

STATE OF NEW YORK

DIVISION OF TAX APPEALS

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In the Matter of the Petition	:	
of	:	
<b>JOVER NARANJO</b>	:	
for Redetermination of Deficiencies or for Refund of	:	
New York State Personal Income Tax under Article 22	:	DETERMINATION
of the Tax Law for the Year 2009 and the Periods	:	DTA NO. 830759
Ended March 31, 2010, June 30, 2010, September 30,	:	
2010, December 31, 2010, December 31, 2011,	:	
December 31, 2012, March 12, 2013, March 31, 2013,	:	
March 31, 2014, June 30, 2014 and September 30,	:	
2014, and for Revision of a Determination or for	:	
Refund of Sales and Use Taxes Under Articles 28 and	:	
29 of the Tax Law for the Period March 1, 2013	:	
through May 31, 2013.	:	

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Petitioner, Jover Naranjo, filed a petition for redetermination of deficiencies or for refund of New York State personal income tax under article 22 of the Tax Law for the year 2009 and the periods ended March 31, 2010, June 30, 2010, September 30, 2010, December 31, 2010, December 31, 2011, December 31, 2012, March 12, 2013, March 31, 2013, March 31, 2014, June 30, 2014 and September 30, 2014, and for revision of a determination or for refund of sales and use taxes under articles 28 and 29 of the Tax Law for the period March 1, 2013 through May 31, 2013.

A hearing was held in Brooklyn, New York, on June 27, 2024, before Jennifer L. Baldwin, Administrative Law Judge, with all briefs to be submitted by November 7, 2024, which date commenced the six-month period for the issuance of this determination. Petitioner appeared

pro se. The Division of Taxation appeared by Amanda Hiller, Esq. (Adam Roberts, Esq., of counsel).

### ***ISSUES***

I. Whether petitioner was liable for the penalty imposed pursuant Tax Law § 685 (g) as a person required to collect, truthfully account for and pay over withholding tax on behalf of Gladiators Contracting Corp. for the periods ended December 31, 2012 and March 31, 2013 and on behalf of Yankee Carting Corp. for the periods ended March 31, 2014 and June 30, 2014 who willfully failed to do so.

II. Whether petitioner was personally liable for the sales and use taxes due on behalf of Yankee Carting Corp. as a person required to collect and pay such taxes under Tax Law §§ 1131 (1) and 1133 (a) for the period March 1, 2013 through May 31, 2013.

III. Whether petitioner's motion for reconsideration should be granted.

### ***FINDINGS OF FACT***

1. In an order, dated February 1, 2024 (ALJ order), the undersigned administrative law judge determined that petitioner, Jover Naranjo, failed to timely protest notices of deficiency L-040552888 (for the period ended December 31, 2010), L-040552889 (for the period ended September 30, 2010), L-040552890 (for the period ended June 30, 2010), L-040552891 (for the period ended March 31, 2010), L-040552892 (for the period ended December 31, 2011), and L-042572546 (for the period ended September 30, 2014) and, consequently, denied petitioner's petition with regard to such notices. The undersigned also determined that notices and demands L-035039237 (for the year 2009) and L-039164193 (for the period ended March 12, 2013) did not give rise to hearing rights at the Division of Tax Appeals and dismissed the petition with

regard to these notices. A formal hearing ensued for the remaining notices in the petition as set forth below.

2. Gladiators Contracting Corp. (GCC) filed form NYS-45, quarterly combined withholding, wage reporting, and unemployment insurance return (form NYS-45), for the period ended December 31, 2012. GCC reported withholding tax due of \$3,590.94. GCC did not remit payment for the amount due. The form NYS-45 is dated January 7, 2013 and appears to be signed by petitioner as president of GCC.

3. GCC filed form NYS-45 for the period ended March 31, 2013. GCC reported withholding tax due of \$831.38. GCC did not remit payment for the amount due. The form NYS-45 is dated April 22, 2013 and appears to be signed by petitioner as president of GCC.

4. On July 30, 2014, the Division of Taxation (Division) issued to petitioner a notice of deficiency, notice number L-041748653, asserting penalty due of \$3,590.94 for the period ended December 31, 2012. On the same date, the Division issued to petitioner a notice of deficiency, notice number L-041748652, asserting penalty due of \$831.38 for the period ended March 31, 2013. Notices of deficiency L-041748653 and L-041748652 were issued to petitioner as an officer or responsible person of GCC who was liable for a penalty equal to the withholding tax that was not paid by GCC pursuant to Tax Law § 685 (g).

