

**ILLINOIS INDEPENDENT TAX TRIBUNAL
CHICAGO, ILLINOIS**

Derek Mercer (Responsible Officer),)	
Petitioner)	Docket No.: 15-TT-202
)	
)	
vs.)	
)	Judge Brian F. Barov
Illinois Department of Revenue,)	
Respondent)	

CERTIFICATE OF SERVICE BY ELECTRONIC TRANSMISION

To: (847) 580-1279
Mr. Michael Raff
Gordon Law Group, Ltd.
400 Central Ave., Suite 340
Northfield, IL 60093
Michael@gordonlawltd.com

PLEASE TAKE NOTICE that on November 3, 2015, the Illinois Department of Revenue's Answer to Taxpayer's Petition was served on the person listed above at the email address listed above. A copy of the Department's Answer to Taxpayer's Petition is attached.

Respectfully submitted,

/s/ Ronald Forman _____
Ronald Forman
Special Assistant Attorney General,

November 3, 2015

Ronald Forman
Special Assistant Attorney General
100 West Randolph Street, 7th Floor
Chicago, IL. 60601
(312) 814-9500

- Petitioner is an individual residing at 308 Odom's Mill Blvd. Ponte Vedra Beach, FL 32082, and his phone number is 904-294-8496. Petitioner's tax identification number is 593-28-8496.

ANSWER: The Department admits the statements contained in Paragraph 2.

Jurisdiction and Venue

- Jurisdiction is proper in Illinois pursuant to section 1010/1-45 of the Illinois Compiled Statutes because Petitioner is a taxpayer pursuant to 35 ILCS 1010/1-10 that was issued an Assessment and Notice of Intent for an alleged tax deficiency pursuant to the Illinois Income Tax Act, 35 ILCS 5/1002(d).

ANSWER: The Department admits the statements contained in Paragraph 3.

- Jurisdiction is further proper pursuant to 2-209 of the Illinois Code of Civil Procedure, 735 ILCS §§ 5/2-209(1) and (2), because Petitioner conducted business within this State.

ANSWER: Paragraph contains legal conclusions, not allegations of material fact, and therefore does not require an answer pursuant to Rule 310(b)(2).

- Venue is proper in Cook County pursuant to section 2-101 of the Illinois Code of Civil Procedure, 735 ILCS § 5/2-101, because it is the county in which the transaction or some part thereof took place.

ANSWER: Paragraph 5 contains a legal conclusion, not an allegation of material fact, and therefore does not require an answer pursuant to Rule 310(b)(2).

Background and relevant facts

6. Petitioner was a passive investor in ATS from September 9, 2008 to March 11, 2014, covering all of the taxable periods at issue (i.e., the First, Second, Third, and Fourth Quarters of 2013, and the First Quarter of 2014 taxable periods).

ANSWER: The Department denies the statements contained in Paragraph 6.

7. ATS filed a return for all taxable periods at issue.

ANSWER: The Department admits the statement contained in Paragraph to the extent Paragraph 7 is referring to form IL-941 for the tax periods at issue in this case.

8. Although Petitioner, until March of 2014, controlled a majority of ATS' membership interests, other members held veto power over certain company matters.

ANSWER: The Department lacks sufficient knowledge or information to form a belief as to the truth or falsity of the statements contained in Paragraph 8.

9. During the taxable periods at issue, ATS' President and Chief Executive Officer was Amy R. McGeorge ("Ms. McGeorge"). Ms. McGeorge ran the company as her day-to-day principal business function and occupation and made all decisions regarding ATS' business matters.

ANSWER: The Department lacks sufficient knowledge or information to form a belief as to the truth or falsity of the statements contained in Paragraph 9.

10. Ms. McGeorge was paid a substantial salary and was also a minority owner of ATS through her ownership interest in Lauder Endeavors, LLC.

ANSWER: The Department lacks sufficient knowledge or information to form a belief as to the truth or falsity of the statements contained in Paragraph 10.

11. Ms. McGeorge signed company checks and made decisions on which creditors to pay.

ANSWER: The Department lacks sufficient knowledge or information to form a belief as to the truth or falsity of the statements contained in Paragraph 11.

12. Ms. McGeorge signed all tax returns and made all tax deposits.

ANSWER: The Department lacks sufficient knowledge or information to form a belief as to the truth or falsity of the statements contained in Paragraph 12.

13. Ms. McGeorge had the customer contacts and the relationships with the ATS employees.

ANSWER: The Department lacks sufficient knowledge or information to form a belief as to the truth or falsity of the statements contained in Paragraph 13.

14. ATS had a history of tax delinquency, but Petitioner did not know ATS was delinquent with payroll taxes for the taxable periods at issue until after the fact.

ANSWER: The Department lacks sufficient knowledge or information to form a belief as to the truth or falsity of the statements contained in Paragraph 14.

