

IT 16-06

Tax Type: Income Tax

Tax Issues: Burden of Proof and Business/Non-Business (General)

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

THE DEPARTMENT OF REVENUE)	Docket No.	XXXX
OF THE STATE OF ILLINOIS)	Tax Periods	3/Q/91-1/Q/96
v.)	1002D NOD No.	XXXX
<i>JOHN DOE</i> , as responsible)		
officer of <i>ABC Business</i> , Inc.,)	John E. White,	
Taxpayer)	Administrative Law Judge	

RECOMMENDATION FOLLOWING SECOND REMAND

Appearances: Jennifer Kieffer, Special Assistant Attorney General, appeared for the Illinois Department of Revenue; *John Doe*, previously appearing *pro se*, did not appear at hearing.

Synopsis: This matter involves a personal liability penalty notice (Notice) the Illinois Department of Revenue (Department) issued to *John Doe* (*John Doe*), as a responsible officer of *ABC Business*, Inc. (*ABC Business*). The penalty proposed is equal to the amount of the Illinois income taxes the Department determined *ABC Business* withheld, or was required to withhold, from the wages of its employees during the third quarter of 1991 through and including the first quarter of 1996, and which *ABC Business* failed to pay over to the Department. The matter has previously been the subject of a default order entered against *John Doe*. *John Doe* appealed that default, via administrative review.

The matter has twice been remanded to the Department's Office of Administrative Hearings by the Circuit Court of *Any County*, Illinois. *John Doe* v. Illinois Department of Revenue, No. XXXX, Order, dated March 5, 2014 (hereafter First Remand Order); Opinion and Order, dated December 16, 2014 (hereafter Second

Remand Order). Pursuant to the Second Remand Order, the Department was directed “to reopen proofs and take evidence on any audits of *ABC Business* that occurred prior to 2006 ...” and was further ordered “to conduct a statute of limitations analysis that includes a review of all audits of *ABC Business* for the third quarter of 1991 through and including the first quarter of 1996.” Second Remand Order, p. 5. During the initial and subsequent status conferences held following the second remand, the administrative law judge (ALJ) notified the parties that he understood the Second Remand Order as requiring the Department to consider whether *ABC Business* had a statute of limitations defense regarding the Notice of Deficiency (NOD) the Department previously issued to it. The Department objected to such a review as being beyond the jurisdiction of the Office of Administrative Hearings.

At a scheduled prehearing conference held on October 19, 2015, *John Doe* presented a series of motions, which included: a Motion to Strike [the Department’s] Affidavit of Completeness; a Motion Request for Immediate Final Decision; and a Motion Request for Stipulation to Restrict Hearing to Statute of Limitations Analysis Pursuant to Order of Court (Motions). Pre-Hearing Order, dated October 20, 2015. Each of the Motions was addressed by Department counsel, identified within the order entered following the pre-hearing conference, and denied. *Id.* Immediately after such Motions were denied, and before the pre-hearing conference was concluded, *John Doe* presented to the ALJ and Department’s counsel a letter, from *John Doe* to Department’s Counsel, dated October 19, 2015 (*John Doe*’s letter), in which *John Doe* wrote that he would “not participate or appear for any hearing in this case ...” *John Doe*’s letter. Upon

presentation of the letter, *John Doe* was asked whether he was withdrawing his protest, to which he replied, in substance and not verbatim, that he was not withdrawing anything.

At hearing, the Department offered evidence regarding the issues set forth in the Pre-Hearing Order, and as directed by the Second Remand Order.¹ As indicated within his letter, *John Doe* did not appear at hearing, and, as a result, he offered no evidence that might have supported any of the factual allegations he previously made in numerous motions and/or arguments offered in support of such motions. After considering the evidence admitted at hearing, and the directions upon remand, I am including in this recommendation findings of fact and conclusions of law. I further adopt and incorporate into this recommendation prior findings of fact and conclusions of law.

Findings of Fact:

1. *ABC Business* Inc. was an Illinois corporation that was incorporated in March 1986 and involuntarily dissolved by the Illinois Secretary of State in August 1997. Department Ex. 2 (certified copies of Illinois Secretary of State (SOS) Domestic Corporation Annual Report forms for *ABC Business* for each of the years 1991 through 1996); Department Ex. 8 (copies of, respectively, Director's certificate of records, and Audit History Worksheet), p. 3; *see also ABC Business, Inc.*, 332 N.L.R.B. No. 52, at 704 (October 1, 2001) (National Labor Relations Board's (NLRB) October 2001 Decision and Order, and the March 2001 administration decision which the Board affirmed, are viewable at NLRB's web site at: <https://www.nlr.gov/case/13-CA-038669>) (last viewed on April 8, 2016) (the

¹ The evidence offered at the hearing directed to be held following remand, and other documents of record, will be prepared and submitted to the Circuit Court as a supplement to the Department's answer in administrative review, after the Director issues the Department's final administrative decision following remand. *See* 735 ILCS 5/3-108(c).

