

STATE OF NEW YORK  
DIVISION OF TAX APPEALS

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In the Matter of the Petition :  
of :  
EUGENE BOSHES : DETERMINATION  
for Redetermination of a Deficiency or for :  
Refund of Personal Income Tax under Article 22 :  
of the Tax Law for the Period April 1, 1980 :  
through December 31, 1983.

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Petitioner, Eugene Boshes, 230 Park Avenue, Suite 610, New York, New York 10169, filed a petition for redetermination of a deficiency or for refund of personal income tax under Article 22 of the Tax Law for the period April 1, 1980 through December 31, 1983 (File No. 803296).

A hearing was held before Joseph W. Pinto, Jr., Administrative Law Judge, at the offices of the Division of Tax Appeals, Two World Trade Center, New York, New York, on October 26, 1989 at 10:45 A.M. Petitioner appeared by Richard H. Wynn, Esq. The Division of Taxation appeared by William F. Collins, Esq. (Herbert Kamrass, Esq., of counsel).

ISSUE

Whether petitioner was a person required to collect, truthfully account for, and pay over withholding taxes with respect to Environmental Research and Development, Inc. for the period in issue and willfully failed to do so, thereby becoming liable for a penalty imposed pursuant to Tax Law § 685(g).

FINDINGS OF FACT

On January 14, 1986, the Division of Taxation issued a Notice of Deficiency and a Statement of Deficiency to petitioner, Eugene Boshes. The Statement of Deficiency stated that he was liable for a penalty under Tax Law § 685(g) which was computed as follows:

Withholding Tax Period	Amount
04/01/80 - 12/31/80	\$ 38,509.04
08/16/81 - 11/30/81	17,113.88
01/01/83 - 01/15/83	684.32
01/16/83 - 01/31/83	514.77
02/01/83 - 02/15/83	514.77
02/16/83 - 02/23/83	1,114.77

03/01/83 - 03/15/83	655.25
03/16/83 - 03/31/83	870.07
12/23/82 - 12/31/82	70,596.40
12/16/83 - 12/31/83	<u>66,054.24</u>
TOTAL	\$196,627.51

Subsequent to the issuance of the Notice of Deficiency and Statement of Deficiency, the Division modified the amount of penalty asserted against Eugene Boshes as follows:

<u>Withholding Tax Period</u>	<u>Amount</u>
02/16/83 - 02/28/83	\$ 514.77
12/23/82 - 12/31/82	17,657.36
12/16/83 - 12/31/83	-0-

The adjusted tax due for the periods between December 23, 1982 and December 31, 1983, therefore became \$21,411.31. Petitioner concedes his liability for this amount of penalty pursuant to Tax Law § 685(g).

Therefore, the only penalty asserted against petitioner pursuant to Tax Law § 685(g) remaining in issue is that for the period April 1, 1980 through December 31, 1980 in the amount of \$38,509.04 and for the period August 16, 1981 through November 30, 1981 in the amount of \$17,113.88. Hence, the total amount left in dispute is \$55,622.92.

During the period left in issue, petitioner was the president of Environmental Research and Development, Inc. ("ERD"), a New York corporation which began operations in 1964. Additionally, petitioner owned one-third of the outstanding stock of said corporation.

The remainder of the stock was owned by petitioner's two partners, Stanley Morris, who was chairman and chief executive officer, and Richard Lehrer, who was executive vice president and chief operating officer. Mr. Lehrer was also treasurer and responsible for the day-to-day operations of the business, including the filing of tax returns and payment of bills.

During the period in issue, petitioner's duties primarily involved making sales of services provided by ERD, including real estate consulting, interior design and construction management. Petitioner estimated that he spent almost 85% of his time outside of the office.

ERD employed between 50 and 70 employees in the years 1980 and 1981, mostly draftsmen, engineers, field supervisors and other support staff.

Shortly after the business began in 1964, the three partners divided up the duties of the corporation, whereby Mr. Boshes took on the sales responsibilities, Mr. Morris supervised the work of the engineers and draftsmen and, as stated above, Mr. Lehrer administered the day-to-day business operations. Each of the men received equivalent salaries, had equal stock ownership, and were signatories on the corporation's checking account. Two signatories were required to sign each check.

