

STATE OF NEW YORK

TAX APPEALS TRIBUNAL

In the Matter of the Petition
of
CHRISTOPHER BLACK
for Redetermination of Deficiencies or for Refund
of Personal Income Tax under Article 22 of the
Tax Law for the Periods Ended December 31,
2014, March 31, 2015, and June 30, 2015.

DECISION
DTA NO. 828015

Petitioner, Christopher Black, filed an exception to the determination of the Administrative Law Judge issued on July 25, 2019. Petitioner appeared by Ross Law Offices (David Cherubin, Esq., of counsel). The Division of Taxation appeared by Amanda Hiller, Esq. (Stephanie Lane, Esq., of counsel).

Petitioner filed a brief in support of his exception. The Division of Taxation filed a brief in opposition. Petitioner filed a reply brief. Oral argument was heard in Albany, New York, on February 6, 2020, which date began the six-month period for the issuance of this decision.

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

ISSUE

Whether petitioner was a person responsible for the collection and payment of employee withholding taxes on behalf of New England Construction Company, Inc., for the periods ended December 31, 2014, March 31, 2015, and June 30, 2015.

FINDINGS OF FACT

We find the facts as determined by the Administrative Law Judge, except for finding of fact 36. We have omitted finding of fact 36 because that finding merely summarizes the Administrative Law Judge's treatment of the Division of Taxation's proposed findings of fact. These findings of fact, so modified, appear below.

1. Petitioner, Christopher Black, was president and 51% shareholder of New England Construction Company, Inc. (NECC), for the periods ended December 31, 2014, March 31, 2015, and for part of the period ended June 30, 2015 (periods at issue). NECC was an S-corporation, incorporated in New York by petitioner in 1994, which, during the periods at issue, was engaged in interior finish construction, including dry wall construction, acoustical ceilings, and millwork.

2. For the quarter ending December 31, 2014, NECC filed a form NYS-45 (quarterly combined withholding, wage reporting and unemployment insurance return), signed by petitioner, reporting \$220,665.41 in withholding tax due, with a check attached, signed by petitioner, for only the unemployment insurance amounts reported by the return. For the quarter ending March 31, 2015, NECC electronically filed an unsigned form NYS-45 showing \$131,941.38 in withholding tax due, with no remittance. For the quarter ending June 30, 2015, NECC filed a form NYS-45, signed by "Anthony Nastasi," as "President," reporting withholding tax due in the amount of \$26,151.28, and reporting that NECC had employees only in the month of April. No remittance accompanied the return. NECC filed a form NYS-45 for the quarter ending September 30, 2015, signed by Mr. Nastasi, reporting no withholding tax liability, and stating that NECC permanently ceased paying wages as of May 7, 2015.

3. The Division of Taxation (Division) issued to petitioner three notices of deficiency (Notices), all dated December 15, 2015, asserting withholding tax penalty against him, as a responsible person of NECC, under Tax Law § 685 (g), for the periods at issue as follows:

Assessment Identification Number	Period Ending	Penalty Amount
L-044110478	December 31, 2014	\$220,665.71
L-044110477	March 31, 2015	\$131,941.38
L-044110476	June 30, 2015	\$26,151.28

4. After graduating from high school, petitioner entered a four-year apprenticeship training program with a firm called Nastasi White, which was a drywall company owned by two brothers, Frank and Tom Nastasi. A drywall company hangs drywall and acoustical ceilings. After completing that program, petitioner became a journeyman union carpenter, working for Nastasi White. When Nastasi White splintered into two companies, petitioner went with the company started by Frank Nastasi and Jerry Marchelletta, Nastasi and Associates, Inc. (Nastasi and Associates). In 1994, petitioner incorporated NECC. The corporation was authorized to issue 200 shares, all of which would be common shares. Petitioner and his brother, Walter, were the two original shareholders. Petitioner's purpose in forming NECC was to have the corporation certified as a minority business enterprise (MBE), which, according to petitioner, allows a company, "to get access to minority contracts that have minority goals attached to them."

5. It is not clear whether Nastasi White or its principals had a role immediately with NECC. Petitioner testified that he worked eight years for Nastasi White, starting right after he ended his four-year apprenticeship program, which he testified began in 1986, so it appears that he was working for Nastasi White when he created NECC. Moreover, he testified that Frank Nastasi and

Jerry Marchelletta handled the corporation's finances at its "inception," but he also testified that his brother, Walter Black, "was designated to handle the financial aspects of the company."