Findings of Fact in the March 2001 NLRB administrative decision include, “*ABC Business* [Inc.], a corporation, with offices and places of business in *Anyplace*, Illinois, was engaged in the business of providing security guard services until August 1997, when the Secretary of State for Illinois dissolved the corporation.”).

2. During the years of 1991 through 1996, *John Doe* was *ABC Business*'s president. Department Ex. 2.
3. From June 1991 through October 1994, *ABC Business* had a contract to provide security guard services to the *Anyplace* Housing Authority (AHA) at residential sites within the City of *Anyplace*, and pursuant to which the AHA paid funds to *ABC Business*, which constituted in excess of 98% of *ABC Business*'s annual gross receipts. Department Ex. 3 (certified copies of, respectively: Special March 2001 *ABC Business* Grand Jury Second Superseding Indictment, case number 97-CR-516, dated September 5, 2001, and docketed in the United States District Court, Northern District of Illinois, Eastern Division (hereafter, *John Doe* indictment); Minute Order Form (showing docket entry for jury verdict in case number 97-CR-516-2 & 3, regarding defendants John and Jane *Doe*) (hereafter, Minute Order); and Judgment in a Criminal Case form in case number 97-CR-516-2, regarding defendant *John Doe*) (hereafter, Judgment Order)), pp. 4-6 (of *John Doe* indictment); *ABC Business, Inc.*, 332 NLRB No. 52, at 704 (October 1, 2001).
4. During the years of 1991 through 1996, *ABC Business* did not file Illinois quarterly withholding tax returns with the Department to report the amounts of Illinois income taxes it withheld, or which it was required to withhold, from the wages of its employees during such quarters. Department Ex. 4 (copy of Department Records

Manager Linda Ballard's (Ballard) letter, certifying, in pertinent part, that, "I have diligently searched the records of this Department[. . . and n]o Illinois Employers' Quarterly Withholding Tax Returns for January of 1991 through March of 1996 were processed as of May 5, 2014 for *ABC Business* Inc. ... FEIN# XXXX"); Department Ex. 7 (copies of, respectively, Director's certificate of records, and Audit Comments report), p. 2 ("The departmental records also indicate that the taxpayer [*ABC Business*] has never filed withholding tax returns.").

5. On or about January 1999, the Department's Bureau of Criminal Investigations (BCI) initiated a criminal investigation involving *John Doe*, *Jane Doe* and *ABC Business*, regarding "WIT [withholding income tax] – Fraud & Failure to File[.]" Department Ex. 13 (copies of, respectively, Director's certificate of records, and 2 pages of printed screen shots from the Department's computer files regarding BCI investigation in case number XXXX), p. 2.
6. The BCI investigation regarding case number XXXX was completed on or about June 2000, without any action being taken by BCI. Department Ex. 13, p. 3; Hearing Transcript (Tr.), pp. 38-44 (testimony of Department audit supervisor Laurie Evans (Evans)).
7. The contents of the Department investigation case file number XXXX were destroyed per Department procedures. Department Ex. 14 (copy of Department Records Manager Ballard's letter, certifying that there was a record of Department investigation case file number XXXX, regarding John and *Jane Doe*, but that it could not be produced because the case file in investigation number XXXX was destroyed per Department procedures). The Department records still in existence regarding that

BCI investigation consist of printed copies of screen shots from the Department's computer records. Department Ex. 13, pp. 2-3; Tr. pp. 35-44 (Evans).

8. Of the Department's existing computer records regarding BCI investigation case file number XXXX, a screen shot of a page titled, Investigations Entry Screen, includes a field titled, Case Review Comments, which contains the following text: "1/2000 WIT. Flag Q. Out of business. Feds have all the records. R & E could not get records. Will see if the feds will give us records & if IRS is involved. N/A pros submitted. 5/2000 case discontinued." Department Ex. 13, p. 3.
9. Count 1 of the *John Doe* indictment provided, in pertinent part:

THE JOHN DOE COMPANIES

(a) Defendants *John Doe* and *Jane Doe* operated the following businesses:

- (1) *ABC Business, Inc. (ABC Business)*, an Illinois corporation with offices located at , *Anyplace, Illinois*, and *Anyplace, Illinois*, which was in the business of providing security guard services;
- (2) *DEF Business, Inc. ****
- (3) *Any County Investigations, Inc. ****
- (4) *GHI Business, Inc. ****
- (5) *JKL Business, Inc. ****

THE JOHN DOE ENTERPRISE

(b) *ABC Business, DEF Business, Any County Investigations, GHI Business*, and defendants *John Doe* and *Jane Doe* were associated in fact, and constituted the "enterprise" (hereinafter the "*John Doe Enterprise*") ***

INDIVIDUALS ASSOCIATED WITH THE JOHN DOE ENTERPRISE

(c) Defendant *John Doe* was a person associated with the *John Doe Enterprise*, in that he was president of *ABC Business, Any County Investigations*, and *GHI Business*, an officer of *DEF Business*; and, together with defendant *Jane Doe*, operated and controlled the activities of *ABC Business, DEF Business, Any County Investigations*, and *GHI Business*;

Department Ex. 3: *John Doe* indictment, pp. 1-3.

