

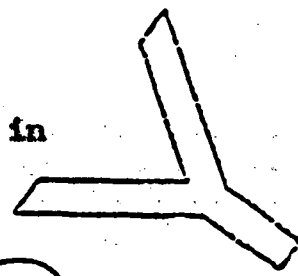


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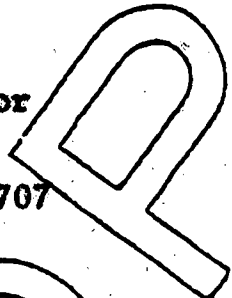
February 19, 1981

FILE NO. 81-003

REVENUE:
Validity of Procedures Set Forth in
Article 14 of the Department of
Revenue Administrative Rules and
Regulations



J. Thomas Johnson, Director
Department of Revenue
1500 South 9th Street
Springfield, Illinois 62707



Dear Mr. Johnson:

I have a letter from your predecessor wherein he inquired whether the procedures set forth in Article 14 of the Department of Revenue's Administrative Rules and Regulations pertaining to the Retailers' Occupation Tax Act (Ill. Rev. Stat. 1979, ch. 120, par. 440 et seq.) are valid. For the reasons hereinafter stated, it is my opinion that substantial portions of Article 14 are not valid, due to the lack of adequate statutory support for promulgation in the aforementioned Act.

According to your predecessor's letter, Article 14, which was filed on June 7, 1979, and became effective June 17, 1979, was adopted by the Department to implement procedures

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for enforcement of section 13 1/2 of the Retailers' Occupation Tax Act (Ill. Rev. Stat. 1979, ch. 120, par. 452 1/2), which provides that:

"Any officer or employee of any corporation subject to the provisions of this 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 wilfully fails to file such return or to make such payment to the Department shall be personally liable for such amounts, including interest and penalties thereon, in the event that after proper proceedings for the collection of such amounts, as provided in said Act, such corporation is unable to pay such amounts to the department; and the personal liability of such officer or employee as provided herein shall survive the dissolution of the corporation."

Article 14, herein reproduced in full, provides that:

"Any officer or employee of the corporation who has the control, supervision or responsibility of filing returns and making payment of the amount of tax imposed in accordance with Section 3 of the Act, and who wilfully fails to file such return or to make such payment to the Department, shall be personally liable for such amounts, including interest and penalties thereon, in the event that after proper proceedings for the collection of such amounts, as provided in the Act, such corporation is unable to pay such amounts to the Department. The personal liability of such officer or employee as provided herein, shall survive the dissolution of the corporation.

When the Department has obtained a judgment against a corporation, and a subsequent execution upon that judgment has been returned by a sheriff indicating no assets were found, when a Seizure Warrant issued to a sheriff has been returned indicating no assets were found, or when the Department has established that a corporation is unable to pay the amount due, the Department will issue to any officer or employee of the corporation who has the control, supervision or responsibility of filing returns and making payment of the amount of tax imposed in accordance with Section 3 of the Act, and

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who wilfully fails to file such return or to make such payment to the Department, a Notice of Tax Liability in the amount of the tax, penalty and interest due the Department by the corporation. If such officer or employee or his legal representative shall, within 20 days after such Notice of Tax Liability, file a protest to said Notice of Tax Liability and request a hearing thereon, the Department shall give notice to such person or legal representative of the time and place fixed for such hearing and shall hold a hearing in conformity with the provisions of the Retailers' Occupation Tax Act. If a protest to the Notice of Tax Liability and request for a hearing thereon is not filed within 20 days after such notice, such Notice of Tax Liability shall become final without the necessity of a final assessment being issued and shall be deemed to be a final assessment.

After the issuance of a final assessment, or a Notice of Tax Liability which becomes final without the necessity of actually issuing a final assessment as hereinbefore provided, the Department, at any time before such assessment is reduced to judgment, may grant a rehearing (or grant departmental review and hold an original hearing if no previous hearing in the matter has been held) upon the application of the person aggrieved. The Department, in determining whether a rehearing or departmental review shall be granted, will consider the diligence of the taxpayer in attempting to obtain a departmental hearing, and/or the discovery of new evidence that was unavailable at the time of the original hearing. Pursuant to such hearing or rehearing, the Department shall issue a revised final assessment to such person or his legal representative for the amount found to be due as a result of such hearing or rehearing."

Section 12 of the Retailers' Occupation Tax Act

specifically provides that the Department has the authority to:

" * * * make, promulgate and enforce such reasonable rules and regulations relating to the administration and enforcement of the provisions of this Act as may be deemed expedient.

* * *

It is a well-established general maxim of administrative law that administrative rules and regulations must be

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authorized by statute and that a statute may not be altered or added to by the exercise of a power to promulgate rules and regulations thereon. (Northern Ill. Auto Workers v. Dixon (1979), 75 Ill. 2d 53, 60.) Moreover, with reference to the Department of Revenue, Illinois courts have stated that rules and regulations promulgated by that Department may not extend the scope of the Retailers' Occupation Tax Act because the Department is without authority to broaden statutory provisions. (Saxon-Western Corp. v. Mahin (1979), 78 Ill. App. 3d 125, 129; Terrace Carpet Co. v. Dep't of Revenue (1977), 46 Ill. App. 3d 84, 90.) Consequently, to be valid, Article 14 must find an adequate statutory basis in the Act and must present a reasonable and consistent interpretation of the authorizing statute.

