

**IT 11-04**

**Tax Type: Income Tax**

**Issue: Responsible Corporate Officer-Failure to File or Pay Tax  
UPIA Willful Failure**

**STATE OF ILLINOIS  
DEPARTMENT OF REVENUE  
OFFICE OF ADMINISTRATIVE HEARINGS  
CHICAGO, ILLINOIS**

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<b>THE DEPARTMENT OF REVENUE</b>	)	Docket No.
<b>OF THE STATE OF ILLINOIS</b>	)	NOD Nos.
v.	)	Tax Periods
<b>JOHN DOE &amp; JANE DOE,</b>	)	
as responsible officers of ABC Business, Inc.,	)	John E. White,
Taxpayers	)	Administrative Law Judge

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**RECOMMENDATION FOR DISPOSITION**

**Appearances:** John Doe appeared, *pro se*, for himself and Jane Doe; Ralph Bassett, Jr., Special Assistant Attorney General, appeared for the Illinois Department of Revenue.

**Synopsis:** This matter arose when John Doe and Jane Doe (Taxpayers) protested the Notice of Deficiency (NOD) the Illinois Department of Revenue (Department) issued to each of them as responsible officers of ABC Business, Inc. (ABC). Each NOD assessed a penalty that was equal to the amount of Illinois income tax, plus penalties and interest, the Department determined ABC withheld from its employees' wages during the second through fourth quarters of 1998, and during the second quarter of 2000 through the second quarter of 2002, and which ABC failed to pay over to the Department.

At hearing, John Doe (John Doe) appeared as a witness, testified under oath, and also offered documents into evidence. I have reviewed the evidence, and I am including in this recommendation findings of fact and conclusions of law. I recommend that the Director revise each NOD to give Taxpayers credit for the tax payments that were made

regarding the periods at issue. The NODs should be further revised to include only the properly applicable statutory late filing and late payment penalties, plus statutory interest, and then be finalized as so revised.

**Findings of Fact:**

1. In July 2002, the Department conducted an audit of ABC, after determining that ABC had not filed quarterly Illinois withholding tax returns for the second through fourth quarters of 1998, and for the second quarter of 2000 through the second quarter of 2002. Department Ex. 3 (copy of Department form titled, Results of Withholding Tax Audit, dated July 12, 2002, and prepared following the Department's July 2002 audit of ABC).
2. Following that 2002 audit, and using the best information available at that time, the Department determined that ABC had withheld Illinois income tax from the wages of its employees in the amount of \$3,375 for each open quarter, and that it owed tax in that amount for each such quarter. Department Ex. 3.
3. During the period from late August through late September 2003, ABC and John Doe hired counsel to represent them, and to communicate with the Department about taking advantage of Illinois' 2003 Tax Delinquency Amnesty Act (2003 TDAA). Taxpayer Ex. 1;<sup>1</sup> 35 ILCS 745/1 *et seq.* (2003) (P.A. 93-0026 (eff. June 20, 2003)).

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<sup>1</sup> Taxpayer Exhibit 1 consists of the following documents:

- a copy of a cover letter, dated September 10, 2010, from Department counsel to Taxpayers, and a copy of an Order prepared on September 8, 2010 (cited hereafter as Taxpayer Ex. 1, 9/10/10 Bassett to John Doe letter);
- a copy of a letter, dated September 25, 2003, from ABC's counsel, Dean Roupas (Roupas), to John Doe (Taxpayer Ex. 1, 9/25/03 Roupas to John Doe letter);
- a copy of a letter, dated September 23, 2003, from George Diaz (Diaz), of the Department's Problems Resolution Division, to Roupas with attachments that consist of copies of Illinois withholding tax returns ABC filed with the Department, late, for January 1996 through December 1997 (Taxpayer Ex. 1, 9/23/03 Diaz to Roupas letter);

4. In the second half of 2003, ABC and Taxpayers had knowledge that ABC had outstanding liabilities for Illinois retailers' occupation tax (ROT), including penalties and interest, for the period from January 1992 through December 1994. Taxpayer Ex. 1, attachment to 8/27/03 Diaz to Roupas letter. Taxpayers and ABC also knew that ABC had outstanding liabilities for Illinois income tax for tax years 1995 through 2002, including penalties and interest, and outstanding liabilities for income tax penalties and interest for 1992, and an outstanding small amount of income tax interest for 1991. *Id.*
5. For some of the periods described immediately above, the tax assessments issued to or proposed against ABC had also been the subject of a contested case pending within the Department's Office of Administrative Hearings, and involving both Taxpayers,