10. Count 4 of the *John Doe* indictment provided, in pertinent part:

1. Beginning in or about June 1991, and continuing through in or about 1999, in *Anyplace*, ...

John Doe and
Jane Doe, ***

defendants herein, did knowingly conspire:

(a) To defraud the United States of approximately \$2.5 million in tax revenue; and

(b) To defraud the United States by impeding, impairing and obstructing the due operation of the Internal Revenue Service (IRS) in the exercise of its lawful government functions, namely, the ascertainment of income and expenses, and the computation, assessment and collection of employees' withholding and payroll taxes, employer's matching social security taxes and individual and corporate income taxes.

MANNER AND MEANS BY WHICH THE CONSPIRACY WAS CONDUCTED

2. It was part of the conspiracy that defendants *John Doe* and *Jane Doe* withheld employment taxes from the wages of employees of *ABC Business* and *DEF Business* and then converted certain of these funds for the defendants' own benefit, instead of paying all of these funds over to the IRS.

3. It was further part of the conspiracy that defendants *John Doe* and *Jane Doe* concealed from the IRS their conversion of employment taxes withheld from the wages of employees of *ABC Business* and *DEF Business* by not filing all required employment tax returns (Forms 941) with the IRS and by intermingling funds with funds of *ABC Business* and *DEF Business*.

Department Ex. 3: *John Doe* indictment, pp. 77-78.

11. Count 110 of the *John Doe* indictment provided, in pertinent part:

1. At time material to this count:

(a) Defendants *John Doe* and *Jane Doe* were officers of *ABC Business, Inc.*, an Illinois corporation located in *Anyplace*, Illinois.

(b) Defendants *John Doe* and *Jane Doe* were persons responsible for accounting for and paying over taxes withheld from the wages of the employees of *ABC Business, Inc.*,

2. On or about October 31, 1991, at *Anyplace*, in the Northern District of Illinois, Eastern Division,

John Doe and
Jane Doe, ***

Defendants herein, did willfully fail to truthfully account for and pay

over to the ... [IRS] the full amount of those *ABC Business* income taxes withheld from total wages of the employees of *ABC Business* Inc, for the third quarter of 1991 ending September 30, 1991, then due and owing to the United States of America;

In violation of Title 26, United States Code § 7202.

Department Ex. 3: *John Doe* indictment, p. 157.

12. Counts 111 through 127 of the *John Doe* indictment charged *John Doe* with similar, separate violations of 26 USC § 7202 for subsequent quarters, beginning with the fourth quarter of 1991 through and including the fourth quarter of 1992, and for the second quarter of 1993 through and including the first quarter of 1996. Department Ex. 3: *John Doe* indictment, pp. 158-174.
13. After a jury trial, *John Doe* was convicted of all but one of the charges brought by the *John Doe* indictment. Department Ex. 3: Minute Order, p. 1; Judgment Order, pp. 1-2.² More specifically, *John Doe* was convicted of 18 separate charges of violating 26 USC § 7202, regarding the fourth quarter of 1991 through and including the fourth quarter of 1992, and regarding the second quarter of 1993 through and including the first quarter of 1996. Department Ex. 3: *John Doe* indictment, pp. 158-174; Judgment Order, p. 2 (documenting *John Doe*'s conviction of, among others, charges in counts 110-127 of the *John Doe* indictment).
14. On or about May 2007, the Department initiated and conducted an Illinois withholding income tax audit of *ABC Business*, which had a *ABC Business* employer identification number (FEIN) of XXXX, and of John and *Jane Doe*, for an audit

² *John Doe* was acquitted of count 71 of the *John Doe* indictment, which charged a violation of 18 USC §§ 1956(a)(1)(B) and 1956(a)(2). Department Ex. 3: *John Doe* indictment, p. 126; Minute Order; Judgment Order, pp. 1-2. The acts pertinent to that charge are not relevant to this matter. See Department Ex. 1; 35 ILCS 5/1002(d); 35 ILCS 735/3-7.

period that ran from January 1, 1991 through and including March 31, 1996 (Audit Period). Department Ex. 7, pp. 3-7; Department Ex. 8, pp. 4-6.