Briefly, the first paragraph of Article 14 and section 13 1/2 of the Act are substantially identical. Thereafter, in paragraphs 2 and 3 of Article 14, the Department has detailed a procedure which purports to implement the final assessment of tax liability against the responsible officer or employee after the Department has established that a corporation is unable to pay.

More specifically, paragraph 1 of Article 14 provides, as does section 13 1/2 of the Act, for the personal liability of certain officers and employees under specified conditions and only:

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" * * * in the event that after proper proceedings for the collection of such amounts, as provided in the Act, such corporation is unable to pay such amounts to the Department. * * * "
(Emphasis added.)

The words of the statute are clear in providing that an officer or employee may be held personally liable for the tax due from a corporation only when the corporation is unable to pay as indicated by failure to collect from the corporation in accordance with the proceedings for collection provided in the Act. Consequently, the first paragraph of Article 14 is merely a restatement of that portion of section 13 1/2 of the Act and, as such, is valid, although without legal effect apart from the statute itself.

In the second paragraph of Article 14, the Department purports to set up three alternative procedures to establish that a corporation is unable to pay an amount due. Specifically, that portion of Article 14 provides that:

" * * *

When the Department has obtained a judgment against a corporation, and a subsequent execution upon that judgment has been returned by a sheriff indicating no assets were found, when a Seizure Warrant issued to a sheriff has been returned indicating no assets were found, or when the Department has established that a corporation is unable to pay the amount due, the Department will issue * * * a Notice of Tax Liability * * * .

* * *

The first two procedures are valid because, as required by section 13 1/2 of the Act, they are "proper proceedings for the collection of such amounts, as provided in said Act".

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(Ill. Rev. Stat. 1979, ch. 120, pars. 444a, 444e, 444f.) However, the third procedure, "or when the Department has established that a corporation is unable to pay the amount due", is not a proceeding authorized by the Act and therefore is not supported by adequate statutory authority.

The Act provides various proceedings for the collection of amounts due. Specifically, these proceedings include judicial proceedings by levy on execution after judgment (Ill. Rev. Stat. 1979, ch. 120, par. 444), foreclosure on a tax lien (Ill. Rev. Stat. 1979, ch. 120, pars. 444a, 444e), levy on the Department's warrant (Ill. Rev. Stat. 1979, ch. 120, par. 444f), together with, according to sections 5e and 5f (Ill. Rev. Stat. 1979, ch. 120, pars. 444e, 444f), other remedies available to a judgment creditor under the laws of this State. Based on information from your office (Transferee Assessment Procedure O. P. #95-104), the Department apparently anticipates the use of an internal procedure relying on field research in the form of observation and investigation by Revenue Collection Officers to determine that a corporation is unable to pay. However, as stated above, I find no authority in the Act which empowers the Department to establish that a corporation is unable to pay by any such internal procedure. Therefore, such a procedure, for the reasons indicated above, is in excess of the Department's authority and consequently invalid as an administrative rule.

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In Department of Revenue v. Joseph Rublick and Sons (1977), 68 Ill. 2d 568, the Illinois Supreme Court interpreted section 13 1/2 as not requiring that any post-judgment collection action be instituted against a corporation prior to the attachment of liability to the responsible officer or employee. However, on the facts of that case, it was admitted in the pleadings that the corporation was unable to pay. Moreover, that case in no way involved the third procedure or one similar to the third procedure set out in Article 14. Similarly, the court in People ex rel. Scott v. Pintozzi (1971), 50 Ill. 2d 115, sustained the imposition of tax liability on certain responsible corporate officers or employees only after citation proceedings to discover assets had established that there were no assets of the corporation to satisfy judgment. Again, this case does not support the use of the third procedure by the Department to determine that the corporation is unable to pay the amount due.

In the remaining section of paragraph 2 and in paragraph 3 of Article 14, the Department details a procedure whereby the responsible officer or employee is personally assessed the amounts due and owing from the corporation. According to paragraph 2, the responsible officer or employee is to be issued a Notice of Tax Liability. Thereafter, provision is made for protest and administrative hearing concerning said Notice of Tax Liability, prior to the issuance of final assessment.

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However, section 13 1/2 of the Act, which is the only section establishing liability for tax against certain responsible officers or employees when a corporation is unable to pay, contains no such provision for the issuance of a Notice of Tax Liability or an administrative procedure for imposing a final assessment. Although such a procedure is authorized against taxpayers elsewhere in the Act (Ill. Rev. Stat. 1979, ch. 120, par. 443), it does not appear to be authorized by section 13 1/2 against the responsible officer or employee even when the corporation has been properly determined as unable to pay. Further, because the action authorized by section 13 1/2 against the responsible officer or employee is in the nature of a suit to collect the amount of tax due from the corporation, the assessment of which is final and not subject to collateral attack (People ex rel. Scott v. Pintozzi (1971), 50 Ill. 2d 115, 126-7), it does not appear that such a procedure is necessary. It should be noted that at the time of the action for collection against the responsible officer or employee, he must be shown to have willfully failed to file such return or make payment. Of course, as a matter of courtesy and to afford the individual an opportunity to pay, the Department could give notice of its claim to the responsible officer or employee and thereafter file the action authorized by section 13 1/2 for the amount due. However, a Notice of Tax Liability and the procedure for "final assessment" as provided in Article 14 has no legal

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consequence as far as imposing liability under section 13 1/2
of the Act.

Very truly yours,

ATTORNEY GENERAL