ILLINOIS INDEPENDENT
TAX TRIBUNAL

CHARLES G. PENNA,	)	
Petitioner	)	
	)	
V	)	**No. 14 TT 249**
ILLINOIS DEPARTMENT	)	**Chief Judge James M. Conway**
OF REVENUE,	)	
Respondent	)	
	)	

ANSWER

Now comes the Department of Revenue of the State of Illinois ("the Department") by and through its attorney, Lisa Madigan, Attorney General of the State of Illinois, and for its Answer to Taxpayer's Petition states as follows:

1. On October 23, 2014, the Department issued an Assessment and Notice of Intent to Mr. Penna for the periods ending March 31, 2011; June 30, 2011; September 30, 2011; and December 31, 2011, assessing a personal liability penalty against him in the total amount of $25,225.52. The personal liability penalty of $25,225.52 is equal to the sum of $365,715.62 in Illinois withholding income tax, $26,687.32 in penalties and $278.41 in interest, less payments/credits in the amount of $367,455.83, that the Department admits were owed by AMG. On the same date, the Department issued a second Assessment and Notice of Intent to Mr. Penna for the periods ending June 30, 2009 and May 31, 2012, assessing a personal liability penalty against him in the total amount of $74,949.27. The personal liability penalty of $74,949.27 is equal to the sum of $46,851.00 in Illinois sales/use tax and E911 surcharge, $15,684.00 in

penalties and $12,414.27 in interest that the Department alleged is owed by AMG. The personal liability penalties of $25,225.52 and $74,949.27 referred to in this paragraph are collectively referred to as the "Penalties." Copies of the Assessments and Notices of Intent ("Notices") are attached as Exhibit B to this Petition.

ANSWER: The Department admits that on October 23, 2014 it issued two Assessments and Notices of Intent ("Notices") to the Petitioner which are attached to the Petition as Exhibit B. The Department states that the notices speak for themselves and therefore deny the petitioner's description and characterization thereof and all other allegations in paragraph 1 of the petition.

2. Mr. Penna resides at 747 North Wabash Avenue, Apt. No. 1003, Chicago, Illinois 60611. Mr. Penna's telephone number is (312) 813-0146, and his Taxpayer Identification number is XXX-XX-9455.

ANSWER: The Department admits the allegations in paragraph 2 of the petition.

3. AMG was a Delaware limited liability company, headquartered in Chicago, that primarily, through its wholly-owned subsidiary AlphaMetrix LLC, sponsored a platform through which certain investors could invest in hedge funds and commodity pools managed by third-party investment managers. In late 2013, AMG's business operations were discontinued and a temporary equity receiver was appointed to take control of the business and, among other things, pay and settle claims made by creditors against AMG, including claims made by taxing authorities. On information and belief, the receiver established a procedure through which a creditor, including a taxing authority, may assert a claim against the receivership estate. On information and belief, the Department may still use this procedure to make a claim against AMG for any and all taxes due and owing to the State of Illinois. On information and belief, the AMG receivership estate possesses sufficient funds to pay the total amount of the Penalties.

ANSWER: The Department lacks knowledge or information sufficient to form a belief as to the truth or falsity of the allegations in paragraph 3 of the petition and therefore neither admits or denies said allegations.

4. Mr. Penna joined AMG in May 2005. From May 2005 until the time period in late 2013 referenced in paragraph 3, Mr. Penna continuously was employed at AMG, consecutively holding the positions of Director of Risk Management and Chief Risk Officer. In 2008, Mr. Penna received an equity member interest in AMG. During all times of Mr. Penna's ownership of his equity membership, he owned less than a 10% interest in AMG.

ANSWER: The Department lacks knowledge or information sufficient to form a belief as to the truth or falsity of the allegations in paragraph 4 of the petition and therefore neither admits or denies said allegations.