15. The Department's computer records reflect that the audit the Department began in 2007, and which led to the NOD issued to *ABC Business* in 2008, was the only audit that the Department had conducted of *ABC Business's* business. Department Ex. 15 (copy of, respectively, Director's certificate of records, and print-out of the Department's computer records regarding the Department's audit history of *ABC Business*, including entries showing *ABC Business's* FEIN as XXXX); Department Ex. 16 (copy of, respectively, Director's certificate of records, and print-out of screen shots from Department's computer records of audits involving *ABC Business*, including entries showing *ABC Business's* FEIN as XXXX), pp. 2-3 (showing one audit, for the period from January 1, 1991 to March 31, 1996).
16. On some Department documents or files, the second word of *ABC Business's* corporate name is misspelled, in the plural form. Department Ex. 7, p. 2; Department Ex. 15, pp. 2-3. That is, the name of the corporation is spelled as "*ABC Businesses, Inc.*" instead of "*ABC Business, Inc.*" *Id.* However, in each of the documents or files in which the second word of *ABC Business's* corporate name is misspelled, the same document or file also includes *ABC Business's* true and correct FEIN of XXXX. *Compare* Department Exs. 7, 15 *with* Department Exs. 4-6, 8, 10-13, 16.
17. As part of the Department's audit of *ABC Business*, the Department determined that *ABC Business* had not filed Illinois Employers' Quarterly Withholding Tax Returns with the Department for the third quarter of 1991 through and including the first quarter of 1996. Department Ex. 5 (copy of, respectively, Director's certificate of

records, and Department form EDA-122, Notice of Proposed Deficiency, dated November 10, 2007, and attachments thereto), pp. 6-11 (copies of six schedules titled, Computation of Withholding Tax, Penalty and Interest, one for each of the six years in the Audit Period); Department Ex. 7, p. 2 (“The departmental records also indicate that the taxpayer has never filed withholding tax returns.”); *see also* Department Ex. 4.

18. On or about July 26, 2007, the Department issued a form EDA-122, Notice of Proposed Deficiency, with attachments, to *ABC Business* regarding the Department’s audit. Department Ex. 6 (copies of, respectively, Director’s certificate of records, and Department form EDA-122, Notice of Proposed Deficiency, dated July 26, 2007, and attachments thereto). That notice was returned to the Department as being undeliverable. *Id.*, p. 2.
19. On or about November 20, 2007, the Department issued another Department form EDA-122, Notice of Proposed Deficiency, with attachments, to *ABC Business* regarding its audit of *ABC Business*, but this one was mailed to *John Doe*’s attention. Department Ex. 5.
20. On January 11, 2008, *John Doe* responded to the form EDA-122, Notice of Proposed Deficiency, the Department served to his attention, regarding *ABC Business*. Department Ex. 9 (copies of, respectively, Director’s certificate of records, and January 11, 2008 letter from *John Doe* to Lyons).
21. On September 19, 2008, the Department issued a Notice of Deficiency (NOD) to *ABC Business*, in care of *John Doe*, to propose to assess Illinois withholding tax, including penalties and interest, in part, based on the Department’s determination that

ABC Business did not file quarterly Illinois returns for the third quarter of 1991 through and including the first quarter of 1996, and did not pay the amounts of tax determined to be due. Department Ex. 10 (copies of, respectively, Director's certificate of records, and NOD).

22. *ABC Business* did not protest the NOD. Department Ex. 11 (copy of Department Records Manager Ballard's letter, certifying that no protest was received in response to the NOD issued to *ABC Business* on September 19, 2008).

23. On December 15, 2008, the Department issued nineteen (19) Final Notices of Tax Due (Final Notices) to *ABC Business*, to the attention of *John Doe*, one for each quarter from the third quarter of 1991 through and including the first quarter of 1996. Department Ex. 12 (copies of, respectively, the Director's certificate of records, and 19 Final Notices).

24. On February 14, 2011, the Department issued a Collection Action, Assessment and Notice of Intent (Notice) to *John Doe*, to propose to assess a penalty that was equal to the amount of *ABC Business's* unpaid Illinois withholding income tax liabilities, including penalties and interest, based on *John Doe's* status as a responsible officer of *ABC Business*. Department Ex. 1 (copies of, respectively, the Director's certificate of records, and Notice); 35 ILCS 735/3-7.

Conclusions of Law:

Evidence Taken Regarding Other Department Audits of *ABC Business*

The evidence reflects that the Illinois withholding income tax audit the Department conducted of *ABC Business* regarding the quarters at issue, which the Department began in May 2007, was the only audit that the Department had conducted of

ABC Business's business. Department Ex. 15; Department Ex. 16, pp. 2-3; Tr. pp. 33-37 (Evans).