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- a copy of a letter, dated September 5, 2003, from Diaz to Roupas with attachments that consist of: (1) a copy of an NOD issued to John Doe, dated May 11, 2001, proposing to assess a § 1002(d) penalty to John Doe regarding ABC's unpaid withholding tax liabilities for the third quarter of 1994 through the fourth quarter of 1995, the first quarter of 1998, the fourth quarter of 1999 through the first quarter of 2000, and (2) a copy of a schedule, dated October 24, 2002, prepared by a Department employee detailing the amounts at issue in two prior contested cases involving ABC and docketed within the Department's Office of Administrative Hearings (Taxpayer Ex. 1, 9/5/03 Diaz to Roupas letter);
  - a copy of a letter, dated September 3, 2003, from Roupas to Diaz with an attachment that consists of an order entered in a contested case involving Taxpayers, as responsible officers of ABC, and docketed under number XXXXXX (Taxpayer Ex. 1, 9/3/03 Roupas to Diaz letter);
  - a copy of a letter, dated August 27, 2003, from Diaz to Roupas with an attachment that consist of a synopsis of amounts owed from ABC pursuant to the Retailers' Occupation Tax Act and the IITA (Taxpayer Ex. 1, 8/27/03 Diaz to Roupas letter);
  - a copy of a letter, dated August 22, 2003, from Roupas to Diaz (Taxpayer Ex. 1, 8/22/03 Roupas to John Doe letter);
  - a copy of a Department form titled, Tax Amnesty Program — Notice of Eligibility, dated September 26, 2003, and issued to ABC, stating an amnesty balance due of \$68,299.68 (Taxpayer Ex. 1, 9/26/03 Tax Amnesty Notice).

Taxpayer Ex. 1.

as responsible officers of ABC. Taxpayer Ex. 1, attachments to 9/5/03 Diaz to Roupas letter, attachment to 9/3/03 Roupas to Diaz letter.

6. In that prior contested case involving Taxpayers, an Order, dated January 24, 2003, was entered which referred to criminal restitution payments that the parties anticipated would be applied to ABC's corporate tax liabilities. Taxpayer Ex. 1, 9/3/03 Roupas to Diaz letter, and attachment.
7. Although the Department issued a notice to ABC stating that ABC was eligible to take part in the 2003 Amnesty program (Taxpayer Ex. 1, 9/26/03 Tax Amnesty Notice), ABC did not do so. Tr. pp. 10-12 (John Doe). John Doe explained, at hearing, that he was not able to complete the negotiations with the Department and finalize ABC's tax liabilities pursuant to the 2003 TDAA, because the Department began a new criminal investigation regarding ABC's liability for the tax amounts and periods at issue here. Tr. pp. 10-12 (John Doe); *see also* 35 ILCS 5/1301-1302; 35 ILCS 745/10 (2003).
8. On February 25, 2004, the Department issued NOD No. XXXX to John Doe and NOD No. XXXX to Jane Doe, as responsible officers of ABC. Department Exs. 1-2 (copies of, respectively, NOD Nos. XXX and XXX)..
9. The NODs proposed to assess the following amounts for each quarter at issue:

<u>Period</u>	<u>Penalty § 1002(d)</u>
2/Q/1998	8,088.84
3/Q/1998	7,919.17
4/Q/1998	7,762.13
2/Q/2000	6,803.26
3/Q/2000	6,616.44
4/Q/2000	5,794.28
1/Q/2001	5,646.15
2/Q/2001	5,504.49
3/Q/2001	5,385.39

4/Q/2001	5,272.03
1/Q/2002	5,173.28
2/Q/2002	5,071.20

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Department Exs. 1-2.

10. The record does not disclose whether, prior to the date the Department issued the NODs to Taxpayers, the Department issued an NOD to ABC to propose to assess Illinois income tax against it for failing to file the quarterly returns the Department determined were not filed for the quarters at issue.
11. John Doe was ABC's president, and Jane Doe was ABC's secretary. Department Exs. 4 (copy of ABC's Domestic Corporation Annual Report for 1999), 5 (copy of ABC's Domestic Corporation Annual Report for 2000), 6 (copy of ABC's Illinois Business Taxpayer Application for Registration filed with the Department in 1988).
12. John Doe signed withholding tax returns ABC filed, late, for periods prior to the quarters at issue. Taxpayer Ex. 1, 9/23/03 Diaz to Roupas letter, and attachments (copies of eight IL-941 returns signed by John Doe for January 1996 through December 1997, and dated June 18, 1998).
13. Between the date Taxpayers protested the NODs and the date of the hearing, the parties notified the ALJ that a criminal investigation and prosecution was being conducted regarding Taxpayers and ABC's tax liabilities for some of the quarters at issue, during which time this contested case was placed on inactive status. *See* Orders dated September 1, 2005 through January 19, 2010;<sup>2</sup> *see also, generally, Department of Revenue v. Olympic Savings & Loan Assoc.*, 78 Ill. App. 3d 668, 396 N.E.2d 1295 (1<sup>st</sup> Dist. 1979). The Orders entered in this matter, and other evidence admitted at

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<sup>2</sup> I take administrative notice of the representations set forth in the contents of the orders issued in this matter.

hearing, reflect that the criminal prosecution for which this matter was placed on inactive status, resulted in restitution payments of tax due to the Department, regarding some of the quarters at issue. *See* Department Ex. 7.

