

IT 02-17

Tax Type: Income 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  
STATE OF ILLINOIS**

) 02 IT 0000  
) SSN# 000-00-0000  
) NOD # 0000

v.

)  
) Mimi Brin  
) Administrative Law Judge  
)

**JOHN DOE**, as responsible officer of  
ABC Industries, Inc.

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**RECOMMENDATION FOR DISPOSITION**

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

**Synopsis:**

This matter comes on for hearing pursuant to John Doe's (hereinafter referred to as "Doe" or the "Taxpayer") protest of Notice of Deficiency No. 0000 (hereinafter referred to as the "NOD") issued by the Illinois Department of Revenue (hereinafter referred to as the "Department") to Doe as a responsible employee of ABC Industries, Inc. (hereinafter referred to as "ABC") for the periods of 1-4/Q/ 94 and 1-2/Q/95 (hereinafter referred to as the "Tax Period"). The issue for hearing is whether Doe was an officer or employee responsible for the filing of Illinois employee withholding tax returns and making the payment of the taxes due thereon and whether he willfully failed to file and/or pay those to the State. By agreement of the parties, Doe appeared via

telephone from Massachusetts, and testified on his own behalf. Following the submission of all evidence and a review of the record, it is recommended that this matter be resolved in favor of the taxpayer. In support of this recommendation, I make the following findings of fact and conclusions of law:

**Findings of Fact:**

1. The Department's *prima facie* case, inclusive of all jurisdictional elements, is established by the admission into evidence of the Notice of Deficiency No. 3057 for the tax periods 1-4/Q/94 and 1-2/Q/95 issued to John Doe. Department Ex. No. 1
2. The basis of the NOD is the employee withholding tax (35 ILCS 5/701 *et seq.*) liability of ABCs Industries, Inc., a corporation with an Illinois location.<sup>1</sup> Department Ex. No. 1
3. At all pertinent times, Doe was ABC's controller. Tr. p. 18
4. During the pertinent times, Doe was an employee, but not an officer, shareholder or director of ABC. Tr. p. 9
5. The NOD, issued July 31, 1997, became final as a matter of law after no protest and request for hearing was received from Doe. This hearing was granted by the Chief Administrative Law Judge on June 1, 1999 based upon a determination that Doe did not originally receive adequate notice of the NOD. Tr. pp. 15-16
6. As controller during the tax period, the responsibility of the issuance of paychecks was with his office. Tr. p. 19

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<sup>1</sup> The corporate base was in Massachusetts. The Massachusetts Department of Revenue found Doe not to be personally liable for corporate withholding taxes for 1995. Tr. p. 25

7. During the tax period, Doe was aware that checks were being issued with his signature on them. Id.
8. He was aware that money was withheld from those paychecks for the State of Illinois (id.), and, further, that the withheld monies were not being paid to the State. Id.
9. Doe signed one of ABC's IL 941 returns for the tax period. Id.
10. During the tax period, some of ABC's creditors were being paid. Tr. p. 19-20

**Conclusions of Law:**

The sole issue to be decided in this case is whether John Doe is personally liable for the unpaid withholding tax of ABC Industries, Inc. The personal liability penalty is imposed by Section 3-7 of the Uniform Penalty and Interest Act ("UPIA"), which provides 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 willfully fails to file the return or to 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 the tax unpaid by the taxpayer including interest and penalties thereon. 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.  
35 ILCS 735/ 3-7(a)

It is clear under the statute that personally liability will be imposed only upon a person who: (1) is responsible for filing corporate tax returns and/or making the tax payments; and (2) "willfully" fails to file returns or make payments.

The admission into evidence of the NOD establishes the Department's *prima facie* case with regard to both the fact that Doe was a "responsible" officer and the fact that he "willfully" failed to file and/or pay. Branson v. Department of Revenue, 168 Ill. 2d 247, 262 (1995).<sup>2</sup> Once the Department has established a *prima facie* case, the burden shifts to the taxpayer to overcome the Department's case. Masini v. Department of Revenue, 60 Ill. App. 3d 11 (1<sup>st</sup> Dist. 1978).

Section 3-7 of the UPIA does not define "responsible" person or "willful" conduct. Doever, the Illinois Supreme Court, in cases wherein it has considered personal liability, has referred to interpretations of similar language in Section 6672 of the Internal Revenue Code (26 USCA §6672). Branson v. Department of Revenue, *supra*; Department of Revenue v. Heartland Investments, Inc., 106 Ill. 2d 19 (1985); Department of Revenue v. Joseph Bublick & Sons, Inc., 68 Ill. 2d 568 (1977). Section 6672 imposes personal liability on corporate officers who willfully fail to collect, account for, or pay over employees' social security and Federal income withholding taxes.