5. During his employment at AMG, Mr. Penna's responsibilities with respect to AMG included, among other things, monitoring the positions held by the funds on the platform to ensure compliance with the risk thresholds set forth in the various funds' offering materials. Mr. Penna was not responsible for any tax matters, including but not limited to matters related to tax compliance, return preparation and filing, or tax payment.

ANSWER: The Department lacks knowledge or information sufficient to form a belief as to the truth or falsity of the allegations in paragraph 4 of the petition concerning whether Mr. Penna's responsibilities with respect to AMG included, among other things, monitoring the positions held by the funds on the platform to ensure compliance with the risk thresholds set forth in the various funds' offering materials and therefore neither admits or denies said allegations. The remaining allegations in paragraph 5 of the petition consist of factual and or legal conclusions and are therefore denied.

6. While Mr. Penna was employed at AMG, AMG had a corporate accounting department. AMG's Chief Financial Officer managed this department and reported directly to its former Chief Operating Officer. Among other responsibilities, the corporate accounting department was responsible for working with AMG's outside accountants to prepare and file the company's tax returns, and to pay any taxes owed. Mr. Penna relied on AMG's COO, CFO and corporate accounting department to ensure that AMG paid all taxes owed.

ANSWER: The Department lacks knowledge or information sufficient to form a belief as to the truth or falsity of the allegations in paragraph 6 of the petition and therefore neither admits or denies said allegations.

7. Since the establishment of the receivership, the receiver has controlled AMG's business and possessed exclusive access to AMG's files and accounts. Since her appointment, Mr. Penna could not review, analyze or address in any way, any aspect of AMG's tax compliance, tax return filing, or tax payments.

ANSWER: The Department lacks knowledge or information sufficient to form a belief as to the truth or falsity of the allegations in paragraph 7 of the petition and therefore neither admits or denies said allegations.

8. During the Periods at Issue, AMG employed an outside, unrelated accounting firm, Arthur Bell Certified Public Accountants ("Arthur Bell"), to prepare and file its Illinois sales and use tax returns. On information and belief, Arthur Bell properly filed the relevant sales and use tax returns, and paid the correct amount owed to the Department for the Periods at Issue.

ANSWER: The Department admits that during the Periods at Issue, AMG employed an outside, unrelated accounting firm, Arthur Bell Certified Public Accountants ("Arthur Bell"), to prepare

and file its Illinois sales and use tax returns. The remaining allegations in paragraph 8 of the petition consist primarily of conclusions and are denied.

9. During the Periods at Issue, AMG employed an unrelated third-party payroll services provider, ADP, LLC ("ADP") to manage its payroll, and for the specific purpose of paying its Illinois withholding tax. On information and belief, ADP was responsible for filing the relevant withholding tax returns and paying the correct amount due to the Department for the Periods at Issue.

ANSWER: The Department lacks knowledge or information sufficient to form a belief as to the truth or falsity of the allegations in paragraph 9 of the petition with respect to whether AMG employed an unrelated third-party payroll services provider, ADP, LLC ("ADP") to manage its payroll, and for the specific purpose of paying its Illinois withholding tax and therefore neither admits or denies said allegations. The remaining allegations in paragraph 9 of the petition consist of factual and or legal conclusions and are therefore denied.

10. Mr. Penna lacks knowledge as to whether or not the Department ever issued an assessment or took any other actions to recover from AMG the tax, penalty and interest underlying the amount of Penalties assessed in the Notices.

ANSWER: The Department lacks knowledge or information sufficient to form a belief as to the truth or falsity of the allegations in paragraph 10 of the petition and therefore neither admits or denies said allegations.

11. The Department assessed the Penalties against Mr. Penna pursuant to 35 ILCS 735/3-7; 35 ILCS 5/1002(d); and 86. Ill. Admin. Code §§ 100.7370(d), 700.340. However, the Department's Penalties should be abated as improper for three reasons: (1) AMG can pay the underlying owed; (2) Mr. Penna was not an officer or employee responsible for filing the returns

and making payment for any taxes; and (3) Mr. Penna did not willfully fail to file the returns, pay the taxes, or otherwise evade the taxes that underlie the Penalties. *See, e.g.,* 35 ILCS 735/3-7 (describing the requirements for imposition of personal liability against an officer or employee for his entity's unpaid trust tax liability).