14. At or about the time the criminal prosecution concluded, the Department issued a Statement of Account to ABC, dated August 5, 2010 (2010 Statement). Department Ex. 7. In that 2010 Statement, the Department notified ABC, among other things, that the following payments had been applied to its outstanding withholding tax liabilities for the following months:

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Period	Tax	Penalty	Interest	Payments/Credits	Balance
2/Q/1998	3,375.00	1,485.00	7,378.33		12,038.07
3/Q/1998	3,375.00	1,485.00	7,187.07		11,852.72
4/Q/1998	3,375.00	1,485.00	6,992.72		11,554.00
2/Q/2000	4,730.55	2,081.44	7,779.62	(4,730.55)	9,861.06
3/Q/2000	4,671.89	2,055.64	7,377.91	(4,671.89)	9,433.55
4/Q/2000	4,470.92	1,520.12	4,734.78	(4,470.92)	6,254.90
1/Q/2001	3,594.23	1,222.02	3,700.02	(3,594.23)	4,922.04
2/Q/2001	3,582.80	1,218.16	3,537.77	(3,582.80)	4,755.93
3/Q/2001	4,004.33	1,361.48	3,812.76	(4,004.33)	5,174.24
4/Q/2001	4,499.44	1,529.82	4,133.14	(4,499.44)	5,662.96
1/Q/2002	3,745.47	1,273.46	3,330.87	(3,745.47)	4,604.33
2/Q/2002	4,596.44	1,596.80	3,948.68	(4,596.44)	5,545.48

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Department Ex. 7. The 2010 Statement also notified ABC of other amounts due, but those other amounts do not relate to the NODs at issue here. *See id.*

15. John Doe made the tax payments identified on the 2010 Statement for the quarters at issue in this matter, via restitution. Tr. p. 12 (John Doe).
16. Based on the unpaid amounts of penalties and interest that had accrued on the unpaid withholding tax due from ABC prior to the date such tax payments were made, as of August 5, 2010, the Department determined that the remaining total amount of tax,

penalties and interest due from ABC for the months at issue was \$91,659.28. *See* Department Ex. 7.

**Analysis:**

Section 1002(d) of the Illinois Income Tax Act (IITA) provides:

Willful failure to collect and pay over tax. Any person required to collect, truthfully account for, and pay over the tax imposed by this Act who willfully fails to collect such tax or truthfully account for and pay over such tax or willfully attempts in any manner to evade or defeat the tax or the payment thereof, shall, in addition to other penalties provided by law, be liable for the penalty imposed by Section 3-7 of the Uniform Penalty and Interest Act.

35 ILCS 5/1002(d).

Section 3-7 of the Uniform Penalty and Interest Act (UPIA) provides, in pertinent part:

(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 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. 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. If reproduced copies of the Department's records are offered as proof of that determination, the Director must certify that those copies are true and exact copies of records on file with the Department. If computer print-outs of the Department's records are offered as proof of such determination, the Director must certify that those computer print-outs are true and exact representations of records properly entered into

standard electronic computing equipment, in the regular course of the Department's business, at or reasonably near the time of the occurrence of the facts recorded, from trustworthy and reliable information. 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.

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35 ILCS 735/3-7(a).

Pursuant to UPIA § 3-7(a), once the Department introduced the NODs into evidence under the certificate of the Director (Department Ex. 1; Tr. pp. 4-5, 7), it presented prima facie proof that Taxpayers were personally responsible for ABC's unpaid withholding tax liabilities, including interest and penalties thereon. 35 ILCS 735/3-7(a); Branson v. Department of Revenue, 68 Ill. 2d 247, 260, 659 N.E.2d 961, 968 (1995).

The Department's prima facie case is a rebuttable presumption. Branson, 68 Ill. 2d at 262, 659 N.E.2d at 968. After the Department introduces its prima facie case, the burden shifts to the taxpayer to establish that one or more of the elements required for the imposition of the penalty are lacking. Raleigh v. Illinois Department of Revenue, 530 U.S. 15, 18-19, 120 S.Ct. 1951, 1954, 147 L.Ed.2d 13 (2000) (*citing* Branson, 168 Ill. 2d at 256-61, 659 N.E.2d at 966-68). A taxpayer cannot overcome the Department's prima facie case by merely denying the accuracy of Department's assessment, or by merely denying conscious awareness that the tax was due by the corporation. Branson, 168 Ill. 2d at 267, 659 N.E.2d at 971. Instead, the taxpayer must present evidence that is consistent, probable, and closely identified with its books and records. PPG Industries, Inc. v. Department of Revenue, 328 Ill. App. 3d 16, 33, 765 N.E.2d 34, 48 (1<sup>st</sup> Dist. 2002); Balla v. Department of Revenue, 96 Ill. App. 3d 293, 296-97, 421 N.E.2d 236,

239 (1<sup>st</sup> Dist. 1981).

