

ST 15-16

Tax Type: Sales Tax

Tax Issue: Responsible Corporate Officer – Failure To File Or Pay Tax

**Illinois Department of Revenue
OFFICE OF ADMINISTRATIVE HEARINGS**

James R. Thompson Center
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Chicago, Illinois 60601
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**THE DEPARTMENT OF REVENUE
OF THE STATE OF ILLINOIS**

v.

**JOHN DOE, JR., as Responsible Officer of
ABC BUSINESS, INC.,
TAXPAYER**

**Docket No. XXXX
Account ID. XXXX
NPL No. XXXX**

**Kelly Yi
Administrative Law Judge**

RECOMMENDATION FOR DISPOSITION

Appearances: Mr. Stephen M. Lewis of Cooke & Lewis, Ltd. appeared for Mr. JOHN DOE, Jr.; Mr. George Foster, Special Assistant Attorney General, appeared for the Department of Revenue of the State of Illinois.

Synopsis:

This matter comes on for hearing pursuant to JOHN DOE, Jr.'s ("Taxpayer") protest of Notice of Penalty Liability ("NPL") No. XXXX, as responsible officer of ABC Business, Inc. ("ABC Business"). The NPL represents a penalty liability for Retailers' Occupation Tax of ABC Business due to the Department for the months of July 2008 through June 2009. A hearing on this matter was held before Administrative Law Judge John White¹ on December 1, 2014, with Taxpayer and his sister Jane Doe ("Jane Doe") providing oral testimony. Following submission of all evidence and a review of the record, it is recommended that the NPL be

¹ This Recommendation is written by Administrative Law Judge Kelly K. Yi and is based on the review of the hearing transcript and the exhibits admitted at hearing. Credibility of the witnesses is at issue only to the extent that the testimony is unsupported by the documentary evidence in the record.

finalized as issued. 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 June 1, 2012, which shows a penalty for unpaid sales tax liability of ABC Business, Inc., of \$XXXX for July 2008 through June 2009. Tr. p. 9; Dept. Ex. 1.
2. ABC Business owned and operated a gas station in Illinois under the name “XYZ Business” (“gas station”). Taxpayer was the president of ABC Business since it incorporated in May 2007 until it dissolved. Tr. pp. 38, 45-46; Dept. Exs. 2 & 4.
3. Taxpayer testified that he became involved in ABC Business after his father appointed him as president because his father could not legally start a corporation due to problems in the past. At that time, Taxpayer was attending college, living at the dorm in Illinois. He graduated from college in August 2008. Tr. pp. 14-15.
4. Beginning September 2008, Taxpayer worked at the gas station as a cashier two to three days a week until he took a job with DEF Business in July 2009 and worked there until February 2011, at which time he began working full time for the GHI Business until November 2012. Tr. pp. 16-17.
5. Taxpayer testified that he was not involved with the debts, liabilities, taxes or operation of the gas station. Tr. p. 19.
6. Taxpayer testified that upon his father’s instruction, he signed the annual report filed with the Secretary of State’s office attesting that he was president of ABC Business but he did not then fully understand what it meant. Tr. pp. 31, 45-47.

7. When July 2008 taxes became due, Taxpayer was 22 years old with a degree in criminal justice. Tr. p. 31-32.
8. Taxpayer signed the prepared tax returns for December 2008, and January 2009 but denied signing tax returns for October-November 2008. There is no signature on the February 2009 tax return. Tr. pp. 33-34; Dept. Ex. 2.
9. Taxpayer signed the prepared March 2009,² sales tax return and the attached check for tax payment. Tr. pp. 20, 36; Dept. Ex. 3.
10. Taxpayer denied signing April and May 2009 tax returns but admitted signing check number XXX for May 2009 tax payment. Tr. p. 37; Dept. Ex. 3.
11. Taxpayer signed June 2009 sales tax return and the corresponding tax payment check. Tr. p. 37; Dept. Ex. 3.
12. Taxpayer denied signing check numbers XXX and XXX, both dated June 2009, payable to creditors, Farmers Insurance Group Company and National City, respectively, but admitted signing check number XXX, also dated June 2009, payable to another creditor, Opex. Tr. pp. 39, 42; Tp. Ex. 3.
13. Of the tax returns Taxpayer acknowledged signing, he testified that he did not complete the number portions reflecting sales tax due but merely signed them when instructed to do so by his father. Tr. 48.
14. Of the corporate checks he signed, Taxpayer testified that he merely signed the prepared checks. Tr. p. 49.
15. Taxpayer's sister, Jane Doe, testified that she worked at the gas station as a cashier; that her father was controlling; and that her father confided in her that he had falsified documents using Taxpayer's name. She, however, admitted that she did not know which documents

² There was a typo in the return as the return should read March 2009, not March 2008. Tr. p. 36.

were reportedly falsified and was not aware that some of the documents admitted at hearing were actually signed by her brother. Tr. pp. 52-54.

