

STATE OF NEW YORK

TAX APPEALS TRIBUNAL

In the Matter of the Petition :

of :

SADHU SINGH AHLUWALIA, OFFICER OF :
CENTER FOR ACCELERATED LEARNING, INC. :

DECISION
DTA NO. 815236

for Redetermination of Deficiencies or for Refund of
New York State and New York City Income Taxes :
under Article 22 of the Tax Law and the Administrative
Code of the City of New York for the Period July 1, :
1992 through March 18, 1994.

Petitioner Sadhu Singh Ahluwalia, Officer of Center For Accelerated Learning, Inc.,
100-23 DeKruif Place, Apt. 23D, Bronx, New York 10475, filed an exception to the
determination of the Administrative Law Judge issued on December 24, 1997. Petitioner
appeared *pro se*. The Division of Taxation appeared by Steven U. Teitelbaum, Esq. (Herbert M.
Friedman, Jr., Esq., of counsel).

Petitioner filed a brief in support of his exception and a reply brief. The Division of
Taxation filed a brief in opposition. Oral argument was not requested.

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

ISSUE

Whether petitioner willfully failed to collect, truthfully account for and pay over
withholding taxes on behalf of Center For Accelerated Learning, Inc.

FINDINGS OF FACT

We find the facts as determined by the Administrative Law Judge except for findings of fact “10,” “32” and “33” which have been modified. The Administrative Law Judge’s findings of fact and the modified findings of fact are set forth below.

The Division of Taxation (“Division”) issued six notices of deficiency, each dated September 25, 1995, against petitioner, Sadhu Singh Ahluwalia, as an officer or responsible person of Center For Accelerated Learning, Inc. for a penalty under Tax Law § 685(g) in an amount equal to the withholding tax not paid by the business.

Notice of Deficiency (Assessment ID L-011107799-6) asserted penalties for the period July 1, 1992 through December 31, 1992 in the total amount of \$6,141.65.

Notice of Deficiency (Assessment ID L-011107795-1) asserted penalties for the period January 1, 1993 through March 31, 1993 in the total amount of \$2,870.62.

Notice of Deficiency (Assessment ID L-011107797-8) asserted penalties for the period April 1, 1993 through June 30, 1993 in the total amount of \$3,780.56.

Notice of Deficiency (Assessment ID L-011107798-7) asserted penalties for the period July 1, 1993 through September 30, 1993 in the total amount of \$3,755.30.

Notice of Deficiency (Assessment ID L-011107796-9) asserted penalties for the period October 1, 1993 through December 31, 1993 in the total amount of \$4,648.04.

Notice of Deficiency (Assessment ID L-011107794-2) asserted penalties for the period January 1, 1994 through March 18, 1994 in the total amount of \$2,549.28.

At the outset of the hearing, petitioner conceded that he was the responsible person for the Center For Accelerated Learning, Inc.

During the periods in issue, the Center For Accelerated Learning, Inc. (“Center”), incorporated in New York State in March 1987, provided long- and short-term courses in business management, such as computer courses and secretarial courses, as well as English as a second language to adults. Its overall objective was “to prepare and motivate the student for employment.”

Center was licensed by the New York State Education Department as a business school.

Prior to and during the periods in issue, petitioner was Center’s sole officer holding the position of President/C.E.O., as well as its sole shareholder. He was responsible for any major decision made for Center.

When Center first began operation, it was located in Harlem. However, petitioner found that Center could not attract enough students to generate tuition revenue sufficient to cover its expenses. In an effort to attract more students, petitioner decided to relocate the school.

On January 24, 1992, Center leased two floors of 252 West 29th Street (near Madison Square Garden) for ten years with an annual rent as follows:

| | |
|-------------------|-------------------------|
| First 2½ years | \$130,000.00 per annum |
| Next 2½ years | \$140,000.00 per annum |
| Remaining 5 years | \$150,000.00 per annum. |

Center also gave the landlord a security deposit of \$23,334.00.

All of Center’s records were maintained at the West 29th Street location.

During the period in issue, Center employed about 15 to 20 people, the majority of whom were teachers. The remaining employees were office workers who maintained school records and performed computer work.