5. Yankee Carting Corp. (YCC) filed form NYS-45 for the period ended March 31, 2014. YCC reported withholding tax due of \$335.72. YCC did not remit payment for the amount due. The form NYS-45 is dated March 31, 2014 and appears to be signed by petitioner as president of YCC.

6. YCC filed form NYS-45 for the period ended June 30, 2014. YCC reported withholding tax due of \$575.52. YCC did not remit payment for the amount due. The form

NYS-45 is dated July 28, 2014. “Jover Naranjo” is printed on the signature line and lists the signer’s title as “President.”

7. On November 26, 2014, the Division issued to petitioner a notice of deficiency, notice number L-042235738, asserting penalty due of \$335.72 for the period ended March 31, 2014. On March 31, 2015, the Division issued to petitioner a notice of deficiency, notice number L-042572545, asserting penalty due of \$575.52 for the period ended June 30, 2014. Notices of deficiency L-042235738 and L-042572545 were issued to petitioner as an officer or responsible person of YCC who was liable for a penalty equal to the withholding tax that was not paid by YCC pursuant to Tax Law § 685 (g).

8. The Division also issued to petitioner a notice of estimated determination, notice number L-041109900, on April 29, 2014, asserting estimated sales tax due of \$750.00, plus interest and penalty. The notice of estimated determination stated that sales tax was asserted against petitioner as an officer or responsible person of YCC in accordance with Tax Law §§ 1138 (a), 1131 (1) and 1133 for the period March 1, 2013 through May 31, 2013. The notice of estimated determination indicated that YCC did not file a sales tax return for the same period that was due on June 20, 2013.

9. Petitioner filed a request for conciliation conference with the Division’s Bureau of Conciliation and Mediation Services (BCMS) in protest of the notices identified above as well as the other notices addressed in the ALJ order.

10. On October 1, 2021, BCMS issued a conciliation order dismissing request, CMS number 000332498, to petitioner that included notices of deficiency L-041748653, L-041748652, L-042235738 and L-042572545. On the same date, BCMS issued a conciliation order dismissing request, CMS number 000332572, to petitioner for notice of estimated

determination L-041109900. The conciliation orders determined that petitioner's protest of the notices was untimely.

11. On November 17, 2021, petitioner filed a timely petition with the Division of Tax Appeals in protest of the conciliation orders. Petitioner attached to the petition documents that indicated that he was arrested on March 14, 2013, a criminal judgment was entered against him on April 23, 2014 and he had a release date from prison of August 23, 2019.

12. At the hearing, the Division presented the testimony of Masud Lasker, a Tax Compliance Agent 1 with the Division. Mr. Lasker explained that notices of deficiency L-041748653, L-041748652, L-042235738 and L-042572545 were issued to petitioner based on GCC's and YCC's failure to remit payment for the amounts reported due on their forms NYS-45. Mr. Lasker also explained that notice of estimated determination L-041109900 was issued to petitioner based on YCC's failure to file a sales tax return for the period March 1, 2013 through May 31, 2013. Mr. Lasker further explained that the amount of tax determined to be due, \$750.00, was a "system-issued arbitrary amount" used when a taxpayer does not file a quarterly sales tax return.

13. Mr. Lasker testified that he determined that petitioner was a responsible person of GCC and YCC. When asked how he came to that determination, Mr. Lasker explained that he used petitioner's signature on the forms NYS-45 filed by GCC and YCC. When asked if there was anything else he looked at to determine petitioner's responsible person status, Mr. Lasker explained:

"We have issued -- we have used the other documents that [the] taxpayer may have signed, like [] forms that [have the] actual signature of the taxpayer. We also use that as [] evidence when we issue the responsible officer assessment. And I looked at[,] also [the] taxpayer may have remitted payment previously, and we also used the signature on the checks as [] evidence to create the responsible officer assessment."

The Division did not put any such documents into the record.

14. Petitioner did not testify at the hearing but submitted documents into the record. The documents appeared to indicate that petitioner was scheduled to surrender to federal prison on June 2, 2014 and commenced a term of supervised release on July 19, 2019, which was completed effective July 18, 2023.

15. Petitioner filed a motion for reconsideration on June 4, 2024, which was also entered into evidence at the hearing. The motion requested that the undersigned reconsider the ALJ order with regard to notices of deficiency L-040552888, L-040552889, L-040552890, L-040552891, L-040552892, and L-042572546. In the motion, petitioner argues that reasonable cause exists to abate penalties and reduce interest. The Division was allowed to respond to petitioner's motion in its brief. The Division's brief does not include a response to the motion.

