

**ST 11-13**

**Tax Type: Sales Tax**

**Issue: Responsible Corporate Officer – Failure to File or Pay Tax**

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

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**THE DEPARTMENT OF REVENUE  
OF THE STATE OF ILLINOIS**

v.

**JOHN DOE,  
Taxpayer**

**No. XXXX  
Account ID XXXX  
NPL Penalty ID XXXX  
Period 3/09-5/09**

**Ted Sherrod  
Administrative Law Judge**

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**RECOMMENDATION FOR DISPOSITION**

**Appearances:** Special Assistant Attorney General George Foster on behalf of the Illinois Department of Revenue; John Doe, *pro se*.

**Synopsis:**

This matter comes on for hearing pursuant to John Doe ("John Doe" or "taxpayer") protest of Notice of Penalty Liability No. 11306143 ("NPL ") as responsible officer of ABC Business ("ABC Business"). The NPL represents a penalty liability for Retailers' Occupation Tax of ABC Business due to the Department of Revenue ("Department") for the period March 2009 through May 2009. A hearing was held on this matter on June 21, 2011, with both the Department and John Doe providing testimony and documentary evidence. Following the submission of evidence and a review of the record, it is recommended that the NPL be finalized as issued. In support of this recommendation, the following "findings of fact" and "conclusions of law" are made.

### **Findings of Fact:**

1. The Department's *prima facie* case was established by the admission into evidence of NPL Penalty ID number 11306143 dated August 9, 2010 showing a total liability owing in the amount of \$10,475.22. Department Exhibit ("Ex.") 1.
2. John Doe was an officer and a co-owner of ABC Business during the period March 2009 through May 2009. Transcript ("Tr.") p. 7, 11.
3. During the hearing on this matter, John Doe admitted that he had control, supervision and responsibility for filing ABC Business's tax returns and making payment of the amount of tax due shown therein. Tr. pp. 7, 8, 29.
4. During the tax period in controversy, John Doe filed returns but did not include with them any taxes that were due and owing by ABC Business. Tr. p. 29.
5. During the tax periods in controversy, John Doe knew that ABC Business was having financial problems. Tr. pp. 29, 30.
6. While funds (taxes collected from purchasers) were available to pay the taxes due for the period in controversy, John Doe deliberately used these funds to pay other creditors rather than the Department. Tr. p. 30.

### **Conclusions of Law:**

In the instant case, the Department seeks to impose personal liability on the taxpayer, John Doe, for failure to remit Retailers' Occupation Tax ("ROT"). The personal liability penalty for failing to properly remit ROT collected from customers is imposed by section 3-7 of the Uniform Penalty and Interest Act ("UPIA"), 35 ILCS 735/3-7, which provides, in part, as follows:

- (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 wilfully fails to file the return or make the payment to the Department, or who wilfully attempts in any other manner to evade or defeat the tax shall be personally liable for a penalty equal to

the total amount unpaid by the taxpayer including interest and penalties thereon.

During the administrative hearing in this matter, the taxpayer testified as follows:

Q. Mr. John Doe, you agree that you are a responsible officer; is that correct?

A. Absolutely.

Q. And that returns were sent in for the (*sic*) March, April and May of 2009 by the company without payment of the taxes?

A. Yes ...[.] ... But it is correct. I'm responsible for that. There's no doubt about it.

Q. So you agree you are responsible for sending in those returns without payment of the tax?

A. Yes.

Q. And is that because the company was having cash flow problems?

A. Yes. ...

Q. Basically you used tax collections to pay certain other creditors?

A. That's the way it would look, yes. We were behind.

Tr. pp. 29, 30.

This testimony constitutes an admission that the taxpayer was a responsible officer and that he used ROT taxes ABC Business collected to satisfy other, non-tax, obligations to creditors other than the Department during the tax period in controversy. The Illinois courts have ruled that giving preferential treatment to other creditors rather than paying a corporation's taxes constitutes a "willful" failure to pay taxes. Department of Revenue v. Heartland Investments, Inc., 106 Ill. 2d 19, 29-30 (1985); Branson v. Department of Revenue, 168 Ill. 2d 247, 259 (1995) ("If a responsible officer uses collected retailers' occupation taxes to pay other creditors of the corporation, while knowing that he or she was obligated to file returns and remit taxes, the willful element ... is satisfied.").

As indicated by the foregoing, the taxpayer has admitted that he was a "responsible officer", and that he was responsible for filing returns and making payments of taxes due. Moreover, as indicated above, the record clearly shows that he willfully failed to pay such taxes by preferring other creditors over the Department. John Doe, therefore, is liable for the NPL penalty the Department has assessed pursuant to section 3-7 of the UPIA.

While the taxpayer has essentially admitted culpability and liability as a responsible officer pursuant to section 3-7 of the UPIA, he nevertheless contends that he is not liable for the amount that

has been assessed pursuant to the NPL at issue in this case. Specifically, he contends that ABC Business has either paid, or set aside amounts to pay, the liability that has been assessed. Tr. pp. 15, 16, 18.

