

**ST 13-19**

**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  
SPRINGFIELD, ILLINOIS**

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

v.

**JOHN DOE**

**Taxpayer**

**Docket # XXXX  
Letter ID: XXXX  
NPL ID: XXXX**

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**RECOMMENDATION FOR DISPOSITION**

Appearances: Matthew Crain, Special Assistant Attorney General, for the Department of Revenue of the State of Illinois; Robert B. McCoy of Miller, Hall & Triggs, LLC for John Doe

Synopsis:

The Department of Revenue (“Department”) issued a Collection Action, Assessment and Notice of Intent (“Notice”) to John Doe ("taxpayer") pursuant to section 3-7 of the Uniform Penalty and Interest Act ("UPIA") (35 ILCS 735/3-7). The Notice alleges that the taxpayer was an officer or employee of ABC Business ("corporation" or “ABC Business”) who was responsible for filing the corporation's retailers' occupation tax ("ROT") returns and paying the taxes, and that he willfully failed to do so. The taxpayer timely protested the Notice, and an evidentiary hearing was held. After reviewing the record, it is recommended that this matter be resolved in favor of the taxpayer.

Findings of Fact:

1. The corporation was in the business of operating a convenience store and gas station.  
(Dept. Ex. #1, p. 4; Tr. p. 9)

2. The corporation was an S corporation that was incorporated in November 2002. The taxpayer's father, Alan Tucker, was the president of the corporation, and the taxpayer was the vice president/secretary of the corporation. The taxpayer was also a shareholder. (Dept. Ex. #1, p. 4, 12, 19-22; Taxpayer Ex. #1, p. 6)
3. The taxpayer and his father were the only owners of the business. The taxpayer's father is now deceased. (Dept. Ex. #1, p. 4; Tr. pp. 9-10)
4. On November 21, 2002, the corporation filed Form NUC-1, Illinois Business Registration, with the Department. The taxpayer's signature is on the form underneath the line that states: "I accept personal responsibility for the filing of returns and the payment of taxes due." (Dept. Ex. #1, pp. 19-22)
5. Beginning in 2002, the taxpayer was an employee of the corporation and "was running the operation." (Tr. p. 14)
6. Among other things, the taxpayer was responsible for completing and signing the corporation's monthly ROT returns, Form ST-1's. (Dept. Ex. #1, pp. 25-61; Tr. pp. 10, 20-21)
7. In 2005, the taxpayer began working full-time at Midwest Vinyl Company, but he continued to "somewhat play a role in the business" because his new job allowed time for that. His father oversaw the everyday operations, but the taxpayer would help when he could. The taxpayer continued to prepare and sign the corporation's monthly ROT returns. (Tr. pp. 10, 14)
8. In 2007, the taxpayer began working full-time at Sunbelt Rentals, Inc. At this time, he was no longer an employee of ABC Business, and his new job required him to work more than 40 hours a week. The taxpayer was not active in the daily business operations of the corporation, but he continued to prepare and sign the corporation's monthly ROT returns. He prepared and signed the returns for the months of February 2010 through November 2010. (Dept. Ex. #1, pp. 4, 25-61; Taxpayer Ex. #1; Tr. pp. 10, 14)

9. In order to complete each ROT return, the taxpayer's father gave the taxpayer a spreadsheet with the necessary information. After completing the return, the taxpayer gave the return to his father. (Dept. Ex. #1, p. 4; Tr. pp. 11-12)
10. The taxpayer's father signed the checks that were sent to the Department for the payment of the corporation's ROT for the months of May 2010 through November 2010. The checks were returned due to insufficient funds. (Dept. Ex. #1, pp. 13-18)
11. The taxpayer had signature authority on the bank account from which the checks were written. (Tr. p. 21)
12. During 2010, the taxpayer was still a shareholder of the corporation. For his 2010 federal Form 1040, the taxpayer included Form 6198, At-Risk Limitations, which shows a loss related to the corporation, but the deductible amount of the loss was zero. (Taxpayer Ex. #1, pp. 3-17)
13. From May 2010 through January 2011, the taxpayer received notices from the Department indicating that the corporation was not paying its ROT liability. (Dept. Ex. #1, pp. 63-80; Tr. pp. 18-19)
14. The corporation ceased operations in November 2010. (Dept. Ex. #1, p. 4; Tr. p. 9)
15. On February 3, 2012, the Department issued a Collection Action, Assessment and Notice of Intent ("Notice") to the taxpayer that proposed a total penalty liability of \$17,599.37, including tax, interest, and penalty, for failing to pay the corporation's ROT for the months of February 2010 through November 2010. The Notice was admitted into evidence under the certificate of the Director of the Department. (Dept. Ex. #1, pp. 1, 8-10)

Conclusions of Law:

Section 3-7 of the Uniform Penalty and Interest Act provides, in relevant part, 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 wilfully fails to file the return or make the

payment to the Department or wilfully 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(a).