### ***CONCLUSIONS OF LAW***

A. Initially, BCMS dismissed petitioner's protest of the notices at issue herein on the basis that the protest was untimely (*see* finding of fact 10). Where the timeliness of a request for a conciliation conference is at issue, the initial inquiry is whether the Division has met its burden of demonstrating the fact and date of mailing of the notice to petitioner's last known address (*see Matter of Katz*, Tax Appeals Tribunal, November 14, 1991). In the ALJ order it was determined that the Division failed to establish the mailing of notices of deficiency L-041748652, L-041748653, and L-042235738. The Division did not offer any proof to establish the mailing of notice of deficiency L-042572545 and notice of estimated determination L-041109900. Accordingly, the 90-day periods to protest such notices are tolled and the Division of Tax Appeals has jurisdiction to consider the merits of petitioner's protest of such notices.

B. Tax Law § 685 (g) provides, in part:

“Any person required to collect, truthfully account for, and pay over the tax imposed by [article 22] 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 tax evaded, or not collected, or not accounted for and paid over . . .”

Tax Law § 685 (n), in turn, defines a “person” to include:

“an individual, corporation, 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.”

C. In determining whether an individual is a responsible person for withholding tax purposes, the Court of Appeals recently articulated the relevant inquiry as “whether the individual had actual authority over the corporation’s financial affairs such that the person had the ability or effective power to remit the overdue taxes” (*Matter of Black v New York State Tax Appeals Trib.*, 41 NY3d 131, 139 [2023]). The Court of Appeals explained that federal cases employ a non-exclusive list of factors in determining whether an individual has significant control over a corporation’s finances, including whether the individual:

“(1) is an officer or member of the board of directors, (2) owns shares or possesses an entrepreneurial stake in the company, (3) is active in the management of day-to-day affairs of the company, (4) has the ability to hire and fire employees, (5) makes decisions regarding which, when and in what order outstanding debts or taxes will be paid, (6) exercises control over daily bank accounts and disbursements records, and (7) has check-signing authority” (*id.* at 139-140, quoting *Vinick v United States*, 205 F3d 1, 7 [1st Cir 2000], quoting *Fiataruolo v United States*, 8 F3d 930, 939 [2d Cir 1993]).

The Court of Appeals further explained that “holding oneself out as a responsible person is a relevant factor under federal law [and,] [a]s in the state courts, no single factor is determinative

in the federal courts, and the totality of the circumstances must be considered” (*Matter of Black v New York State Tax Appeals Trib.*, 41 NY3d at 140 [citations omitted]).

The record in this matter fails to establish that petitioner was a responsible person of GCC and YCC for withholding tax purposes. The record herein contains four forms NYS-45 allegedly signed by petitioner as president of GCC and YCC. One such return does not contain a signature only a printed name. That same return is dated July 28, 2014 when petitioner was incarcerated (*see* finding of fact 14). The notion that petitioner signed this return while he was incarcerated strains credulity. It also calls into question the other returns petitioner allegedly signed. Without more, it cannot be determined that petitioner “had actual authority over the corporation’s financial affairs such that [he] had the ability or effective power to remit the overdue taxes” (*Matter of Black v New York State Tax Appeals Trib.*, 41 NY3d at 139).

If the Division relied on anything else to determine that petitioner was a responsible person of GCC and YCC, the Division did not submit any such documents into the record (*see* finding of fact 13). As such, there is no evidence in the record to show that petitioner, for example, was active in the management of day-to-day affairs of GCC and YCC or that he exercised control over daily bank accounts and disbursement records or that he even had check-signing authority (*see Matter of Black v New York State Tax Appeals Trib.*, 41 NY3d at 139-140). Petitioner was arrested on March 14, 2013 (*see* finding of fact 11), which overlaps the periods at issue herein. It cannot be reasonably inferred that petitioner remained involved in the day-to-day operations of the companies. Therefore, it cannot be determined that petitioner was a responsible person of GCC and YCC during the periods at issue.

As noted, Tax Law § 685 (g) requires that the responsible person’s failure to collect and pay over withholding tax be willful to be found liable for the penalty. In determining



willfulness, the Court of Appeals described the inquiry as “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” (*Matter of Black v New York State Tax Appeals Trib.*, 41 NY3d at 145, quoting *Matter of Levin v Gallman*, 42 NY2d 32, 34 [1977]).

