

STATE OF NEW YORK
TAX APPEALS TRIBUNAL

In the Matter of the Petition :
of :
STEPHEN G. FLAX : DECISION
DTA NO. 801155
for Redetermination of a Deficiency or for Refund :
of New York State Personal Income Tax under :
Article 22 of the Tax Law and New York City :
Personal Income Tax under Chapter 46, Title T of :
the Administrative Code of the City of New York :
for the Year 1982. :
_____ :

Petitioner, Stephen G. Flax, 61 Jane Street, Apt. 5M, New York, New York 10014, filed an exception to the determination of the Administrative Law Judge issued on January 14, 1988 with respect to his petition for redetermination of a deficiency or for refund of New York State personal income tax under Article 22 of the Tax Law and New York City personal income tax under Chapter 46, Title T of the Administrative Code of the City of New York for the year 1982 (File No. 801155). Petitioner appeared by Saltzman & Halloran (Michael I. Saltzman, Esq., of counsel). The Division of Taxation appeared by William F. Collins, Esq. (Paul A. Lefebvre, Esq., of counsel).

Petitioner submitted a brief on exception. The Division filed a letter in response to petitioner's brief. Oral argument, at the request of the petitioner, was heard on June 7, 1988.

After reviewing the entire record in this matter, the Tax Appeals Tribunal renders the following decision.

ISSUE

Whether petitioner, Stephen G. Flax, is subject to penalties under section 685(g) of the Tax Law and section T46-185.0(g) of the Administrative Code of the City of New York, as a person who willfully failed to collect, truthfully account for and pay over the New York State and New York City withholding taxes due from National Plywood Co., Inc. for the period January 1, 1982 through June 30, 1982.

FINDINGS OF FACT

We find the facts of this matter as determined by the Administrative Law Judge and such facts are incorporated herein by this reference.

These facts may be summarized as follows:

National Plywood Co., Inc., 445 Exterior Street, Bronx, New York 10451, failed to pay over the New York State and New York City personal income taxes withheld from the wages of its employees for the period January 1, 1982 through June 30, 1982 as follows:

New York State tax	\$11,116.69
New York City tax	<u>2,862.86</u>
Total	\$13,979.55

On February 27, 1984, the Division of Taxation issued a Statement of Deficiency in conjunction with a Notice of Deficiency against Adolph M. Flax wherein penalties were asserted pursuant to section 685(g) of the Tax Law and section T46-185.0(g) of the Administrative Code of the City of New York for amounts equal to the New York State and New York City withholding taxes due from National Plywood Co., Inc. ("National") for the aforesaid period. A Statement of Deficiency and Notice of Deficiency were issued against petitioner, Stephen G. Flax, under the same date. The penalties asserted thereon were identical in nature and amount

to those asserted against Adolph M. Flax.

During and prior to the period at issue, National was engaged in the wholesale distribution of plywood and formica. National was a family business which was owned and operated for many years by members of the Flax family. Nathan, Benjamin, Max, Adolph, Sol and Sidney Flax, who were brothers, all worked in the business over the years, as did a sister, Sadie.

Originally, Nathan and Benjamin Flax owned 100 percent of the stock of National. When Nathan died several years prior to the period at issue, his stock passed to Benjamin. At some point prior to the period at issue, Adolph M. Flax and his brother, Sol, each acquired 10 percent of the shares of National.

In or about 1964, Adolph M. Flax's brothers, Nathan and Benjamin, put him in charge of the formica department of National. His duties in such position involved ordering formica products from suppliers and selling them to National's customers. Adolph M. Flax held this position until National filed for bankruptcy in July 1982.

Petitioner, Stephen G. Flax, was asked to come into the family business in 1976, when his uncle, Benjamin Flax, had a period of illness. At that time, he was involved with the plywood portion of National's business. He also became involved at that time in the financial affairs of National.

Benjamin Flax became ill again in or about 1979, and although he did not work full time, he continued to manage the financial affairs of National in 1979, 1980 and 1981 with Adolph M. Flax's son, petitioner Stephen G. Flax. In 1981 Benjamin Flax worked half a day nearly every day. Petitioner, Stephen G. Flax, became more involved in the financial affairs of National as the health of his uncle, Benjamin Flax, deteriorated. This pattern continued until April 1982, the

month before Benjamin Flax died.

In July 1981, in view of Benjamin Flax's illness, Adolph M. Flax and his son, petitioner Stephen G. Flax, purchased all the stock of National. As the result of the sale, each owned 50 percent of the stock.

In 1981, Adolph Flax became ill and was hospitalized or recovering from the effects of surgery for most of the year. In 1982, Adolph Flax returned to work but was only able to work 3 hours a day and some days he was not able to work at all. Due to Adolph Flax's illness, petitioner did not discuss National finances with him.

National had a bookkeeper who kept its books and records and handled the receipts and payments of bills on a day-to-day basis. In 1978 or 1979, the bookkeeper, who had been with National for a number of years, became ill and died. Subsequently, National retained the services of an attorney and an accountant, who, together with petitioner, Stephen G. Flax, hired a new full time bookkeeper who worked at National's office during the first half of 1982.

During the period at issue petitioner, Stephen G. Flax, held the title of vice president.

During the early part of 1982, when Benjamin Flax was not in the office, petitioner, Stephen G. Flax, worked with the bookkeeper on National's accounts payable. The bills and checks were presented to him for examination and signature. This procedure was followed on a weekly or bi-weekly basis. In the first half of 1982, some general creditors and utilities were paid. Stephen G. Flax was aware of the amount of money in National's bank account and the amount of money coming in through accounts receivable. He was not familiar with the withholding tax law and computations. He left the computations and preparation of withholding tax returns to the bookkeeper.