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

Under section 3-7, the Department's certified record relating to the penalty liability constitutes *prima facie* proof of the correctness of the penalty due.<sup>1</sup> Branson v. Department of Revenue, 168 Ill. 2d 247, 260 (1995). Once the Department presents its *prima facie* case, the burden shifts to the taxpayer to prove by a preponderance of the evidence that one or more of the elements of the penalty are lacking, *i.e.*, that the person charged was not a responsible corporate officer or employee, or that the person's actions were not willful. *Id.* at 261; Fiataruolo v. United States, 8 F.3d 930, 938 (2<sup>nd</sup> Cir. 1993); Ruth v. United States, 661 F. Supp. 652, 653 (N.D. Ill. 1986), *aff'd* 823 F.2d 1091 (7<sup>th</sup> Cir. 1987). "If the taxpayer offers no countervailing evidence, the Department's *prima facie* case stands un rebutted and becomes conclusive." Branson, at 260. 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.*

For guidance in determining whether a person is responsible under section 3-7, the Illinois Supreme Court has referred to cases interpreting section 6672 of the Internal Revenue

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<sup>1</sup> The relevant portion of section 3-7 provides as follows: "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 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(a).

Code (26 U.S.C. §6672).<sup>2</sup> Branson, at 254-56; Department of Revenue v. Heartland Investments, Inc., 106 Ill. 2d 19, 29-30 (1985). These cases state that being a corporate officer does not, *per se*, impose a duty to pay the trust taxes. Monday v. United States, 421 F. 2d 1210, 1214 (7th Cir. 1970), *cert. den.* 400 U.S. 821. The critical question in determining responsibility under this section is whether the person had *significant control* over the corporation's finances. See Fiataruolo, at 939; Purdy Co. of Illinois v. United States, 814 F. 2d 1183, 1186 (7th Cir. 1987). A person's "duty" with respect to this penalty liability must be viewed in light of his or her "power to compel or prohibit the allocation of corporate funds. It is a test of substance, not form." Godfrey v. United States, 748 F. 2d 1568, 1576 (Fed. Cir. 1984). In order to determine whether a person had the requisite control over the corporation's finances to be considered a responsible person, courts have developed the following seven-factor test:

Courts examine whether the person

- (1) is an officer or member of the board of directors;
- (2) owns shares or possesses an entrepreneurial stake in the company;
- (3) is active in the management of day-to-day affairs of the company;
- (4) has the ability to hire and fire employees;
- (5) makes decisions regarding which, when and in what order outstanding debts or taxes will be paid;
- (6) exercises control over daily bank accounts and disbursement records; and
- (7) has check-signing authority.

Fiataruolo, at 939; Skoczylas v. United States, 906 F. Supp. 2d 161, 168 (E.D. NY 2012); Winter v. United States, 196 F. 3d 339, 345 (2<sup>nd</sup> Cir. 1999).

No single factor is dispositive; the determination must be made in light of the totality of the circumstances. *Id.* Thus, the "mechanical duties of signing checks and preparing tax returns are ... not determinative of liability." Godfrey, at 1575. Courts have also noted that a person "need

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<sup>2</sup> This section imposes personal liability on any person who is required to collect, account for, and pay employees' withholding taxes and who willfully fails to do so.

not hold any particular position in a business and need not actually exercise authority to be held a responsible party...” Fiataruolo, at 939. At the same time, the test “is not meant to ensnare those who have merely technical authority or titular designation.” *Id.*

Applying this test to the present case, the taxpayer has presented sufficient evidence to rebut the first element of the penalty, *i.e.*, the taxpayer was not a responsible officer. Under the seven-factor test, the first, second, and seventh factors weigh in favor of the Department because the taxpayer was an officer who also had an ownership interest in the corporation, and he had check signing authority. From the evidence presented, however, the remaining factors weigh in favor of the taxpayer. During the time period in question, the taxpayer did not take an active role in the day-to-day operations, and he did not hire or fire employees. The checks that were sent to the Department for the payment of the taxes (which were returned due to insufficient funds) were signed by the taxpayer’s father. This corroborates the taxpayer’s testimony that he did not have control over the checkbook or the disbursement of funds.

The fact that the taxpayer performed the mechanical duty of preparing the ROT returns is not determinative. See Godfrey, *supra*. Furthermore, “knowledge that taxes are unpaid is only relevant to the issue of willfulness once a person is found responsible.” Barton v. United States, 988 F. 2d, 58, 60 (8<sup>th</sup> Cir. 1993) (citing Godfrey, at 1576); see also Vinick v. United States, 205 F. 3d 1, 13 n. 10 (1<sup>st</sup> Cir. 2000); Pototzky v. United States, 8 Cl. Ct. 308, 317 (1985). The fact that the taxpayer had knowledge that the taxes were not being paid is not a basis for imposing the penalty without evidence that he had significant control over the corporation’s finances in order to compel or prohibit the allocation of its money. Considering the totality of the circumstances, the evidence does not support a finding that the taxpayer was a responsible officer.

#### Recommendation

It is therefore recommended that the Collection Action, Assessment and Notice of Intent be dismissed.

Linda Olivero  
Administrative Law Judge

Enter: October 7, 2013