STATE OF NEW YORK

TAX APPEALS TRIBUNAL

In the Matter of the Petition	:	
of	:	
THOMAS L. BYRAM, OFFICER OF BAPTIST MEDICAL CENTER OF NY, INC.	:	DECISION DTA No. 808333
for Redetermination of a Deficiency or for Refund of Personal Income Tax under Article 22 of the Tax Law for the Years 1981 through 1983.	:	

Petitioner Thomas L. Byram, officer of Baptist Medical Center of NY, Inc., 58-05 76th Street, Elmhurst, New York 11373, filed exceptions to the determination of the Administrative Law Judge issued on June 18, 1992 with respect to his petition and to the order of the Administrative Law Judge issued on November 5, 1992 with respect to his motion to renew. Petitioner appeared by Kotite & Kotite, Esqs. (Edward A. Kotite, Esq., of counsel). The Division of Taxation appeared by William F. Collins, Esq. (Lawrence A. Newman, Esq., of counsel).

Petitioner filed a brief in support of his exceptions. Petitioner also included a statement with his exception to the November 5, 1992 order. The Division of Taxation filed a letter brief in opposition to both of petitioner's exceptions. Petitioner filed a reply letter brief which was received on March 3, 1994 and began the six month period for the issuance of this decision. Petitioner's request for oral argument was denied.

The Tax Appeals Tribunal renders the following decision per curiam.

ISSUES

I. Whether the Administrative Law Judge properly disallowed petitioner's motion to renew on the basis of newly discovered evidence.

II. Whether the Division of Taxation timely assessed the penalties it asserts against petitioner.

III. Whether the Administrative Law Judge correctly declined to find as fact that the Baptist Medical Center of NY, Inc.'s Board of Trustees directed petitioner not to pay withholding taxes.

IV. Whether the Administrative Law Judge erred in finding petitioner liable for penalties of 100% of Baptist Medical Center of NY, Inc.'s unremitted withholding taxes under Tax Law § 685(g) and (n).

FINDINGS OF FACT

We find the facts as determined by the Administrative Law Judge in his June 18, 1992 determination. These facts are set forth below.

On April 28, 1989, the Division of Taxation (hereinafter the "Division) issued to petitioner, Thomas L. Byram, a Notice of Deficiency which asserted $594,586.21 in penalty due from petitioner pursuant to Tax Law § 685(g). The penalty asserted in the notice was premised upon the failure of Baptist Medical Center of NY, Inc. ("BMC") to remit to the Division withholding taxes in the same amount for the years 1981, 1982 and 1983.

Pursuant to a Conciliation Order dated March 23, 1990, penalty asserted against petitioner herein was reduced to $474,458.21.

Baptist Medical Center of NY, Inc. was a not-for-profit corporation which operated a 300 to 400-bed teaching hospital in Brooklyn, New York. The hospital was located in a poor, high-crime neighborhood and had about 1,000 employees. The hospital was headed by a Board of Trustees ("Trustees"). Petitioner was not a member of the board. The hospital was affiliated with the American Baptist Church.

Throughout the period at issue petitioner was executive director of the hospital. Petitioner held this position since about 1973. As executive director petitioner was generally responsible to oversee the operation of the hospital. He was charged with implementing the policies of the hospital's governing body, the Trustees.

Petitioner had authority to sign checks on behalf of the hospital. A facsimile of petitioner's signature, along with that of another individual, appears on photocopies of hospital checks for payment of withholding tax which were entered into the record.

In his capacity as executive director petitioner signed the corporation's annual withholding tax reconciliation forms (IT-2103) for the years 1981 through 1983.

At some point prior to the years at issue, the hospital filed a petition in bankruptcy under Chapter 11. The date of such filing is not contained in the record. The hospital remained in Chapter 11 throughout the period at issue.

The hospital's financial difficulties resulted from Medicare and Medicaid reimbursement rates which were inadequate to cover the hospital's operating costs. The hospital's trustees, the Bankruptcy Court and the New York State Health Department were aware of the hospital's financial difficulties and of the fact that the hospital was not paying its New York State withholding taxes in a timely manner.

Throughout the period at issue, the hospital's Trustees sought to continue the operation of the hospital, notwithstanding the persistent shortage of operational revenues. Petitioner, as executive director, sought to implement this policy and he gave priority to meeting payroll and paying suppliers over paying withholding taxes.

While in bankruptcy, the hospital sought to obtain additional funding from metropolitan and national American Baptist Church organizations. Such organizations had provided financial assistance to the hospital in the past. These organizations elected not to provide funding for the hospital during the period at issue.