Conclusions of Law:

The sole issue to be decided in this case is whether Taxpayer should be held personally liable for the unpaid Retailers' Occupation Tax of ABC Business, Inc. 35 ILCS 120/1 *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.

The admission into evidence of the NPL establishes the Department's *prima facie* case with regard to both the fact that Taxpayer was a "responsible" officer and the fact that he "willfully" failed to file and/or pay. Branson v. Department of Revenue, 168 Ill. 2d 247 (1995). Once the Department has established a *prima facie* case, the burden shifts to the taxpayer to overcome the case. Masini v. Department of Revenue, 60 Ill. App. 3d 11 (1st Dist. 1978). 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 (7th 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.*

I conclude, based on the testimony and evidence admitted at the evidentiary hearing, that Taxpayer was a responsible officer of ABC Business. During the period covered by the NPL, Taxpayer was president of ABC Business with attendant authority and obligations. While the documentary evidence supports Taxpayer's testimony that the signature on some of the tax returns and corporate checks was not his, Taxpayer admitted signing some of them, and a few of the corporate checks he denied signing resemble his authenticated signature.³ It is proper for a jury or a judge to form an opinion as to the genuineness of handwriting based upon a comparison of proven and disputed handwriting samples. 735 ILCS 5/8-1501; 1601 Michigan Partners v. Measuron, 271 Ill.App.3d 415 (1st Dist. 1995), citing Yelm v. Masters, 81 Ill.App.2d 186, 197(1967). 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). As president with the ability to sign corporate checks, Taxpayer could have written a check to the State of Illinois for unpaid sales tax.

Taxpayer's testimony attempted to minimize his responsibilities and involvement at the gas station. He testified that his role was a cashier. According to his testimony, Taxpayer was not involved with the debts, liabilities, taxes or operation of the gas station and allowed his father

³ Taxpayer denied that the signature on check number XXX and XXX, payable to creditors, was his but they resemble his authenticated signature on check number XXX and other documents offered into evidence. *See* Tp. Ex. 3; Dept. Exs. 2-3, 5-6.

to make decisions in the operation of the gas station. This does not make Taxpayer less of a responsible officer or indicate that he was not a responsible officer. 35 ILCS 735/3-7. The statute does not confine liability to only one person or to the person most responsible. All responsible persons owe a fiduciary obligation to care properly for the funds that are entrusted to them. “A fiduciary cannot absolve himself merely by disregarding his duty and leaving it to someone else to discharge.” Hornsby v. Internal Revenue Service, 558 F.2d 952 (5th Cir. 1979). One does not cease to be a responsible person merely by delegating that responsibility to others. Gustin v. United States, 876 F.2d 485 (5th Cir. 1989). Responsibility is a matter of status, duty and authority, not necessarily knowledge. Mazo v. United States, 591 F.2d 1151 (5th Cir. 1979). With the status of president, and the authority to inspect the books and records at any time, Taxpayer was a responsible officer.

The evidence shows then that Taxpayer was in a responsible position with ABC Business in which he knew or should have known whether returns were filed accurately and taxes paid. In order to overcome the Department’s *prima facie* case, evidence must be presented which is consistent, probable and identified with the corporation’s books and records. Central Furniture Mart, Inc. v. Johnson, 157 Ill. App. 3d 907 (1st Dist. 1987). When the Department established its *prima facie* case, the burden shifted to Taxpayer to overcome the presumption of responsibility through sufficient evidence. Branson, supra. The documents caused to be admitted by Taxpayer at the hearing were copies of corporate checks issued in May and June 2009, most of which he denied signing, and his 2009 individual tax returns showing a gross wage of \$XXXX. Taxpayer’s Exs. 2-4. Taxpayer’s authenticated signature differs from that of some of the signatures he denied as his, but because he admitted signing some of the tax returns and corporate checks, whether he worked elsewhere partial-year in 2009 is insufficient to show that Taxpayer was not a responsible officer of ABC Business or that he was less responsible than his

father. I conclude that Taxpayer has failed to rebut the Department's presumption that he was a responsible party under the statute.

