

ST 14-25

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**

v.

**JOHN DOE,
Taxpayer**

No. **XXXX**
Account ID **XXXX**
NPL Penalty ID **XXXX**
Period **3/11-6/11**

**Ted Sherrod
Administrative Law Judge**

RECOMMENDATION FOR DISPOSITION

Appearances: Special Assistant Attorney General Marc Muchin on behalf of the Illinois Department of Revenue; Jay Jung, Esq. of Nepple Law, PLC on behalf of John Doe.

Synopsis:

On April 16, 2013, the Illinois Department of Revenue (“Department”) issued notice of penalty liability NPL Penalty ID number XXXX to John Doe (“taxpayer”) as a responsible officer of ABC Business Inc. (“ABC Business”) for the unpaid tax liabilities of ABC Business incurred during the period 3/11 through 6/11. The taxpayer protested this notice of penalty liability and requested a hearing. A hearing to consider this matter was held on August 19, 2014 during which both parties submitted documentary evidence. I have reviewed this evidence, and I am including in this recommendation findings of fact and conclusions of law. I recommend that the notice of penalty liability at issue be finalized as issued.

Findings of Fact:

1. The Department's *prima facie* case, inclusive of all jurisdictional elements, was established by the admission into evidence of notice of penalty liability NPL penalty ID number XXXX determining that a personal liability penalty is due and owing by the taxpayer for the period 3/11 through 6/11. Department Exhibit (“Ex.”) 1.
2. For the period listed on the notice of penalty liability, the taxpayer was a person responsible for filing returns for ABC Business, an Illinois corporation domiciled in Anywhere, Illinois, under the Retailers’ Occupation Tax Act and for paying over the tax due within the meaning of section 3-7 of the Uniform Penalty and Interest Act, 35 ILCS 735/3-7 (“section 3-7”). Transcript (“Tr.”) pp. 10, 11¹; Department Ex. 3.
3. For the period listed on the notice of penalty liability, the taxpayer willfully failed to make payment of the Retailers’ Occupation Tax due from ABC Business within the meaning of section 3-7. *Id.*
4. The taxpayer concedes that he is liable as a responsible officer for the unpaid Retailers’ Occupation Tax due from ABC Business for the months of March 2011 and April 2011, and is only contesting the amount of the penalty liability assessed for the month of June, 2011. Tr. pp. 4, 5.
5. ABC Business filed a refund claim for an alleged overpayment of taxes due for June, 2011 which the Department denied pursuant to a Notice of Tentative Denial of Claim for ST-1, Sales and Use Tax and E911 Surcharge Return on February 28, 2014. Tr. pp. 10, 11; Taxpayer’s Ex. 1.

¹ The taxpayer is not contesting the Department’s *prima facie* correct determination that the taxpayer was a responsible officer of ABC Business who willfully failed to file returns and pay taxes that were due from that company for the tax period in controversy. Tr. pp. 10, 11.

6. The record contains no documentary evidence indicating that ABC Business ever protested the Department's Notice of Tentative Denial of Claim for ST-1, Sales and Use Tax and E911 Surcharge in accordance with 35 ILCS 120/6b.

Conclusions of Law:

The Uniform Penalty and Interest Act ("UPIA") imposes a liability upon corporate officers that have the control, supervision or responsibility of filing returns and making payments of a corporation's taxes. Specifically, section 3-7 of the UPIA states 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(a)

Pursuant to the foregoing, an officer or employee of a corporation can be held personally liable for the corporation's unpaid tax, including interest and penalties, if he is in any way responsible the corporation's tax returns and payment and "willfully" fails to fulfill this responsibility. In the instant case, John Doe ("taxpayer") has been issued a notice of penalty liability assessing a personal liability penalty upon him as a person who was responsible for the unpaid tax of ABC Business.

