STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
DONALD A. HOPPER	:	DETERMINATION ON REMAND DTA NO. 807025
for Redetermination of a Deficiency or for Refund of Personal Income Tax under Article 22 of the Tax Law for the Period January 1, 1983 through December 31, 1984.	:	

Petitioner, Donald A. Hopper, 620 East 20th Street, New York, New York 10009, 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 January 1, 1983 through December 31, 1984.

Petitioner filed an exception to the determination of the Administrative Law Judge issued on October 22, 1992. The Tax Appeals Tribunal rendered a decision on July 29, 1993 remanding the matter to the Administrative Law Judge for a new determination.

On remand, a brief was filed by petitioner on October 6, 1993 and by the Division of Taxation on October 14, 1993. Petitioner appeared pro se. The Division of Taxation appeared by William F. Collins, Esq. (Mark F. Volk, Esq., of counsel).

ISSUE

Whether petitioner is liable for the penalty asserted against him pursuant to Tax Law § 685(g) with respect to withholding taxes from Royale Towers Associates.

FINDINGS OF FACT

A hearing in this matter was held on March 30, 1992, and a determination was issued on October 22, 1993 finding petitioner liable forpenalties asserted against him under section 685(g) of the Tax Law. The Administrative Law Judge determination relied on two provisions of New York State Partnership Law to support its conclusions. On July 29, 1993, the Tax Appeals Tribunal held that it was an error for the Administrative Law Judge to hold petitioner liable under those provisions and directed the execution of a new determination addressing the issue

of liability under Tax Law § 685(g). The Tax Appeals Tribunal found the facts as determined by the Administrative Law Judge and those facts are set forth below, along with additional Finding of Fact "13".

Royale Towers Associates ("Royale") was a limited partnership which owned the Taft Hotel in New York City. Petitioner, Donald A. Hopper, was Royale's only general partner. He had a two percent interest in Royale. Royale's only limited partner was Edward J. Halloran who had a 98 percent interest in Royale. Petitioner became the general partner of Royale at the request of Halloran.

Petitioner is an attorney. He graduated from Fordham Law School in 1951 and then worked as an assistant district attorney in the County of New York. In 1958, petitioner joined the law firm of Lehman, Goldmark, and Rohrlick, working in its litigation department. He changed law firms approximately five years later. In about 1970, petitioner began working exclusively for Halloran, handling various litigation matters. In 1975, petitioner stopped working for Halloran and began a solo practice, working out of his home.

In 1978, petitioner had a chance meeting with Halloran. Halloran then owned, through an entity called Shelton Towers Associates ("Shelton"), the Halloran House, a major hotel in New York City. Mr. Halloran also owned a number of apartment houses, commercial leases, a concrete company, and other companies. In this chance encounter, Halloran complained of the high cost of litigation fees he was incurring in his various businesses. Shortly after this conversation, petitioner returned to work for Halloran, again handling litigation matters.

Petitioner worked out of Shelton's offices. He was paid by two companies, Shelton and Transit-Mix Concrete. The bulk of petitioner's time was spent on landlord-tenant litigation matters related to properties owned by Shelton. However, during the term of petitioner's employment, business transacted by Transit-Mix Concrete became the focus of various government investigations, and petitioner became involved in gathering documents and providing them to investigators. These were the only legal matters handled by petitioner on behalf of Halloran. Halloran employed the services of several law firms to handle other legal

matters.

Halloran was eventually indicted and later convicted of various criminal activities having to do with his financial and business activities. None of the criminal investigations involved petitioner.

From 1979 through 1983, Halloran had a partnership interest in the Taft Hotel. In 1983 he obtained bank financing to purchase his partner's interest in the hotel. The hotel was purchased entirely with borrowed monies, with the possible exception of a $2,000.00 capital contribution made by Halloran to Royale. Royale was formed in 1983 for the sole purpose of acquiring, rehabilitating and operating the Taft Hotel. Petitioner performed no legal services in connection with Halloran's acquisition of the Taft Hotel or the formation of Royale. He stated that he agreed to be the sole general partner of Royale to accommodate Halloran.

Petitioner did not participate in the operation of the Taft Hotel. He never went to the hotel. He did not perform any legal services for Royale. He received no income from Royale. He did not hire or fire employees, pay bills, maintain any records or otherwise participate in the operation of the hotel.

The Taft Hotel was sold in September 1984. Representatives of the seller, the purchaser, the mortgagees, representatives of Royale's creditors and several other individuals were present at the closing. Royale was represented by petitioner, Halloran, Brian H. Madden, Halloran's assistant, Peter Marino, the hotel's general manager, and John Horl, another Shelton employee. Petitioner appeared at the closing only to sign checks and execute documents on behalf of Royale. He received no monies from the sale of the hotel.

Petitioner signed two sales tax returns and one withholding tax return on behalf of Royale. He could not recall signing these returns, but stated in testimony that they must have been brought to him for his signature because the person who normally signed them was not available.

In a response to information requested by the Division of Taxation ("Division"), Bank Leumi identified petitioner as a person authorized to sign bank checks on behalf of Royale.

On or about March 10, 1988, the Division issued a Notice of Deficiency to petitioner, asserting a penalty of $423,461.23. A statement attached to the notice explained that the penalty was asserted against petitioner as a person required to collect, account for and pay over withholding taxes on behalf of Royale for the period January 1, 1983 through December 31, 1984.

On exception, the Tax Appeals Tribunal admitted into the record certain notes of a tax compliance agent concerning unpaid franchise taxes. Petitioner and the Division of Taxation were given an opportunity to address the significance of this document on remand, and neither raised any issue of law or fact with reference to it.