6. At some point not specified in the record, petitioner asked Nastasi and Associates whether he could do that company's "minority participation work" in relation to contracts with governmental entities. More specifically, Nastasi and Associates had drywall contracts with governmental entities that sometimes required it, as a primary contractor, to use MBE subcontractors to do, for example, 30% of the work. Performing the company's minority participation work was "a good fit" according to petitioner, because Nastasi and Associates was familiar with petitioner's workmanship, as he had worked with the Nastasis during his apprenticeship years, and the company needed someone to do its minority participation work.

7. In the 1995 to 1996 time range, Frank Nastasi and Jerry Marchelletta invested money in NECC, with the two sons of each becoming shareholders of the corporation. As a result of that investment and acquiring his brother's interest in the company, petitioner became a 51% shareholder, with the four sons owning the remaining 49% interest, one of whom was Anthony Nastasi.

8. Upon the failing health of his father, Frank Nastasi, Anthony Nastasi became involved in the financial management of NECC. Petitioner testified that once Anthony Nastasi became involved in NECC, the arrangement between the parties was as follows:

"My responsibility was in the field because that was my background. Everything inside the office as far as payments and all the liabilities and distributions as far as checks and taxes, I had nothing to do with that. They [the Nastasis] had handled all of that . . . I was purely day to day operations with managing projects, making sure the job was billed correctly, making sure it was on schedule. Those were my responsibilities."

9. After Frank Nastasi died around 2005, Anthony Nastasi eventually bought out Tom Nastasi and took over ownership of Nastasi and Associates. According to petitioner, by 2010, the

Nastasis had invested substantial sums in NECC, perhaps \$6 million. During the entire time he owned NECC, petitioner invested, at most, \$200,000.00 in it. Anthony Nastasi eventually bought out the interests of Jeffrey and Jerry Marchelletta in NECC, acquiring a 44% interest in NECC, with 5% being owned by a Mr. Richard Lee, who was not involved in the management of the corporation.

10. Petitioner entered into an agreement, dated December 28, 2005, with Nastasi and Associates, which recited that “[w]hereas [NECC] was indebted to [Nastasi and Associates] for more than [\$4,000,000.00], and the parties desire to order their relationship in the event of certain contingencies,” the parties agreed that “upon the written demand of Anthony Nastasi,” petitioner would resign his position as president of NECC, and would be deemed to have sold to Anthony Nastasi 26 shares of NECC common stock for \$26.00. According to the agreement, after NECC paid in full all outstanding obligations it owed Nastasi and Associates and those of any secured creditors, the corporation would distribute 70% of the remaining assets to Anthony Nastasi and Tom Nastasi, 25% to petitioner, and 5% to Mr. Lee, after which petitioner would be immediately reinstated as president, and Anthony Nastasi and Tom Nastasi would be deemed to have transferred 70 shares of NECC common stock to petitioner for \$70, and Mr. Lee would be deemed to have transferred to petitioner his five shares for \$5.00.

11. When asked why he would enter into such a contract, petitioner testified:

“My background – I came into this agreement with nothing really, and working for the Nastasi’s, just to give you a little backdrop, this was one of the most powerful drywall companies in the New York area. At that time an inner city kid, it was like being . . . inducted into the Hall of Fame, being like Derek Jeter on the Yankees.

I didn’t know much about the business aspect of the business, and at this point it sounded like a good fit for me because just trying to feed my family.”

12. Until February 2015, NECC's offices were located in New York City, while Nastasi and Associates' offices were located in Hauppauge, New York. Because Anthony Nastasi handled the financial affairs of both corporations, NECC's checkbook was kept in Nastasi and Associates' Hauppauge office, where it was locked in Anthony Nastasi's safe at night. Petitioner testified that he would travel to that office about once a week to sign checks prepared by the controller of Nastasi and Associates, Mary Probst, at Anthony Nastasi's behest. With petitioner's approval, Anthony Nastasi maintained a facsimile stamp of petitioner's signature at the Hauppauge office, which was also kept in Anthony Nastasi's safe. Mr. Nastasi would authorize its use without consulting petitioner. Petitioner testified that he had no authority to issue checks without Anthony Nastasi's permission, including checks for federal and State taxes.