ANSWER: The allegations in paragraph 11 of the petition consist not of material allegations of fact but primarily of factual and/or legal conclusions and are denied.

12. The Department's attempt to hold Mr. Penna personally liable for AMG's alleged unpaid trust tax is improper because "[o]nly where the corporation has incurred ... tax liability *and is unable to pay such amounts* to the Department of Revenue may personal liability attach ...." *McLean v. Dep't of Revenue*, 326 Ill. App. 3d 667, 673-74 (1st Dist. 2001) (emphasis added); *see also Dep't of Revenue v. Heartland Invs., Inc.*, 106 Ill. 2d 19, 32 (1985) (same). Here, on information and belief, AMG has cash and other liquid assets on hand well in excess of the Penalties. And the Department should have a priority claim for all amounts due and owing. Under Local Rule 66.1 of the United States District Court for the Northern District of Illinois, "the administration of estates by receivers . . . shall be similar to that in bankruptcy case... Section 507(a)(8) of the United States Bankruptcy Code provides that claims for unpaid trust taxes receive priority over general unsecured claims. Thus, if the Department has a valid claim for the Penalties, that claim should be a priority claim in the receivership.

ANSWER: The allegations in paragraph 12 of the petition consist not of material allegations of fact but primarily of factual and/or legal conclusions and are denied.

13. The Department's assessments should be reversed for the independent reason that Mr. Penna is not a responsible officer under the governing statutes. Specifically, he was not an officer responsible for filing the returns and making payment for any taxes, including Illinois

taxes. *See, e.g.*, 35 ILCS 735/3-7(a) (defining responsible officer as the officer or employee "who has the control, supervision, or responsibility of filing returns and making payment of the amount of any trust tax imposed . . . ."). Mr. Penna's duties related to the development and implementation of AMG's plan of strategic growth and business development. He was not responsible for preparing the company's tax returns, filing them, or paying any tax due and owing. That was the responsibility of the Chief Operating Officer, to whom AMG's CFO and accounting department reported. While Mr. Penna was employed at AMG and owned only a minority interest in AMG at all relevant times, these facts alone are insufficient to render him a responsible officer under the relevant statutes. *See, e.g., Cerone v. State of Ill.*, 2012 IL App (1st) 110214 (June 26, 2012) (noting that even a majority interest ownership interest by itself is not sufficient to hold an officer personally liable under the statute). Thus, Mr. Penna is not a responsible officer, and the Assessment should be vacated for this reason alone.

ANSWER: The allegations in paragraph 13 of the petition consist not of material allegations of fact but primarily of factual and/or legal conclusions and are denied.

14. The Penalties must also be abated because Mr. Penna did not willfully fail to file the returns, pay the taxes, or otherwise evade the taxes that underlie the Penalties because he reasonably relied on AMG's COO, CFO, its corporate accounting department, its third-party accountants (Arthur Bell), and its third-party payroll services provider (ADP) to ensure that the company's returns were filed and its taxes were paid. Mr. Penna did not know the COO, CFO, corporate accounting department, Arthur Bell, and/or ADP failed to pay any taxes due and owing. Thus, no grounds exist to find Mr. Penna acted willfully under the relevant statutes. *See, e.g., Branson v. Dep't of Revenue*, 168 Ill. 2d 247, 266-67 (1995) (affirming finding of no willfulness during period in which the taxpayer corporation's bookkeeper was charged with

paying bills and filing returns); *Estate of Young v. Dep't of Revenue*, 316 Ill. App. 3d 366, 376-77 (1st Dist. 2000) (when there is a system in place for paying taxes, reliance on that system is reasonable when the taxpayer company is not "in serious financial difficulty"); *Dep't of Revenue v. Marion Sopko, Inc.*, 84 Ill. App. 3d 953, 956 (2d Dist.1980) (evidence of willfulness insufficient where corporate officer directed accountant to pay taxes stated in notice of deficiency and was not aware that accountant had underreported sales receipts).