Even if it was determined that petitioner was a responsible person of GCC and YCC, the record again fails to establish that petitioner willfully failed to collect and pay over withholding tax. The forms NYS-45 and Mr. Lasker’s testimony establish that GCC and YCC failed to remit the taxes reported as due. The forms NYS-45, however, do not establish that petitioner, himself, consciously diverted New York State trust funds and Mr. Lasker did not testify regarding willfulness. Also, as noted, the periods at issue herein overlap petitioner’s arrest and incarceration. As such, it cannot be determined that petitioner’s actions or lack thereof were willful.

D. During the periods at issue, Tax Law § 1133 (a) provided, in part, that “every person required to collect any tax imposed by [article 28] shall be personally liable for the tax imposed, collected or required to be collected under [article 28].” Tax Law § 1131 (1), in turn, defined a “person required to collect any tax imposed by [article 28]” to include, among others:

“any officer, director or employee of a corporation or of a dissolved corporation, any employee of a partnership, any employee or manager of a limited liability company, or any employee of an individual proprietorship who as such officer, director, employee or manager is under a duty to act for such corporation, partnership, limited liability company or individual proprietorship in complying with any requirement of [article 28]; and any member of a partnership or limited liability company.”

E. The determination of whether an individual is a responsible person for sales and use tax purposes is similar in scope and analysis to the question of whether a person is required to

collect and pay over withholding tax. Both inquiries require an examination of the facts and consider similar factors (*see Matter of Coppola v Tax Appeals Trib.*, 37 AD3d 901, 903 [3d Dept 2007] [sales and use taxes]). The Tax Appeals Tribunal has stated that:

“[t]he question to be resolved in any particular case is whether the individual had or could have had sufficient authority and control over the affairs of the corporation to be considered a responsible officer or employee. The case law and the decisions of this Tribunal have identified a variety of factors as indicia of responsibility: 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 interests in the corporation” (*Matter of Constantino*, Tax Appeals Tribunal, September 27, 1990 [citations omitted]; *see Matter of Moschetto*, Tax Appeals Tribunal, March 17, 1994).

The record is devoid of any evidence to establish that petitioner was a responsible person for sales tax purposes. While Mr. Lasker explained that the notice of estimated determination was issued to petitioner as a result of YCC failing to file a sales tax return for the period March 1, 2013 through May 31, 2013, he did not explain why petitioner was a responsible person of YCC for this period. Notably, this period does not overlap the periods the Division determined that petitioner was a responsible person of YCC for withholding tax purposes (*see* finding of fact 7). It does, in part, overlap one of the periods the Division determined that petitioner was a responsible person of GCC for withholding tax purposes (*see* finding of fact 4). Without any evidence, it cannot be determined that petitioner had or could have had sufficient authority and control over the affairs of YCC to be considered a responsible person for sales and use tax purposes (*see Matter of Constantino*).

F. Turning to petitioner’s motion for reconsideration, while the Rules of Practice and Procedure of the Tax Appeals Tribunal (Rules) do not expressly provide for such a motion, it is essentially a motion for reargument. The Rules provide that a motion for reargument must be

made to the administrative law judge who rendered the determination within 30 days after the determination was served (*see* 20 NYCRR 3000.16 [b]). The ALJ order was issued on February 1, 2024. Petitioner filed the motion on June 4, 2024. Accordingly, the motion was not timely filed.<sup>1</sup>

Even if petitioner's motion for reconsideration was timely filed, it would nonetheless be denied. In his motion, petitioner argues that reasonable cause exists to abate penalties and lower interest on the notices of deficiency that the undersigned determined in the ALJ order were not timely protested. Without a timely protest, a notice of deficiency becomes a fixed and final assessment and, consequently, the Division of Tax Appeals does not have jurisdiction to consider petitioner's arguments on the substantive merits of his protest (*see Matter of Lukacs*, Tax Appeals Tribunal, November 8, 2007).

G. The petition of Jover Naranjo is granted with regard to notices of deficiency L-041748653, L-041748652, L-042235738 and L-042572545 and notice of estimated determination L-041109900, which are cancelled. Petitioner's motion for reconsideration is denied.

DATED: Albany, New York  
May 1, 2025

/s/ Jennifer L. Baldwin  
ADMINISTRATIVE LAW JUDGE

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<sup>1</sup> Petitioner may take exception to the ALJ order and seek review by the Tax Appeals Tribunal by filing an exception with the Tax Appeals Tribunal within 30 days of notice of this determination (*see* 20 NYCRR 3000.5 [f]; 3000.17 [a] [1]).