

STATE OF NEW YORK

TAX APPEALS TRIBUNAL

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In the Matter of the Petition	:	
of	:	
<b>JOSEPH PASQUINO</b>	:	DECISION
	:	DTA NO. 815731
for Redetermination of a Deficiency or for Refund of	:	
Personal Income Tax under Article 22 of the Tax Law for	:	
the Period July 1, 1990 through June 12, 1994.	:	

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Petitioner Joseph Pasquino, c/o Kalkstein & Co., 144 Albany Post Road, Buchanan, New York 10511, filed an exception to the determination of the Administrative Law Judge issued on August 20, 1998. Petitioner appeared by Lawrence Kalkstein, Esq. The Division of Taxation appeared by Terrence M. Boyle, Esq. (Herbert M. Friedman, Jr., Esq., of counsel).

Neither party filed a brief in this matter. Oral argument was not requested.

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

***ISSUE***

Whether the Division of Taxation properly determined that petitioner was liable for penalties of 100% of Beta Growth Network, Inc.'s unremitted withholding taxes pursuant to Tax Law § 685(g) and (n).

***FINDINGS OF FACT***

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

On May 28, 1996, the Division of Taxation (“Division”) issued to petitioner, Joseph Pasquino, three notices of deficiency<sup>1</sup> which asserted, in total, \$53,998.87 in penalty due from petitioner pursuant to Tax Law § 685(g). Specifically, notice number L012087146 asserted \$36,958.77 in penalty due for the period June 30, 1993 through September 29, 1993; notice number L012087145 asserted \$16,887.22 in penalty due for the period October 18, 1993 through December 29, 1993; and notice number L012087147 asserted \$152.88 in penalty due for the period March 30, 1994 through June 12, 1994. The penalty asserted in the notices was premised on the failure of the Beta Growth Network, Inc. (“BGN”) to remit to the Division withholding taxes as reported for those periods.

BGN was a construction company. During the relevant period BGN worked exclusively as a subcontractor on projects for the City of New York and the New York City School Construction Authority. The general contractor on the City of New York project was a corporation referred to in the record as Kruger Construction Company. The general contractor on the School Construction Authority project was Herbert Construction Company.

Petitioner has been in the construction business for about 40 years. He became involved with BGN in approximately April 1993 when the former principal of BGN advised petitioner that the corporation had financial problems and asked petitioner to loan money to the corporation. Both petitioner and the former principal of BGN understood that petitioner would have a voice in the corporation’s operations if he were to loan money to the corporation. Petitioner did loan money to BGN at that time. In total, according to BGN’s bankruptcy petition (*see*, Finding of

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<sup>1</sup> The Division also issued a fourth Notice of Deficiency to petitioner on May 28, 1996 (notice number L012087148). This notice was canceled by a Conciliation Order dated March 14, 1997. The Conciliation Order sustained the notices referenced above.

Fact “6”), petitioner “advanced and raised capital” for BGN of approximately \$750,000.00. Of that amount, \$157,000.00 was repaid by BGN in 16 payments made between June 21, 1993 and December 28, 1993. The balance of the funds loaned by petitioner to the corporation was not repaid, as the bankruptcy petition lists petitioner as an unsecured nonpriority creditor with a claim of \$399,400.00 against the corporation.<sup>2</sup>

At about the same time petitioner loaned money to the corporation, he became actively involved in its day-to-day operations.<sup>3</sup> Petitioner became secretary of BGN and devoted the majority of his time to the corporation’s affairs. At the time, BGN was having cash flow problems. Specifically, the general contractor on one of BGN’s projects, Herbert Construction Company, was late in paying BGN for services provided. Petitioner negotiated with Herbert Construction and the New York City School Construction Authority to secure payment for BGN for services rendered. In addition, because of this delay in payment, BGN was late in paying its suppliers and subcontractors. Petitioner negotiated with BGN’s creditors in an effort to obtain more time to pay and to reduce the amount of the debts. Petitioner’s efforts resulted in “Vendor’s Estoppel Agreements” between BGN and various vendors which certified the amount of the debt owed by BGN to such vendors. Petitioner also obtained waivers from some vendors on liens held by such vendors. Petitioner determined which of BGN’s creditors were paid. He had

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<sup>2</sup> Petitioner testified that he loaned BGN \$200,000.00 and that no part of the loan was repaid. This testimony is rejected in favor of information contained in BGN’s bankruptcy petition which indicates loans totaling \$750,000.00 and repayments totaling \$157,000.00.

<sup>3</sup> Petitioner testified that he became involved in the operations of BGN only after the corporation defaulted on his loan. This testimony is rejected in light of petitioner’s testimony that he became involved with BGN with the understanding that he would have a voice in its operations; the fact that petitioner took control of BGN’s operations at about the same time he made the loan (there having been very little time for a default to have occurred); the fact that BGN commenced repayment to petitioner in June 1993; and the lack of any testimony regarding when the default occurred.

authority to sign checks on behalf of BGN and did sign checks in payment of creditors. In addition, in an effort to resolve petitioner's late payment and nonpayment of its creditors, and as a result of petitioner's negotiations with Herbert Construction, Herbert issued several checks jointly payable to BGN and various suppliers and subcontractors of BGN.