### **Issues and Arguments**

John Doe made two arguments at hearing, on Taxpayers' behalf. First he contends that the assessments proposed on the NOD should be limited to the tax proposed due for first three quarters listed on the NODs and on the Department's 2010 Statement. John Doe reasons that the proposed liability should be reduced because he had been ready and willing to pay all of the tax, for all of the quarters at issue, during Illinois' 2003 amnesty period, but was precluded from doing so by the State's criminal investigation. Tr. pp. 10-13 (John Doe); *see also* Pre-Hearing Order, dated May 27, 2010 (Pre-Hearing Order).<sup>3</sup> Next, John Doe asks that the NOD issued to Jane Doe, his wife, be dismissed outright, because the circuit court determined that she was not a responsible officer of ABC. Tr. p. 12 (John Doe). The Department did not directly respond to either of Taxpayers' arguments. *See* Tr. pp. 19-20.

I begin by addressing Taxpayers' latter argument, that the NOD issued to Jane Doe should be dismissed. The basis for Taxpayers' argument was that the criminal case allowed them to show that Jane Doe "had no responsibilities or involvement in any liabilities." Tr. p. 12. Taxpayers, however, offered no documentary evidence to

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<sup>3</sup> The Pre-Hearing Order sets forth the following issues:

- The issues in this case are (1) whether Taxpayers (individually or jointly) were responsible for filing the tax returns and paying the taxes for ABC Properties, Inc., (2) if so whether Taxpayers (individually or jointly) were willful in their failure to do so pursuant to the Notice of Deficiency dated February 25, 2004 for the tax, penalty and interest for the second, third and fourth quarters of 1998, the second, third and fourth quarter of 2000, all quarters of 2001 and the first and second quarters of 2002, and (3) the correct amount currently due on each quarter at issue.
- There is an issue of whether the assessments on some of the quarters are limited due to the Department's action or failure to act in response to Taxpayer's amnesty request during the Department's 2003 amnesty program.

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Pre-Hearing Order.

corroborate this argument. For example, Taxpayers offered no written plea agreement between John Doe, ABC, Jane Doe, and the State of Illinois, in which the parties made some agreement regarding Jane Doe's actions regarding ABC, which agreement might be binding on an administrative determination regarding Jane Doe's potential civil responsibility for ABC's tax liabilities. Alternatively, they offered no documents to show that Jane Doe was not a responsible officer because, for example, she lacked the authority to sign ABC's checks and therefore could not have been responsible for paying ABC's tax liabilities. In short, what Taxpayers offered was mere testimony that the Department's determinations were not correct. Tr. p. 12 (John Doe).

But, as a matter of law, mere testimony is not sufficient to rebut the Department's presumptively correct determination that an individual is personally liable for a corporation's unpaid tax liabilities. Branson, 168 Ill. 2d at 267, 659 N.E.2d at 971. In Branson, the Illinois supreme court made clear that "[a]fter the Department presents a prima facie claim for tax penalty liability, our construction of [the applicable statute] places the burden on the taxpayer to establish that one or more of the elements of the penalty are lacking." Branson, 168 Ill. 2d at 261, 659 N.E.2d at 968; 35 ILCS 735/3-7.

In sum, Taxpayers offered no evidence to show that Jane Doe was not one of ABC's responsible officers. Nor did they offer evidence to show that they did not willfully fail to file the quarterly returns for the periods at issue. Indeed, John Doe has never denied that he was a responsible officer of ABC, and that he was personally liable for ABC's outstanding withholding tax liabilities. *See* Tr. *passim*. Therefore, the Department's determinations regarding those facts have not been rebutted. *See* Branson, 168 Ill. 2d at 261, 659 N.E.2d at 968; 35 ILCS 735/3-7(a).

I move now to Taxpayers' argument that it is not liable for all of the amounts proposed in the NODs, and identified on the 2010 Statement. At hearing, John Doe first objected to the correctness of the Department's initial determination of the amount of tax withheld by ABC, as set forth on the 2003 audit form, by pointing out that it was contradicted by the Department's 2010 Statement. Tr. pp. 6-8; Department Exs. 3, 7. The Department agreed on this point, and it conceded that the tax amounts proposed due on the NODs were superseded by the tax amounts shown to have been paid, for the same months, on the 2010 Statement. *Compare* Department Ex. 3 *with* Department Ex. 7; Tr. pp. 7-8.

The Department's correction of the tax amounts due for the quarters at issue, therefore, is based on John Doe's actual payments of more tax than the Department previously estimated ABC owed for particular quarters. *Compare* Department Ex. 3 *with* Department Ex. 7 *and* Tr. p. 12 (John Doe). At least for purposes of the tax proposed to be due in the NODs, when John Doe paid more tax than the Department originally estimated ABC owed, Taxpayers thereby conceded the correctness of the increased amount of tax that ABC withheld, or should have withheld, for each such quarter identified on the 2010 Statement. *See In re Cook County Treasurer*, 166 Ill. App. 3d 373, 379, 519 N.E.2d 1010, 1014 (1<sup>st</sup> Dist. 1988) *aff'd* 131 Ill. 2d 541 (1989) (generally, any statement made by a party or on his behalf which is inconsistent with his position in litigation may be introduced into evidence against him); Michael H. Graham, Cleary & Graham's Handbook of Illinois Evidence § 802.1 ("Relevant admissions of a party, whether consisting of a statement or conduct, are admissible when offered by the opponent as an exception to the Hearsay Rule.") (*citing Gilson v. Gulf, M & O. Co.*, 42

Ill. 2d 193, 246 N.E.2d 269 (1968)). In other words, both parties acknowledge that the tax amounts proposed within the NODs were corrected by the 2010 Statement, on which the Department took into account the tax amounts ABC actually withheld for certain quarters, and which amounts were paid, via restitution, in 2010. Department Exs. 3, 7; Tr. pp. 7-8, 12.