13. The Division introduced various bank signature cards for NECC's account with First Republic Bank. A signature card dated April 11, 2011, lists Anthony Nastasi as "Signer Number 1" and petitioner as "Signer Number 2." A replacement signature card, dated November 5, 2012, lists petitioner as "Signer Number 1" and Anthony Nastasi as "Signer Number 2" and includes the handwritten note that "Chris Black may withdraw funds independently. Withdrawals by Anthony Nastasi must receive Chris Black's dual approval." Petitioner testified that the handwritten note was put on the replacement signature card in order to maintain NECC's MBE certification at a time when he was trying to get NECC re-certified. A Removal of Authorized Signer card, dated May 21, 2015, and signed by Anthony Nastasi as "President" removed petitioner's authorization as a signer on the account.

14. As part of his role with NECC, petitioner represented the corporation with regard to matters related to its MBE status. He also represented the corporation with regard to tax matters involving the Division. Thus, petitioner's signature appears on NECC's application to register

for a sales tax certificate of authority (DTF-17), dated June 17, 2011. Section G of that form requires the applicant to list its responsible persons. Petitioner is listed first, with his title as president. His primary duties are described as “Oversees all business activities.” That form also lists Anthony Nastasi as a responsible person of petitioner, with his business title listed as vice president, and his primary duties being described as “director of all business activities.” In connection with a sales tax audit of NECC for the period March 1, 2009 through November 30, 2011, petitioner signed consent forms extending the statute of limitations for assessment dated January 28, 2013, and August 7, 2013. He also signed a form AU-377.12, test period audit method election form, dated January 26, 2014, and a form AU-346, statement of proposed audit change for sales and use tax, dated January 26, 2014. The record also contains a form POA-1, power of attorney, bearing petitioner’s signature and dated November 21, 2013, appointing an attorney to represent NECC before the Division in withholding tax matters for the 2010 through 2013 period.

15. At the hearing, the Division introduced copies of transactions NECC made in its electronic account with the Division, in relation to its “Business Contact Information.” Specifically, by transaction dated August 4, 2014, petitioner was named as the person to contact for a series of taxes, including corporation tax, sales tax, and withholding tax. The blank for who authorized that transaction on behalf of NECC was left empty. By a second transaction dated February 26, 2015, NECC continued to list petitioner as the contact person for all the taxes shown, including withholding tax, but now listed Nastasi and Associates’ address in Hauppauge as the address. Mary Probst, NECC’s controller, is listed in the “Submitted by” blank.

16. Petitioner testified that he first became aware that NECC was becoming “seriously delinquent” with regard to New York State taxes in late 2012. In October 2012, petitioner

negotiated the terms of an installment agreement to pay off an unspecified New York State tax debt in the amount of \$75,000.00. As part of that negotiation, petitioner filled out and signed a form AU-431, responsible person questionnaire, dated October 23, 2012. On page 1 of that form, petitioner checked the “yes” box indicating that he “participate[d] in making significant business decisions” and that he was “responsible for maintaining and managing the business.” With regard to the question whether he had authority to perform specified functions, he checked the “yes” box for the following functions:

- manage the business with knowledge and control over financial affairs;
- pay or direct payment of bills or other business liabilities;
- act, on behalf of the business, with the Tax Department;
- hire and fire employees; and
- negotiate loans, borrow money for the business, or guarantee business loans.

On the second page of the form, with regard to a question asking about petitioner’s “involvement in the financial affairs of the corporation,” petitioner responded “[a]ll financial affairs dealing with [NECC’s] day to day business.”

17. At the hearing, petitioner testified that the answers on the responsible person questionnaire were inaccurate. He answered the questions inaccurately because those questions as to his responsibilities with NECC were the same questions that MBE agencies used to audit his control over NECC’s operations, and he needed to be able to show that he maintained control over the corporation in order for NECC to retain its MBE status.

18. Petitioner signed forms NYS-45 for periods ending September 30, 2013, December 31, 2013, March 31, 2014, June 30, 2014, and September 30, 2014, along with the accompanying checks. The return for the period ending June 30, 2014 showed no withholding tax due and included a check remitting full payment for the unemployment insurance amount due. The

returns for the remaining periods paid the amount of the unemployment insurance due, but did not include any payment for the withholding amount shown as due, as follows:

Period Ended	Amount of Withholding Tax Shown Due, but Not Paid
September 30, 2013	\$154,937.96
December 31, 2013	\$143,258.46
March 31, 2014	\$132,226.02
September 30, 2014	\$200,756.34

The record shows that the Division issued notices of deficiency to petitioner for the last three of these periods, but those notices are not at issue in this matter.¹

19. The Internal Revenue Service (IRS) issued to petitioner an undated proposed assessment of trust fund recovery penalty, for unpaid employment tax trust funds (form 2751), related to NECC under Internal Revenue Code (IRC) (26 USC) § 6672 for quarters ending December 31, 2012 through September 30, 2014, in the aggregate amount of \$6,150,839.47 in tax and \$4,361,715.73 in penalty. According to the form 2751, \$124,522.41 of that amount was assessed for the quarter ending December 31, 2012, while \$959,211.33 was assessed for the quarter ending March 31, 2013.

