

STATE OF NEW YORK
TAX APPEALS TRIBUNAL

In the Matter of the Petition :
of :
BENJAMIN K. CHIN :
for Redetermination of a Deficiency or for :
Refund of Personal Income Tax under Article 22 :
of the Tax Law for the Year 1982. :

DECISION
DTA No. 802832 and 802500

In the Matter of the Petition :
of :
BENJAMIN CHIN, :
OFFICER OF JUMBO HOUSE, INC. :
for Revision of a Determination or for Refund :
of Sales and Use Taxes under Articles 28 and 29 :
of the Tax Law for the Period March 1, 1982 :
through August 31, 1983. :

Petitioner Benjamin K. Chin, 384 Broome Street, Apt. 10, New York, New York 10013, filed an exception to the determination of the Administrative Law Judge issued on July 5, 1990 with respect to his petitions for redetermination of a deficiency or for refund of personal income tax under Article 22 of the Tax Law for the year 1982 and for revision of a determination or for refund of sales and use taxes under Articles 28 and 29 of the Tax Law for the period March 1, 1982 through August 31, 1983 (File Nos. 802832 and 802500). Petitioner appeared by George Pugh, Esq. The Division of Taxation appeared by William F. Collins, Esq. (Gary Palmer, Esq., of counsel).

Petitioner and the Division of Taxation each filed a brief. Petitioner's request for oral argument was denied.

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

ISSUES

I. Whether petitioner was a person, as defined in § 685(n) of the Tax Law, who was required to collect, truthfully account for and pay over withholding tax due from Jumbo House, Inc. for the year 1982, and who willfully failed to so collect, truthfully account for and pay over such tax so as to render him liable for the penalty imposed by § 685(g) of the Tax Law.

II. Whether petitioner was a person required to collect tax on behalf of Jumbo House, Inc. pursuant to §§ 1131(1) and 1133(a) of the Tax Law so as to render him personally liable for penalty and interest imposed for late filed sales tax returns and late payment of sales tax pursuant to § 1145(a)(1)(i) of the Tax Law.

III. Whether petitioner has established that the failure to timely file sales tax returns and to timely pay tax was due to reasonable cause and not due to willful neglect so as to form a basis for the abatement of penalty and that portion of interest that exceeds interest computed in accordance with § 1142 of the Tax Law.

FINDINGS OF FACT

We find the facts as determined by the Administrative Law Judge except for findings of fact "4" and "5(b)" which have been modified. We have also made an additional finding of fact. The Administrative Law Judge's findings of fact, the modified findings of fact and the additional finding of fact are set forth below.

Jumbo House, Inc. operated a Chinese restaurant in New York City. Its major shareholders were Mr. Tik Kuey Ng, Mr. Fee Yin Chan, petitioner, Benjamin Chin, and Mr. Chin's mother. Other shareholders were Mr. Yet Chiu Chang, a Dr. Lourdes (a friend of Mr. Chang's), the sister of Mr. Chin and a Mr. Hanet. Its officers were Mr. Ng, President and Mr. Chin, Secretary. Its bookkeeper was Mr. Chang. The corporation had a certified public

accountant, Jeffrey Foong of 217 Park Row, and an attorney, Richard Wong, also of 217 Park Row.

Jumbo started business in 1979. On its opening night, it had a fire. It had to renovate its premises and recommence business. It had another fire in August 1983. Again, it renovated and recommenced business. At this time, the restaurant obtained a bank loan on the basis of the collateral of a savings bank account owned by Mr. Chin's wife.

On September 2, 1982, Jumbo executed deferred payment agreements with the Division of Taxation for its back taxes for an estimated liability for the periods ending on and before February 28, 1982 of \$70,925.94. Later in March 1983, it executed another agreement for an estimated liability for the periods ending on and before November 30, 1982 of \$99,895.81.

In late 1983 or 1984 the business was sold. The purchaser was Flower Lounge Restaurant, Inc. This purchaser was notified by the Division of Taxation on December 30, 1983 of a bulk sale liability under Tax Law § 1141(c) for the sales taxes owed by Jumbo House in the amount of \$161,379.97 plus interest. Later, however, Flower Lounge was notified that it had been released from this liability.