Taxpayers' argument here, in other words, is not really directed to the amount of tax that ABC actually withheld, or which it was required to withhold, for the quarters at issue. Instead, it is directed to the amounts of the penalties and interest identified on the 2010 Statement. *See* Pre-Hearing Order. The 2010 Statement itemizes the total due from ABC, for each quarter, into separate amounts of tax, penalty and interest. Department Ex. 7. It does not, however, particularly identify which penalties the Department proposes to assess against Taxpayers. *See id.* Nor did the Department do so at hearing. *See* Tr., *passim*. Despite the uncertainty over which particular penalties the Department proposed here, the fundamental issue — what penalties properly apply to ABC's failures timely to file its quarterly withholding tax returns, and to pay such liabilities — is more a question of law, than one of fact. But neither the evidence nor Illinois law supports John Doe's argument that Taxpayers' personal liability for ABC's taxes should be reduced to *only* the amount of tax that remains unpaid for the first three quarters listed on the NODs. On this point, it is important to recall that the Department determined that ABC's outstanding tax liabilities included penalties and interest for which Taxpayers were derivatively and personally liable. Department Ex. 1. Since that determination is presumptively correct (35 ILCS 735/3-7(a); Branson, 168 Ill. 2d at 261, 659 N.E.2d at 968), Taxpayers bear the burden to show that the penalty and interest amounts the Department proposed against

them should not apply. PPG Industries, Inc., 328 Ill. App. 3d at 33, 765 N.E.2d at 48.

Illinois law provides that employers doing business in Illinois, and required by the Internal Revenue Code to withhold tax on compensation paid in Illinois to Illinois residents, are also required to timely file Illinois withholding returns, and to pay over to the Department the amounts of tax withheld. 35 ILCS 5/701; 35 ILCS 5/704. Employers who withhold, or who are required to withhold, such Illinois income tax from compensation paid in Illinois, are liable for such tax. 35 ILCS 5/705. More specifically, § 705 provides, in pertinent part: “For purposes of assessment and collection, any amount withheld or required to be withheld and paid over to the Department, and any penalties and interest with respect thereto, shall be considered the tax of the employer.” 35 ILCS 5/705 (emphasis added).

Taxpayers do not dispute that ABC was an employer who was required to file quarterly returns and pay over to the Department the tax it withheld from its employees. Taxpayer Exs. 1-2; Tr. p. 12 (John Doe). The tax amounts John Doe paid for all but the first three quarters listed on the NODs, moreover, admit the Department’s presumptively correct determination that ABC was liable for such tax amounts. Department Exs. 1, 7. The amounts the Department proposed to assess against Taxpayers include tax, penalties and interest (Department Exs. 1, 7), and § 705 of the IITA clearly requires that applicable penalties and interest be considered part of the tax ABC owes. 35 ILCS 5/705. The job now is to determine the type and amount of penalties that properly apply here.

The UPIA became effective in 1994, prior to the periods at issue, and is applicable to such periods. 35 ILCS 735/3-1; P.A. 87-205 (eff. January 1, 1994). Briefly, the UPIA authorizes the imposition of the following different types of penalties: late filing penalties (35 ILCS 735/3-3(a), (a-5), (a-10)); late payment penalties (35 ILCS

735/3-3(b), (b-5), (b-10)); penalties for failure to file correct information returns (35 ILCS 735/3-4); negligence penalties (35 ILCS 735/3-5); fraud penalties (35 ILCS 735/3-6); and personal liability penalties (35 ILCS 735/3-7). Starting with the last in the series, a corporate taxpayer is not a person who is subject to a personal liability penalty, so ABC, itself, would not be subject to a personal liability penalty. *See* 35 ILCS 735/3-7. Next, both the negligence and the fraud penalties are imposed on a taxpayer who has filed a return with the Department. 35 ILCS 735/3-5; 35 ILCS 735/3-6. The Department determined that ABC had not filed the quarterly returns for the quarters at issue (Department Ex. 3), and there was no evidence offered at hearing to show that ABC has ever filed those delinquent returns. Thus, neither the negligence nor the fraud penalties apply here. 35 ILCS 735/3-5; 35 ILCS 735/3-6. Moving on, the withholding tax returns ABC was required to file for the quarters at issue are not information returns, as that phrase is defined within UPIA § 3-4(c). 35 ILCS 735/3-4(c). Therefore, that penalty does not apply to this situation. 35 ILCS 735/3-4. The remaining penalties authorized by the UPIA are for late filing and late payment, and are discussed more fully below.