20. When asked what he did once he became aware of NECC's tax problems, petitioner testified that "I approached Anthony and asked what he was going to do about it, and Anthony Nastasi responded that "this is my [i.e., Anthony's] responsibility. It is my money, I'll take care of it." When asked what he did to ensure that taxes were being paid, petitioner testified that "I

¹ These notices are listed on the petition for this proceeding but were severed and made part of a separate proceeding, DTA No. 828017.

couldn't do anything about making sure that the taxes were being paid because it was his [Anthony Nastasi's] money and his responsibility.”

21. When asked by his counsel to describe his discussions with Anthony Nastasi when he became aware that the corporation was incurring tax delinquencies with New York State, petitioner testified that “I approached Anthony Nastasi on many occasions on those tax liabilities and Anthony Nastasi would tell me ‘don’t worry about it, I’m taking care of it, that’s my responsibility.’” On such occasions, Anthony Nastasi would remind him that it was “his [Anthony Nastasi's] company, his money.” According to petitioner, he (petitioner) had no ability to pay the tax debts without Anthony Nastasi's approval and Anthony Nastasi would not approve such repayments.

22. When asked why he remained in his position with NECC as president even though he had no real control, petitioner replied: “Just trying to maintain my MBE certification.” When asked to elaborate further, he testified that the MBE certification provided opportunity for more contracts.

23. The Division's contact log shows that petitioner spoke with the Division's tax compliance unit from October 2013 to December 2014 a total of eight times regarding NECC's overdue taxes. The tax compliance agent's summary of the substance of those conversations shows that on four occasions petitioner asserted that the corporation would soon be making a payment towards the existing liabilities. On two of those occasions, petitioner advised the Division that the corporation was close to obtaining new financing that would allow the corporation to make sizable payments towards the amount owed. Thus, on the second of those occasions, the contact sheet summarizes the conversation on May 12, 2014, as follows:

“I called and spoke with [Chris Black] who said he couldn't make a payment last week because he had to make payroll. TP said he still working on some deal and

will be able to make at least the \$450,000 by May 25. TP said he doesn't need IPA, what he needs is a release of lien, so he can get his business going. I told TP he either makes the payment or provide [sic] financial documentations [sic], if no payment by May 25. I warned TP that collection actions, including seizure will be taken, if no compliance. TP understood."

24. By letter dated February 3, 2014, the Office of Business Diversity and Civil Rights of the Port Authority of New York and New Jersey (Port Authority) notified petitioner of its intent to decertify NECC as an MBE based on a report by the Port Authority's Inspector General (OIG report). The letter describes the OIG report's findings in pertinent part as follows:

"According to the OIG report, [NECC] is heavily dependent on another construction company, Nastasi & Associates, for financing, staffing, management and daily operations. Anthony Nastasi, who also owns 44% of [NECC], owns Nastasi & Associates. Although you referred to Mr. Nastasi as a 'silent partner', Nastasi exerts a substantial amount of control over the operations of [NECC].

The OIG investigation has determined that [NECC] shares numerous management, office, and field employees, as well as equipment and warehouse space with Nastasi & Associates. . . . You did not disclose this information in either the MBE/WBE Recertification Application or the [Background Qualification Questionnaires] submitted on behalf of [NECC] to work on WTC projects."

By letter dated July 21, 2014, a hearing officer upheld the proposed decertification of NECC as a MBE, citing, among other things, the existence of "several substantial non-documented interest free loans between [NECC] and parties related to [Nastasi and Associates]."²

25. According to petitioner, NECC had been doing a substantial business with the Port Authority, as it had a contract with the Port Authority with an original value of \$12.5 million that had grown to have a value of \$22.5 million.

² As president of NECC, petitioner signed a "Security Agreement" between NECC and Nastasi and Associates, dated February 12, 2014, which gave the latter a security interest in certain assets of NECC, "[t]o secure and provide for payment of . . . \$8,502,996.00 provided in note or notes of [NECC]." Petitioner testified that NECC had entered into similar agreements over the years in recognition of the monies that Anthony Nastasi was putting into NECC's business. Petitioner testified that loans pertaining to that security agreement were what was being referred to in the Port Authority's July 21, 2014 letter.