15. Ms. McGeorge periodically reported to investors that she had plans to improve the ATS' profits and was trying to sell the business. Her contacts with Petitioner were often merely requests for more money. Despite repeated requests for additional funding, Petitioner told her during 2013 that he was done, and was not going to make any further investments in or loans to the company. Ms. McGeorge was well-aware she could expect no further funding from Petitioner.

ANSWER: The Department lacks sufficient knowledge or information to form a belief as to the truth or falsity of the statements contained in Paragraph 15.

16. Nevertheless, after numerous pleas from Ms. McGeorge for assistance, Petitioner did make one final loan of \$125,000 to ATS in February 2014 to assist ATS in entering into an Installment Agreement with the Internal Revenue Service. This investment was for the

specific purpose of making such tax payment. The March, 2014 Installment Agreement had been negotiated by Ms. McGeorge.

ANSWER: The Department lacks sufficient knowledge or information to form a belief as to the truth or falsity of the statements contained in Paragraph 16.

17. During the summer of 2012 through the summer of 2013, Petitioner worked full-time for his church: Christ Redeemer Church in Ponte Vedra. He held the title of Executive Administrator. He resigned his position with the church in the fall of 2013, and accepted the full time position of CEO with Woofound, Inc., a start-up company located in Baltimore, Maryland. Petitioner continues to commute to Baltimore, returning home to his Florida residence every other weekend.

ANSWER: The Department lacks sufficient knowledge of information to form a belief as to the truth or falsity of the statements contained in Paragraph 17.

18. Petitioner never drew a salary from ATS. Although Petitioner was listed as Vice President in company records, he never acted in such capacity. In fact, the reason that Petitioner was listed as Vice President is not known, but, presumably, it was simply a matter of corporate convenience and to protect his investment in ATS.

ANSWER: The Department lacks sufficient knowledge or information to form a belief as to the truth or falsity of the statements contained in Paragraph 18.

19. Petitioner was a director of and significant investor in ATS but, by 2013, the “handwriting was on the wall,” and he was no longer involved with ATS in any meaningful way.

ANSWER: The Department lacks sufficient knowledge or information to form a belief as to the truth or falsity of the statements contained in Paragraph 19.

20. Petitioner had no authority to sign checks on behalf of ATS, never signed any checks on behalf of ATS, and was not involved at all in the operation of the business. Petitioner had no authority over employee matters.

ANSWER: The Department lacks sufficient knowledge or information to form a belief as to the truth or falsity of the statements contained in Paragraph 20.

21. Upon information and belief, Ms. McGeorge continued running ATS in 2013 to continue receiving her large salary and in attempt to recoup her losses.

ANSWER: The Department lacks sufficient knowledge or information to form a belief as to the truth or falsity of the statements contained in Paragraph 21.

22. In March, 2014, Petitioner abandoned his interest in Lauder Endeavors, leaving Ms. McGeorge as sole owner and, as a result, the majority owner of ATS.

ANSWER: The Department lacks sufficient knowledge or information to form a belief as to the truth or falsity of the statements contained in Paragraph 22.

23. Upon information and belief, after closing the doors of ATS, Ms. McGeorge merely “moved across the street,” and continues to run a temporary staffing agency, using extensive customer and employee contacts from ATS. Upon information and belief, she operates under the entity names of Ginger Marketing, LLC and People, LLC, and also continues to use “Talagy” as a trade name.

ANSWER: The Department lacks sufficient knowledge or information to form a belief as to the truth or falsity of the statements contained in Paragraph 23.

24. Petitioner had no idea of the extent of ATS’ 2013 Illinois tax delinquency until he received the Notice from the Department.

ANSWER: The Department lacks sufficient knowledge or information to form a belief as to the truth or falsity of the statements contained in Paragraph 24.

25. Petitioner was never interviewed in connection with the delinquent payroll taxes by an Illinois Department of Revenue Investigator.

ANSWER: The Department admits the statement contained in Paragraph 25.

Applicable law

26. The Department seeks to impose personal liability on Petitioner as a responsible officer of ATS pursuant to section 1002(d) of the Illinois Income Tax Act, 35 ILCS 5/1002(d). 35 ILCS 5/1002(d) provides that any person who has control, supervision, or responsibility of filing returns or making payments for a taxpayer, and who willfully fails to do so, shall be personally liable for a penalty equal to the amount of tax due including penalty and interest.

ANSWER: Paragraph 26 contains legal conclusions, not allegations of material fact, and therefore does not require an answer pursuant to Rule 310(b)(2).