Section 3-3 of the UPIA authorizes the imposition of a penalty for failing to file, timely, a return that is required to be filed by a taxpayer. 35 ILCS 735/3-3(a-5), (a-10). The late filing penalty is assessed in two tiers, both of which may be imposed. The first tier is measured as 2% of the tax required to be shown due on a return that was required to be filed, up to a maximum of \$250. 35 ILCS 735/3-3(a-5). The second tier is the greater of 2% of the tax required to be shown due on a return, or \$250. *Id.* The second tier penalty may not exceed \$5,000. *Id.* In short, if both tiers apply, the greatest late filing penalty that may be imposed will be the greater of \$5,250, or 2% of the tax that should

have been reported on the return, plus \$250. *Id.* Absent some question of notice, the only fact that would prevent the second tier penalty from being automatically added to the first tier penalty would be if the taxpayer filed a delinquent return within 30 days from the date the Department notifies it that the required return has not been filed. *Id.*

For returns due on and after January 1, 2001, the legislature retained the two tier structure for the late filing penalty, but allowed a taxpayer the opportunity to show that the first tier penalty base (that is, the tax required to be shown due on a return) ought to be “reduced by any tax that is paid on time or by any credit that was properly allowable on the date the return was required to be filed ....” 35 ILCS 735/3-3(a-10). This amendment does Taxpayers no good here, as they do not claim that ABC paid some amount of its withholding taxes timely, or that ABC had credits available to use to offset the tax amounts it was required to show due on the quarterly returns it did not file. *See* Taxpayer Exs. 1-2; Tr., *passim*.

Based on the UPIA’s provisions in effect during the quarters at issue, the late filing penalties applicable to ABC for not timely filing the returns at issue are equal to 2% of the tax required to be shown due on each of the quarterly returns that were not filed, plus \$250, for each unfiled return period. 35 ILCS 735/3-3(a-5), (a-10); *see also* Department Ex. 7. To convert that conclusion into dollars and cents, the applicable late filing penalties, which are considered part of the tax ABC owes for the periods at issue (35 ILCS 5/705), are as follows:

Period	Tax	Applicable UPIA § 3-3 Late Filing Penalty 2% of tax (first tier) + 250 (second tier)
2/Q/1998	3,375.00	67.50 + 250 = 317.50
3/Q/1998	3,375.00	67.50 + 250 = 317.50
4/Q/1998	3,375.00	67.50 + 250 = 317.50
2/Q/2000	4,730.55	94.61 + 250 = 344.61

3/Q/2000	4,671.89	93.44 + 250	=	343.44
4/Q/2000	4,470.92	89.42 + 250	=	339.42
1/Q/2001	3,594.23	71.88 + 250	=	321.88
2/Q/2001	3,582.80	71.66 + 250	=	321.66
3/Q/2001	4,004.33	80.09 + 250	=	330.09
4/Q/2001	4,499.44	89.99 + 250	=	339.99
1/Q/2002	3,745.47	74.91 + 250	=	324.91
2/Q/2002	4,596.44	91.93 + 250	=	341.93
Total Applicable Late Filing Penalty				\$ 3,960.43

Department Ex. 7; 35 ILCS 735/3-3(a-5), (a-10). When calculating the first tier late filing penalty for each quarter, I rounded the product to the nearest cent.

Section 3-3(b) of the UPIA also imposes a penalty for a taxpayer's failure timely to pay an amount of tax when due. 35 ILCS 735/3-3(a-5), (a-10). For returns due on and after January 1, 1998 and on or before December 31, 2000, UPIA § 3-3(b-5) imposed a 20% penalty for failing to pay the full amount of any tax shown due, or required to be shown due, on a return within 30 days after a notice of arithmetic error, notice and demand, or a final assessment is issued by the Department. 35 ILCS 735/3-3(b-5)(2).

For returns due on and after January 1, 2001 and on or before December 31, 2003, the Illinois General Assembly reduced the UPIA's late payment penalty rate from a straight 20% to a sliding scale that went up to 15%, depending on the length of time between the date tax was due and the date tax was paid. 35 ILCS 735/3-3(b-10)(1). The 15% rate is imposed if the period between the date tax is due and the date tax is paid is greater than 180 days. *Id.* Considering that here, tax was due on the date the respective quarterly returns were due (35 ILCS 5/704(b)), that is, in 1998 through 2002, and tax was paid, for most of the quarters at issue, in 2010 (*see* Order, dated January 19, 2010; Department Ex. 7), I conclude that ABC's tax liabilities for the quarters at issue include the applicable late payment penalties authorized either by UPIA § 3-3(b-5) or (b-10). 35

ILCS 5/705; 35 ILCS 735/3-3(b-5)(1), (b-10)(1). The late payment penalties applicable here are:

