

IT 95-73

Tax Type: INCOME TAX

Issue: Penalty Under 1002(d) - Failure To File/Pay Withholding

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

THE DEPARTMENT OF REVENUE)
OF THE STATE OF ILLINOIS)

v.)

XXXXX,)
Taxpayer)

) Docket No.:
) FEIN or SSN:

) Harve D. Tucker,
) Administrative Law Judge

RECOMMENDATION FOR DISPOSITION

SYNOPSIS: This matter comes on for hearing pursuant to the Taxpayer's timely protest to the Notice of Deficiency dated April 14, 1994. At issue is whether the Taxpayer is liable for the 35 ILCS 5/1002(d) penalty equal to the amount of the unpaid withholding tax owed by XXXXX. Following a hearing, submission of all evidence and a review of the record, it is recommended that this matter be resolved in favor of the Taxpayer.

FINDINGS OF FACT:

1. The Taxpayer was employed by XXXXX (sometimes hereinafter referred to as "the company") for the entire subject tax period. From the second quarter of 1992 through November, 1992, he was Vice President of the company. He was appointed Vice President for convenience only. His main duties were as corporate accountant. Tr., pp.18-19, 39-41

2. As the accountant, he would prepare monthly financial statements, corporate income tax returns and quarterly payroll tax returns. He spent two to three days a week at the company. Tr., p.19

3. During the subject period, the company was involved in extensive litigation, resulting in a considerably weakened financial position for the company. Meanwhile, vendor and payroll tax liability increased. Tr., pp.20-26

4. As the accountant, he received a salary of \$1,000 a week, reduced to \$500 a week when the financial problems began. Tr., p.27

5. The Taxpayer and the President of the company, XXXXX, had access to the books and records. Tr., p.27

6. The Taxpayer had check signing authority but no spending authority. The President of the company, XXXXX, had the only authority to disburse funds. Tr., pp.28, 35

7. The Taxpayer made out some checks (including payroll), reviewed bank statements and prepared withholding tax returns. Tr., pp.28-31, 37-39

8. The Taxpayer was aware that the withholding taxes were not being paid and other bills were being paid. He would tell the President what taxes were due, but the President paid other bills with what he deemed to have higher priorities. Tr., pp.31-33

9. He owned no stock in the company and was not involved in its incorporation. Tr., pp.19, 39

CONCLUSIONS OF LAW: 35 ILCS 5/1002(d) 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 to a penalty equal to the total amount of the tax evaded, or not collected, or not accounted for and paid over. * * * * For purposes of this subsection, the term "person" includes an individual, corporation or partnership, or an officer or employee of any corporation . . . who as such officer (or) employee is under a duty to perform the act in respect of which the violation occurs.

The record clearly establishes that the Taxpayer was an officer of the

company in name only. Although he had access to the books and records and informed the President of the company of the outstanding withholding tax liability, he had no control what disbursements would be made.

It is, therefore, recommended that a final decision be issued consistent with the determination above and that the Notice of Deficiency be cancelled in its entirety.

Harve D. Tucker
Administrative Law Judge

Date