As previously noted, section 3-7 of the UPIA states, in part, that a responsible officer of a corporation who willfully fails to file a return or make payment to the Department “shall be personally liable for a penalty equal to the total amount of tax unpaid” by the corporation. (emphasis added) Accordingly, pursuant to section 3-7, liability inures to a responsible officer of a corporation only to the extent that the corporation has failed to satisfy a tax obligation of that corporation and an outstanding liability of that corporation remains due and owing. See also 86 Ill. Admin. Code, ch. I, section 521.105 (“If the underlying liability of the corporation is reduced to zero, the responsible officer liability will no longer exist[.] Therefore, responsible officers can ...[pay]...liabilities owed by the corporate taxpayer.”).

The admission of the NPL into evidence in the instant case establishes the Department’s *prima facie* case that ABC Business has not paid the liability assessed. Branson, *supra* at 258. In order to prevail, the taxpayer must rebut the Department’s *prima facie* determination that ABC Business's tax liability has not been satisfied. Vitale v. Department of Revenue, 118 Ill. App. 3d 210 (1983). In order to rebut the Department’s *prima facie* case, the taxpayer must present competent evidence identified with its books and records (i.e. documentary evidence) to prove its case. Masini v. Department of Revenue, 60 Ill. App. 3d 11 (1<sup>st</sup> Dist. 1978); Central Furniture Mart, Inc. v. Johnson, 157 Ill. App. 3d 907 (1<sup>st</sup> Dist. 1987).

During the evidentiary hearing, the taxpayer introduced documents purporting to show that a portion of the unpaid liability for which the taxpayer was assessed was withdrawn from the ABC Business banking account at ABC Bank in Oak Brook, Illinois pursuant to a levy by the Department issued to the bank on or about August 24, 2009. Taxpayer Ex. 1, 2. This evidence shows that the

amount of this levy was \$2,204.95 and that this amount was withdrawn from ABC Business's account on September 11, 2009. *Id.* Based upon this evidence, the taxpayer contends that he is entitled to a credit in at least this amount against the NPL liability at issue in this case. Tr. pp. 15, 16.

The taxpayer's purported proof is problematic for a number of reasons. First, as noted by the Department:

...[W]e don't know if that – those monies had anything to do with the liabilities on this notice of penalty liability. They might have been for other liabilities owed by the Department.

And, in fact, if those monies had been remitted to the Department of Revenue, it may have been to prevent other liabilities from being listed on this notice of penalty liability, in addition to what, in fact, was listed here.

Tr. pp. 21, 22

Moreover, the record in this case plainly shows that the amount withdrawn from ABC Business's account on September 11, 2009 to satisfy Department's levy was credited back to ABC Business's account on September 29, 2009. Taxpayer's Ex. 1. During testimony, the taxpayer admitted that he does not know how the money that was credited back to the ABC Business account at ABC Bank was used after it was returned to this account by the Department. Tr. p. 15. Accordingly, the taxpayer clearly cannot show that all or any portion of these funds that were withdrawn and returned to the taxpayer's account by the Department were used to satisfy ABC Business's liability that is the basis of the NPL assessment at issue in this case. Given this fact, I find that the evidence taxpayer has presented does not prove that the Department has received any portion of the funds owed to it by ABC Business giving rise to the NPL at issue. Therefore, I find that the evidence the taxpayer has presented is insufficient to prove that any portion of the amount due and owing to Department by ABC Business constituting the basis of the assessment at issue in this case has previously been paid.

The taxpayer also contends that the amount shown on the NPL is incorrect because it does not reflect amounts levied upon the taxpayer's co-owner of ABC Business subsequent to the issuance of the NPL to satisfy a portion of the ABC Business liability giving rise to the NPL at issue in this case.

Tr. p. 11. However, by the taxpayer's own admission, virtually no evidence of such payment has been presented in the instant case. *Id.* Therefore, the taxpayer's self serving and uncorroborated claim that his co-owner has already paid a portion of the amount constituting the measure of the NPL provides no basis for reducing the taxpayer's assessment.

Moreover, the Department, during the administrative hearing, conceded that the NPL, which was issued on August 9, 2010, does not necessarily reflect the current balance due from the taxpayer with respect to this liability. Tr. p. 13. Accordingly, the Department has admitted that the taxpayer is responsible only for the portion of the balance shown to be due on the NPL that the Department's records show currently remains unpaid, if less than the amount shown on the NPL dated August 9, 2010 at issue. In accordance with the Department's admission, the taxpayer must be credited with any amounts shown to have been paid reducing ABC Business's liability subsequent to the issuance of the NPL at issue. Since the amount of the current balance due from the taxpayer is not part of the record, the issue whether the current balance due from the taxpayer is accurate and satisfies the taxpayer's objections cannot be adjudicated in these proceedings.

**WHEREFORE**, for the reasons stated above, it is my recommendation that the Department's NPL at issue in this case be finalized as issued.

**Date: August 26, 2011**

**Ted Sherrod  
Administrative Law Judge**