26. Petitioner testified that Anthony Nastasi began to lose financial control of NECC in 2014 as a result of its accumulating tax liabilities, and a growing liability vis a vis the carpenters' union. Petitioner introduced a chain of emails showing Anthony Nastasi's attempt to enter into a deferred payment agreement with the district counsel of the carpenters' benefit fund in February 2015 on behalf of both Nastasi and Associates and NECC. As part of that negotiation, by email dated February 13, 2015, Charles Virginia, counsel for the carpenters' benefit fund, asked that a "questionnaire" be filled out in connection with the application for a "payment plan." Anthony Nastasi forwarded the questionnaire to petitioner, stating "You need to fill out for [NECC]." Petitioner emailed Anthony Nastasi back on February 15, 2015, stating:

"I am being advised by my council
Not to fill this out due to not having any
Control of the \$.
You can fill this out."

Anthony Nastasi responded two hours later with another email to petitioner, on which others were copied, stating:

"Then we are done !
I am exercising my right to your shares of our pre agreement of 2006 so you are relieved of your duties and your relieved of your position.
Please do not touch any company property as of this moment[.] And leave the premises as you are terminated as well as Christina [petitioner's daughter who also worked for NECC]."

Consistent with the above, petitioner signed an "Agreement of Sale" dated May 20, 2015, transferring 51 shares of stock in NECC to petitioner for \$26.00. Attached to that agreement was a letter of the same date from petitioner, resigning his position with NECC "effective immediately."

At the hearing, petitioner testified that he did not want to execute the document Anthony Nastasi sent him via his February 13, 2015 email because doing so would have created personal liability for him for “hundreds of thousands of dollars of union benefits, fringe benefits.”

27. The Division’s contact log contains an entry for April 9, 2015, in which Anthony Nastasi informed the Division that petitioner had been “released from his duties.”

28. Petitioner retained A. Earl Blanche, CPA, to represent him with regard to the proposed trust fund recovery penalties described in finding of fact 19. Mr. Blanche wrote the IRS, arguing that petitioner should not be considered a “responsible person” for purposes of IRC (26 USC) § 6672 because petitioner lacked financial control of NECC, which, instead, was controlled by Anthony Nastasi. In connection with that protest, Mr. Blanche sent the IRS an affidavit sworn to by Anthony Nastasi on September 9, 2015, in which Mr. Nastasi made the following statements:

“1. In addition to being a shareholder and director of [NECC,] I held the corporate offices of secretary and treasurer, also. I have held these offices from the time I invested in [NECC] until the present. Neither [petitioner] (President/CEO for [NECC]) nor any other employee of [NECC] exercised control over the corporate disbursements (e.g., payments for vendors, creditors, union benefits and obligations, all payroll taxes, employer compensation and benefits, etc.).

2. As Director/Secretary-Treasurer of [NECC], I had ultimate authority and absolute control over the financial disbursements of the company. I opened the bank account at First Republic Bank (FRB) and added Mr. Black to the Master Signature Card and Agreement to Open Account(s) (the first signature card document for the FRB bank accounts (sic). . . .

3. I controlled the payment of [NECC] bills and creditors at my office, which is separate and apart from [NECC’s] place of business. All correspondence, including bank statements came to my office. I handled all checking activity for [NECC] from my office. I kept the checks and check register at my office and only authorized personnel at my office had access to the checkbook. Mr. Black did not have access to the checkbook to make disbursements. I would direct my staff to write checks and Mr. Black would come to my office to sign the checks I authorized.

4. . . . Mr. Black, as President/CEO of [NECC], handled the operating activities

of [NECC], but did not control any of the financial responsibilities and decisions of [NECC]. Mr. Black had signature authority on the bank account only to enable him to handle items related to running the operations of [NECC]; his authority did not include payment of [NECC] accrued liabilities, tax obligations, or anything beyond the company's general operations.”

29. By letters dated December 14, 2015, and September 20, 2017, the IRS Appeals Office determined that petitioner should not be held liable for trust fund recovery penalties assessed for the quarters in the period December 31, 2012 through June 30, 2015.