During the period at issue, BGN withheld New York State income taxes from its employees' paychecks. At the same time, however, BGN did not pay such withholding taxes over to New York State. BGN also did not timely file its withholding tax returns during this period. Petitioner was aware that BGN was withholding taxes from its employees' paychecks, and that BGN was not remitting such taxes or timely filing withholding tax returns during this period.

BGN filed a petition in bankruptcy under Chapter 11 of the United States Bankruptcy Code on January 18, 1994. Petitioner signed the petition on behalf of BGN.

At about the same time, BGN filed its quarterly combined withholding and wage reporting returns for the two quarters comprising the period July through December 1993. Petitioner signed such returns on behalf of BGN. Petitioner filed these withholding tax returns on behalf of BGN in order to proceed with the bankruptcy. BGN later filed its Quarterly Combined Withholding and Wage Reporting Return for the quarter April through June 1994 on or about July 20, 1994. This return was filed unsigned.

Petitioner also signed BGN's quarterly combined withholding and wage reporting returns for the quarters January through March 1993 (dated September 24, 1993) and April through June 1993 (dated December 1, 1993). These two returns reported zero tax withheld and therefore did not give rise to any penalty assessments.

BGN's bankruptcy case was converted to a Chapter 7 liquidation on or about May 10, 1995. BGN's Chapter 7 case was closed pursuant to an Order of Final Decree dated August 18, 1995.

Petitioner did not receive any salary as secretary of BGN.

It is uncertain whether petitioner received stock in BGN. The bankruptcy petition indicates that the shares of the former principal of BGN were to be collateral for the loans made by petitioner to the corporation. Petitioner testified as to his understanding that he was to receive some percentage of corporate stock when he first became involved in BGN. Petitioner was uncertain, however, whether he ever actually received any corporate stock.

According to newspaper reports received in evidence, in July 1995 the owner of the Herbert Construction Company was charged with receiving more than \$7,000,000.00 in kickbacks from subcontractors. There is no evidence in the record linking this alleged activity and Herbert's failure to timely pay BGN for services rendered.

Petitioner testified that Herbert paid BGN's employees directly at about the time BGN ceased operations. Petitioner was uncertain when such direct payment by Herbert occurred, however, and stated that it may have occurred after BGN's bankruptcy case was closed. There is insufficient evidence in the record to find that BGN's employees were paid by Herbert during the period at issue.<sup>4</sup>

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<sup>4</sup> This finding is based on petitioner's equivocal testimony as to when this direct payment may have occurred, and the fact that the withholding tax assessment is based on BGN's filed returns (i.e., BGN would not have reported that it withheld tax where employees were paid by Herbert).

***THE DETERMINATION OF THE ADMINISTRATIVE LAW JUDGE***

In his determination, the Administrative Law Judge concluded that petitioner was, in fact, liable for penalties for his failure to remit, to the State of New York, taxes withheld from BGN's employees. The Administrative Law Judge reasoned that petitioner, as an officer of BGN, clearly was a person within the meaning of Tax Law § 685(n). As such person, the Administrative Law Judge determined that petitioner was required to collect, truthfully account for, and pay over withholding taxes pursuant to Tax Law § 685(g).

In citing to relevant case law, the Administrative Law Judge addressed certain factors which indicated that petitioner was a responsible person for the collection of and payment over to the State of withholding taxes, such as: petitioner's status as an officer of BGN; petitioner's control of the corporation's financial affairs; that petitioner negotiated with BGN's creditors and general contractors; that petitioner signed the corporation's withholding tax returns and its bankruptcy petition; and that petitioner had check signing authority.

With respect to the fact that petitioner had check signing authority, the Administrative Law Judge stressed that while petitioner was in control, BGN made 16 payments to petitioner in repayment of his loan to the company despite BGN's failure to make any payment of withholding taxes during the same period of time.

The Administrative Law Judge rejected petitioner's argument that Herbert Construction was to blame for the failure of the withholding taxes to be paid due to the fact that Herbert failed to pay BGN in a timely fashion and because the criminal charges against Herbert made it impossible for BGN to recover the balance it was owed.

Lastly, the Administrative Law Judge held that petitioner's failure to remit the withholding taxes of BGN was willful since he knew that BGN was not paying its withholding taxes during the period at issue and, concurrently, petitioner directed that available funds be used to repay other creditors including moneys he was owed. Accordingly, the Administrative Law Judge sustained the three notices of deficiency issued against petitioner.

***ARGUMENT ON EXCEPTION***

Petitioner continues to argue that he should not be held liable for penalties pursuant to Tax Law § 685(g) for his mere filing of withholding tax returns.

***OPINION***

As fully discussed by the Administrative Law Judge, petitioner's status as a responsible person for the collecting and paying over of withholding taxes was based upon several factors as set forth above. Petitioner was not held liable as a responsible person based solely upon the fact that he filed withholding tax returns on behalf of BGN. Thus, since the Administrative Law Judge adequately and completely dealt with the issue presented to him, we sustain his determination for the reasons set forth therein.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of Joseph Pasquino is denied;
2. The determination of the Administrative Law Judge is sustained;
3. The petition of Joseph Pasquino is denied; and

4. The notices of deficiency, dated May 28, 1996, are sustained.

DATED: Troy, New York  
April 15, 1999

/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