Period	Tax	Applicable UPIA § 3-3 Late Payment Penalty	
		Penalty Rate	Penalty Amount
2/Q/1998	3,375.00	20%	675.00
3/Q/1998	3,375.00	20%	675.00
4/Q/1998	3,375.00	20%	675.00
2/Q/2000	4,730.55	20%	946.11
3/Q/2000	4,671.89	20%	934.38
4/Q/2000	4,470.92	15%	670.64
1/Q/2001	3,594.23	15%	539.13
2/Q/2001	3,582.80	15%	537.42
3/Q/2001	4,004.33	15%	600.65
4/Q/2001	4,499.44	15%	674.92
1/Q/2002	3,745.47	15%	561.82
2/Q/2002	4,596.44	15%	689.47
Total Applicable Late Payment Penalty			\$ 8,179.54

Department Ex. 7; 35 ILCS 735/3-3(b-5), (b-10). Again, when calculating the applicable statutory penalty, I rounded to the nearest cent.

To summarize, the penalties authorized by the UPIA and which are applicable to ABC's failures timely to file quarterly withholding returns and to pay its withholding taxes when due, consist of late filing penalties in the amount of \$ 3,960.43, and late payment penalties in the amount of \$ 8,179.54. 35 ILCS 5/705; 35 ILCS 735/3-3(a-5), (a-10), (b-5), (b-10). After taking into account the penalties properly applicable to ABC's withholding tax liabilities for the quarters at issue, I now compare those applicable penalties with the penalties the Department proposed to assess on the NODs, and more specifically identified on the 2010 Statement. Department Exs. 1, 7; Tr. pp. 5-8. The table below repeats the penalty and interest amounts identified on the 2010 Statement, and then calculates those separate amounts as a percentage of the tax proposed, or paid, for each quarter:

Period	Tax	Penalty	Penalty as % of Tax	Interest	Interest as % of Tax
2/Q/1998	3,375.00	1,485.00	44%	7,378.33	219%
3/Q/1998	3,375.00	1,485.00	44%	7,187.07	213%
4/Q/1998	3,375.00	1,485.00	44%	6,992.72	207%
2/Q/2000	4,730.55	2,081.44	44%	7,779.62	164%
3/Q/2000	4,671.89	2,055.64	44%	7,377.91	158%
4/Q/2000	4,470.92	1,520.12	34%	4,734.78	106%
1/Q/2001	3,594.23	1,222.02	34%	3,700.02	103%
2/Q/2001	3,582.80	1,218.16	34%	3,537.77	99%
3/Q/2001	4,004.33	1,361.48	34%	3,812.76	95%
4/Q/2001	4,499.44	1,529.82	34%	4,133.14	92%
1/Q/2002	3,745.47	1,273.46	34%	3,330.87	89%
2/Q/2002	4,596.44	1,596.80	34.7%	3,948.68	86%

See Department Ex. 7. Again, when computing the percentages above, I rounded to the nearest significant digit.

Based on the 2010 Statement, the Department is proposing to assess a penalty that is equal to approximately 44% (for the first five quarters listed within the NODs), or 34% (for the next six quarters) of the tax amounts either proposed or paid. Department Ex. 7. The penalty for the last quarter is the only odd one, which equals about 34.7% of the tax paid. *Id.* The Department offered no argument at the end of the hearing, so I do not know, for certain, the basis for the penalty amounts identified on the 2010 Statement. But after taking into account Taxpayers' argument that the amounts assessed against them should be reduced because they were precluded from taking advantage of the 2003 TDAA, it is hard to ignore that the penalty amounts identified on the 2010 Statement are roughly equal to 200% of the sum of the 2% late filing penalty, plus the 20% or 15% late payment penalty, that would be properly applicable under the UPIA.

The incentivizing features of the 2003 TDAA were that it allowed eligible taxpayers to pay many eligible taxes without penalty or interest, plus it allowed eligible taxpayers to avoid the doubling of penalty and interest for any eligible taxes that could

have been paid during the amnesty period. *See* 35 ILCS 745/1 *et seq.* (2003). Obviously, the key word here is “eligible,” and both the law, and the competent, credible evidence within this record make clear that neither of the Taxpayers were eligible for amnesty, even if ABC might have been.

Section 10 of the 2003 TDAA provided, in part:

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Amnesty shall not be granted to taxpayers who are a party to any criminal investigation or to any civil or criminal litigation that is pending in any circuit court or appellate court or the Supreme Court of this State for nonpayment, delinquency, or fraud in relation to any State tax imposed by any law of the State of Illinois.

