

**ST 04-21**

**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. 03-ST-0000  
IBT #: 0000-0000  
NPL # 0000**

**Charles E. McClellan  
Administrative Law Judge**

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**RECOMMENDATION FOR DECISION**

**Appearances:** John D. Alshuler, Special Assistant Attorney General, for the Illinois Department of Revenue (the “Department”); Kevin R. Krantz of Kessler, Krantz & Christensen, for John Doe (“Taxpayer”).

**Synopsis:**

This matter came on for an evidentiary hearing on September 17, 2004 following the filing of a timely protest to a Notice of Penalty Liability (“NPL”) issued to Taxpayer by the Department on October 14, 2003. The NPL, in the amount of \$6,251.71, was issued to Taxpayer as a responsible officer or employee of ABC Corp. The underlying corporate liability for Retailers’ Occupation Tax and Use Tax (“sales tax”) was incurred by ABC Corp. (“ABC”) for the months of January through March of the year 2000. The issue is whether Taxpayer is liable, as a responsible person, for the penalty assessed him

under § 735/3-7 of the Uniform Penalty and Interest Act<sup>1</sup>. I find that he was not a responsible officer or employee of ABC Corp. during the periods at issue, and, as a result, that the NPL should be cancelled.

**Findings of Fact:**

1. ABC was a New Jersey corporation. Tr. pp. 10-11.
2. Taxpayer was the president and chief executive officer (“CEO”) of ABC from November of 1995 until August of 1999 when he resigned from these positions. *Id.*
3. As CEO of ABC, Taxpayer was in charge of executive management, strategic direction and planning for sales expansion and marketing activities. Tr. pp. 14-15.
4. During Taxpayer’s tenure as CEO of ABC, it had 1400 employees and \$60 million in revenues. *Id.*
5. ABC had an accounting department headed by a chief financial officer. It also had a controller, a tax department and a human relations department. *Id.*
6. The ABC tax department prepared tax returns for the company. *Id.*
7. In August of 1999 Joe Blow (“Blow”) was appointed as president and chief executive officer of ABC and Taxpayer resigned from those positions. Tr. p. 11, Taxpayer Ex. No. 1.
8. In his new position, Blow reported to Taxpayer who was the chief executive officer of XYZ International (“XYZ”), the parent company of ABC. Taxpayer Ex. No. 1.

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<sup>1</sup> Unless otherwise noted, all statutory references are to 35 ILCS 735/1, *et seq.*, the Uniform Penalty and Interest Act. (“UPIA”).

9. Taxpayer resigned his position at XYZ on January 12, 2000 when he purchased \*\*\*\*\*, a wholly owned subsidiary of XYZ that it acquired in November of 1995. Tr. pp. 22-23.
10. XYZ was a holding company that had no books or accounting records because it had no transactions. Tr. p. 18.
11. ABC was founded in 1929. It holds over 300 lighting patents and offers more than 1,300 types of value-added specialty lamps, including the 15,000-watt liquid-cooled xenon lamps used in IMAX projectors.<sup>2</sup> *Id.*
12. Under date of February 21, 2000, Taxpayer filed written letters of resignation as a corporate director and officer with the boards of directors of XYZ International, ABC, and the rest of the subsidiary corporations of XYZ International by telecopier and mail. Tr. pp. 19-22, Taxpayer Exs. No. 2, 3, and 4.
13. In August 1999, XYZ International was in default of its loan from Money Capital Corporation (“Money Capital”). Tr. p. 16.
14. Under date of March 23, 2000, XYZ International and Money Capital signed an agreement acknowledging that ABC intended to file a voluntary bankruptcy petition under Chapter 7 of the U.S. Bankruptcy Code. Tr. p. 25-27, Taxpayer Ex. No. 5.
15. Taxpayer became aware of ABC’s bankruptcy filing in March of 2000 when Money Capital requested the budget for ABC. Tr. p. 25.

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<sup>2</sup> An IMAX projector is a motion picture projector used in IMAX theaters. IMAX theaters have much larger projection screens than do standard motion picture theaters.

16. On October 14, 2003 the Department issued NPL No. 8667 to Taxpayer pursuant to 35 ILCS 735/3-7 as a person who was responsible for paying to the Department the sales tax obligations of ABC for the months of January 2000 through March of 2000. Dept. Ex. No.1.