We modify finding of fact “10” of the Administrative Law Judge’s determination to read as follows:

Petitioner did not do any of Center’s accounting work.
Rather, he relied upon his employees to do such work.¹

At the hearing, petitioner explained that prior to the years in issue he was actively involved in the running of Center. However, in 1993 he began experiencing health problems which forced him to delegate his responsibilities to his employees in order to keep the school in operation. Subsequent to the period in issue, petitioner’s health problems were diagnosed as a heart condition.

During the hearing, petitioner explained that he took affirmative steps to ensure that the withholding taxes were paid. He stated that he informed his employees that the withholding taxes were “his first liability” and therefore must be remitted to the State. He further testified that his employees informed him that withholding taxes were due. In addition to telling his employees that the withholding taxes came first, he borrowed money from his friends to pay the taxes. He could not recall the exact date or amount he borrowed from his friends. Petitioner did recall that the borrowed funds were used to pay wages, withholding taxes and the rent. He could not recall the exact amount used to pay the withholding taxes.

Petitioner testified that Center had financial problems in the first half of 1992 but things began to improve in mid-1992 and 1993. He explained that as student enrollment increased, Center’s revenues began to cover expenses. The record corroborates his testimony.

¹We modified finding of fact “10” of the Administrative Law Judge’s determination in the interest of clarity.

Center's income came solely from student tuition, the majority of which was paid by New York State TAP grants. According to petitioner, Center had about 200 students a year.

Center's employees were paid their respective salaries/wages throughout the period in issue up to and including March 18, 1994.

Center had an outstanding secured loan with Anchor Savings Bank. The record is silent as to when this loan was first obtained; however, the monthly installment was \$807.75 plus the applicable interest rate, payable over 60 months. In 1992 and 1993, regular payments were made on that loan.

During 1992 and 1993, rent was paid to the landlord for the West 29th Street location.

Center's fixed assets consisted of furniture and equipment. Petitioner estimated that Center owned about 40 computers. Review of the record reveals that in 1993 Center made significant fixed asset purchases and claimed depreciation of \$17,300.00 on its income statement for computer equipment purchased during the year.

During the period in issue, Center was treated as a New York "S" Corporation. The record is silent as to when the S Corporation election was made.

For the period in issue, petitioner did not receive a salary from Center. He did claim the S Corporation ordinary loss on his income tax returns.

The record includes copies of each Form WT-4-A, Quarterly Withholding and Wage Reporting Return ("quarterly withholding return") which Center filed for the period in issue. Review of these quarterly withholding returns reveals that while Center reported withholding New York State and New York City taxes from its employees' wages on each return, it did not

include a payment with any of them. Each of these quarterly withholding returns was signed by petitioner.

The record includes Center's 1993 audited financial statements. Ruben G. Gonzalez, CPA, in his audit report, stated that his responsibility was to express an opinion on financial statements prepared by Center's management. He further stated that:

these financial statements were prepared on the basis of cash receipts and disbursements, which is a comprehensive basis of accounting other than generally accepted accounting principles.

Note "7" in the "Notes to Financial Statements" states:

[s]ince the Corporation elected as Sub Chapter "S" Corporation there is no Federal Income Tax. New York State and New York City Taxes were paid.

Review of the audited financial statements indicates that Center paid \$625.00 in income tax in both 1992 and 1993.

As noted above, Center's sole source of revenue was tuition. In 1994, TAP grants were reduced resulting in a decline in both student enrollment and revenue.

Center ceased conducting classes prior to June 7, 1994, the date on which petitioner filed for Chapter 11 bankruptcy on behalf of Center. At the hearing, petitioner explained that he hoped to revamp Center's finances and resume classes with the fall term.

Upon learning that Center had filed for bankruptcy reorganization under Chapter 11, the New York State Education Department revoked Center's license. At that point, Center could no longer operate as a business school and the United States Bankruptcy Court converted the filing into Chapter 7.

Petitioner did not engage an attorney to represent Center in the bankruptcy proceeding. Rather, he prepared and filed all the necessary documents. None of the papers filed with the U.S. Bankruptcy Court are part of the record.

According to petitioner, a portion of the rent due in 1994 was unpaid at the time of the bankruptcy filing. He was unable to recall the exact amount.