Only one signature was required on corporate checks. Benjamin Flax and both petitioners each had authority to sign corporate checks in 1982.

Petitioner, Stephen G. Flax, secured financing for National. He made the decision as to which employees would be laid off. He also was the person who made the decision to file for Chapter XI bankruptcy in July, 1982. He signed tax returns other than withholding tax returns on behalf of National during the period at issue. He first learned that the withholding taxes at issue were not paid in June 1982, prior to filing for bankruptcy.

OPINION

The Administrative Law Judge determined that petitioner was a responsible person and that his actions were willful within section 685(g) of the Tax Law. On exception, the petitioner challenges only the conclusion that his failure to pay was willful.

We affirm the determination of the Administrative Law Judge.

Tax Law section 685(g) penalizes those persons responsible for the withholding and paying over of such funds for willfully failing to so withhold or pay over. This section provides:

“Willful failure to collect and pay over tax. - Any person required to collect, truthfully account for, and pay over the tax imposed by this article who willfully fails to collect such tax or truthfully account for and pay over such tax or willfully attempts in any manner to evade or defeat the tax or the payment thereof, shall, in addition to other penalties provided by law, be liable to a penalty equal to the total amount of the tax evaded, or not collected, or not accounted for and paid over. No addition to tax under subsections (b) or (e) shall be imposed for any offense to which this subsection applies. The tax commission shall have the power, in its discretion, to waive, reduce or compromise any penalty under this subsection.” (Emphasis added.)

The question of willfulness is related directly to the question of whether petitioner was a responsible officer since an officer responsible for the collection and paying over of the taxes is

the one who can consciously and voluntarily decide not to do so. However, merely because one is determined to be a responsible officer, it does not automatically follow that a failure to withhold and pay over income taxes is “willful” within the meaning of that term as used in section 685(g). More is required. The Court of Appeals held in Matter of Levin v. Gallman (42 NY2d 32), that the test is “whether the act, default, or conduct is consciously and voluntarily done with knowledge that as a result, trust funds belonging to the Government will not be paid over but will be used for other purposes ... No showing of intent to deprive the Government of its money is necessary but only something more than accidental non-payment is required” (Matter of Levin v. Gallman, supra, at 34 [emphasis added]).

The essence of the willfulness standard is that the person must voluntarily and consciously direct the trust fund monies from the State to someone else. There need not be any particular motive for doing so, only the result that the State has not received the monies held in trust for it. Mere negligence is not enough. The fact that section 685(g) imposes a penalty and is violated only by a willful failure is strong evidence that it was not intended to be imposed without personal fault. (See, e.g., Slodov v. United States, 436 US 238; Brown v. United States, 591 F2d 1136 [5th Cir 1979]; White v. United States, 372 F2d 513 [Ct Cl 1967]; Braden v. United States, 442 F2d 342 [6th Cir 1971] interpreting analogous language in section 6672 of the Internal Revenue Code.)

Proof of this conscious and voluntary action is by necessity dependent on the facts and circumstances of each case. Here, the petitioner did not know of the failure to pay over the withholding taxes at the time the failure occurred. This lack of actual knowledge negates a finding that the act was voluntarily and consciously done by the petitioner (cf. Matter of Levin

v. Gallman, 42 NY2d 32, 34, supra and Matter of MacLean v. State Tax Commn., 69 AD2d 951, 952, affd 49 NY2d 920 [where actual knowledge supported a finding of willful]).

However, a responsible officer's failure can be willful, notwithstanding his lack of actual knowledge, if it is determined the officer recklessly disregarded his corporate responsibilities including the responsibility to see that taxes were paid. (Matter of Capoccia v. State Tax Commn., 105 AD2d 528, 529; Matter of Ragonesi v. State Tax Commn., 88 AD2d 707, 708; compare, Reyers v. State Tax Commn., 116 AD2d 880; Matter of Lyon, Tax Appeals Tribunal, June 3, 1988.)

We conclude that petitioner recklessly disregarded his responsibilities because he did not prove that as a responsible officer he made a reasonable delegation of authority to ensure that the withholding taxes were paid. Petitioner has attempted to place responsibility on the corporation's bookkeeper for the failure to pay the taxes. However, even if petitioner did in fact delegate this responsibility to the bookkeeper, petitioner has not demonstrated that this was a reasonable delegation. He did not prove that it was reasonable to rely on this person nor did he prove that he reasonably supervised the work of this person.

Finally, petitioner did not prove that he could not easily have determined that the taxes were not paid. Petitioner was unaware of the failure to pay the taxes only because he failed to inquire. A responsible officer cannot insulate himself from liability by such a "hear no evil - see no evil" policy.

Under these circumstances we hold that petitioner's actions were willful. He was in a

position to determine whether the corporation was meeting all of its tax responsibilities since he signed tax returns. The information was easily available to him. He was fully involved in-the financial affairs of the corporation. His assertions concerning his unfamiliarity with the withholding tax law and computations are not relevant.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of Stephen G. Flax is denied;
2. The determination of the Administrative Law Judge is affirmed; and
3. The petition of Stephen G. Flax is denied and the Notice of Deficiency

issued against him on February 27, 1984 is sustained.

DATED: Albany, New York
SEP 09 1988

John P. Dugan
President

Francis R. Koenig
Commissioner