

ST 97-39

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
JOHN DOE (Resp. Officer))	
XYZ CORPORATION)	Daniel D. Mangiamele
)	Administrative Law Judge
Taxpayer)	

RECOMMENDATION FOR DISPOSITION

Appearances: Richard M. Colombik & Associates by Cary R. Rosenthal, for JOHN DOE; Alan Osheff, 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. XXXXX, issued by the Department on December 8, 1993. The taxpayer alleges he assumed no personal responsibility for the business but was hired as sales manager. Taxpayer further alleges that when the corporation defaulted on its loan to BANK, the bank accepted responsibility to pay XYZ CORPORATION'S sales tax obligations. The Department acknowledged and stipulated on the record that as of August 15, 1989 BANK was responsible for paying sales tax and that any payments due for sales

tax after that period was to be deleted from the NPL. At issue is whether the taxpayer was a responsible corporate officer of XYZ CORPORATION prior to August 15, 1989 who willfully failed to remit Retailers' Occupation Tax and/or Use Tax, as well as related taxes when due to the State of Illinois in the amount of \$126,993.00 for the period February 1989 through August 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. XXXXX against JOHN DOE covering the period February 1989 through September 1989, March 1990 through May 1990 and August 1990 (hereinafter referred to as the "liability period"). Dept. Ex. No. 1

2. JOHN DOE was vice-president of XYZ CORPORATION, the underlying corporation. Tr. pp. 82-88

3. By stipulation the parties agreed that any assessment after August 15, 1989 was to be deducted from the NPL. Tr. pp. 11-12

4. JOHN DOE was a stockholder of XYZ CORPORATION Tr. p. 18

5. JOHN DOE had check writing authority and signed sales tax returns as early as September, 1987. Dept. Ex. No. 4, Tr. pp. 22-23, 86-87

6. Taxpayer's duties included firing sales personnel, training, controlling advertising promotions, monitoring sales

personnel, approving sales transactions and providing the bookkeeper with sales information. Tr. pp. 16-17, 24

7. BANK financed the sales of boats for XYZ CORPORATION Tr. p. 27

8. Taxpayer was personally obligated on the corporation's loan from BANK. Tr. p. 30

9. Taxpayer continued to operate the corporation by selling off boats to relieve the inventory when the corporation defaulted on its loan agreement to BANK. Tr. p. 46

10. Taxpayer signed promissory notes and personally guaranteed them on behalf of the corporation. Tr. pp. 93-97, Taxpayer Ex. No. 5

11. Taxpayer paid corporate creditors when he had knowledge that the corporation owed sales tax to the Department of Revenue. Tr. pp. 111, 128, 131, and 132

12. Taxpayer had knowledge of sales tax obligations and confirmed this fact to Revenue Auditor Harris on or about August 28, 1990. Tr. pp. 143, 148-149

13. Taxpayer produced no documentation showing BANK assumed or was responsible for paying sales tax prior to August 15, 1989.

Conclusions of Law:

On examination of the record established, this taxpayer 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

determinations of penalty liability must stand. In support thereof, the following conclusions are made.

During the audit period herein the Retailers' Occupation Tax Act (ROTA) 35 ILCS 13.5 provided 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. The Illinois Supreme Court has stated:

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 rebuttal 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 him.

In this matter JOHN DOE testified he was not a responsible corporate officer who managed and had control of the business. However the record indicates he had responsibility for sales tax based upon many facts. First, he was a shareholder and vice-president during the liability period. Responsibility such as this can be found in the case of Robert W. Monday v. United States of America 1421 F. 2d 1210. The evidence further indicates that taxpayer was actively engaged as an officer of XYZ CORPORATION. His testimony of responsibilities and activities as vice-president included more than that of a sales manager as he alleged. He had check writing authority, signed sales tax returns, trained personnel, fired personnel, controlled advertising, promotions, monitored sales personnel, approved sales transactions, became obligated personally on corporate loans, signed promissory notes, handled financing of boats with BANK, and paid corporate creditors.

Further taxpayer had knowledge of corporate sales tax obligations due the Department, as confirmed by Auditor Harris's testimony, that JOHN DOE told him he was aware of at least \$80,000.00 in sales tax owed to the Department. (Tr. p. 143) Taxpayer's allegation that he delegated the record keeping to his bookkeeper is without merit since his activities with the corporation were those of an owner and not merely a sales manager. In Branson v. Department of Revenue, 168

Ill. 2d 247, 559 N.E. 2d 96, (1995) the Court stated on page 267 "we do not intend to imply that a corporate officer who is responsible for filing Retailers' Occupation Tax returns and remitting the collected taxes may avoid personal liability under Section 13 1/2 merely by delegating bookkeeping duties to third parties and failing to inspect corporate records or otherwise failing to keep informed of the status of the Retailers' Occupation Tax returns and payments."

In Department of Revenue v. Heartland Investments, Inc. 106 Ill. 2d (1985) the court held that willfull failure to pay requirement was met by evidence that the Retailers' Occupation taxes collected were knowingly used to pay corporate creditors other than the Department of Revenue. Further, in Ruth v. United States, 823 F. 2d. 1091 (7th Cir. 1987), willfulness may be established by a showing of "gross negligence involving a known risk of violation," as where a responsible party clearly ought to have known of a "grave risk of non payment" and who is in a position to easily find out, but does nothing. Taxpayer's activities and knowledge, which are all of record, clearly satisfy these requirement.

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 taxpayer to rebut the presumption of willfulness and therefore, I find that this 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 the Notice of Penalty Liability as amended by stipulation be finalized plus penalties and interest to date.

Administrative Law Judge