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35 ILCS 745/10 (2003). The Orders entered in this matter, and John Doe’ testimony that is consistent with those Orders and other documentary evidence, show that Taxpayers were “a party to a [ ] criminal investigation” at the time of the 2003 TDAA. *See* Orders dated September 1, 2005 through January 19, 2010; Taxpayer Exs. 1-2; Tr. pp. 12-15 (John Doe). Pursuant to a legislative mandate, also included within § 10 of the 2003 TDAA, the Department adopted emergency regulations to implement the provisions of that Act, one of which provided:

Eligible Taxpayers – Criminal Investigation or Case. ITDAA Section 10 provides that amnesty may not be granted to taxpayers that are a party to *any criminal investigation for nonpayment, delinquency or fraud in relation to any State tax imposed by any law of the State of Illinois* with respect to an otherwise Eligible Liability. A taxpayer who is a party to a pending investigation or case is ineligible to participate in the Amnesty Program with respect to the specific taxes and tax periods under investigation or contained in the complaint, information, or indictment, and will not be subject to the 200% Sanction for failure to participate in the Amnesty Program with respect to that liability.

86 Ill. Admin. Code § 520.105(g) (emphasis original).

Another part of the same emergency regulations provided:

(h) Eligible Liabilities. Under ITDAA Section 10, the Amnesty Program applies to *any tax, except for the motor fuel use tax imposed under 35 ILCS 505/13a, imposed by reason of or pursuant to authorization by any law of the State of Illinois and collected by the Department*. Each liability that comes within this definition and meets the other criteria for a taxpayer to participate in the Amnesty Program is generally divisible into two parts: the Eligible Liability that must be paid during the Amnesty Program and the penalty and interest that may be abated under the Amnesty Program. An exception to this rule is the reimbursement of collection expenses incurred by the Department, when those expenses are not deemed by statute to be part of the related tax liabilities. The obligation to pay these expenses is not a penalty that may be abated by participation in the Amnesty Program, nor does failure to pay one of these expenses during the Amnesty Program Period disqualify the taxpayer from the benefits of amnesty. The following examples are illustrative of items that may be characterized as Eligible Liabilities or as penalties or interest that may be abated, or as expenses that are neither Eligible Liabilities nor penalties:

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(6) Responsible officer penalties imposed pursuant to Section 3-7 of the Uniform Penalty and Interest Act for failure to collect, account for and pay over trust taxes are penalties imposed on the responsible officer, even though the penalty includes unpaid tax, and therefore cannot be Eligible Liabilities of the responsible officer. However, a responsible officer's employer may participate in the Amnesty Program. If the underlying trust tax liability of the employer is paid under the Amnesty Program, the related penalties and interest, and therefore the responsible officer penalty, will be abated.

86 Ill. Admin Code § 520.105(h)(6) (emphasis original). Under the plain text of the 2003 TDAA and related regulations, Taxpayers here were not eligible for amnesty for any of the quarters at issue, and they cannot, therefore, be subject to “the 200% Sanction for failure to participate in the Amnesty Program with respect to that liability.” 86 Ill. Admin. Code § 520.105(g); 86 Ill. Admin Code § 520.105(h)(6).

Taxpayers have argued that the only amounts that they could possibly owe, as responsible officers of ABC, are the amounts of the taxes remaining unpaid for the 1998 quarters at issue. Tr. pp. 10-13 (John Doe). I cannot agree, because the tax ABC owes —

for all of the periods at issue — includes the applicable late filing and late payment penalties authorized by UPIA 3-3, and applicable statutory interest authorized by UPIA § 3-2. 35 ILCS 5/705; 35 ILCS 735/3-2; 35 ILCS 735/3-3(a-5), (a-10), (b-5), (b-10). But since the 2010 Statement clearly overstates the amount of the penalties that are applicable to each of the quarters at issue, I conclude that Taxpayers have rebutted the Department's determination that they are personally liable for the total amount of penalties as stated thereon. And since the 2010 Statement's identification of the applicable penalties due for each quarter is clearly in error, the interest amounts identified for each quarter must also be revised. Therefore, the penalty and interest amounts proposed on the NODs, and putatively corrected by the 2010 Statement, must be revised to be consistent with the UPIA's statutory penalty and interest provisions applicable to taxes or taxpayers that were not eligible for amnesty under the 2003 TDAA. 86 Ill. Admin. Code § 520.105(g); 86 Ill. Admin Code § 520.105(h)(6).

### **Conclusion**

Taxpayers have not rebutted the Department's prima facie correct determinations that they are both responsible officers of ABC, and that they both willfully failed to file ABC's quarterly withholding tax returns for the quarters at issue. Taxpayers have also not rebutted the Department's presumptively correct determination that they are personally liable for ABC's outstanding tax liabilities for the quarters at issue, which liabilities include applicable statutory penalties and interest. Taxpayers have, however, rebutted the correctness of the Department's calculation of the amounts of penalties and interest that shall be considered part of ABC's outstanding tax due for the quarters at issue.

I recommend, therefore, that the Director revise the NODs to give Taxpayers credit for the taxes paid, via restitution, for the second quarter of 2000 through the second quarter of 2002. I also recommend that the NODs be revised to include only the late filing and late payment penalties as authorized by UPIA § 3-3, and interest as authorized by UPIA § 3-2, and which are applicable to taxpayers who were not eligible for amnesty under the 2003 TDAA. I recommend that the NODs be finalized as so revised, pursuant to statute.

May 16, 2011

John White  
Administrative Law Judge