

STATE OF NEW YORK
TAX APPEALS TRIBUNAL

In the Matter of the Petition	:	
of	:	
LORI ANZILOTTI, OFFICER OF PREMIERE CONCRETE STRUCTURES, INC.	:	DECISION DTA No. 812214
for Redetermination of a Deficiency or for Refund of New York State and New York City Income Taxes under Article 22 of the Tax Law and the New York City Administrative Code for the Period April 16, 1991 through July 15, 1991.	:	

Petitioner Lori Anzilotti, officer of Premiere Concrete Structures, Inc., 1073 Grant Avenue, Pelham Manor, New York 10803-3438, filed an exception to the determination of the Administrative Law Judge issued on May 18, 1995. Petitioner appeared by Robinson, Brog, Leinwand, Reich, Genovese & Gluck, P.C. (A. Mitchell Greene, Esq., of counsel). The Division of Taxation appeared by Steven U. Teitelbaum, Esq. (Laura J. Witkowski, Esq., of counsel).

Petitioner filed a brief in support of her exception. The Division of Taxation filed a letter stating no brief in opposition would be filed. This letter was received on August 22, 1995 and began the six-month period for the issuance of this decision. Petitioner's request for oral argument was denied.

Commissioner Dugan delivered the decision of the Tax Appeals Tribunal. Commissioners Koenig and DeWitt concur.

ISSUES

- I. Whether petitioner should be permitted to submit new evidence with her reply brief.
- II. Whether petitioner was a person required to collect, truthfully account for, and pay over the tax imposed by Article 22 of the Tax Law, who willfully failed to collect such tax or willfully attempted to evade or defeat the tax or the payment thereof pursuant to the terms of

Tax Law § 685(g) for the period in issue and therefore is subject to the penalty provided for in said section.

FINDINGS OF FACT

We find the facts as determined by the Administrative Law Judge. These facts are set forth below.

Petitioner, Lori Anzilotti, was the president of Premiere Concrete Structures, Inc. ("Premiere") during the period in issue, April 16, 1991 through July 15, 1991 (the "period in issue").

Premiere was a New York corporation, incorporated on November 13, 1989. It was a concrete contractor which was engaged in a \$5,600,000.00 project involving the Ramada Hotel at Times Square in New York City during the period in issue.

During the period in issue, Ms. Anzilotti kept the books of the corporation and had the authority to sign checks on each of the two checking accounts of the corporation. She signed various forms with taxing authorities, including the following: a Form CT-6, Election by a Small Business Corporation to be Treated as a New York State S Corporation, dated November 20, 1989, which listed her as president of Premiere and owner of 51% of the stock; three Federal forms 941, Employer's Quarterly Federal Tax Return, dated April 30, 1991, July 31, 1991 and October 31, 1991; New York State Form CT-5.4, Application for Automatic Six-Month Extension for Filing a Form CT-3-S or a CT-4-S, dated January 10, 1992, and listing her as president of Premiere; a Form IT-2103, Reconciliation of Tax Withheld, dated February 27, 1992, for the year 1991, listing her as president of Premiere; and 13 forms IT-2101, returns of tax withheld, for the semi-monthly periods between January 1991 through July 1991 (one for January was missing), all of which were signed by Ms. Anzilotti as president of Premiere except the return due May 3, 1991, which contained an illegible signature.

In addition, the U.S. Income Tax Return for an S Corporation for 1989 listed petitioner as Premiere's designated tax matters person and shareholder.

Further, in a letter to the Internal Revenue Service ("IRS"), dated December 5, 1991, Ms. Anzilotti signed as president of Premiere and represented to the IRS that she represented Premiere with regard to tax matters.

In the Reconciliation of Tax Withheld, Form IT-2103, dated February 27, 1992, petitioner represented that Premiere withheld State and City taxes of \$165,389.00, but paid over only \$59,095.00, leaving a balance due of \$106,294.00.

Some of the returns of tax withheld, forms IT-2101, filed during 1991 were filed late, to wit, those filed for the the periods ending April 30, 1991, May 31, 1991, June 15, 1991 and June 30, 1991.

Petitioner issued six checks, each dated July 17, 1991, on the Premiere checking account, Marine Midland Bank Account No. 555-178099, for payment of the withholding taxes owed in the following amounts:

<u>Check Number</u>	<u>Amount</u>
2145	\$14,883.34
2146	15,526.76
2147	19,976.81
2148	12,009.21
2149	9,384.79
2150	5,247.09

The total of these checks was \$77,028.00.

