

**ST 04-8**

**Tax Type: Sales Tax**

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

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

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<b>THE DEPARTMENT OF REVENUE</b>	)	
<b>OF THE STATE OF ILLINOIS</b>	)	
	)	<b>Docket No. 02-ST-0000</b>
v.	)	<b>IBT # 0000-0000</b>
	)	<b>NPL # 0000</b>
<b>JOHN DOE</b>	)	
	)	
<b>Respondent</b>	)	

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**RECOMMENDATION FOR DISPOSITION**

Appearances: Kent Steinkamp, Special Assistant Attorney General, for the Department of Revenue of the State of Illinois; William Panichi, Attorney at Law, for John Doe.

Synopsis:

The Department of Revenue (“Department”) issued a Notice of Penalty Liability (“NPL”) to John Doe (“respondent”) pursuant to section 3-7 of the Uniform Penalty and Interest Act (“UPIA”) (35 ILCS 735/3-7). The NPL alleges that the respondent was an officer or employee of Doe Automotive Group, Inc. (“corporation”) who was responsible for wilfully failing to pay the corporation’s sale taxes during the time period of February 2000 through December 2000. The respondent timely protested the NPL, and an evidentiary hearing was held. After reviewing the record, it is recommended that the Department’s determination be upheld.

Findings of Fact:

1. The corporation was in the business of operating a car dealership. (Tr. pp. 9-10)
2. The respondent was the manager of the dealership. The respondent purchased cars at auctions, controlled the inventory, sold cars, and managed the day-to-day activities. (Tr. pp. 10-11, 52)
3. When the respondent sold a car, the respondent completed a Form ST-556, Sales Tax Transaction Return, for each sale. The respondent was responsible for filling out these forms when he sold a vehicle. (Tr. pp. 11-12, 16)
4. When the respondent completed a Form ST-556 for a sale, he also signed the form. (Dept. Ex. #2)
5. Sometimes the respondent delivered the completed forms to the Secretary of State's office, along with forms regarding the title of the vehicles. (Tr. pp. 14-15)
6. On January 14, 2000, the respondent signed a Commercial Loan Agreement for the corporation. Joe Blow, who was the president of the corporation, and Mr. Smith, who was the secretary of the corporation, also signed the Agreement. The note was for \$250,000. (Dept. Ex. #3, pp. 7-14; Tr. pp. 28-30)
7. The respondent understood that by signing the Commercial Loan Agreement, he was liable for the amount of the note. (Tr. p. 29)
8. On May 17, 2000, the respondent signed an Agreement that was between "John Doe and Doe Automotive Group" and "Ron Doe and ABC Automotive." The Agreement concerned the transfer of title and consideration for a vehicle. There were inconsistencies in the "title trail" of the vehicle, and the parties agreed that an attorney would hold the consideration in escrow until the new title was processed and delivered to John Doe and Doe Automotive Group. (Dept. Ex. 3, p. 5)
9. The last sentence of the Agreement signed on May 17, 2000 states that "[t]he individuals signing below are representing that they have full legal authority to sign this

document and to bind, to the terms of this document, the entities for which they are signing.”  
(Dept. Ex. #3, p. 5)

10. On March 20, 2002, the Department issued NPL number 0000 to the respondent that proposed a total penalty liability of \$38,405.00, including tax, interest, and penalty, for failure to pay sales taxes during the time period of February 2000 through December 2000. The NPL was admitted into evidence under the certificate of the Director of the Department. (Dept. Ex. #1).

Conclusions of Law:

Section 3-7 of the Uniform Penalty and Interest Act provides in part 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 wilfully fails to file the return or make the payment to the Department or wilfully 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)).

An officer or employee of a corporation may therefore be personally liable for the corporation's taxes if (1) the individual had the control, supervision or responsibility of filing the sales tax returns and paying the taxes, and (2) the individual willfully failed to perform these duties.

Under section 3-7, the Department's certified record relating to the penalty liability constitutes *prima facie* proof of the correctness of the penalty due.<sup>1</sup> See Branson v. Department of Revenue, 168 Ill.2d 247, 260 (1995). Once the Department presents its *prima facie* case, the burden shifts to the respondent to establish that one or more of the elements of the penalty are lacking, i.e., that the person charged was not a responsible corporate officer or employee, or that the person's actions were not wilfull. Id. at 261. In order to overcome the Department's *prima facie* case, the allegedly responsible person must present more than his or her testimony denying

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<sup>1</sup> The relevant portion of section 3-7 provides as follows: "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. \* \* \* 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." 35 ILCS 735/3-7(a).

the accuracy of the Department's assessment. A. R. Barnes & Co. v. Department of Revenue, 173 Ill.App.3d 826, 833-34 (1st Dist. 1988). The person must present evidence that is consistent, probable, and identified with the respondent's books and records to support the claim. Id.