30. Petitioner filed joint New York State resident income tax returns (forms IT-201) with his wife for 2014 and 2015, with W-2 forms issued by NECC attached. On those returns, petitioner reported receiving \$196,923.00 and \$76,923.00 in wages from NECC for, respectively, 2014 and 2015.

31. For the calendar year 2014, NECC electronically filed a form CT-3-A, New York S corporation franchise tax return, which showed an ordinary business loss of \$3,561,752.00. The signature page of the return was undated and did not list any authorized person. Attached was a schedule K-1 issued to petitioner, which allocated to him a business loss of \$1,816,494.00. For 2015, NECC electronically filed a CT-3-S, showing an ordinary business loss of \$5,451,882.00. The signature page of the return was undated and did not list any authorized person. Attached to the return was a schedule K-1 issued to petitioner, showing an ordinary business loss of \$1,058,860.00.

32. Petitioner's daughter also worked for NECC for all or some portion of the periods at issue, but there is nothing in the record as to her earnings.

33. At the hearing, Laurie Bishop, the tax compliance agent who recommended the issuance of the notices to petitioner, testified on behalf of the Division. She explained that she based her determination that petitioner qualified as a responsible person for NECC during the audit period

on the documents in the Division's records, showing his title and responsibilities with the company. She did not interview anyone with NECC before determining that petitioner qualified as a responsible person of NECC.

34. Mary Probst, NECC's controller during the years at issue, and employed at the time of the hearing by a company owned by petitioner, testified that all of the receipts for the two companies came to Nastasi and Associates' Hauppauge office, where they were transferred between NECC's and Nastasi and Associates' bank accounts, as needed. According to Ms. Probst, it was Anthony Nastasi who determined which of NECC's liabilities would be paid, including tax liabilities, and that if petitioner had directed her to pay those tax liabilities without the approval of Anthony Nastasi, she would not have done so. Ms. Probst testified that petitioner had no access to NECC's checkbook.

35. Tom Pillari, an attorney admitted to practice in New York State, testified that he was hired by Anthony Nastasi and did legal work for both Nastasi and Associates and NECC under Anthony Nastasi's direction. He testified that Anthony Nastasi was in complete financial control of NECC, kept NECC's checkbook and the facsimile stamp of petitioner's signature in his safe, and did not give petitioner access to either. He agreed with the statements Anthony Nastasi made in his September 9, 2015 affidavit (*see* finding of fact 28). Asked to describe how Anthony Nastasi treated petitioner, Mr. Pillari testified:

“In my opinion, if you want to know how I honestly feel, Chris Black was more of an employee. He allowed the Nastasi family to operate a minority enterprise, and it was Anthony's business, period. I don't know how else to describe it. It was Anthony Nastasi's business. It was his money. He put all the money into this business and it was his business. And he made that clear to everybody including myself, including Chris. It was not Chris Black's business to run. Chris Black got a salary and some nice perks and I think he had a pretty decent life, but it was not his business.”

THE DETERMINATION OF THE ADMINISTRATIVE LAW JUDGE

The Administrative Law Judge began his determination by citing the section of the Tax Law that provides for imposition of a penalty for the willful failure to collect and pay over withholding tax by a person under a duty to do so. The Administrative Law Judge also quoted the subsection relating to the definition of a person under a duty to collect and pay over taxes. According to the Administrative Law Judge, the question of whether someone is a responsible person under a duty to collect and pay over withholding taxes is a factual one, but ultimately turns on whether the individual had or could have had sufficient authority and control over the affairs of the business to be considered a responsible officer or employee.

The Administrative Law Judge next described the various factors used in prior decisions that indicate status as a responsible person for purposes of the withholding tax penalty, including the individual's status as an officer, director, or shareholder; authorization to write checks on behalf of the corporation; the individual's knowledge of and control over the financial affairs of the corporation; authorization to hire and fire employees; whether the individual signed tax returns for the corporation; the individual's economic interest in the corporation; and if the individual held himself out to third-parties as a responsible person.

The Administrative Law Judge noted that the imposition of a penalty for failure to collect and pay over withholding taxes requires more than merely determining that an individual was a responsible person; it must also be shown that such individual acted willfully. According to the Administrative Law Judge, decisions of New York courts and this Tribunal have held that willfulness is shown through conscious and voluntary acts done with the knowledge that the taxes would not be paid over, but rather used for other purposes. However, a lack of knowledge

that taxes were not being paid does not hinder a finding of willful failure to remit taxes, if the responsible person recklessly disregarded his or her responsibilities in seeing that taxes are paid.