Petitioner did not testify as to the office procedures for mailing documents by Premiere. However, Ms. Anzilotti stated the checks were mailed the same day they were written. These checks, with the exception of number 2147, were stamped on the reverse side with the following: "For deposit only to credit Comptroller State of N.Y. Jul 26 91 NYS Income Tax Account NY State Tax Commission Albany New York." Check number 2147 had a similar stamp but the date on the stamp was "Jul 25 91". Each of the checks had at least one other stamp, presumably a presentment stamp, affixed by Norstar Bank, Upstate NY, Utica New York, with either a date of "AG '91' 01" or "JY '91' 31". It is noted that the checks had numerous stamps affixed to the reverse sides.

After the hearing in this matter, the Division of Taxation ("Division") submitted an affidavit of David Schaible, a head clerk in the Records and Information Section, Processing Division, Withholding Tax Unit, sworn to October 12, 1994, which indicated that, since 1990, it had not been the practice of the unit to retain the envelopes in which it received payments from taxpayers and it had followed this procedure in this matter.

However, Mr. Schaible did state that, based on his personal knowledge and based on his 14 years of employment in the Withholding Tax Unit, the stamp in the center of the back of each check, which stated "Comptroller State of N.Y. Jul 26' 91" (5 checks) and "Comptroller State of N.Y. Jul 25" 91" (1 check), represented the date upon which each check was endorsed by the State and presented for deposit at Norstar Bank of Upstate New York, the State's depository for taxes withheld and remitted by employers, and that the general rule was that checks were endorsed the same day they were received. The other stamps which appeared on the back of the checks, to wit, "Norstar Bank of Upstate N.Y. Albany N.Y. Jul 26 91" (5 checks) and "Norstar Bank of Upstate N.Y. Albany N.Y. Jul 25 91" (1 check), represented the date on which each check was presented for payment at the taxpayer's bank (Marine Midland) by Norstar Bank.

Mr. Schaible also stated that the standard procedure of Norstar Bank during the year in issue was to present a check twice before it was dishonored. As a result, the checks in issue had the additional stamp "JY '91' 31 Norstar Bank, Norstar Bank Upstate NY Utica, New York" (3 checks) and "AG '91' 01 Norstar Bank Upstate NY Utica, New York" (3 checks), representing the dates upon which each check was presented for payment for the second time at the taxpayer's bank (Marine Midland) by Norstar Bank.

Each of the checks was signed by Lori Anzilotti and was dated July 17, 1991. Petitioner alleged that the checks were mailed on the date they were prepared, i.e., July 17, 1991.

During the year 1991, Lori Anzilotti held herself out as the "controller" and the "secy/tres" of Premiere, as well as president.

Lori Anzilotti was one of the two directors of Premiere listed on the minutes of the first meeting of the board of directors on November 20, 1989, and also signed the corporate banking resolutions as president on July 17, 1990. Her name also appeared as a signatory on the bank's form, again listed as the president of the corporation, along with Robert Anzilotti, secy/tres., Glen Werner and Martin Meyers. During the years Premiere was in business, Ms. Anzilotti owned between 37.5% and 51% of the corporate stock.

During the period in issue, the Ramada Hotel project became behind in payments to Premiere, to the point where it made a payment in excess of \$400,000.00 sometime in July of 1991. There is no evidence in the record of the exact amount paid to Premiere by Ramada or the specific date of payment. Ms. Anzilotti stated the payment from Ramada came in late July. No bank records to that effect were introduced and neither witness could recall the date or amount of the Ramada payment. However, it is known that the account had \$20,000.00 to \$30,000.00 in it at the time the Ramada check was deposited.

One of the other directors, Martin Meyers, was a family friend who had invested in Premiere. Mr. Meyers was repaid all of his investment, which at times was about \$500,000.00, on June 25, 1991. Approximately one month later, on July 23, 1991, Mr. Meyers withdrew \$350,000.00 from Premiere's checking account, Marine Midland Bank No. 555-178099, and deposited the funds into the Marine Midland account of his wife, Joan Meyers, Account No. 013-543091. Joan Meyers was a stockholder in Premiere.

Ms. Anzilotti said Premiere treated Mr. Meyers as a "line of credit", to which it would go whenever it needed the cash to meet its payroll obligations.

Ms. Anzilotti discovered that the money was gone from the account when the bank notified her in "late July" that several checks had been presented for payment and that there were insufficient funds to pay them.

The withdrawal by Mr. Meyers prevented many checks written on the Premiere account at Marine Midland (Account No. 555-178099) from being paid. Six of these checks, returned for insufficient funds, were the checks written to New York State Income Tax for payment of the

withholding taxes in issue, and set forth in more detail above. As a result of Mr. Meyers' withdrawal, and liens filed by other subcontractors against the Ramada project, Ramada refused to pay Premiere directly for work done by Premiere's subcontractors. Rather, it paid the subcontractors directly.