For a period of time after the Chapter 11 filing, petitioner had access to the school; however, he did not remove anything, including the records from the facility because of his expectation that Center would reopen in the fall. At some point, the landlord barred petitioner's access to the building and he was unable to retrieve the records. According to petitioner, Center's records are lost.

According to petitioner, the assets of Center were auctioned off. The exact date of the sale is not part of the record nor is the disposition of the proceeds.

After a conciliation conference, the conferee issued a Conciliation Order (CMS No. 151032), dated May 10, 1996, sustaining the statutory notices — notices of deficiency numbers L011107794, L011107795, L011107796, L011107797, L011107798 and L011107799.

We modify finding of fact "32" of the Administrative Law Judge's determination to read as follows:

The following facts are admitted by the Division:

The adverse financial situation of Center resulted in a serious financial crisis for the school and petitioner.

In 1992, Center shifted its operation from 2090 Adam Clayton Powell Blvd., New York City to 252 West 29th Street, New York City in the hope that the new location would create better business opportunities.

The expenses at the new location exceeded the gross income due to very low student enrollment. The operating expenses in 1992 were \$416,957.00 against the total income of \$309,425.00. This created a net loss of (\$111,631.00). The losses in 1992 wiped out petitioner's stockholder's equity and loan by (\$279,013.00) in 1992 which was reduced to (\$264,013.00) in 1993.

Petitioner did not receive any wages for the years 1992, 1993 and 1994.

The payment of wages and other related expenses absorbed all the operating expenses. If petitioner had not paid wages and other related expenses, the business school would have stopped operation. Petitioner asserts that he continued school operation waiting for the first opportunity to pay the taxes as quickly as possible should the school finances improve. Center's finances did not improve, so he did not get this opportunity.²

THE DETERMINATION OF THE ADMINISTRATIVE LAW JUDGE

The Administrative Law Judge noted that a person required to collect, truthfully account for and pay over the tax imposed by Article 22 who willfully fails to do so or willfully attempts in any manner to evade or defeat the tax or the payments thereof shall be liable to a penalty equal to the total amount of the tax not collected or accounted for and paid over (Tax Law § 685[g]).

A "person" subject to the Tax Law § 685(g) penalty includes an individual, officer or employee of a corporation (including a dissolved corporation) who as such individual, officer or employee is under a duty to perform the act in respect of which the violation occurs (Tax Law § 685[n]).

Petitioner admits that he was a person under a duty to collect, truthfully account for and pay over such withholding taxes for Center. Therefore, the Administrative Law Judge's inquiry

²We modified finding of fact "32" of the Administrative Law Judge's determination in the interest of brevity and combined it with finding of fact "33."

was limited to whether his failure to do so was willful. Petitioner denied that he willfully failed to collect, truthfully account for and pay over withholding taxes on behalf of Center. Rather, he said that he relied on his employees to do all accounting work for Center. Petitioner claimed that poor health necessitated his cutting back on his supervisory activities and that he delegated his responsibilities to his employees in order to keep the school running. Petitioner also contended that tax payments were made and that the amount of withholding taxes due and owing is less than the amounts asserted in the six notices of deficiency. However, the Administrative Law Judge noted, Center's records were lost and petitioner could not supply substantiating documentary evidence. In petitioner's view, Note "7" to the audited 1993 financial statements established that all taxes due for tax year 1993 were paid.

The Administrative Law Judge recognized that the fact that one is determined to be a responsible officer does not necessarily mean that the person is liable for the taxes in issue (*see, Matter of Lyon*, Tax Appeals Tribunal, June 3, 1988). The crux of the willfulness standard "is that the person must voluntarily and consciously direct the trust monies from the State to someone else" (*Matter of Gallo*, Tax Appeals Tribunal, September 9, 1988). Nevertheless, the Administrative Law Judge noted, a person's failure to withhold and pay over the tax has been held to be willful, notwithstanding his lack of knowledge, where the person delegated his corporate responsibilities, including the responsibility to see that taxes were paid (*Matter of Capoccia v. New York State Tax Commn.*, 105 AD2d 528, 481 NYS2d 476; *Matter of Ragonesi v. New York State Tax Commn.*, 88 AD2d 707, 451 NYS2d 301).

