

ST 96-47

Tax Type: SALES TAX

Issue: Responsible Corp. Officer - Failure to File or Pay Tax

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

THE DEPARTMENT OF REVENUE)	
OF THE STATE OF ILLINOIS)	
)	No.
v.)	IBT
)	NPL
)	
TAXPAYER, (Resp. Off.))	Daniel D. Mangiamele
CORPORATION)	Administrative Law Judge
Taxpayer)	

RECOMMENDATION FOR DISPOSITION

Appearances: Messrs. Lane Gensburg of Dale, Jacobs & Gensburg, for TAXPAYER; Richard Rohner, Special Assistant Attorney General, for the Illinois Department of Revenue.

Synopsis:

This matter comes on for hearing pursuant to the taxpayer's timely protest of Notice of Penalty Liability No. XXXX, issued by the Department on November 17, 1994. At issue is whether TAXPAYER hereinafter referred to as "taxpayer" was a responsible corporate officer of CORPORATION who willfully failed to remit Retailers' Occupation Tax and/or Use Tax, as well as related taxes when due to the State of Illinois for the period of January 1, 1987 through December 31, 1989. Following the submission of all evidence and a review of the record, it is recommended that this matter be resolved in favor of the Department.

Findings of Fact:

1. The Department's *prima facie* case, inclusive of all jurisdictional elements, was established by the admission into evidence of the Notice of

Penalty Liability (NPL) No. XXXX covering the period January 1987 through December 1989 (hereinafter referred to as the "liability period"). Dept. Ex. No. 1

2. Taxpayer stipulated she is the responsible officer, sole shareholder, and officer of CORPORATION, the underlying corporation herein. Tr. pp. 7, 53

3. Taxpayer was actively involved in the day to day operation of CORPORATION. Tr. pp. 7, 54

4. Taxpayer through her witnesses and evidence attacked the original audit of CORPORATION stating the Department used bank statements which were the wrong records to conduct the underlying audit of CORPORATION. Tr. p. 30

5. Department auditor, Benjamin Jimenez reviewed records of cash register tapes submitted by taxpayer in the original audit. Tr. p. 110

6. The original cash register tapes submitted by taxpayer in the underlying audit were incomplete. Tr. pp. 119, 123

Conclusions of Law:

On examination of the record established, this taxpayer has failed to demonstrate by the presentation of testimony or through exhibits, evidence sufficient to overcome the Department's *prima facie* case of personal liability under the assessment in question. Accordingly, by such failure, and under the reasoning given below, the Department's determination of penalty liability must stand. In support thereof, the following conclusions are made.

During the audit period herein of January 1, 1987 through December 31, 1989 the Retailers' Occupation Tax Act (ROTA) paragraph 452 1/2, provides as follows:

Any officer or employee of any corporation subject to the provision of the Act who has the control, supervision or responsibility of filing returns and making payment of the amount of tax herein imposed in accordance with Section 3 of this Act and who willfully fails to file such return or

make such 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 evaded, including interest and penalties thereon.

As can be seen, in order to be subjected to this penalty, a person must (1) be an employee or officer of the corporation, (2) have control, supervision or responsibility for filing returns and paying the taxes, and (3) willfully fail to file the returns, pay the tax or otherwise evade or defeat the tax.

A *prima facie* case for officer liability may be established by the Department through introduction of its Notice of Penalty Liability, as the Illinois Supreme Court has stated as follows:

that under Section 13 1/2 of the Act, the Department's establishment of a *prima facie* case for a tax penalty operates, in effect, as a rebuttable presumption of willfulness. In addition to establishing the amount of penalty due and the person responsible for paying the taxes, the Department's *prima facie* case for a tax penalty presumes willfulness. To rebut the presumption, the person defending against the penalty must adduce sufficient evidence to disprove willful failure to file returns and pay taxes.

Branson v. Department of Revenue, 168 Ill. 2d 247, 659 N. E. 2d 961, (1995).

Nothing in the evidence presented by taxpayer serves to overcome the Department's *prima facie* case with respect to the penalty assessed against TAXPAYER.

In this matter taxpayer stipulated and admitted through her testimony that she was a responsible corporate officer who managed and had control of the business. The record indicates she was the sole shareholder and officer during the liability period. Taxpayer's defense consists of attacking the underlying audit conducted on CORPORATION, which I find to be immaterial and irrelevant in this proceeding. Taxpayer continually argued that if the Department would have used the taxpayer's cash register tapes the tax liability would be less. Mr. Jimenez, the Department auditor, testified that the records of cash register

tapes were not used because they were incomplete in that they produced tapes for only ten to fifteen days out of each month.

Taxpayer had the opportunity to question the Department's assessment against the underlying corporation by protesting the Notice of Tax Liability. The Administrative Law Judge following a hearing on that protest, ruled that records submitted by taxpayer were insufficient to overcome the Department's *prima facie* case. The remedy for the underlying corporation was to file an administrative review of that decision. Since no review was taken the Department's assessment is correct, as a matter of law.

However, even if the taxpayer were able to open the original hearing, nothing that taxpayer has presented would be sufficient to overcome the original Notice of Tax Liability. In the case of Vitale v. Illinois Department of Revenue, 73 Ill. Dec. 702, 118 Ill. App. 3d 210 (3rd Dist. 1983), the court would not overturn the Departments estimate of liability based on taxpayer's estimate using a different methodology. The court stated as follows:

The audit techniques used by the Department, techniques which were made necessary only by reason of the plaintiff's failure to maintain adequate records, were not designed by whim or caprice, but rather represented a studied effort to reconstruct with limited information, and much hard work, the taxpayer's business records. The auditors used fair-minded statistical assumptions. This is all the law requires.

Vitale v. Illinois Department of Revenue, 73 Ill. Dec. at page 704.

Once the Notice of Penalty Liability was admitted into evidence the Department established its *prima facie* case pursuant to the above cited statutory provisions. The burden therefore shifted to the taxpayer to rebut the presumption created with competent evidence. It is my determination that no evidence was proffered by the taxpayer to rebut the presumption of willfulness and therefore, I find that the taxpayer was willful in the failure to pay taxes due.

On the basis of the foregoing findings of fact and conclusions of law, I recommend that Notice of Penalty Liability No. XXXX be finalized as to this taxpayer plus statutory penalties and interest.

Administrative Law Judge