ANSWER: The Department lacks knowledge or information sufficient to form a belief as to the truth or falsity of the allegations in paragraph 14 of the petition that Mr. Penna did not know the COO, CFO, corporate accounting department, Arthur Bell, and/or ADP failed to pay any taxes due and owing and therefore neither admits or denies said allegations. The remaining allegations in paragraph 14 of the petition consist not of material allegations of fact but primarily of factual and/or legal conclusions and are denied.

15. On information and belief, some portion of the tax allegedly owed by AMG that underlies the Penalties refers or relates to a tax owed by AMG for goods purchased for its own use, rather than a tax that was or should have been collected or withheld by AMG from another person.

ANSWER: The Department admits the allegations in paragraph 15 of the petition.

16. To the extent the Penalties are imposed for a tax owed by AMG for goods purchased for its own use, the Penalties are imposed in violation of 35 ILCS 735/3-7(f). The statute expressly provides that an officer or employee of a taxpayer may only be found liable for a "trust tax," which the statute defines as an amount "collected or withheld by a taxpayer from another person," or for which "an amount is required to be collected or withheld by a taxpayer from another person."

ANSWER: The allegations in paragraph 16 of the petition consist not of material allegations of fact but primarily of factual and/or legal conclusions and are denied.

17. Additionally, Mr. Penna is not subject to the Penalties to the extent that the tax liability underlying the Penalties has been paid by AMG and to the extent that the Department issued the Notices outside of the applicable statute of limitations period. *See* 35 ILCS 735/3-7(a); 35 ILCS 735/3-7(c).

ANSWER: The allegations in paragraph 17 of the petition consist not of material allegations of fact but primarily of factual and/or legal conclusions and are denied.

18. On information and belief, AMG does not owe the tax liability underlying the Penalties.

ANSWER: The allegations in paragraph 18 of the petition consist not of material allegations of fact but primarily of factual and/or legal conclusions and are denied.

19. Therefore the Penalties should be abated.

ANSWER: The allegations in paragraph 19 of the petition consist not of material allegations of fact but primarily of factual and/or legal conclusions and are denied.

20. Mr. Penna reserves the right to supplement his Petition with additional errors in the event that he receives the Notices and as he learns additional relevant facts.

ANSWER: The assertions in paragraph 20 of the petition do not consist of material allegations of fact requiring a response from the Department .

WHEREFORE, the Department prays that the Tribunal enter an order:

a. denying the prayer for relief in the Petitioner's Petition in its entirety;

b. finding that the Notices of Penalty Liability at issue are correct as issued;

c. ordering judgment in favor of the Department and against the Taxpayer; and granting such further relief as this Tribunal deems appropriate under the circumstances.

Respectfully Submitted,

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State of Illinois

By: _____

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CHICAGO, ILLLINOIS

CHARLES G. PENNA	)	
	)	
v.	)	**14-TT-249**
	)	
STATE OF ILLINOIS	)	
DEPARTMENT OF REVENUE	)	

AFFIDAVIT OF MARK DYCKMAN
PURSUANT TO TRIBUNAL RULE 5000.310(b)(3)

1. I am currently employed by the Illinois Department of Revenue in the Legal Services Bureau.
2. My current title is Deputy General Counsel.
3. I lack the personal knowledge required to either admit or deny the allegations alleged and neither admitted or denied in Petitioner's Petition paragraphs 3,4,5,6,7,9,10 and 14.

Under penalties as provided by law pursuant to Section 1-109 of the Code of Civil Procedure, the undersigned certifies that the statements set forth in this instrument are true and correct, except as to matters therein stated to be on information and belief and as to such matters the undersigned certifies that he (she) verily believes the same to be true.

Mark Dyckman
Deputy General Counsel
Illinois Department of Revenue

DATED: 2-5-15