Nevertheless, we have held that a responsible officer can make a reasonable delegation of authority (*Matter of Lyon, supra*). In *Lyon*, the record indicated that the officer to whom

fiduciary responsibilities had been delegated was experienced in running the corporation. In addition, the petitioner in that case kept himself informed as to the corporation's operations through regular meetings and also hired an outside accountant to prepare and file corporate tax returns. The Administrative Law Judge concluded that petitioner did not prove that, as a responsible officer, he made a reasonable delegation of authority to ensure that the withholding taxes were paid. Petitioner testified that he delegated his responsibilities to his paid employees, but did not identify the employees to whom he delegated his duties with respect to Center's withholding tax responsibilities, nor has he identified anyone on whom he relied within Center. Further, the Administrative Law Judge noted, petitioner offered no evidence to establish these employees' qualifications and expertise in handling tax matters. In addition, the Administrative Law Judge concluded that petitioner failed to prove that he took any supervisory steps to ensure that the employees were paying Center's withholding tax liabilities. In short, the Administrative Law Judge concluded that petitioner failed to demonstrate that his reliance on these unidentified employees was reasonable.

The Administrative Law Judge concluded, based on the record, that petitioner was aware that monies payable to the State as withholding taxes were diverted to pay Center's payroll and other creditors in order to keep the school running. For the foregoing reasons, the Administrative Law Judge concluded that petitioner's conduct was willful under Tax Law § 685(g).

Petitioner contended that trust fund payments were made on Center's behalf that were not reflected in the six notices of deficiency issued in this matter. In support of this argument, the Administrative Law Judge stated, petitioner offered only his testimony and one piece of documentary evidence. The Administrative Law Judge found petitioner's testimony concerning

the withholding tax payments vague and very general. Moreover, the Administrative Law Judge noted, the only documentary evidence submitted by petitioner (Note “7” to the audited financial statements) failed to establish that withholding taxes were paid in 1993. The Administrative Law Judge found that petitioner failed to provide evidence necessary to establish the amount and date of withholding tax payments. Therefore, the Administrative Law Judge concluded, petitioner failed to establish that the notices of deficiency issued in this matter are incorrect.

ARGUMENTS ON EXCEPTION

Petitioner disagrees with the Administrative Law Judge’s conclusion that his conduct was willful (Determination, conclusion of law “C”).

Petitioner also disagree with the conclusions that sustained the notices of deficiency on the grounds he failed to prove that the notices are incorrect (Determination, conclusions of law “D” and “E”).

OPINION

Petitioner urges that his conduct was not willful because he was ill and delegated the responsibility to others to pay Center’s withholding taxes. Unfortunately, he has not created a factual record which supports his arguments. He may have been ill, but the record does not show the extent of his illness during the subject period and there is no evidence, e.g., a statement from his doctors, showing how his illness impacted on his ability to carry out his duties. Petitioner claims that he delegated the duty to pay Center’s withholding taxes to others, but there is no evidence showing who these “others” were. Further, there is no evidence to show whether the alleged delegees were qualified by training and experience to ensure that Center’s taxes were

paid. Perhaps most significantly, there is no evidence that petitioner took any steps to ensure that Center's withholding taxes were paid.

With respect to the notices of deficiency themselves, petitioner argues that they are incorrect in that they fail to give credit for taxes paid. Here again, he does not offer sufficient evidence that would permit us to draw that conclusion.

Therefore, we affirm the determination of the Administrative Law Judge.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of Sadhu Singh Ahluwalia, Officer of Center For Accelerated Learning, Inc., is denied;
2. The determination of the Administrative Law Judge is affirmed;
3. The petition of Sadhu Singh Ahluwalia, Officer of Center For Accelerated Learning, Inc., is denied; and
4. The six notices of deficiency dated September 25, 1995 are sustained.

DATED: Troy, New York
September 17, 1998

/s/Donald C. DeWitt

Donald C. DeWitt
President

/s/Carroll R. Jenkins

Carroll R. Jenkins
Commissioner

/s/Joseph W. Pinto, Jr.

Joseph W. Pinto, Jr.
Commissioner