Mr. Wong, the attorney for Jumbo, held in escrow funds of Jumbo (presumably received from the sale of the business). In April 1987, these funds were about \$12,000.00. Mr. Wong was informed at that time by Mr. George Pugh, the attorney for Mr. Chin, of the Division's assertions of sales taxes and withholding taxes.

From the sale of the business Mr. Chin, as stockholder, received about \$27,000.00. With this he paid off bank loans of \$10,000.00 and \$15,000.00.

Mr. Ng and Mr. Chang were the most active owners in the business. Both dealt with suppliers who were Chinese and who did not speak English. Both Mr. Ng and Mr. Chang could speak Chinese. Mr. Chin could not speak Chinese. Almost all of the business transactions of Jumbo, both the sales and purchases, were done in cash.

Mr. Chin states that his duties with Jumbo involved only dealing with the public when a knowledge of English was necessary. Neither Mr. Ng nor Mr. Chang could speak or read

English. These duties would be needed when dealing with non-Chinese customers and in dealing with the government.

Mr. Chin signed some of the sales tax returns of Jumbo. Sometimes he would sign returns with an "X" indicating the name of Mr. Ng. (All returns in evidence had also been rubber stamped with the name of the certified public accountant, Mr. Foong, as preparer.) Mr. Chin signed a Form 2103, withholding tax reconciliation, for the corporation. Mr. Chin acted for the corporation in signing the deferred payment agreements with the Division of Taxation. Mr. Chin and Mr. Ng were authorized to sign checks. All checks required two signatures. Checks were used to pay only the rent, utilities and taxes.

Mr. Chin admits pointing out to Mr. Ng when taxes were due. While Mr. Chin states that Mr. Ng made all decisions concerning payment of taxes, Mr. Chin did not cease exercising his authority to sign checks on behalf of the restaurant when taxes were not paid.

We modify finding of fact "4" of the Administrative Law Judge's determination to read as follows:

Sales tax returns were filed late and payments made late for the sales tax quarters ending May 31, 1982, August 31, 1982, November 30, 1982, May 31, 1983 and August 31, 1983.¹

A Notice of Deficiency was issued to Benjamin Chin on November 25, 1985 for a penalty under Tax Law § 685(g) of Article 22 of the Tax Law for withholding taxes for the year 1982 in the amount of \$9,348.60.

We modify finding of fact "5(b)" of the Administrative Law Judge's determination to read as follows:

A Notice of Determination and Demand for Payment of Sales and Use Taxes Due was issued to petitioner on June 26, 1985 for a penalty for the late filing of five returns and late payment of tax due for the sales tax

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The Administrative Law Judge's finding of fact "4" read as follows:

"Sales tax returns were filed late and payments made late for the sales tax quarters ending August 31, 1982, November 30, 1982 and August 31, 1983."

This fact was modified to more fully reflect the record.

quarters ending May 31, 1982, August 31, 1982, November 30, 1982, May 31, 1983 and August 31, 1983 in the amount of \$10,765.75, plus interest of \$11,425.06, for a total amount due of \$22,190.81. An explanation stated that petitioner was liable individually and as officer of Jumbo House, Inc. under Tax Law §§ 1131(1) and 1133.²

We find an additional finding of fact to read as follows:

The major shareholders, Mr. Ng, Mr. Chan, petitioner Mr. Chin and Mr. Chin's mother, each invested \$15,000.00 in Jumbo House.

OPINION

In his determination, the Administrative Law Judge found that petitioner was liable for the penalty under § 685(g) of the Tax Law. He found that petitioner failed to sustain his burden to prove that he was not a person required to collect, truthfully account for and pay over withholding taxes. The Administrative Law Judge stated that although petitioner claimed that his duties with respect to the corporation were ministerial, the fact that petitioner was the only officer who knew English did not necessarily mean that petitioner's role in the corporation was only ministerial. The Administrative Law Judge stated that, on the contrary, the other officers of the corporation probably would expect such a person as petitioner to do everything possible to insure that the corporation meets its obligations. For the same reasons, the Administrative Law Judge found petitioner to be liable as a person required to collect sales and use taxes from Jumbo pursuant to §§ 1131(1) and 1133(a) of the Tax Law. Lastly, the Administrative Law Judge determined that petitioner was liable for the penalties for late filing of the sales tax returns under Tax Law § 1145(a)(1)(i).