27. In determining the first element, whether an individual is a responsible person, the courts have indicated that the focus should be on whether that person has significant control of the business affairs of a corporation and whether he participates in decisions regarding the payment of creditors and the dispersal of funds. *See, e.g., Monday v. United States*, 421 F. 2d 1210 (7th Cir. 1970), *cert. denied* 414 U.S. 910 (1973). Liability attaches to those persons with the power and responsibility within the corporate structure for seeing that taxes are remitted to the government. *Id.*

ANSWER: Paragraph 27 contains a legal conclusion, not allegations of material fact, and therefore does not require an answer pursuant to Rule 310(b)(2).

28. As to the second element, it must also be determined whether the taxpayer “willfully” failed to remit withholding taxes due to the Department. The phrase “willful failure” is not defined by any Illinois tax statute. However, Illinois courts have held that the Illinois responsible officer provisions are analogous to the provisions of the Internal Revenue Code section 6672 and, as such, Illinois law may be interpreted in a similar manner. *Branson v. Department of Revenue*, 168 Ill. 2d 247 (1995).

ANSWER: Paragraph 28 contains legal conclusions, not allegations of material fact, and therefore does not require an answer pursuant to Rule 310(b)(2).

Error 1

Petitioner was improperly classified as a responsible person under 35 ILCS 5/1002(d)

29. As a passive investor in ATS for the taxable periods at issue, Petitioner was never required to collect, truthfully account for, and/or pay over any tax imposed under the Internal Revenue Code. As such, Petitioner had no statutorily-imposed duty to make ATS’ tax payments.

ANSWER: Paragraph 29 contains legal conclusions, not allegations of material fact, and therefore does not require an answer pursuant to Rule 310(b)(2).

30. Petitioner may not be presumed to be a “responsible person” merely from acquiring titular authority for the purpose of protecting his investment in ATS.

ANSWER: Paragraph 30 contains legal conclusions, not allegations of material fact, and therefore does not require an answer pursuant to Rule 310(b)(2).

31. Petitioner exercised no authority over ATS' finances or general decision making, had no office space at ATS, and was engaged full-time elsewhere.

ANSWER: The Department lacks sufficient knowledge or information to form a belief as to the truth or falsity of the statements contained in Paragraph 31.

32. Petitioner took no action with respect to ATS' expenditures, tax deposits, or payroll.

ANSWER: The Department lacks sufficient knowledge or information to form a belief as to the truth or falsity of the statements contained in Paragraph 32.

Error 2

Petitioner did not act willfully within the meaning of 35 ILCS 5/1002(d)

33. For the taxable periods at issue, Petitioner was far removed from the financial decisions of ATS. He did not write checks and made no decisions regarding the payment of creditors.

ANSWER: The Department lacks sufficient knowledge or information to form a belief as to the truth or falsity of the statements contained in Paragraph 33.

34. Petitioner did not make a voluntary, conscious, nor deliberate choice to pay withholding taxes to other creditors instead of paying taxes to the government.

ANSWER: The Department lacks sufficient knowledge or information to form a belief as to the truth or falsity of the statements contained in Paragraph 34.

35. In fact, Petitioner did all he could to see that ATS' taxes were paid. Specifically, Petitioner loaned funds to ATS in February of 2014, at the request of Ms. McGeorge, for the explicit purpose of paying the company's delinquent taxes. He had no legal duty or obligation to make such loan.

ANSWER: The Department lacks sufficient knowledge or information to form a belief as to the truth or falsity of the statements contained in Paragraph 35.

36. Petitioner was a busy executive during the taxable periods at issue and worked full time for his church in 2013, through the fall. Petitioner currently works full time in Baltimore as an executive at a start-up company, commuting from Jacksonville.

Ms. McGeorge, as ATS' chief executive officer, occupied the dominant role in the financial affairs of ATS, and she alone made decisions not to pay the Internal Revenue Service and to instead pay other creditors.

ANSWER: The Department lacks sufficient knowledge or information to form a belief as to the truth or falsity of the statements contained in Paragraph 36.

Conclusion and relief requested

37. WHEREFORE, Petitioner Derek M. Mercer accordingly and respectfully requests the reversal or modification of the Notice because Petitioner: (1) was not a "responsible person" and (2) did not act "willfully" to avoid the payment of taxes for the four quarters at issue within the meaning of 35 ILCS 5/1002(d).

ANSWER: The Department denies the statements contained in Paragraph 37

WHEREFORE, the Department prays that this Tribunal enter an Order that:

- a. denies each prayer for relief in Errors I and II of the Taxpayer's Petition;
- b. finds the Collection Action (Assessment and Notice of Intent) Notice is correct as issued;
- c. orders judgment in favor of the Department and against the Taxpayer; and
- d. grants any further relief this Tribunal deems just and appropriate.

Respectfully Submitted,

/s/Ronald Forman
Ronald Forman
Special Assistant Attorney General
Illinois Department of Revenue

Ronald Forman
Special Assistant Attorney General
Illinois Department of Revenue
100 West Randolph Street, Level 7-900
Chicago, IL 60601
(312) 814-9500
ronald.forman@illinois.gov