CONCLUSIONS OF LAW

A. Tax Law § 685(g) imposes liability on those persons responsible for the collection and remittance of withholding taxes who willfully fail to collect or remit such funds. Section 685(g) 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 the term "person" as it is used in section 685(g) as follows:

> "the term person includes an individual, corporation or partnership or an officer or employee of any 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."

Petitioner claims that he was not a "person" required to collect and pay over tax on behalf of Royale. If he is found to be such a person, he contends that any failure to collect or pay over withholding taxes was not willful.

Petitioner was the sole general partner of Royale, with a two percent interest in the partnership. Petitioner argues that his status as a general partner is not a sufficient basis upon which to conclude that he was a person under a duty to collect and remit withholding taxes on

behalf of Royale. The issue of whether a corporate officer is a "person" as defined by section 685(n) has been litigated many times (e.g., Matter of McHugh v. State Tax Commn., 70 AD2d 987, 417 NYS2d 799; Matter of MacLean v. State Tax Commn., 69 AD2d 951, 415 NYS2d 492, affd 49 NY2d 920, 428 NYS2d 675). The relevant factors to be considered in this circumstance are well defined and include the following: whether the individual signed the company's tax returns, possessed the right to hire and fire employees, derived a substantial portion of income from the company's activities, possessed a financial interest in the company and had the authority to pay the company's obligations (Matter of Amengual v. State Tax Commn., 95 AD2d 949, 464 NYS2d 272; see also, Matter of McHugh v. State Tax Commn., supra; Matter of Malkin v. Tully, 65 AD2d 228, 412 NYS2d 186; Matter of MacLean v. State Tax Commn., supra). The person's official duties in relationship to the company are also a pertinent area of inquiry (Matter of Amengual v. State Tax Commn., supra).

Here, uncontroverted evidence establishes that petitioner did not participate in the supervision or management of the Taft Hotel. He did not hire or fire employees, maintain books and records, pay bills or, in any other way become involved in the operation of the Taft Hotel. Moreover, he derived no income from Royale and had no direct financial stake in the success or failure of the Taft Hotel despite his two percent interest in the partnership. Nonetheless, I find that petitioner was a person under a duty to collect and pay over withholding taxes on behalf of Royale. As the sole general partner of Royale, petitioner had authority to act for the partnership in financial and tax matters. He signed two sales tax returns and one withholding tax return for Royale, identifying himself as a general partner. He signed the Certificate of Limited Partnership in his capacity as general partner. When the Taft Hotel was sold, he attended the closing as a representative of the seller and signed the deed transferring the premises. He was an authorized signatory on the partnership's Bank Leumi bank account. Weighing petitioner's lack of involvement in the operation of the Taft Hotel against his demonstrated legal authority to act for Royale, I find that petitioner was a "person" pursuant to Tax Law § 685(n).

The next issue to be decided then is whether the failure to pay over taxes was willful. The conclusion that petitioner was under a duty to act for Royale in collecting and paying over taxes does not automatically lead to a determination that his failure to do so was "willful" within the meaning of Tax Law § 685(g). In Matter of Levin v. Gallman (42 NY2d 32, 34, 396 NYS2d 623, 624), the Court of Appeals held that the test of willfulness 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 other than accidental non-payment is required" (id. at 34).

The Tax Appeals Tribunal has stated that "[t]he essence of the willfulness standard is that the person must voluntarily and consciously direct the trust fund monies from the State to someone else" (Matter of Gallo, Tax Appeals Tribunal, September 9, 1988). However, the failure to collect and pay over taxes can be willful, notwithstanding the lack of actual knowledge, if it is determined that one with a duty to act, recklessly disregarded that duty (see, Matter of Capoccia v. State Tax Commn., 105 AD2d 528, 481 NYS2d 476; Matter of Ragonesi v. State Tax Commn., 88 AD2d 707, 451 NYS2d 301).

There is no question that petitioner had no day-to-day contact with the Taft Hotel, did not oversee its finances, did not know whether taxes were or were not being paid, and made no inquiries as to whether Royale was meeting its tax obligations. Petitioner claims that the partnership was actually run by Halloran and that he had no authority whatsoever to make any decisions with regard to the partnership. I have no doubt, based on the evidence submitted, that Halloran did run the partnership, but that does not put an end to the matter. Petitioner offered no explanation of how it was that he, as the sole general partner of Royale, lacked any authority to act for the partnership in tax matters. The only conclusion that can be drawn from the evidence is that petitioner knowingly disregarded his duty to ensure that Royale collected and paid over taxes due to the State. His motivation is immaterial. One with a duty to act for a partnership cannot avoid liability by failing to concern himself with whether or not taxes are being paid (see, Matter of Malkin v. Tully, 65 AD2d 228, 412 NYS2d 186, 188).

This is not to say that every general partner will be found liable for the penalty imposed under Tax Law § 685(g). Determining whether a general partner recklessly disregarded his or her duty is a factual inquiry, thus, a different set of facts may yield a different result in each case. Here, petitioner has failed to show that he did anything more than ignore his responsibility (cf., Matter of Reyers v. New York State Tax Commn., 116 AD2d 880, 498 NYS2d 199 [a responsible officer did not willfully fail to pay over taxes where he delegated preparation and filing of tax returns to a bookkeeper, often inquired as to the status of the returns, and relied on the skill and judgment of an outside accounting firm]; Matter of Rounick, Tax Appeals Tribunal, October 17, 1991 [a responsible officer delegated authority to collect and pay withholding taxes to his chief financial officer who was an experienced certified public accountant knowledgeable in the financial affairs of the corporation]).

B. The petition of Donald Hopper is denied, and the Notice of Deficiency issued on March 10, 1988 is sustained.

DATED: Troy, New York
December 9, 1993

/s/ Jean Corigliano
ADMINISTRATIVE LAW JUDGE