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The Administrative Law Judge's finding of fact "5(b)" read as follows:

"A Notice of Determination and Demand for Payment of Sales and Use Taxes Due was issued to petitioner on June 26, 1985 for a penalty for the late filing of returns and late payment of tax due for the period March 1, 1982 through August 31, 1983 (although it did not include the quarter ending February 28, 1983) in the amount of \$10,765.75, plus interest of \$11,425.06, for a total amount due of \$22,190.81. An explanation stated that petitioner was liable individually and as officer of Jumbo House, Inc. under Tax Law §§ 1131(1) and 1133."

This fact was modified to more accurately reflect the record.

In his exception, petitioner contends that he is not a responsible officer and, thus, is not liable for any amounts owed in penalties and interest due under Tax Law §§ 685(g) and 1145(a)(1)(i). Moreover, petitioner asserts that such liability imposed upon him is in violation of due process and equal protection under the 5th and 14th Amendments to the Constitution and Article 1, §§ 6 and 11 of the New York State Constitution.

The Division asserts that the determination of the Administrative Law Judge is correct in all respects and should be affirmed.

We affirm the determination of the Administrative Law Judge.

Section 685(g) of the Tax Law 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."

Section 685(n) defines persons subject to the § 685(g) penalty as follows:

"[T]he term person includes an individual, corporation (including a dissolved corporation), or a member or employee of any partnership, who as such officer, employee, or member is under a duty to perform the act in respect of which the violation occurs."

The question of whether someone is a "person" required to collect and pay over withholding taxes is a factual one. Factors which should be considered are whether the petitioner signed the tax return, derived a substantial part of his income from the corporation, or had the right to hire and fire employees (Matter of Malkin v. Tully, 65 AD2d 228, 412 NYS2d 186; see, Matter of MacLean v. State Tax Commn., 69 AD2d 951, 415 NYS2d 492, 494, affd 49 NY2d 920, 428 NYS2d 675). Other pertinent areas of inquiry include the person's official duties, the amount of corporation stock he owned, and his authority to pay corporate obligations (Matter of Amengual v. State Tax Commn., 95 AD2d 949, 464 NYS2d 272, 273; see, Matter of McHugh v. State Tax Commn., 70 AD2d 987, 417 NYS2d 799, 801).

From the evidence presented at the hearing, through the testimony of petitioner himself, it is clear that petitioner is a person required to collect and pay over withholding taxes. Petitioner was an officer of the corporation, he was a major stockholder in the corporation, he invested a large amount of money in the corporation, he was involved in the day-to-day operations of the corporation, he signed tax returns and was a required co-signatory on the corporate checks. Furthermore, petitioner testified that he signed a withholding tax reconciliation form, deferred payment agreements and informed Mr. Ng, president of the corporation, when taxes were due. All of these duties and responsibilities performed by petitioner result in his being required to collect and pay over withholding taxes within the meaning and intent of § 685(n) of the Tax Law.

Since petitioner is deemed to be a person required to collect and pay over withholding taxes, we must decide whether his failure to withhold and pay over such taxes was willful. The question of willfulness is related directly to the question of whether petitioner was a responsible officer since clearly 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. We do not believe, however, that merely because one is determined to be a responsible officer that it automatically follows that a failure to withhold and pay over income taxes is "willful" within the meaning of that term as used in Tax Law § 685(g). More is required. As the Court of Appeals indicated in Matter of Levin v. Gallman, 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, 42 NY2d 32, 396 NYS2d 623, 625; see, Matter of Lyon, Tax Appeals Tribunal, June 3, 1988).