The notice of penalty liability issued the taxpayer is *prima facie* correct and the burden is on the taxpayer to rebut this presumption. *Id.*; Branson v. Department of Revenue, 168 Ill. 2d 247 (1995). Department Ex. 1. The liability at issue arises from unpaid tax assessed ABC

Business and Leasing, Inc. (“ABC Business”). In the instant case, the taxpayer concedes penalty liability for all of the months included in the notice of penalty liability except June, 2011. Tr. pp. 4, 5, 10. Moreover, the taxpayer concedes that he was a responsible officer of ABC Business and that he willfully failed to pay the taxes due. Tr. pp. 10, 11. Rather, he argues that ABC Business was wrongfully denied a credit for overpaid taxes for the month of June 2011 that extinguished all of the unpaid liability assessed ABC Business for that month. Tr. pp. 11-14, 19.

During the hearing, the taxpayer argued that the notice of penalty liability is incorrect because it does not reflect a reduction in the corporate liability of ABC Business upon which the notice of penalty liability is based resulting from a credit for a tax overpayment to which ABC Business is entitled. While the record indicates that ABC Business filed a refund claim subsequent to the issuance of the Department’s determination of its liability, it also reveals that the Department denied this refund claim. Taxpayer Ex. 1. Moreover, during the hearing, the taxpayer produced no evidence that ABC Business ever contested this refund claim denial by timely protesting it within 60 days of the denial as required by 35 ILCS 120/6b and 6c to prevent this refund claim denial from become final and non-appealable. See also 86 Ill. Admin. Code, ch. I, section 130.1501(c).

In this case, the record does not indicate that ABC Business ever filed a protest to the Department’s assessment of this company underlying the notice of penalty liability at issue. Consequently, the notice of penalty liability became final and conclusive as to all questions concerning the merits of the Department’s assessment. Department of Revenue v. Dombrowski Enterprises, 202 Ill. App. 3d 1050 (1st Dist. 1990).

The taxpayer argues that, even if the Department’s assessment was correct, ABC Business was entitled to a credit for a tax overpayment that extinguished a portion of this liability after it arose. However, the record indicates that ABC Business refund claim was denied

(Taxpayer's Ex.1), and does not show that ABC Business ever contested the Department's refund claim denial. Therefore, it supports a finding that the Department's refund claim denial became final. 35 ILCS 120/6b, 6c.

In contesting ABC Business' waiver of its right to contest the Department's refund claim denial by failing to protest it within 60 days as required by 35 ILCS 120/6b and 6c, the taxpayer argues as follows:

The taxpayer's defense is, again, for the month of June of 2011 he timely filed the amended sales tax return showing a refund of \$XXXX, and the Revenue denied his refund of \$XXXX, and the Revenue denied his refund request to me without proper basis here, and that if the taxpayer had received a refund, that refund amount would be more than enough to cover his tax liability...[.]

ALJ SHERROD: And the Department granted this refund?

MR. JUNG: No, they did not. They actually denied refund.

ALJ SHERROD:You're saying ABC Business and Leasing contested this notice of tentative denial of claim?

MR. JUNG: Yes.

ALJ SHERROD: In 60 days?

THE WITNESS: Yes.

ALJ SHERROD: Do you have their protest [in] evidence?

MR. JUNG: Well, I believe that tax liability has been personally assessed against John Doe.

ALJ SHERROD: But did ABC Business and Leasing contest this? There's two different parties here. ABC Business is not actually the party to these proceedings. John Doe is.

MR. JUNG: Your Honor, when the taxpayer John Doe was personally assessed with the taxes of the corporation, he was contesting the underlying tax liability where his tax liability arose from. It appears that the corporation itself did not contest the Revenue's decision to deny the claim, but instead it appears that John Doe filed these appeals in his personal individual name.

Tr. pp. 11-13.