Notwithstanding petitioner's contention to the contrary, the record herein is insufficient to show that the Trustees ever explicitly advised petitioner not to pay withholding taxes or passed resolutions to that effect.

Petitioner resigned his position in or about March or April 1984.

The Division's records indicate the following with respect to the hospital's withholding tax obligations (and the basis for the assessment against petitioner) for the years at issue:

	1981	1982	1983
Tax Withheld from Employees	$738,616.75	$891,900.43	$913,462.01
Tax Remitted	570,100.18	656,641.66	842,779.14
Shortage	$168,516.57	$235,258.77	$ 70,682.87

Subsequent to the years at issue, the hospital converted its bankruptcy petition to a Chapter 7 liquidation. The hospital has ceased operations.

We find the facts as determined by the Administrative Law Judge in his November 5, 1992 order. These facts are set forth below.

On August 29, 1991, a hearing in the instant matter was held before Timothy J. Alston, Administrative Law Judge, at the offices of the Division of Tax Appeals, Troy, New York. Petitioner appeared at said hearing and was represented by Edward A. Kotite, Esq. The Division was represented by Lawrence H. Newman, Esq.

The issue at the hearing was whether, during the years 1981 through 1983, petitioner was liable for penalty pursuant to Tax Law § 685(g) as a person required to collect and pay over withholding tax on behalf of BMC and who willfully failed to do so.

At the close of the hearing the following exchange occurred between the Administrative Law Judge and the parties' representatives:

"MR. ALSTON: Before we close, I just note that once we do close, I'll accept no further evidence in this matter.

"Anything further you wish to add, Mr. Newman?

"MR. NEWMAN: Nothing further.

"MR. ALSTON: Mr. Kotite?

"MR. KOTITE: Nothing, sir.

"MR. ALSTON: Unless either of the parties wish to file briefs, I'll close the record. Does either party wish to file a brief or memorandum?

"MR. KOTITE: I would just like to file a little something, yeah.

"MR. ALSTON: And what about the Division, Mr. Newman?

"MR. NEWMAN: Only in response.

* * *

"MR. ALSTON: Other than that, does anyone have anything else they wish to add at this point?

"MR. NEWMAN: No.

"MR. KOTITE: No.

"MR. ALSTON: There being nothing further, the record in this matter is now closed. Thank you very much."

On June 18, 1992, a determination was issued wherein the Administrative Law Judge found that petitioner was a person responsible to collect and pay over withholding tax and that petitioner had willfully failed to do so. The Administrative Law Judge thus sustained the notice of deficiency protested by petitioner in his petition.

In the determination the Administrative Law Judge made the following finding of fact (numbered "11"):

> "Notwithstanding petitioner's contention to the contrary, the record herein is insufficient to show that the Board of Trustees ever explicitly advised petitioner not to pay withholding taxes or passed resolutions to that effect."

In his affidavit in support of the motion, Mr. Kotite made the following assertions:

> "3. This motion is based on newly discovered records which were previously unavailable to Byram and which mandate the granting of the motion.
>
> "4. The evidence to support the motion are copies of minutes of meetings of the Board of Trustees of the Baptist Medical Center of NY, Inc. which conclusively demonstrate that Byram was directed by the Trustees not to pay withholding taxes.
>
> "5. The evidence further demonstrates that Byram's actions in not paying withholding taxes was approved and supported by both the United States Bankruptcy Court and the New York State Department of Health. This documentary proof would directly affect key findings of fact (in particular, finding of fact #11) and conclusions (in particular, conclusion of law, D, G and K) of law of the Administrative Law Judge and necessitate new findings of facts and conclusions of law favorable to Petitioner."

The minutes of meetings of the Trustees of BMC were annexed to Mr. Kotite's affidavit.

No evidence was presented regarding why such minutes were undiscovered or unavailable at the time of the August 29, 1991 hearing.