Petitioner relies on United States v. Pomponio (429 US 10, 76-2 USTC ¶ 9695) for the proposition that the standard for "willfulness" consists of an "intentional violation of a known legal duty." He argues that no evidence was presented at the hearing that petitioner knew that he was violating any law nor that he had any legal notice that he could be held liable for the

actions or nonactions of others. His reliance on this case is misplaced. In United States v. Pomponio (supra), the Court defined the term "willful" in the context of a section in the Internal Revenue Code making it a crime to willfully file a false income tax return. Such definition of "willful" has no bearing whatsoever in this case which involves the willful failure to withhold or pay over withholding taxes pursuant to § 685(g) of the Tax Law and where the burden of proof is on petitioner (Tax Law § 689[e]).

Petitioner claims that he did all that he could do within his power and resources to comply with the law. However, there was no evidence introduced at trial to demonstrate that his failure to file such tax returns was anything but willful. As stated in Matter of Ragonesi v. New York State Tax Commn., "corporate officials responsible as fiduciaries for tax revenues cannot absolve themselves merely by disregarding their duty and leaving it to someone else to discharge" (Matter of Ragonesi v. New York State Tax Commn., 88 AD2d 707, 451 NYS2d 301, 303). Accordingly, we agree with the finding by the Administrative Law Judge that petitioner's failure to withhold and pay over withholding taxes was willful.

We must now address whether petitioner was liable for penalties and interest due as a result of the late filing of the corporation's sales tax returns.

In determining petitioner's liability for penalties and interest, we begin by determining whether petitioner was a person required to collect tax on behalf of the corporation pursuant to §§ 1131(1) and 1133(a) of the Tax Law. As stated in Matter of Hall (Tax Appeals Tribunal, March 22, 1990), the Tax Law holds a responsible person liable for penalty and interest assessed against the corporation. An officer or employee is held liable because he satisfies the definition of "persons required to collect tax" within the meaning of Tax Law § 1131(1) as an officer or employee who is under a duty to act for the corporation in complying with any provision of the sales tax law. The penalties and interest at issue are imposed on any person failing to file a return or to pay over any tax (Tax Law § 1145[a][1][i]). Since the requirements to file a return and pay over tax are among the most essential to comply with the sales tax law, there is a clear and logical integration between the responsible person provisions of Tax Law §

1131(1) and the penalty and interest provisions of Tax Law § 1145(a)(1) (see, Matter of Hall, supra).

Section 1131(1) of the Tax Law defines "persons required to collect tax" to include:

"any officer, director or employee of a corporation or of a dissolved corporation, any employee of a partnership or any employee of an individual proprietorship who as such officer, director or employee is under a duty to act for such corporation, partnership or individual proprietorship in complying with any requirement of this article."

Section 1133(a) of the Tax Law states that:

"every person required to collect any tax imposed by this article shall be personally liable for the tax imposed, collected or required to be collected under this article."

In Matter of Autex Corp., we summarized the factors which are considered in determining whether an individual is responsible for the sales and use taxes due from a corporation as follows:

"The determination that an individual is a responsible officer depends upon the particular facts of each case (Stacy v. State, 82 Misc 2d 181, 368 NYS2d 448). Factors stated by the Division's regulations are whether the person was authorized to sign the corporate tax return, was responsible for managing or maintaining the corporate books or was permitted to generally manage the corporation (20 NYCRR 526.11[b][2]).

"Other indicia developed by the case law are: the authorization to hire or fire employees, the derivation of substantial income from the corporation or stock ownership (Blodnick v. State Tax Commn., 124 AD2d 437, 507 NYS2d 536, appeal dismissed 69 NY2d 822, 513 NYS2d 1027); the individual's possible shared status as an officer, director or stockholder (Cohen v. State Tax Commn., 128 AD2d 1022, 513 NYS2d 564); the individual's day-to-day responsibilities, involvement with, knowledge of and control over the financial affairs and management of the corporation, the duties and functions as outlined in the certificate of incorporation and the bylaws, the preparation and filing of sales tax forms and returns (Vogel v. NY Tax & Finance, 98 Misc 2d 222, 413 NYS2d 862); and the payment, including the authorization to write checks on behalf of the corporation, of other creditors other than the State of New York and the United States (Chevlowe v. Koerner, 95 Misc 2d 388, 407 NYS2d 427)" (Matter of Autex Corp., Tax Appeals Tribunal, November 23, 1988).