Despite this arrangement, Premiere remained in business into 1992, making its last payroll on April 7, 1992. Throughout the period from August of 1991 through April of 1992, Premiere was able to pay its withholding taxes and conduct business, albeit on a much smaller scale. Further, the business survived because of loans from Robert and Lori Anzilotti.

During the period in issue, Premiere had a separate account for payroll and a money market account to take advantage of the float, if the opportunity presented itself.

On September 14, 1992, the Division issued to Lori Anzilotti seven notices of deficiency for the following periods and in the following amounts:

<u>Assessment Number</u>	<u>Period Ended</u>	<u>Amount Due</u>
L-006345939-7	6/30/91	\$29,265.79
L-006345940-7	4/30/91	10,849.25
L-006345941-6	5/31/91	19,976.81
L-006345942-5	6/15/91	12,009.21
L-006345943-4	5/15/91	15,526.76
L-006345944-3	7/15/91	5,247.09
L-006345945-2	6/30/91	9,384.79

Petitioner timely filed for a conciliation conference which was held on May 20, 1993. A Conciliation Order was issued on July 2, 1993 which sustained the statutory notices in full. Petitioner filed a petition for a formal hearing in the Division of Tax Appeals which was answered by the Division of Taxation on November 8, 1993.

Petitioner believed that the withdrawal of funds by Mr. Meyers was unauthorized and asked the Westchester County District Attorney's office to investigate the act. However, the Westchester County District Attorney's office said it did not have jurisdiction over the matter and referred petitioner to the Manhattan District Attorney's office. That office refused to prosecute based on the evidence presented to it.

Premiere made no further corporate distributions after the withdrawal by Mr. Meyers on July 23, 1991.

OPINION

We deal initially with two evidentiary matters, namely the Administrative Law Judge's rejection of the submission by petitioner of a copy of a complaint in an action brought by Premiere in the United States Bankruptcy Court for the Southern District of New York against Martin Meyers and Joan Carole Meyers and the Administrative Law Judge's allowance into the record of the affidavit of David Schaible concerning the date of receipt of the checks issued by petitioner.

The Administrative Law Judge's determination not to allow the Meyers' complaint into evidence was based upon the fact that it was submitted as evidence after the record at hearing was closed by the Administrative Law Judge (Determination, conclusion of law "A").

On exception, petitioner asserts that the Administrative Law Judge erred and that since the "summons and complaint [were] specifically referred to in the transcript at the hearing [they] should be introduced into evidence as further proof of the acts taken by the Petitioner to cure the default" (Petitioner's brief, Point I).

We agree with the Administrative Law Judge. As we stated in Matter of Schoonover (Tax Appeals Tribunal, August 15, 1991), cited by the Administrative Law Judge:

"[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. Further, the submission of evidence after the closing of the record denies the adversary the right to question the evidence on the record. For these reasons we must follow our policy of not allowing the submission of evidence after the closing of the record" (Matter of Schoonover, supra).

Here, the record is clear that the Administrative Law Judge closed the record on September 9, 1994 after giving the parties a last opportunity to submit testimonial or documentary evidence. The complaint was submitted with petitioner's reply brief below dated January 16, 1995, long after the record was closed.

We also affirm the determination of the Administrative Law Judge to allow the Schaible affidavit into the record. Petitioner, at hearing, suggested that the Administrative Law Judge leave the record open for the submission by the Division of information in the form of an affidavit or otherwise on the issue of when the State received the checks issued by petitioner. The Schaible affidavit is in response to that suggestion and was submitted by the Division within the time frame set by the Administrative Law Judge at hearing, i.e., October 15, 1994.

We deal next with the principal issue of whether petitioner willfully failed to collect and pay over withholding tax.¹

The essence of petitioner's position at hearing and on this exception is that her failure to remit the withholding tax at issue was not willful because she was thwarted in her efforts to carry out her responsibilities to remit the tax by the unauthorized transfer of funds by Mr. Meyers from the corporation's account to his wife's account.

The Division argues that the evidence in this case is contrary to petitioner's position and supports the determination of the Administrative Law Judge. The core of the Division's argument is that Mr. Meyers' transfer of funds from the corporation's account is not dispositive on the issue of willfulness since such event occurred after the returns and payments were due and that "petitioner knowingly did not timely file the returns, remit payment on the respective due dates, or even set aside money for remittal at any time" (Brief at hearing, p. 5).

We affirm the determination of the Administrative Law Judge.

We believe it will be helpful to first outline the relevant statutory provisions for withholding of personal income taxes and the underlying purposes and principles for the responsibility and liability for such withholding.