After considering the various indicia of petitioner's status as a responsible person for NECC, the Administrative Law Judge concluded that petitioner qualified as a responsible person. In reaching this conclusion, the Administrative Law Judge considered the agreement between petitioner and the Nastasis going back to the formation of NECC that petitioner would relinquish financial control of NECC while still exercising operational control. For the Administrative Law Judge, it was key that petitioner continued holding himself out as a responsible person for NECC well after the time petitioner became aware that withholding taxes were not being paid.

The Administrative Law Judge then turned to the willfulness requirement of the penalty imposed against petitioner. While acknowledging that a responsible person can make a reasonable delegation of responsibility, the Administrative Law Judge found that petitioner's delegation to Anthony Nastasi was unreasonable in face of mounting evidence that NECC's tax obligations were not being fulfilled. Noting that the Division is not bound by determinations by the IRS, the Administrative Law Judge also rejected petitioner's argument that such a determination was conclusive on the question of whether petitioner was a responsible person for purposes of the Tax Law. Because petitioner's actions amounted to "more than accidental nonpayment," the Administrative Law Judge concluded that the willfulness requirement was met.

Based on evidence in the record, the Administrative Law Judge agreed with petitioner's argument that he should not be considered a responsible person after February 18, 2015, as petitioner's tenure as a corporate officer ended on that date. The Administrative Law Judge thus granted the petition to the extent that he directed the Division to recompute notice of deficiency

number L-044110477 accordingly and he further directed the Division to cancel notice of deficiency number L-044110476. He otherwise denied the petition and sustained notice of deficiency number L-044110478.

ARGUMENTS ON EXCEPTION

Petitioner argues on exception that the Administrative Law Judge incorrectly found that petitioner had control of NECC sufficient to be considered a responsible person. Petitioner argues that he never had control of the company and was thwarted in carrying out his duties. He posits that because Tax Law § 685 (g) is modeled after IRC (26 USC) § 6671, federal case law holding that access to a corporate checkbook is a significant factor in making a responsible person determination should weigh in his favor here. Petitioner disagrees with the weight assigned by the Administrative Law Judge to petitioner's holding himself out as a responsible person where petitioner had no actual authority. As petitioner could not pay the withholding taxes regardless of whether he wanted to, he argues that his actions cannot be interpreted as willful.

The Division argues that petitioner has not shown the notices of deficiency are incorrect and urges this Tribunal to affirm the determination of the Administrative Law Judge. The Division notes that it is not bound by a federal determination of responsible person status. Furthermore, the Division states that the liability of a responsible person is personal in nature and cannot be avoided by pointing to another responsible person. The Division contends that finding an individual has control of a corporate entity does not depend on such individual's actual assertion of such authority. According to the Division, where preclusion from carrying out his or her corporate duties was foreseeable and by creation of a taxpayer, the taxpayer does not escape personal liability for the failure to collect and pay over taxes. The Division argues that

petitioner's disregard of his corporate responsibilities, by failing to ensure that tax payments were remitted to the state, met the requirement of willfulness for purposes of the penalty under Tax Law § 685 (g).

OPINION

The notices of deficiency here at issue assert penalties arising under Tax Law § 685 (g) for petitioner's willful failure to collect and pay over withholding tax. Tax Law § 685 (g) provides, in relevant part:

“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 sum of [i] the total amount of the tax evaded, or not collected, or not accounted for and paid over”

The withholding tax penalty is properly imposed only on persons required to collect, truthfully account for, and pay over withholding tax. The definition of such a person is given in Tax Law § 685 (n):

“. . . the term person includes an individual, corporation or 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.”

The question of whether someone qualifies as a person under a duty to collect and pay over withholding taxes is a factual one (*Matter of Cohen v State Tax Commn.*, 128 AD2d 1022 [3d Dept 1987]; *Matter of McHugh v State Tax Commn.*, 70 AD2d 987 [3d Dept 1979]) and its resolution turns on a variety of factors. These factors include status as a corporate officer, involvement in management and fiscal matters of the business, authorization to fire and hire employees and economic interest in the corporation, inter alia (*see Matter of Moschetto*, Tax

Appeals Tribunal, March 17, 1994; *see also Matter of Constantino*, Tax Appeals Tribunal, September 27, 1990). Whether one held her or himself out to third parties as a responsible person is also a factor to consider in making a responsible person determination (*Matter of McHugh*; *Matter of Amengual v State Tax Commn.*, 95 AD2d 949 [3d Dept 1983]).