**Conclusions of Law:**

The statute that imposes personal liability for paying to the state unpaid corporate Retailers' Occupation Tax and Use Tax obligations provides as follows:

Any officer or employee of any taxpayer subject to the provisions of a tax Act administered by the Department who has the control, supervision or responsibility of filing returns and making payment of the amount of any trust tax imposed in accordance with that Act and who willfully fails to file the return or 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. 35 ILCS 735/3-7(a).

This section of the statute sets forth two tests for determining whether a person has personal liability for unpaid sales tax incurred by a corporation. First, the person must be responsible for accounting for and paying the tax due. Second, the individual must willfully fail to file or pay the tax shown to be due on the payroll tax returns.

In this case, once the Department introduced into evidence the Notice of Deficiency under the Director's certificate, its *prima facie* case was made on the questions of responsibility and willfulness. *Branson v. Dept. of Revenue*, 168 Ill.2d 247, 261-262 (1995). The burden then shifted to the Taxpayer to overcome the Department's case. *Id.* To rebut the Department's *prima facie* case, Taxpayer had to come forward with sufficient evidence to disprove the Department's case. *Id.*, 168 Ill.2d at 262.

The statute does not define the concept of willful failure. However, in applying the penalty tax, the Illinois courts look to federal cases involving § 6672 of the Internal Revenue Code<sup>3</sup> which contains language similar to the Illinois statute. *Branson, supra*, at 254, *Dept of Revenue v. Joseph Publick & Sons*, 68 Ill.2d 568 (1977). The key to liability under IRC § 6672 is control of finances within the employer corporation including the power to control the allocation of funds to other creditors in preference to the withholding tax obligations. *Haffa v. U.S.*, 516 F.2d 931 (7<sup>th</sup> Cir. 1975). The issue of willfulness is concerned with the state of the responsible person's state of mind. *Sawyer v. U.S.*, 831 F.2d 755 (7<sup>th</sup> Cir. 1987) "Willful failure to pay taxes has generally been defined as involving intentional, knowing and voluntary acts or, alternatively, reckless disregard for obvious or known risks." *Branson, supra*, at 255.

Being a corporate officer does not, *per se*, impose the duty to collect, account for and pay over the withheld taxes. *Monday v. U.S.*, 421 F.2d 1210, (7<sup>th</sup> Cir. 1970). However, an officer may have that duty even though he does not have the treasury function. *Id.* He has the duty if he has general control over corporate business affairs and participates in decisions concerning payment of creditors. *Id.*

The NPL issued to Taxpayer was for sales tax liabilities incurred by ABC during the months of January 2000 through March of 2000. During these months, he was no longer president and CEO of ABC because he resigned in August of 1999, over four months before the liabilities were incurred by ABC. Therefore, he was not an officer or employee of ABC when the liabilities were incurred or when they became due to be paid to the Department. That being the case, he could not have general control over the corporate affairs of ABC or participate in its management during the periods at issue in

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<sup>3</sup> 26 U.S.C. § 6672.

this matter. Thus, he fails the first test required by the statute, that he be a responsible officer or employee of ABC during the period that that it incurred the underlying liability.

From August 1999 until February 21, 2000, Taxpayer, no longer affiliated with ABC, was CEO of XYZ, the parent company of ABC. His replacement as president and CEO of ABC, Blow, was also named as the president and chief operating officer of XYZ and he reported to Taxpayer. In its closing argument, the Department suggested that as CEO of XYZ he should have known that the sales tax obligations of ABC were not paid, and that this made him liable under the statute. There is nothing in the record to support this argument.

The evidence in the record indicates that Taxpayer had no reason to know that the sales tax obligations of ABC were not being paid. Taxpayer was no longer an officer of ABC during the periods in which the underlying corporate liabilities were incurred. The evidence of record is that he knew in August of 1999 that ABC was in default of its loan from Money Capital (Tr. p. 16), that the ABC's tax department prepared tax returns (Tr. p. 15), that he never prepared sales tax returns, that it was not company policy for him to review sales tax returns, that he never signed sales tax returns (Tr. p. 16), that he never personally paid sales taxes on behalf of ABC and that he would have signed ABC checks only if they exceeded a certain amount. This testimony is uncontroverted and consistent with documents in the record that establish that he was replaced as CEO and president of ABC after his resignation in August 1999, that he resigned from XYZ no later than February 21, 2000, and that he had no responsibility for or knowledge of the unpaid sales taxes of ABC during the period at issue in this matter.

Recommendation:

For the reasons set forth above, I recommend that the NPL issued to Taxpayer be canceled.

Date: 11/29/2004

Charles E. McClellan  
Administrative Law Judge