of Penalty Liability (“NPL”) was issued by the Department on March 24, 2011 assessing a penalty against the taxpayer, Mary Doe, as a responsible officer or employee who willfully failed to pay sales taxes for Anywhere Tavern, Inc. (“Anywhere Tavern”) as required by statute. For the reasons indicated below, I find that the record establishes that she was the responsible person and that the taxes were willfully not paid. Therefore, she is personally liable for the penalty imposed by section 3-7 of the Uniform Penalty and Interest Act, 35 **ILCS** 735/3-7, and accordingly I recommend that the Department’s NPL be affirmed. In support of my findings and recommendation upholding the Department’s determination, the following "findings of fact" and "conclusions of law" are made.

**Findings of Fact:**

1. The Department issued Notice of Penalty Liability number 11296270 to the taxpayer on March 24, 2011 assessing penalties pursuant to 35 **ILCS** 735/3-7 for the months of March 2010 through July 2010. Department Exhibit (“Ex.”) 1.
2. An Illinois Domestic/Foreign Corporation Annual Report for a business operating under the trade name of “Anywhere Tavern, Inc.” was filed with the Illinois Secretary of State on August 20, 2009. Department Group Ex. 3. This document bore the taxpayer’s signature as President of “Anywhere Tavern” on the signature affidavit accompanying this document. *Id.*
3. Anywhere Tavern filed Illinois Department of Revenue Sales and Use Tax Returns (Form ST-1) for the months of March through July 2010. Tr. p. 24. The taxpayer either prepared or assisted in the preparation of these returns. *Id.* No payments were made of the amounts shown to be due on these forms. Tr. p. 23.

4. The taxpayer had the authority to write checks, and paid company bills. Tr. p. 24. While funds (taxes collected from purchasers) were available to pay the taxes due for the period in controversy, the taxpayer deliberately used these funds to pay other creditors rather than the Department. *Id.*

**Conclusions of Law:**

The issue in this case is whether the taxpayer, Mary Doe, is personally liable for the statutory penalty provided for failure to pay the sales tax collected by Anywhere Tavern, Inc. (“Anywhere Tavern”) during the period set forth in the Notice of Penalty Liability issued to the taxpayer. The operative statutory provision that imposes personal liability for the taxes due under the Retailers’ Occupation Tax Act is Section 3-7(a) of the Uniform Penalty and Interest Act (“UPIA”). In relevant part, it provides as follows:

- (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 who willfully attempts in any other manner to evade or defeat the tax shall be personally liable for a penalty equal to the total amount 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. Proof of that determination by the Department shall be made at any hearing before it or in any legal proceedings by reproduced copy or computer print out of the Department’s record relating thereto in the name of the Department under the certificate of the Director of Revenue ...[.]  
35 ILCS 735/3-7(a)

As is evident from the above, section 3-7 of the UPIA prescribes two tests to determine if an individual is personally liable for unpaid sales and withholding taxes. First, the person

must be responsible for accounting for and paying the tax due. Second, the individual must willfully fail to file or pay the tax shown to be due.

In this case, once the Department introduced into evidence the NPL under the Director's certificate, its *prima facie* case was made on the questions of responsibility and willfulness and the burden then shifted to the taxpayer to overcome the presumed correctness of the Department's determination. Branson v. Department of Revenue, 168 Ill. 2d 247, 261-62 (1995). Oral testimony alone is not enough to rebut the Department's *prima facie* case. Copilevitz v. Department of Revenue, 41 Ill. 2d 154 (1968); Mel-Park Drugs, Inc. v. Department of Revenue, 218 Ill. App. 3d 203 (1<sup>st</sup> Dist. 1991); A.R. Barnes & Co. v. Department of Revenue, 173 Ill. App. 3d 826 (1<sup>st</sup> Dist. 1988). Documentary evidence in the form of books and records is required to rebut the Department's conclusions. *Id.* at 833-34.

During the evidentiary hearing, the taxpayer offered into evidence two electronic mail letters indicating that the taxpayer left Anywhere Tavern subsequent to the tax period in controversy. Tr. p. 19; Taxpayer's Ex. 1, 2. The taxpayer also submitted into the record a letter to George Foster, Department's counsel in this case, advising him that after September 2010 she was no longer involved in the company, and that she had negotiated a payment plan with the Department to pay off the balance of unpaid sales taxes in August 2010, prior to severing her company ties. Taxpayer's Ex. 3. The taxpayer contends that she made arrangements with the Department for the payment of Anywhere Tavern delinquent sales taxes in August 2010 and cannot be held responsible because she left Anywhere Tavern in September 2010, before payments due under the payment plan could be completed. Tr. pp. 31, 32. She contends that she was not

responsible for Anywhere Tavern's failure to make all of the sales tax payments due under the payment plan because she had no authority to complete payments after she left.