The Department also offered evidence showing that, besides its audit of *ABC Business* which began in 2007, the Department's BCI also began a criminal investigation of *ABC Business* and the *John Doe* in 1999. Department Exs. 13-14. This evidence consisted of copies of Department computer records regarding BCI's investigation of *ABC Business* and the *John Doe*, and the testimony of Evans. Evans testified that the BCI conducted criminal investigations, and contrasted that task with the duties of auditors. Tr. pp. 38-43 (Evans). As an example, Evans testified that a BCI agent would not issue a notice of deficiency. Tr. p. 39 (Evans). Evans also identified and described the contents of the Department's computer records regarding BCI's criminal investigation of *ABC Business* and *John Doe*. She explained that the computer records showed that the criminal investigation was begun in January 1999, after an Department employee assigned to the Department's individual processing division noticed that an individual filed an Illinois income tax return claiming that Illinois income tax had been withheld by his employer, *ABC Business*, but that the Department processing employee noted that *ABC Business* had not filed any returns to report, or to pay, any such taxes withheld. Tr. pp. 41-42 (Evans); *see* Department Ex. 13, pp. 2-3. Evans also testified that the computer records showed that the BCI investigation was closed in June of 2000, without any action being taken by BCI, based on the IRS's then-current involvement in the matter. Tr. p. 42 (Evans); Department Ex. 13, p. 3.

After considering the evidence admitted at hearing, I recommend that the Director conclude that the Department conducted only one audit of *ABC Business*. Department Ex.

7, pp. 3-7; Department Ex. 8, pp. 4-6; Department Exs. 15-16; Tr. pp. 33-37 (Evans). And even if the criminal investigation that was initiated by the Department's BCI were to be considered an audit, that investigation/audit did not result in any agency action against either *ABC Business* or *John Doe*. Department Exs. 15-16. It was only the audit that the Department began in 2007 which led to the Department's issuance of the NOD to *ABC Business* on September 19, 2008. Compare Department Ex. 10 with Department Exs. 15-16.

Evidence Taken Regarding Potential Statute Of Limitations Defense(s) Against The NOD Issued To *ABC Business*

Section 905 of the Illinois Income Tax Act (IITA) imposes different time limits on the Department's authority to issue a notice of deficiency, depending on different fact situations. 35 ILCS 5/905. The expiration of a statute of limitations is an affirmative defense, which is forfeited if not timely raised. Jenna R.P. v. Anyplace School Dist., 2013 IL App (1st) 112247, ¶ 75, 3 N.E.3d 927, 943 (2013). A party who claims the benefit of a statute of limitations has the burden of proving that the action is barred by the limitations period set by a particular, and applicable, statute. In re Marriage of Stockton, 401 Ill. App. 3d 1064, 1074, 937 N.E.2d 657, 665 (2d Dist. 2010); 25 Ill. Law and Prac. *Limitations of Actions* § 136 (2012). Since *John Doe* chose not to appear at or take part in the hearing the Circuit Court directed the Department's Office of Administrative Hearings to hold, and at which evidence would be taken, he waived any possible statute of limitations defense *ABC Business* might have had against the NOD the Department issued on September 19, 2008. Department Ex. 10; Pre-Hearing Order. Affirmative defenses not made are waived. Jenna R.P., 2013 IL App (1st) 112247 at ¶ 75, 3 N.E.3d at 943.

Regarding this issue, moreover, I need not rely strictly on *John Doe*'s knowing decision to not appear and present evidence at hearing. That is because Department counsel offered into evidence the Department's records manager certification that she had diligently searched the Department's records, and found that such records did not include any of the Illinois Employers' Quarterly Withholding Tax Returns that the Department determined *ABC Business* was required to have filed for the period from January 1991 through and including March 1996. Department Exs. 4, 5-7. That evidence demonstrates that § 905(c) of the IITA applies to this dispute. 35 ILCS 5/905(c) (previously Ill.Rev.Stat. ch. 120, ¶ 9-905(c)); Mitchell v. Department of Revenue, 230 Ill. App. 3d 795, 799, 596 N.E.2d 31, 34 (1st Dist. 1992).

The facts in Mitchell are analogous with the facts in this case, and court's reasoning is on point. Mitchell also involved a personal liability penalty the Department proposed to assess against an individual responsible officer of a corporation, regarding the corporation's unpaid Illinois withholding tax liabilities. *Id.* There, the court confronted the individual officer's claim that the notice of deficiency issued to the corporation was not timely since it issued after the period set by IITA § 905(j). Mitchell, 230 Ill. App. 3d at 797, 596 N.E.2d at 32. As the court noted:

The penalties at issue here were imposed upon Mitchell in his capacity as a responsible officer of Mitco for his willful failure to cause a return to be filed and to collect and pay withholding taxes, pursuant to section 1002(d) of the Act.

Section 905(a) provides the general three-year statute of limitation for notices of deficiency.^{FN2}

FN2. Ill.Rev.Stat.1989, ch. 120, par. 9-905(a) provides:

“Except as otherwise provided in this Act:

- (1) A notice of deficiency shall be issued not later than 3 years after the date the return is filed, and
- (2) No deficiency shall be assessed or collected with respect

to the years for which the return was filed unless such notice is issued within such period.”

Section 905(c) provides an exception to the general statute of limitations and is applicable in this instance.^{FN3} This section addresses the consequences of a total failure to file any return.