OPINION

Issue I

The Administrative Law Judge denied petitioner's motion to renew on the basis of newly discovered evidence due to his reading of our decision in Matter of Jenkins Covington, N.Y. (Tax Appeals Tribunal, November 21, 1991, affd Matter of Jenkins Covington, N.Y. v. Tax Appeals Tribunal, 195 AD2d 625, 600 NYS2d 281, lv denied 82 NY2d 664, 610 NYS2d 151). Applying Jenkins Covington, the Administrative Law Judge concluded that petitioner failed to show that the evidence was unavailable at the time of the hearing or could not have been discovered with due diligence. In addition, the Administrative Law Judge stated that:

> "even if petitioner had shown that the evidence in question was newly discovered, upon my review of the evidence submitted with petitioner's motion it does not appear that this documentation supports petitioner's contention that he was directed by the Board of Trustees not to pay withholding taxes. The documentation does reveal that the Board of Trustees was aware of the hospital's withholding tax deficiencies. The documentation also reveals that the Board was aware that its members and the administrators of the hospital potentially faced personal liability for those taxes. As noted, however, the documentation does not reveal a directive ordering petitioner not to pay withholding tax" (Administrative Law Judge's order, p. 5).

On exception, petitioner argues that the Administrative Law Judge improperly denied this motion. Petitioner asserts that since the evidence he wishes to submit was "thought to be lost," it constitutes newly discovered evidence for which the Administrative Law Judge should have reopened the record (Petitioner's brief, p. 3). Moreover, petitioner contends that he exercised due diligence when attempting to locate and produce this evidence. The Division urges the Tax Appeals Tribunal to affirm the Administrative Law Judge's denial of petitioner's motion to renew.

We uphold the Administrative Law Judge's determination denying petitioner's motion to renew. Further, we agree with the Administrative Law Judge's conclusion that Jenkins Covington offers guidance to resolve this case, but we conclude it is not controlling. In Jenkins

Covington, the Tax Appeals Tribunal had already rendered its final decision regarding the controversy. In this case, petitioner made his motion to renew during the time when his exception to the June 18, 1992 determination was pending before the Tax Appeals Tribunal. Thus, Jenkins Covington does not control because the instant matter has not been finally decided by the Division of Tax Appeals. As a result, we have more discretion to reopen this case than Jenkins Covington.

Although we possess the discretion to reopen the record of this pending matter for additional evidence, we have a well established policy of limiting the exercise of such discretion because "[i]n order to maintain a fair and efficient hearing system, it is essential that the hearing process be both defined and final. If the parties are able to submit additional evidence after the record is closed, there is neither definition nor finality to the hearing" (Matter of Schoonover, Tax Appeals Tribunal, August 15, 1991). Additionally, in Matter of Wyman (Tax Appeals Tribunal, December 31, 1992), we held "that remand, while an available option . . . is not invoked in a regular manner . . . . Rather, it is a procedure reserved for special circumstances." In congress, these cases indicate that though we have the discretion to reopen or remand for reopen, we will only do so in special cases (see, Matter of Wyman, supra). The guidance of Jenkins Covington indicates that newly discovered evidence that could not have been discovered with due diligence in time for the hearing can be a special circumstance.

Petitioner maintains the Administrative Law Judge should have reopened the record for the submission of new evidence, specifically, certain minutes of the Trustees' meetings. Though he asserts this, he fails to offer any evidence as to why the Administrative Law Judge should have granted this motion. For example, petitioner asserts:

> "[t]hese copies [of the minutes] were found by Petitioner after the initial hearing . . . despite Petitioner having earlier searched for them. As is the case with virtually all material relating to the hospital, this material was thought to be lost. The material was discovered by Petitioner in old boxes while clearing out a storage area. Since he had searched diligently for them previously, under the circumstances he should not be faulted for not having found the material earlier" (Petitioner's brief, p. 3, emphasis added).

While petitioner attempts to suggest valid reasons for why he did not submit the evidence when the record was open, a mere conclusory statement will not suffice in this instance. Petitioner has never described the efforts, if any, he made to locate this evidence prior to the hearing. At the hearing, petitioner stated that Board resolutions existed to support his assertions (Tr., p. 25), but did not state that he had looked for them and been unable to retrieve them. We conclude that petitioner failed to prove that he exercised due diligence when attempting to locate evidence of the Board's actions. Since petitioner offered only a conclusory statement in support of his motion to renew, and due to our prior decisions regarding the need for both definition and finality in the hearing process, we affirm the Administrative Law Judge's determination denying petitioner's motion to renew.