*Id.*

The record shows that the payment plan with the Department to pay off delinquent sales taxes was entered into in August 2010 which is subsequent to the tax period in controversy (March 2010 through July 2010). While the taxpayer's effort in August 2010 to mitigate the sales tax delinquencies arising during the tax period at issue is commendable, it does not rebut the Department's findings with respect to the taxpayer's status and conduct during the tax period at issue giving rise to its determination with respect to the taxpayer's responsibility and willfulness during this period. Consequently, neither the payment plan the taxpayer entered into in August 2010 nor the taxpayer's inability to effectuate this plan and fully satisfy Anywhere Tavern delinquent sales tax liabilities disproves the presumed correctness of the Department's determination of liability in this case.

In the instant case, the taxpayer was the president of Anywhere Tavern from its inception until at least September, 2010. Anywhere Tavern by-laws are not in evidence, so the record does not show what duties and responsibilities they vested in the president of the corporation. However, the president of a corporation is customarily charged with overall responsibility for management of the corporation (Krantz v. Oak Park Trust & Savings Bank, 16 Ill. App. 2d 331 (1<sup>st</sup> Dist. 1958); Brown v. Fire Insurance Co. of Chicago, 274 Ill. App. 414 (1<sup>st</sup> Dist. 1934)) and there is no reason to assume that not to be the situation in this case. Thus, even though another business partner may have had substantial control over the corporation's affairs which the taxpayer alleges to be the case

here (tr. pp. 20, 21), the taxpayer has failed to show why she, as president, did not also have the authority to make sure the company's Retailers' Occupation Taxes were paid as required. In a corporation there may be more than one responsible officer. Monday v. United States, 421 F. 2d 1210 (7<sup>th</sup> Cir. 1970), cert. den. 400 U.S. 821. The statute does not confine liability to only one person in the corporation or to the person most responsible. 35 ILCS 735/3-7. Therefore, absent proof to the contrary, I find that the taxpayer's position as president gave her the status and authority that made her a responsible person under the statute.

Finding that the taxpayer was a responsible person, the next question is whether she willfully failed to pay over Retailers' Occupation Tax within the meaning of the statute. The concept of willfulness is not defined in the statute. The Court in Monday, *supra* noted that the concept, when used in criminal statutes, requires "bad purpose or the absence of justifiable excuse". *Id.* at 1215. The court distinguished the meaning of the term when used in civil actions by saying, "[R]ather, willful conduct denotes intentional, knowing and voluntary acts. It may also indicate a reckless disregard for obvious or known risks." *Id.*

The willfulness requirement "is satisfied if the responsible person acts with reckless disregard of a known risk that the trust funds may not be remitted to the Government ...[.]" Garsky v. U.S., 600 F. 2d 86 (7<sup>th</sup> Cir. 1979). A high degree of recklessness is not required because if it were required, the purpose of the statute could be frustrated simply by delegating responsibilities within a business and adopting a "hear no evil – see no evil" policy. Wright v. U.S., 809 F. 2d 425 (7<sup>th</sup> Cir. 1987). A "responsible person is liable if he (1) clearly ought to have known that (2) there was a

grave risk that withholding taxes were not being paid and if (3) he was in a position to find out for certain very easily.” *Id.* at p. 427. Willfulness can be established by showing gross negligence as in a situation in which a responsible party ought to have known of a grave risk of nonpayment and who is in a position to find out, but does nothing. Branson, *supra* at 255.

In this case, the taxpayer either prepared or assisted in the preparation of the Retailers’ Occupation Tax returns, and, according to her own testimony, made payments to creditors. Tr. pp. 20, 24. Thus, she most certainly was aware of the obligation to file and pay Retailers’ Occupation Tax to the state. She testified that the taxes weren’t paid because Anywhere Tavern was having financial difficulties. Tr. pp. 23, 24. This testimony indicates that she knew that the sales taxes were not being paid. However, there is no testimony or other evidence that she took steps to afford the Department priority over other creditors or that she objected to not paying sales taxes even while signing and filing returns without taxes while paying other company expenses. “If a responsible officer uses collected retailers’ occupation taxes to pay other creditors of the corporation, while knowing that he or she was obligated to file returns and remit taxes, the willful element ... is satisfied.” Branson, *supra* at 259. These factors establish willfulness within the context of the statute and make her liable for the penalty assessed.

For the reasons previously noted, the taxpayer had the burden to rebut the Department’s *prima facie* case establishing liability through the presentation of documentary evidence. However, the taxpayer offered no documents in support of her testimony that she was not a responsible person and did not willfully fail to pay taxes during the tax period in controversy. Her only evidence consisted of uncorroborated

statements, in the form of electronic mail letters dealing with events subsequent to the period at issue in this case. Therefore, the taxpayer failed to offer sufficient proof to overcome the Department's *prima facie* case.

**WHEREFORE**, for the reasons stated above, it is my recommendation that the Department's NPL at issue in this case be finalized as issued.

**Ted Sherrod**  
**Administrative Law Judge**

**Date: November 14, 2012**