FN3. Ill.Rev.Stat.1989, ch. 120, par. 9-905(c) provides:

“No return or fraudulent return. If no return is filed or a false and fraudulent return is filed with intent to evade the tax imposed by this Act, a notice of deficiency may be issued at any time.”

By its express terms, section 905(j) applies only to those withholding tax situations where returns have actually been filed. Where the return has been filed, a notice of deficiency must be filed within three years, three months and 15 days after the close of the calendar year.

The General Assembly further provided that there be an additional penalty for the failure to file withholding returns. Ill.Rev.Stat.1989, ch. 120, par. 10-1004.

This seemingly minor penalty is “in addition to any other penalties imposed by (the) Act.” Ill.Rev.Stat.1989, ch. 120, par. 10-1004.

Accordingly, the circumstances of this case are governed by section 905(c) which relates to taxpayer's or persons derivatively liable for taxes who fail to file tax returns. In such cases, the notice of deficiency may be issued at any time without limitation.

Mitchell, 230 Ill. App. 3d at 799, 596 N.E.2d at 34.

One critical distinction between the facts in Mitchell and the facts here is in the nature of some of the evidence the Department offered, in Mitchell, to support its determination that Mitco Sales, Inc. (Mitco), the corporation over which Mitchell presided and partially owned, failed to file required withholding tax returns. For two quarters of 1983, Mitco had filed required returns. Mitchell, 230 Ill. App. 3d at 800, 596 N.E.2d at 34. For the other two quarters in 1983, the Department offered a certified record showing that the Department had not received the quarterly returns Mitco was required to file to report and pay the amounts of Illinois income tax Mitco withheld from the wages of its employees. *Id.*; Department Ex. 4. For the quarters in 1981 and 1982,

however, the Department offered only the testimony of a Department investigator, who testified that he “recollected” that Mitco had not filed similar returns for the other parts of the audit period, and the testimony of an auditor, who testified that she had not searched the Department’s records for 1981 and 1982. Mitchell, 230 Ill. App. 3d at 800, 596 N.E.2d at 34. Instead, the auditor computed Mitchell’s penalties for 1981 and 1982, by projecting to the quarters in those years the amounts Mitco reported having withheld on the two quarterly returns that Mitco did file for 1983. *Id.*

The Mitchell court concluded that the Department had not presented a prima facie case regarding the 1981 and 1982 years, but had presented a prima facie case regarding the two quarters in 1983 for which the Department presented a prima facie showing that Mitco had not filed required returns. *Id.* at 800-801, 596 N.E.2d at 34-35. The court’s holding is instructive here:

As to the returns for the years 1981 and 1982, defendant contends, and we agree, that the DOR made no attempt to check its records to determine whether the returns were filed and therefore did not carry its burden in showing that the returns were not filed.

While we do not reweigh the evidence, we cannot say that the ALJ’s finding that defendant did not file returns for 1981 and 1982 is just and reasonable in light of the evidence presented. The evidence presented was merely the investigator’s “recollection” that those returns were not filed. There was no evidence introduced to establish that the returns were not filed, nor even any testimony that a search had been made for the 1981 and 1982 returns. There was no indication in the record of the basis of the investigator’s recollection.

Mitchell, 230 Ill. App. 3d at 800-801, 596 N.E.2d at 34-35.

In this case, the Department offered the certification of its records manager showing that she had diligently searched the Department’s records, and determined that the Department had not processed any quarterly withholding returns from *ABC*

Business regarding the periods at issue. Department Ex. 4; Department Exs. 1, 10. The evidence the Department offered here is precisely the type of evidence the Mitchell court held would establish the Department's prima facie correct determination that a corporation had not filed required withholding returns for a given period, triggering the application of IITA § 905(c). *Compare id. with Mitchell*, 230 Ill. App. 3d at 799, 596 N.E.2d at 34 (“Section 905(c) provides an exception to the general statute of limitations and is applicable in this instance. [footnote omitted] This section addresses the consequences of a total failure to file any return.”). Even if *John Doe* had appeared at hearing and presented a statute of limitations defense for *ABC Business*, the plain text of IITA § 905(c) imposes no time limit on the Department's authority to issue an NOD regarding periods for which it can show that a taxpayer has not filed required Illinois withholding tax returns. Department Ex. 4; 35 ILCS 5/905(c); Mitchell, 230 Ill. App. 3d at 799, 596 N.E.2d at 34.

Evidence Taken Regarding *John Doe's* Liability for the IITA § 1002(d) / Uniform Penalty and Interest Act (UPIA) § 3-7 Penalty

The First Remand Order vacated the agency's administrative decision dated July 12, 2012, and the Second Remand Order reversed the agency's August 20, 2014 Recommendation Following Remand. First Remand Order, p. 1; Second Remand Order, p. 5. Both of those agency decisions were based on procedural dismissals against *John Doe*,³ and neither addressed the substance issues involved in determining whether *John Doe* was personally liable for a penalty authorized by IITA § 1002(d) or UPIA § 3-7.