Section 671 of the Tax Law fixes the responsibility on employers to deduct from wages paid to employees "a tax computed in such manner as to result, so far as practicable, in withholding from the employee's wages during each calendar year an amount substantially

¹Petitioner conceded that she was a "person required to collect, truthfully account for, and pay over" the withholding taxes of Premiere during the period at issue (Determination, conclusion of law "B").

equivalent to the tax reasonably estimated to be due under this article [22] resulting from the inclusion in the employee's New York adjusted gross income or New York source income of his wages received during such calendar year."

Tax Law § 673 provides that any amount of tax actually deducted and withheld is deemed to have been paid to the Commissioner of Taxation on behalf of the person from whom withheld and such person is credited with having paid that amount of tax for the tax year. In effect, the section provides a credit to an employee, regardless of whether the employer turns the funds over to the State.

Tax Law § 674 prescribes the general requirement for employers to file a withholding return and to pay over to the Commissioner of Taxation or a depository designated by the Commissioner, the taxes required to be deducted and withheld. The section prescribes various filing periods, depending on the amount required to be deducted.

Tax Law § 675 fixes the employer's liability for withheld taxes and provides that any amount of tax actually deducted and withheld shall be held to be a special fund in trust for the State.

Tax Law § 681 prescribes the authority for the Commissioner of Taxation to examine returns and determine the proper amount of tax due; and where no return has been filed to estimate the tax due.

The Legislature has prescribed stringent protective measures in the form of liability for the tax and penalties to insure collection.

One such protective measure is Tax Law § 685(g) which 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:

"[w]illful 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 [commissioner of taxation] shall have the power, in its discretion, to waive, reduce or compromise any penalty under this subsection" (Tax Law § 685[g], emphasis added).

The test of willfulness is whether the act of nonpayment was "consciously and voluntarily done" (Matter of Levin v. Gallman, 42 NY2d 32, 396 NYS2d 623).

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

"[p]erson defined. For purposes of subsections (g), (i), (o), (q) and (r), the term person includes an individual, corporation, partnership or limited liability company or an officer or employee of any corporation (including a dissolved corporation), or a member or employee of any partnership, or a member, manager or employee of a limited liability company, who as such officer, employee, manager or member is under a duty to perform the act in respect of which the violation occurs" (Tax Law § 685[n]), emphasis added).

This statutory scheme is designed to insure the collection by the State of the income taxes due it. While it does not relieve individual employees from all liability for the timely and proper payment of their taxes, it does reduce the State's exposure by placing separate responsibility for withholding on employers and individual personal responsibility on those persons responsible to see that income taxes are withheld and paid over to the State. The personal liability under section 685(g) is neither derivative of nor secondary to the employer's liability (Matter of Yellin v. New York State Tax Commn., 81 AD2d 196, 440 NYS2d 382).

This case is another illustration of the pitfalls confronting corporate officers who, when faced with cash flow problems, choose to use available funds to keep the business operating instead of timely filing returns and remitting withholding tax (see, Matter of Byram, Tax Appeals Tribunal, August 11, 1994; Matter of Hopper, Tax Appeals Tribunal, August 18, 1994, affd Matter of Hopper v. Commr. of Taxation, ___ AD2d ___ [Feb. 1, 1996]; Matter of Lenhard, Tax Appeals Tribunal, November 9, 1989; Matter of Gallo, Tax Appeals Tribunal, September 9, 1988; Matter of Dworkin Constr. Co., Tax Appeals Tribunal, August 4, 1988; Matter of Lyon, Tax Appeals Tribunal, June 3, 1988). Here, Premiere's principal client, Ramada, was late in its payments to petitioner. As a result, Premiere late filed the returns for the periods ending April 30, 1991, May 31, 1991, June 15, 1991 and June 30, 1991 and made no effort to remit withholding tax until it received the payment from Ramada and issued checks for

those periods on July 17, 1991. Petitioner's focus on the alleged wrongdoing of Mr. Meyers, while understandable, misses the essential point that petitioner had actual knowledge that the withholding taxes were not paid when due. As such, her actions bring her clearly within the holding of Matter of Levin v. Gallman (*supra*). Neither the extenuating circumstances, i.e., the late payment from Ramada, nor petitioner's attempt to remit the tax when the Ramada payment was finally realized negate the willfulness of her earlier actions which are in contravention of the duties placed upon her under the law.

Under the circumstances, we can only affirm the determination of the Administrative Law Judge.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of Lori Anzilotti, Officer of Premiere Concrete Structures, Inc. is denied;
 2. The determination of the Administrative Law Judge is affirmed;
 3. The petition of Lori Anzilotti, Officer of Premiere Concrete Structures, Inc. is denied;
- and
4. The notices of deficiency dated September 14, 1992 are sustained.

DATED: Troy, New York
February 22, 1996

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

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

/s/Donald C. DeWitt
Donald C. DeWitt
Commissioner