Sometime in 1980, ERD sold 20% of its stock to a group of investors for approximately \$900,040.00. The purpose of this sale was purported to be for the payment of outstanding bills including New York State and City withholding taxes.

Although Mr. Boshes and the firm's accountant at the time, Mr. John Herde, testified that a check payable to the proper taxing authority in the sum of approximately \$66,000.00 was

drawn in late 1981 and signed by Mr. Boshes, said payment was never received by the Division of Taxation.

In January of 1982, Mr. Lehrer and Mr. Morris left ERD and formed a new corporation called Research Dynamics. Although Mr. Boshes had an oral agreement with his partners that the proceeds of the stock sale would be used to pay unpaid taxes, Mr. Boshes testified that he believed his partners diverted the funds to their new corporation.

During the period in issue, Mr. Boshes had the authority to sign checks and tax returns and to hire and fire employees. He also acknowledged that he delegated all of the day-to-day operations and management of the business to his partner including the preparation and payment of withholding taxes.

#### STATEMENT OF PETITIONER'S POSITION

Petitioner contends that when he signed the check in late 1981 for payment of unpaid taxes in the sum of approximately \$66,000.00, he believed that it would be cosigned by one of his partners and forwarded to the proper taxing authority. Because of this good faith belief that the taxes would be paid, petitioner does not believe that he is responsible for the subsequent failure of his partners to forward the payment to the Division of Taxation.

#### CONCLUSIONS OF LAW

A. Tax Law § 685(g) penalizes those persons responsible for the withholding and paying over of income tax for willfully failing to so withhold or pay over. It provides as follows:

"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. No addition to tax under subsections (b) or (e) shall be imposed for any offense to which this subsection applies. The tax commission shall have the power, in its discretion, to waive, reduce or compromise any penalty under this subsection."

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

"Person defined.--For purposes of subsections (g), (i), and (o), the term person includes an individual, corporation or partnership or an officer or employee of any 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."

Clearly, petitioner falls within the definition of "person" in Tax Law § 685(n). The question in this case is whether petitioner's failure to pay the withholding taxes was willful.

Since the record demonstrates that petitioner did not have actual knowledge that the withholding taxes were not paid when due, the issue then becomes whether petitioner's failure to know that taxes were not paid resulted from the reckless disregard for known or obvious risks which should be equated to actual knowledge (Matter of Michael Lenhard, Tax Appeals Tribunal, November 9, 1989; Matter of David B. Lyon, Tax Appeals Tribunal, June 3, 1988;

Matter of Steven G. Flax, Tax Appeals Tribunal, September 9, 1988).

In the instant matter, petitioner contends that he reasonably delegated authority for the timely filing of withholding tax returns and the payment of withholding taxes themselves. He attempts to place responsibility on his two partners and co-shareholders for the failure to pay the withholding taxes, but he has not demonstrated that this was a reasonable delegation or that it was reasonable to rely on Mr. Lehrer or Mr. Morris. He also did not prove that he could not easily have determined that the taxes were not paid. In fact, he was "unaware of the failure to pay the taxes only because he failed to inquire. A responsible officer can not insulate himself from liability by such a 'hear no evil--see no evil' policy." (Matter of Stephen G. Flax, supra.)

The credibility of petitioner's contentions is further eroded by the fact that ERD was a small corporate operation with only three principals. Under such circumstances, petitioner's contention that he made a reasonable delegation of the authority to pay withholding taxes is without merit and his failure to inquire as to the payment of the withholding taxes an even more egregious error. Petitioner was in a position to determine if the corporation was meeting its tax responsibilities, but chose not to do so.

B. The petition of Eugene Boshes is denied and the Notice of Deficiency dated January 14, 1986 is sustained, as modified and mutually agreed upon by the parties (see Finding of Fact "2").

DATED: Troy, New York  
April 5, 1990

/s/ Joseph W. Pinto, Jr.  
ADMINISTRATIVE LAW JUDGE