For guidance in determining whether a person is responsible under section 3-7, the Illinois Supreme Court has referred to cases interpreting section 6672 of the Internal Revenue Code (26 U.S.C. §6672)<sup>2</sup>. See Branson at 254-56; Department of Revenue v. Heartland Investments, Inc., 106 Ill.2d 19, 29-30 (1985). These cases state that the critical factor in determining responsibility is whether the person had “significant” control over the corporation's finances. See Purdy Co. of Illinois v. United States, 814 F.2d 1183, 1186 (7th Cir. 1987). Significant control does not mean exclusive or absolute control over the disbursement of funds. Thomas v. U.S., 41 F.3d 1109, 1113 (7<sup>th</sup> Cir. 1994). All that is required is that the person could have impeded the flow of business necessary to prevent the corporation from squandering the taxes that it should have paid to the Department. Id.

In the present case, the respondent did not present sufficient documentary evidence to show that he did not have significant control over the corporation's finances. The two agreements that were signed by the respondent indicate that the respondent had significant power over the financial affairs of the corporation. An employee who was not involved in the financial aspects of the company would not be expected to sign a note for \$250,000. The respondent admitted that he knew when he signed the note that he would be liable for the amount of the note. (Tr. p. 29) This leads to the reasonable conclusion that the respondent was connected closely enough to the corporation's finances that he could have prevented the default on the note from occurring. The agreement that the respondent signed with Ron Doe and ABC Automotive was not a typical document that an employee would sign if that employee did not have a significant role in the corporation's finances.

The only document that was submitted by the respondent was the Illinois Business Registration form, NUC-1, which indicates that Joe Blow was responsible for filing the returns

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<sup>2</sup> This section imposes personal liability on corporate officers who willfully fail to collect, account for, or pay over employees' social security and Federal income withholding taxes.

and paying the taxes. (Resp. Ex. #1) Although Mr. Blow may have been a responsible officer, more than one taxpayer may be found to be responsible. See Thomas at 1113. Despite the fact that two or more persons may be jointly and severally liable under section 3-7, the Department is not entitled to more than one satisfaction of the tax liability. McLean v. Department of Revenue, 326 Ill.App.3d 667, 677 (1<sup>st</sup> Dist. 2001). In this case, the respondent may be responsible as well as Mr. Blow, but the Department is entitled to collect the liability only once.

In order to overcome the Department's *prima facie* case, it was incumbent upon the respondent to present more than his own testimony indicating that he was not a responsible person. (See A. R. Barnes & Co. at 833-34; Mel-Park Drugs, Inc. v. Department of Revenue, 218 Ill.App.3d 203, 217 (1st Dist. 1991).) Although the respondent indicated that he did not have signature authority for the checking account, he did not provide documentation from the bank, such as a signature card, to support that testimony. The respondent did not present corporate documents to verify his lack of an ownership interest in the corporation. He was active in the management of day-to-day affairs of the company, and it is not clear whether he had the ability to hire and fire employees. The respondent stated that he was not a manager after September 2000, and he indicated that he could provide proof of that, but he did not present it at the hearing. (Tr. pp. 42-43) Because the respondent signed financial documents, including a note for a significant amount of money, and he failed to provide corroborating evidence to support his testimony, the Department's determination regarding the respondent's responsibility cannot be dismissed.

The same conclusion must be reached regarding the wilfull element of the liability. Cases define "wilfull" as involving intentional, knowing and voluntary acts or, alternatively, reckless disregard for obvious known risks. See Branson at 254-56; Heartland at 29-30. Wilfull conduct does not require bad purpose or intent to defraud the government. Branson at 255; Heartland at 30. Willfulness may be established by showing that the responsible person (1) clearly ought to have known that (2) there was a grave risk that the taxes were not being paid and (3) the person was in a position to find out for certain very easily. Wright v. United States, 809

F.2d 425, 427 (7th Cir. 1987). Furthermore, whether the person in question wilfully failed to pay the taxes is an issue of fact to be determined on the basis of the evidence in each particular case. Heartland at 30; Department of Revenue v. Joseph Bublick & Sons, Inc., 68 Ill.2d 568, 577 (1977). Courts have found that giving preferential treatment to other creditors rather than paying the corporation's taxes constitutes wilfull behavior. See Heartland at 29-30.

The respondent has failed to produce evidence that his actions were not wilfull. His connection with the business indicates that he was in a position to know that there was a grave risk that the taxes were not being paid. The respondent bore the burden of disproving the wilfull failure to pay. The respondent has not met that burden in this case.

#### Recommendation

For the foregoing reasons, it is recommended that the Notice of Penalty Liability be upheld.

Linda Olivero  
Administrative Law Judge

Enter: March 31, 2004