Issue II

On exception, petitioner contends that the Division did not assess the penalties against him in a timely manner. Petitioner asserts that because New York derives much of its tax law from Federal tax law, Federal cases either control, or at least illuminate this matter. Therefore, petitioner relies on several United States Tax Court decisions. He argues that the Division must make its assessment of penalties within three years of the date on which the withholding tax returns were filed (see, Kraus v. United States, 85-1 USTC ¶ 9310; Morales v. United States, 92-2 USTC ¶ 50597). Moreover, petitioner states that while he "is not unaware of Wolfstich v. N.Y. State, 483 N.Y.S.2d 779 (3rd Dep't 1984), in which the court takes the view that there is no statute of limitation on assessments against responsible persons for liability for failure to withhold . . . it is submitted that Wolfstich is completely inconsistent with the Federal law upon which New York law is based" (Petitioner's brief, p. 5). The Division counters that petitioner incorrectly relies on Federal case law when Matter of Wolfstich v. New York State Tax Commn. (106 AD2d 745, 483 NYS2d 779) clearly controls.

We find that the Administrative Law Judge correctly applied Matter of Wolfstich v. New York State Tax Commn. (supra). Accordingly, petitioner's argument that the Division did not timely assert the deficiency against him fails. Although petitioner asserts Federal case law

directly contradicts the Appellate Division's holding in Wolfstich, and urges this Tribunal to follow the Federal interpretation, we cannot ignore the precedence of Wolfstich, where the Appellate Division, Third Department directly addressed whether the three-year period of limitations of section 683 applied to the assessment of penalty under section 685(g) and concluded that it did not. We are not able to disregard the interpretation of statute set forth by our reviewing court. As stated by the Supreme Court in Vanilla v. Moran (188 Misc 325, 67 NYS2d 833, affd 272 AD 859, 70 NYS2d 631, lv denied 272 AD 971, 72 NYS2d 420, lv dismissed 297 NY 593, affd 298 NY 796):

> "[n]either the fact that the Court of Appeals has not passed upon the question . . . nor doubt of the soundness of the decisions of . . . the Supreme Court and the Appellate Division thereof, even if such doubtfulness were conceded, afford any basis for this court to refuse or fail to follow the authority of those decisions" (Vanilla v. Moran, supra, 67 NYS2d 833, 842).

Even though section 685(g) was modeled upon Federal tax law (Matter of Wolfstich v. New York State Tax Commn., supra), the Appellate Division's holding in Wolfstich controls our decisions regarding issues of timeliness because the Third Department sets precedent for this Tribunal.

Issue III

The Administrative Law Judge refused to find as fact that BMC's Trustees directed petitioner not to remit BMC's withholding taxes. On exception, petitioner argues that the Administrative Law Judge erred by not finding this assertion a fact. Petitioner asserts that the Trustees implicitly directed him not to remit the withholding taxes when they instructed him to pay other bills in order to keep BMC operating. Therefore, petitioner insists these circumstances compelled the Administrative Law Judge to find as fact that petitioner failed to remit the taxes per the Trustees' directive. On exception, the Division maintains that the Administrative Law Judge correctly found the facts.

We defer to the Administrative Law Judge's finding of the facts. While petitioner's testimony may support his assertion that the Trustees directed him not to remit the appropriate

withholding taxes, the Administrative Law Judge did not find this testimony sufficient to find the facts as asserted by petitioner. We generally defer to the Administrative Law Judge's evaluation of the credibility of the witness (see, Matter of Modern Refractories Serv. Corp. (Tax Appeals Tribunal, December 15, 1988, affd Matter of Modern Refractories Serv. Corp. v. Dugan, 164 AD2d 69, 563 NYS2d 200). As we stated in Matter of Spallina (Tax Appeals Tribunal, February 27, 1992) "the credibility of witnesses is a determination within the domain of the trier of the facts, the person who has the opportunity to review the witnesses first and evaluate the relevance and the truthfulness of their testimony." In this matter, there is nothing in the record that justifies setting aside the Administrative Law Judge's evaluation of petitioner's testimony. Therefore, we find the facts as found by the Administrative Law Judge.

Issue IV

The Administrative Law Judge found petitioner liable for penalties of 100% of BMC's unremitted withholding taxes per Tax Law § 685(g) and (n) because petitioner was a "person" who "willfully" failed to remit BMC's withholding taxes. On exception, petitioner asserts that he "was not a 'responsible person' and, thus, is not personally liable for the unpaid withholding tax" (Petitioner's brief, p. 6). The Division argues that the Administrative Law Judge correctly decided this issue and urges us to affirm his decision.

We affirm the Administrative Law Judge's determination holding petitioner liable for penalties associated with BMC's unremitted withholding taxes. In order for the State to hold one liable for penalties of 100% of the unremitted withholding taxes, the individual must qualify as a "person" who acted "willfully" per Tax Law § 685(g) and (n) in his failure to remit the appropriate withholding taxes. Section 685(g) provides:

> "[a]ny 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 . . . 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."