In effect, the taxpayer argues that his protest of the notice of penalty liability should be treated as the functional equivalent of a protest contesting the Department's denial of ABC Business'

refund claim because both liabilities relate to the Department's determination of ABC Business' liability for the period indicated in the notice of penalty liability.²

However, 35 ILCS 120/6b and 6c provide as follows:

6b. As soon as practicable after a claim for credit or refund is filed, the Department shall examine the same and determine the amount of the credit or refund to which the claimant or the taxpayer's legal representative, in the event that the taxpayer has died or become incompetent, is entitled and shall, by its Notice of Tentative Determination of Claim, notify the claimant or his legal representative of such determination, which determination shall be prima facie correct. ... If such claimant, or the legal representative of a deceased or incompetent taxpayer, within 60 days after the Department's Notice of Tentative Determination of Claim, files a protest thereto and requests a hearing thereon, the Department shall give notice to such claimant, or the legal representative of a deceased taxpayer, or a taxpayer who is under legal disability of the time and place fixed for such hearing, and shall hold a hearing in conformity with the provisions of this Act, and pursuant thereto shall issue its Final Determination of the amount, if any, found to be due as a result of such hearing, to such claimant, or the legal representative of a deceased taxpayer, or a taxpayer who is under legal disability. ...

6c. If a protest to the Department's Notice of Tentative Determination of Claim is not filed within 60 days and a request for a hearing thereon is not made as provided in Section 6b of this Act, the said Notice shall thereupon become and operate as a Final Determination; and, if the Department's Notice of Tentative Determination, upon becoming a Final Determination, indicates no amount due the claimant, or, upon issuance of a credit memorandum or refund for the amount, if any, found by the Department to be due, the claim in all its aspects shall be closed and no longer open to protest, hearing, judicial review, or by any other proceeding or action whatever, either before the Department or in any court of this State.

35 ILCS 120/6b, 6c.

As is evident from the foregoing, a protest negating the finalization of a refund claim denial must be filed by the "claimant", i.e. the person or entity that filed the refund claim. *Id.* The record indicates that the "claimant" denied a refund in the instant case was ABC Business. Taxpayer Ex. 1. Consequently, the taxpayer's protest of the notice of penalty liability at issue did not

² I take judicial notice of the taxpayer's protest of the notice of penalty liability issued him which was filed May 14, 2014, more than 60 days after the Department's issuance of its Notice of Tentative Denial of Claim for Form ST-1, Sales and Use Tax and E911 Surcharge Return (Taxpayer Ex. 1) dated February 28, 2014 to ABC Business. Even if the taxpayer's protest of the Department's notice of penalty liability at issue were treated as the equivalent of ABC Business' protest of the Department's refund claim denial, it would not constitute a timely filed protest of this refund claim denial pursuant to 35 ILCS 120/6b.

constitute the functional equivalent of ABC Business' protest of its refund claim denial because it was not filed by ABC Business, the entity that filed the refund claim, as required by 35 ILCS 120/6b. For the foregoing reason, and because the record contains no evidence that ABC Business itself ever filed a protest of the refund claim denial, I find that the record does not show ABC Business prevented the finalization of the refund claim denial issued to it by the Department by timely protesting this refund claim denial. 35 ILCS 120/6c. The record, therefore, supports a finding that ABC Business was not entitled to a refund offsetting the Department's determination reflected in the notice of penalty liability, as the taxpayer contends.

Moreover, had ABC Business timely filed a protest of the Department's refund claim denial in accordance with 35 ILCS 120/6b, it would still have needed sufficient evidence to support its claim in order to prevail. The record contains no evidence other than the taxpayer's assertion that ABC Business' refund claim should have been granted to support ABC Business' contention that its refund claim was erroneously denied. Tr. pp. 5, 11, 19

In sum, for the reasons enumerated above, I find that the notice of penalty liability that has been issued in the instant case does not overstate the amount of the taxpayer's liability because the taxpayer has not established that the underlying corporate liability reflected in the notice of penalty liability has been offset by any payment or credit attributable to the underlying corporation, ABC Business. Specifically, the taxpayer failed to prove that any ABC Business' credit for any overpayment offsetting the liability the Department determined was ever granted. Moreover, since the taxpayer conceded that he was liable as a responsible officer and has not even attempted to rebut the *prima facie* correctness of the Department's notice of penalty liability in this regard, I find that the Department's *prima facie* case has not been rebutted.

Conclusion

For the reasons stated above, I recommend that the notice of penalty liability at issued be affirmed.

**Ted Sherrod
Administrative Law Judge**

Date: October 1, 2014