³ The agency decision dated July 12, 2012 involved a default order entered against *John Doe*, after he failed to appear at a pre-hearing conference. The August 20, 2014 recommendation following remand granted summary judgment in favor of the Department, and denied *John Doe's* claim for summary judgment, regarding whether the Notice the Department issued to him pursuant to IITA § 1002(d) and UPIA § 3-7 was timely or untimely.

Since the Circuit Court’s administrative review orders vacated and reversed the agency’s prior decisions against *John Doe*, Department counsel, at the Pre-Hearing Conference, asked that the issues at the hearing the Circuit Court directed the Department to hold include whether *John Doe* was a responsible officer of *ABC Business* who acted willfully in any of the ways contemplated by IITA § 1002(d) or UPIA § 3-7. *See* Pre-Hearing Order, p. 2. Regarding that issue, at hearing, the Department offered into evidence, among other items, certified copies of *ABC Business* court documents showing that *John Doe* had been convicted of “willfully fail[ing] to truthfully account for and pay over to the ... [IRS] the full amount of those *ABC Business* income taxes withheld from total wages of the employees of *ABC Business Inc.*,” ... [i]n violation of Title 26, United States Code § 7202” for all but one of the quarters at issue in this case. *Compare* Department Ex. 3: *John Doe* indictment, pp. 157-74; Minute Order; Judgment Order, p. 2 *with* Department Ex. 1.

Illinois law permits the admission of a person’s criminal conviction in a civil case where the acts underlying the conviction are relevant to the facts at issue in the civil matter. Thorton v. Paul, 74 Ill. 2d 132, 151, 384 N.E.2d 335, 343 (1979) (“We think the preferred rule is that stated by the Appellate Court for the Second District in *Smith v. Andrews* (1964), 54 Ill. App. 2d 51, 203 N.E.2d 160, which held proof of a conviction to be admissible in a civil case as prima facie evidence. We are not concerned here with the effect of a guilty plea. This approach preserves the opportunity to rebut the factual basis of the conviction insofar as those facts are applicable to the civil proceeding.”), *overruled by* American Family Ins. Co. v. Savickas, 193 Ill. 2d 378, 384-87, 739 N.E.2d 445, 449-51 (2000) (overruling portion of Thorton v. Paul, *infra*, and holding that, in some cases, a

person's criminal conviction can act to estop contrary claims regarding acts underlying conviction). In this case, moreover, *John Doe* has previously taken the position that he could not be liable for the penalty proposed here because he did not willfully fail to pay over *ABC Business's* withheld income taxes. See Second Remand Order, p. 3. More specifically, *John Doe* argued that another individual, *Jack Black*, had been convicted of embezzling monies from *ABC Business* which, *John Doe's* motion argued, *ABC Business* had withheld from employees and intended to pay over to the IRS and/or to Illinois. *Id.* (citing *John Doe's* July 8, 2014 Motion to Include Accountant *Jack Black's* Plea Agreement to Embezzlement of Tax Monies of *ABC Business, Inc.*, Brief and Argument of Defendant-Appellant *Jack Black*, and Brief of the United States in Support of Surreply to Department's Reply to Taxpayer's Response to Department's Motion for Summary Judgment).

Since I must assume that the substantive question of *John Doe's* personal liability for *ABC Business's* unpaid withholding income tax liabilities remains unresolved (First Remand Order; Second Remand Order, p. 5), I agree that *John Doe's* criminal convictions are relevant here. They are initially relevant because the IITA imposes on employers, and responsible persons acting for such employers, the statutory duty to withhold Illinois income taxes from compensation paid to employees where the employer has a similar duty to withhold *ABC Business* income taxes from such compensation, under the provisions of the Internal Revenue Code. 35 ILCS 5/701(a)(1). Section 701(a)(1) of the IITA provides, in pertinent part:

Sec. 701. Requirement and Amount of Withholding.

(a) In General. Every employer maintaining an office or transacting business within this State and required under the provisions of the Internal Revenue Code to withhold a tax on:

(1) compensation paid in this State (as determined under Section 304(a)(2)(B) to an individual; or

35 ILCS 5/701(a) (formerly Ill.Rev.Stat. ch. 120, ¶ 7-701(a)); *see also* 35 ILCS 5/704(a)-(b) (Employer's Return and Payment of Tax Withheld) (formerly Ill.Rev.Stat. ch. 120, ¶ 7-704(a)-(b)); 35 ILCS 5/705 (Employer's Liability for Withheld Taxes) (formerly Ill.Rev.Stat. ch. 120, ¶ 7-705)). Pursuant to IITA § 304(a)(2)(B), compensation is paid in Illinois if the individual employee's service is performed entirely in Illinois. 35 ILCS 5/304(a)(2)(B)(i) (formerly Ill.Rev.Stat. ch 120, ¶ 3-304(a)(2)(B)(i)).