Applying these criteria to the instant matter leads to the conclusion that petitioner was a person required to collect sales tax on behalf of the corporation. As stated above, petitioner was an officer of the corporation, as well as a major stockholder and substantial investor. He had authority to sign tax returns and corporate checks, and he exercised such authority. Therefore,

we agree with the Administrative Law Judge's determination that petitioner is a person required to collect sales and use taxes on behalf of the corporation and, therefore, can be held liable for penalties and interest due.

Section 1145(a)(1)(i) of the Tax Law imposes penalties and interest upon:

"Any person failing to file a return or to pay or pay over any tax to the tax commission within the time required by or pursuant to this article (determined with regard to any extension of time for filing or paying) shall be subject to a penalty of ten percent of the amount of tax due if such failure is for not more than one month, with an additional one percent for each additional month or fraction thereof during which such failure continues, not exceeding thirty percent in the aggregate. Provided, however, in the case of a failure to file such return within sixty days of the date prescribed for filing of such return by or pursuant to this article (determined with regard to any extension of time for filing), the penalty imposed by this subparagraph shall not be less than the lesser of one hundred dollars or one hundred percent of the amount required to be shown as tax on such return."

Section 1145(a)(1)(iii) of the Tax Law provides that:

"If the tax commission determines that such failure or delay was due to reasonable cause and not due to willful neglect, it shall remit all of such penalty and that portion of such interest that exceeds the interest that would be payable if such interest were computed at the rate set by the tax commission pursuant to section eleven hundred forty-two."

In order for the penalties to be abated, the burden is on petitioner to establish reasonable cause as well as the absence of willful neglect. Section 536.5(c) of the sales and use taxes regulations states:

" . . . grounds for reasonable cause [in failing to timely file sales tax returns], where clearly established by or on behalf of the taxpayer or other person . . .

"(2) The destruction of the taxpayer's or the taxpayer's representative's place of business or business records by a fire or other documented casualty, which precluded timely compliance, may constitute reasonable cause provided that:

(i) in the case of the failure to file any return, the return is filed; or

(ii) in the case of the failure to pay or pay over any tax, such amount is paid or paid over, within a justifiable period of time after the casualty has taken place. A justifiable period of time is that period which is substantiated by or on behalf of the taxpayer or such other person liable for penalty, as a reasonable period of time for filing the return and/or for paying any tax based on the facts and circumstances in each case" (20 NYCRR 536.5[c][2] [emphasis added]).

Petitioner alleges that a fire in August 1983 caused the corporation to be late in filing and paying sales taxes for the sales tax quarters ending May 31, 1982, August 31, 1982, November 30, 1982, May 31, 1983 and August 31, 1983. No attempt has been made to explain how a fire in the summer of 1983 could have affected the timely filing of the first four sales tax returns which were due well before the August fire. Although the fifth return came after the fire, the taxpayer did not clearly establish that the fire precluded timely compliance in filing the corporation's tax returns. Therefore, we agree with the finding of the Administrative Law Judge that penalties and interest are owing by petitioner under § 1145(a)(1)(i) of the Tax Law.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of petitioners Benjamin K. Chin and Benjamin Chin, Officer of Jumbo House, Inc., is denied;
2. The determination of the Administrative Law Judge is affirmed;
3. The petitions of Benjamin K. Chin and Benjamin Chin, Officer of Jumbo House, Inc., are dismissed; and
4. The Notice of Deficiency dated November 25, 1985 and the Notice of Determination and Demand for Payment of Sales and Use Taxes Due dated June 26, 1985 are sustained.

DATED: Troy, New York
December 20, 1990

/s/John P. Dugan
John P. Dugan
President

/s/Francis R. Koenig
Francis R. Koenig
Commissioner

/s/Maria T. Jones
Maria T. Jones
Commissioner