We do not agree with petitioner that the Administrative Law Judge erred in concluding that petitioner was a responsible person for purposes of Tax Law § 685 (g). Here, in light of the cited case law and our prior decisions, we consider whether petitioner presented facts showing that petitioner lacked control and authority over the affairs of NECC. We have reviewed the findings of fact and observe that petitioner was an officer of NECC and its majority shareholder, managed its field operations, had check signing authority, filed tax returns on behalf of the company and had considerable economic interest in NECC. These facts, considered in conjunction with petitioner's holding himself out to third parties, as well as to the Division itself in responding to its questionnaire, are uncontested and require the conclusion that petitioner qualifies as a responsible person for NECC. We do not find petitioner's testimony that his representations to third parties and the Division were "inaccurate" and that he never in fact had authority or control over NECC overcomes the substantial evidence demonstrating just the opposite.

As noted by the Administrative Law Judge, merely determining that a taxpayer is a responsible person is not enough to impose a withholding tax penalty on a taxpayer; it must also be shown that the taxpayer acted willfully in failing to collect or pay over withholding tax (Tax Law § 685 [g]). It is a matter of settled law that the test for determining whether an act is willful is determining "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 more than accidental nonpayment is required” (*Matter of Levin v Gallman*, 42 NY2d 32, 34 [citations omitted] [1977]; *see also Matter of Lyon*, Tax Appeals Tribunal, June 3, 1988). Willfulness can be found where a responsible person recklessly disregards his or her corporate responsibilities, notwithstanding his or her lack of actual knowledge that taxes were not being paid (*see Matter of Capoccia v New York State Tax Commn.*, 105 AD2d 528 [3d Dept 1984]; *Matter of Ragonesi v New York State Tax Commn.*, 88 AD2d 707 [3d Dept 1982]). As relevant to the instant case, corporate officers cannot absolve themselves by disregarding their duty and leaving it to someone else to discharge (*Matter of Ragonesi*, at 708). Similarly, declining to exercise one’s authority does not cause one’s actions or inactions to fail to be willful (*see Matter of Risoli v Commr of Taxation & Fin.*, 237 AD2d 675 [3d Dept 1997]; *Matter of Cho*, Tax Appeals Tribunal, February 9, 2017).

Here, there is no question that petitioner left his duty to collect and pay over withholding tax to another person. Petitioner claims that he was “thwarted” in his attempts to comply with responsibilities for NECC’s tax obligations, but such a claim is difficult to reconcile with petitioner’s account of how different responsibilities for NECC were assigned since its formation. It seems, from the record, that the arrangement whereby petitioner claims to have no control or authority to pay NECC’s tax obligations was one of his own making; that is, a conscious and voluntary act that resulted in NECC’s failure to pay its tax (*see Matter of Levin*). This, even without actual knowledge that withholding tax would not be paid, could be sufficient to sustain a finding of willfulness for purposes of the withholding tax penalty. However, in this case, we find that petitioner had actual knowledge that withholding tax was not being paid to the

Division. Thus, petitioner's continued reliance on another to pay withholding tax constituted a reckless disregard of his duty to act.

Lastly, we consider petitioner's argument that the federal determination that petitioner was not a responsible person for employment taxes should be accorded more deference. The Division is not bound by such a federal determination and may conduct its own examination and reach its own conclusion (*see Matter of Dufton*, Tax Appeals Tribunal, April 5, 1995; 20 NYCRR 159.4). Although we agree that Tax Law § 685 (g) and IRC (26 USC) § 6671 are parallel statutes, and meanings given to terms used in the federal statute are relevant to construction of New York Tax Law (*see* Tax Law § 607), such a principle does not require the Division to give deference to a factual determination of the IRS regarding the status of a responsible person.

Accordingly, it is ORDERED, ADJUDGED, and DECREED that:

1. The exception of Christopher Black is denied;
2. The determination of the Administrative Law Judge is affirmed;
3. The petition of Christopher Black is denied, except as modified by the determination of the Administrative Law Judge; and
4. Notice of deficiency number L-044110477, as modified by the determination of the Administrative Law Judge, and notice of deficiency number L-044110478 are sustained.

DATED: Albany, New York
August 6, 2020

/s/ Roberta Moseley Nero
Roberta Moseley Nero
President

/s/ Dierdre K. Scozzafava
Dierdre K. Scozzafava
Commissioner

/s/ Anthony Giardina
Anthony Giardina
Commissioner