In determining whether an individual is a responsible person, the federal courts have indicated that the focus should be on whether that person has significant control over the business affairs of a corporation and whether he or she participates in decisions regarding the payment of creditors and disbursement of funds. Monday v. United States, 421 F. 2d 1210 (7<sup>th</sup> Cir. 1970), cert. denied 400 U.S. 821 (1970). The courts have considered specific facts in determining whether individuals were "responsible" for the payment of

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<sup>2</sup> In Branson v. Department of Revenue, 168 Ill. 2d 247 (1995), the Illinois Supreme Court held that the admission of the Notice of Penalty Liability into evidence established all of the statutory requirements for the imposition of the penalty, including willfulness. While the Court was addressing §452 ½ (which is also section 13 ½ of the Retailers' Occupation Tax Act, 35 ILCS 120/1 *et seq.*), rather than section 3-7 of the Uniform Penalty and Interest Act ("UPIA"), a comparison of all of these provisions reveals that they are almost identical. All of these provisions enumerate corporate officer and employee penalty liability.

employee taxes, to wit: 1) the duties of the officer as outlined in the corporate by-laws; 2) the ability of the individual to sign checks of the corporation; 3) the identity of the officers, directors and shareholders of the corporation; 4) the identity of individuals who hired and fired employees and 5) the identity of the individuals in control of the financial affairs of the corporation. Id.; Gephart v. United States, 818 F. 2d 469 (6<sup>th</sup> Cir. 1987); Peterson v. United States, 758 F. Supp. 1209 (N.D. Ill. 1990). Liability attaches to those with the power and responsibility within the corporate structure for seeing that the taxes are remitted to the government. Id.

Responsible persons may include officers who can borrow money on behalf of the corporation, Peterson v. United States, *supra*, and may be those with check writing authority who may or may not be the ones with the responsibility for accounting, bookkeeping or the making of payments to creditors. Monday v. United States, *supra*; Wright v. United States, 809 F.2d 425 (7<sup>th</sup> Cir. 1987); Calderone v. United States, 799 F.2d 254 (6<sup>th</sup> Cir. 1986) There may be more than one responsible person in a corporation. Monday v. United States, *supra*; Williams v. United States, 931 F.2d 805, 810 n.7 (11<sup>th</sup> cir. 1991)

Using the criteria followed by courts in addressing officer liability for taxes, I can not conclude that Doe is a “responsible” officer for all of the tax period. The following conclusions certainly can be made: at all times, he was controller of ABC; it was under his “office” that creditor checks were issued; it was under his office that employee paychecks were issued, as well Illinois Il 941 returns filed; and, he had check signing authority and he knew that checks were issued using his signature facsimile stamp.

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Therefore, a similar analysis of Section 3-7 of the UPIA, based on the court’s conclusions may be made. Frowner v. Chicago Transit Authority, 25 Ill. App. 2d 312 (1<sup>st</sup> Dist. 1960).

Throughout his testimony, Doever, Doe maintained that he had no decision making authority regarding what liabilities were to be paid. He was not a corporate shareholder, director or officer. He testified that the sole owner, board chairman, CEO and treasurer of the corporation, XXXXX, directed him as to which creditors to pay.

He repeatedly related that because there has been such a lengthy period of time between the original issuance of the NOD, his subsequent notice of the assessment and the time these proceedings commenced, it was no longer possible for him to find persons who could confirm his arguments. The liability period is for the entire 1994 year and one-half of 1995. The NOD originally issued on July 31, 1997. It has already been determined that notice of the assessment to him was insufficient. While he was granted a hearing in this matter on June 1, 1999, it was not until March 27, 2002 that an initial status conference was held. As Doe indicated, the bank that held ABC's accounts during the tax period changed hands many times, therefore, it was not possible for him to find signature cards, etc. He was not able to find any bank personnel that had knowledge of the account. Nor could he find fellow employees in the area who might verify that he had no control over what obligations were paid.

While it is basic that oral testimony, without competent corroboration, is insufficient to rebut the NOD's *prima facie* presumption of responsibility, it is clear that the delays in addressing the issue, that from the record cannot be attributed to him, have caused problems such that Doe is prevented from presenting his position in a legally sufficient manner. Therefore, there appears to be reasonable cause for this particular assessment to be cancelled.

**WHEREFORE**, for the reasons stated above, it is my recommendation that the Notice of Penalty Liability #0000 issued against John Doe, be cancelled.

12/20/02

Mimi Brin  
Administrative Law Judge