The certified copies of *John Doe's* indictment and convictions provide direct evidence of several facts relevant to the issues presented here. *See* M. Graham, Cleary & Graham's Handbook of Illinois Evidence § 401.1 (6th ed. 1994), p. 134 (distinguishing direct versus circumstantial evidence). First, they show that *ABC Business* maintained an office and transacted business in Illinois, and was required under the provisions of the Internal Revenue Code (hereafter, IRC) to withhold — and actually withheld — tax on compensation it paid to its employees. Department Ex. 3: *John Doe* indictment, pp. 1-5, 157-74; Minute Order; Judgment Order, p. 2. Next, they show that the employees whose *ABC Business* income taxes *ABC Business* withheld were employees *ABC Business* paid to provide security guard services at AHA locations within the City of *Anyplace* — that is, locations entirely situated within Illinois. *Id.*; 35 ILCS 5/701(a)(1); *see also* 35 ILCS 5/704(a)-(b) (formerly Ill.Rev.Stat. ch. 120, ¶ 7-704(a)-(b)); 35 ILCS 5/705 (formerly Ill.Rev.Stat. ch. 120, ¶ 7-705)).

Finally, the evidence documenting *John Doe's* convictions for willfully failing to account for and to pay over the *ABC Business* taxes *ABC Business* withheld from its

Illinois employees, constitutes prima facie evidence that he was a person who was required to collect, truthfully account for, and pay over the tax imposed on *ABC Business*, under the provisions of the IRC. Department Ex. 3: *John Doe* indictment, pp. 157-74; Minute Order; Judgment Order, p. 2; *see also* Department Ex. 2 (showing *John Doe* was president of *ABC Business* during all years at issue). Illinois law imposes similar requirements upon employers, and responsible officers of such employers, where the compensation the employer pays its employees is paid in Illinois. 35 ILCS 5/701(a)(1); 35 ILCS 5/1002(d). And while Illinois law is clear that “the Department’s prima facie case for a tax penalty presumes willfulness” (Branson v. Department of Revenue, 168 Ill. 2d 247, 262, 659 N.E.2d 961, 968 (1995)), *John Doe*’s convictions provide additional support for the Department’s determination that *John Doe* actually and willfully failed to file *ABC Business*’s withholding tax returns, and to pay over such withholding taxes, or otherwise attempted to defeat or evade the collection of such taxes. *Compare* Department Ex. 3: *John Doe* indictment, pp. 1-3, 157-74; Minute Order; Judgment Order, p. 2 with Department Ex. 1.

I acknowledge that the certified records of *John Doe*’s *ABC Business* convictions do not provide direct evidence that he willfully failed to account for and pay over *ABC Business*’s *Illinois* withholding taxes. M. Graham, Cleary & Graham’s Handbook of Illinois Evidence § 401.1 (6th ed. 1994), p. 134. But those certified documents certainly provide strong circumstantial evidence that he had the requisite statutory authority to perform the acts IITA §§ 701 and 704 required of *ABC Business*, and that he willfully failed to perform such acts. *Id.*; Department Exs. 1-3. It is not unreasonable to infer, from *John Doe*’s *ABC Business* convictions, that he acted similarly willfully regarding *ABC*

Business's Illinois withholding income tax obligations. Again, *John Doe* had the opportunity to appear at hearing and provide whatever evidence he had to explain why, for example, he did not have the status, duty or authority to file *ABC Business's* Illinois withholding income tax returns, or to pay such Illinois taxes. He had the same opportunity to appear and offer evidence tending to show that he did not act willfully regarding *ABC Business's* Illinois withholding returns, or its Illinois withholding tax payments. But he chose not to do so. *See* Pre-Hearing Order.

The Department offered into evidence at hearing its prima facie case, and much more evidence, to support its claim that *John Doe* was personally liable for *ABC Business's* unpaid Illinois withholding income taxes for the third quarter of 1991 through and including the first quarter of 1996. *E.g.*, Department Exs. 1-3; Branson, 168 Ill. 2d at 262, 659 N.E.2d at 968. No evidence was offered which tends to rebut such credible, documentary evidence. I recommend that the Director reaffirm that the Notice issued to *John Doe* should be finalized as issued, because the evidence shows that he was a person who was responsible for accounting for and paying over taxes withheld from the wages of the employees of *ABC Business* and that he willfully failed to truthfully account for and pay over to the Department the taxes withheld or required to be withheld by *ABC Business* for the quarters at issue. 35 ILCS 5/1002(d); 35 ILCS 735/3-7.

Conclusion:

Based on the evidence and the directions of the Second Remand Order, I recommend that the Director reaffirm the Department's finalization of the Notice previously issued to *John Doe*, and return this matter to the Circuit Court of *Any* County.

April 15, 2016

John E. White
Administrative Law Judge