Tax Law § 685(n) defines a "person" as "an officer or employee of any corporation (including a dissolved corporation) . . . who as such officer, employee, or member is under a duty to perform the act in respect of which the violation occurs."

Petitioner qualifies as a "person" under Tax Law § 685(n). In Matter of Malkin v. Tully (65 AD2d 228, 412 NYS2d 186, 188), the Third Department held that the following factors indicate one's status as a "person":

> "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 . . . . While no one factor is controlling, all must be considered. In our review we must bear in mind that petitioner has the burden of overcoming the assessment . . . ."

Petitioner, as BMC's executive director, signed both BMC's checks and withholding tax returns. While petitioner maintains that the Trustees "were intimately involved in the day-to-day operational and financial aspects of the Hospital" (Petitioner's brief, p. 8), he concedes he "was Executive Director, which gave him certain operational authority" (Tr., p. 14). Additionally, petitioner argues that the Trustees "made policy" which he carried out as Executive Director. While this may have been the case, we agree with the Administrative Law Judge that petitioner had the general authority to withhold taxes and that petitioner did not prove that the Board precluded petitioner from paying the taxes. Therefore, we find petitioner constitutes a "person" under Tax Law § 685(n).

On exception, petitioner has also contended that:

> "the Trustee of the U.S. Bankruptcy Court and the New York State Department of Health directed that any monies available be used to keep the hospital running . . . . This directive necessarily excluded the payment of withholding taxes" (Petitioner's exception, p. 3).

However, petitioner has provided no evidence to support these assertions. A trustee is appointed by the Bankruptcy Court in Chapter 11 reorganization only under certain circumstances (see, 11 USCS § 1104[a]) and petitioner has not established that such an appointment occurred, much less that the Trustee directed that State taxes not be paid. Nor is there any evidence in the record that the Department of Health directed that the taxes at issue not be paid.

Next, we address the issue of whether petitioner acted "willfully" in his failure to remit the appropriate withholding taxes to the State. The Court of Appeals first addressed the issue of willfulness in Matter of Levin v. Gallman (42 NY2d 32, 396 NYS2d 623, 624-625) where it held:

> "[n]o prior New York authorities have defined 'willful' as used in this statute [Tax Law § 685(g)]. Prevailing Federal opinion, in interpreting a similar Internal Revenue Code provision . . . appears to hold 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 nonpayment is required . . . we adopt the Federal definition of 'willful' as so defined" (emphasis added).

Accordingly, because petitioner intentionally failed to remit BMC's withholding taxes to the State, paying other creditors instead, he acted willfully for purposes of Tax Law § 685(g).

Since petitioner qualifies as a "person" who "willfully" failed to remit the appropriate withholding taxes, we find that the Administrative Law Judge properly held petitioner liable for penalties in the amount of 100% of the unremitted withholding taxes.

Although we find petitioner liable for the taxes at issue, we agree with the Administrative Law Judge's statement that:

> "[t]his is not to suggest that it would have been inappropriate for the Commissioner to exercise his discretionary authority in this case had he been requested to do so. Petitioner was executive director of a not-for-profit hospital providing health care primarily to poor individuals. The hospital was thus performing a basic public service and was operated, for the most part, with public funds. Under the circumstances, holding this petitioner responsible for Tax Law § 685(g) penalty seems rather harsh. This result seems even more harsh when contrasted with the Division's recent, well-publicized resolution of a withholding tax deficiency far greater in amount than that at issue herein (see, Matter of Joint Diseases North General Hospital, 148 AD2d 873, 539 NYS2d 511, revg 142 Misc 2d 165, 536 NYS2d 931). Like the instant matter, the North General matter involved a not-for-profit hospital in a poor neighborhood. That having been said, it is not within the authority of the Division of Tax Appeals to substitute its discretion for that of the Division of Taxation to determine which matters to pursue and which not to pursue. Unfortunately, the issue of whether the Division of Taxation's action herein is in the best interests of New York State does not supply a basis upon which to cancel the Notice of Deficiency" (Determination, conclusion of law "J").

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. Both exceptions of Thomas L. Byram, officer of Baptist Medical Center of NY, Inc. are denied;

2. The determination and the order of the Administrative Law Judge are affirmed;

3. The petition and motion of Thomas L. Byram, officer of Baptist Medical Center of NY, Inc. are denied; and

4. The Notice of Deficiency dated April 28, 1989 is sustained.

DATED: Troy, New York
August 11, 1994

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

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