The second and remaining element which must be met in order to impose personal liability is the willful failure to pay the taxes due. The Department presents a *prima facie* case for willfulness with the introduction of the NPL into evidence. Branson v. Dept. of Revenue, 168 Ill. 2d 247 (1995). The burden, then, is on the responsible party to rebut the presumption of willfulness. 35 ILCS 735/3-7 fails to define what constitutes a willful failure to pay or file taxes. In attempting to clarify what constitutes a willful failure to file or pay taxes, the courts have adopted a broad interpretation of the words "willfully fails." Department of Revenue ex rel. People v. Corrosion Systems, Inc., 185 Ill. App. 3d 580 (4th Dist. 1989). Under this broad interpretation, responsible officers are liable if they fail to inspect corporate records or otherwise fail to keep informed of the status of the Retailers' Occupation Tax returns and payments. Branson, supra. Willfulness also includes "failure to investigate or to correct mismanagement after having notice that withholding taxes have not been remitted to the Government." Peterson v. United States, 758 F. Supp. 1209 (N.D. Ill. 1990). "Willfulness" as used in the statute may indicate a reckless disregard for obvious or known risks. Monday v. United States, 421 F. 2d 1210 (7th Cir. 1970) *cert. denied* 400 U.S. 821 (1970).

Taxpayer's conduct was willful under each of the above benchmarks. As president, Taxpayer was certainly in a position to inspect corporate records and keep informed of the status of the tax returns and payments. Taxpayer's failure to do so constitutes willfulness under the statute. If Taxpayer delegated his responsibilities to someone else, his father, Taxpayer's conduct was still willful. Responsible officers are liable if they delegate bookkeeping duties to third parties and fail to inspect corporate records or otherwise fail to keep informed of the status of the tax returns and payments. Branson, supra at 267. If the taxes were not paid by

Taxpayer's father, then they were not paid with Taxpayer's approval, which satisfies the willful requirement under the statute. Referring to his father, Taxpayer testified that "I never asked questions. I just followed his lead." Tr. p. 48. A responsible person cannot escape his obligation to ensure that taxes are paid simply by delegating the responsibility to others. Wright v. United States, 809 F.2d 425 (7th Cir. 1987). Taxpayer testified that "My father initiated all the corporation; and he just appointed me as president; but he couldn't use his name what I later found out because the previous - - the original corporation he had, I guess, kind of went belly-up; so he was no good for any new corporation at all." Tr. p. 14. Taxpayer further testified that his father "had an office in the back of the [gas] station where he had all his paperwork, cameras and all this" but Taxpayer was not allowed into the office. Tr. p. 18.

Taxpayer's testimony, above, also demonstrates willfulness. Taxpayer knew that his father was not able to register a new corporation as him as president due to problems in the past. I take notice that officers of failed corporations are not prevented from registering a new corporation unless there are tax debts owed to the State. Section 120/2a of the Retailers' Occupation Tax Act states, in relevant part, as follows:

The Department may deny a certificate of registration to any applicant if a person who is named as***a corporate officer of the applicant on the application for the certificate of registration is or has been named as***a corporate officer on the application for the certificate of registration of another retailer that is in default for moneys due under this Act or any other tax or fee Act administered by the Department. 35 ILCS 120/2a.

This knowledge along with the fact that Taxpayer was not allowed to enter the father's office should have been an indication to a responsible officer that investigation is warranted as to whether taxes are being paid and remitted. Failure to investigate after such knowledge demonstrates willfulness. "Willfulness" as used in the statute may indicate a reckless disregard for obvious or known risks. Monday v. United States, 421 F. 2d 1210 (7th Cir. 1970) *cert. denied* 400 U.S. 821 (1970). Taxpayer's failure to investigate and pay sales tax indicates a "reckless

disregard” for the risk that taxes were not being reported or remitted to the State of Illinois. Taxpayer allowed funds to be used to pay other creditors. The checks written to the creditors evidence the preference of other creditors over the State of Illinois. A person acts willfully by preferring other creditors to the State. There was no testimony or documentary evidence showing any positive steps that Taxpayer took to pay the taxes. Taxpayer was a responsible person in a position to easily discover the underpayment of ABC Business’s taxes. He clearly ought to have known of the grave risk of nonpayment or underpayment, but he did nothing. Under these circumstances, a finding of willfulness is justified. Estate of Young v. Department of Revenue, 316 Ill. App. 3d 366 (1st Dist. 2000). I conclude that he has failed to rebut the Department’s presumption that he willfully failed to report and pay ABC Business’s sales taxes.

Recommendation:

WHEREFORE, for the reasons stated above, it is my recommendation that Notice of Penalty Liability No. XXXX issued against JOHN DOE, Jr. should be finalized as issued.

Kelly K. Yi
Administrative Law Judge

October 29, 2015