

STATE OF NEW YORK  
TAX APPEALS TRIBUNAL

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In the Matter of the Petition	:	
of	:	
<b>LILLIAN E. DAVISON</b>	:	DECISION
	:	DTA NO. 800757
for Redetermination of a Deficiency or for	:	
Refund of Personal Income Tax under Article 22	:	
of the Tax Law for the Period August 1, 1978	:	
through May 22, 1982.	:	

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Petitioner, Lillian E. Davison, 320 East 58th Street, New York, New York 10022, filed an exception to the determination of the Administrative Law Judge issued on February 19, 1988 with respect to her petition for redetermination of a deficiency or for refund of personal income tax under Article 22 of the Tax Law for the period August 1, 1978 through May 22, 1982 (File No. 800757). Petitioner appeared pro se. The Division of Taxation appeared by William F. Collins, Esq. (Kevin A. Cahill, Esq., of counsel).

Petitioner did not file a brief on exception. The Division filed a letter in opposition to the exception. Oral argument was requested by petitioner but was denied.

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

***ISSUE***

Whether petitioner was a person required to collect, truthfully account for and pay over withholding taxes with respect to McCordi Corporation for the period at issue and willfully failed to do so, thereby becoming liable for a penalty imposed pursuant to Tax Law section 685(g).

***FINDINGS OF FACT***

We find the facts as stated in the Administrative Law Judge's determination and such facts are incorporated herein by this reference.

In or about 1978 petitioner commenced negotiations in an attempt to purchase McCordi Corporation (McCordi) from its majority stockholders. Under the terms of an agreement between the parties, petitioner paid one-third down with the remainder to be paid over a term of years on an installment basis. On July 13, 1978, petitioner assumed the presidency of the corporation. Soon thereafter she became aware that McCordi owed back withholding taxes on salaries previously paid to employees. Immediately petitioner saw to it that McCordipaid the withholding taxes. Following this she met with the comptroller who assured her that future withholding tax liabilities could and would be paid promptly. The comptroller was hired by and was directly reportable to petitioner. From the time that petitioner provided for the payment of the withholding tax liabilities until April 1979 when she became aware that the corporation was again delinquent in its withholding tax obligations, petitioner failed to inquire about the timely discharge of such obligations.

In January 1979, however, petitioner requested an extension of time to pay Federal withholding taxes for the last quarter of 1978 due to the fact that corporate records were being audited. Prior to assuming her presidency, petitioner had retained independent auditors to perform a complete audit of the company's books and records. Upon learning that the results of the audit disclosed that misrepresentations had been made to petitioner concerning the corporation's financial condition, the prior owners of McCordi (majority stockholders who retained seats on the board of directors) called for a meeting of the board and on April 19, 1979 petitioner was discharged.

Shortly before her discharge, petitioner was made aware that withholding taxes had not been paid. In an attempt to satisfy some of the withholding tax deficiencies, petitioner deposited the proceeds of an insurance check made payable to McCordi for flood damage into a corporate bank account. However, she was discharged from McCordi before checks could be issued to pay the withholding taxes.

From July 13, 1978 until April 19, 1979 petitioner was the president of McCordi and was responsible for procuring sales and for overseeing the entire operation of the business. She worked full-time for McCordi, received a salary and had the authority to hire and fire employees. Along with two of the bookkeepers, petitioner had the authority to and did actually sign corporate checks. Check signing authority was granted to petitioner and the bookkeepers by the board of directors. McCordi's payroll was prepared by a payroll service, A.P.S. The comptroller (hired by petitioner), acting on information provided by A.P.S, was responsible for preparation of McCordi's withholding tax returns. Petitioner was responsible for signing the checks for payment of the withholding taxes due. She does not know whether withholding tax returns were filed and taxes were paid after the issuance of the check soon after her assumption of the presidency of McCordi.

### ***OPINION***

The Administrative Law Judge determined that petitioner was a person required to collect, truthfully account for and pay over withholding taxes (a "responsible officer") and that petitioner's actions were "willful" within the meaning of Tax Law section 685(g) and that the penalty prescribed by that section should be imposed on petitioner, i.e., a penalty equal to 100 percent of the tax due. The Administrative Law Judge found the petitioner liable for the penalty for the period August 1, 1978 through April 30, 1979.

On exception, petitioner concedes her status as a "person" for the purposes of Tax Law section 685(g). Petitioner, however, argues that her actions do not fall within the meaning of "willful" as used in section 685(g).

We affirm the determination of the Administrative Law Judge.

Tax Law section 685(g) penalizes those persons responsible for the withholding and paying over of such funds for willfully failing to so withhold or pay over. This section provides:

"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." (Emphasis added.)

The question of willfulness is related directly to the question of whether petitioner was a responsible officer since an officer responsible for the collection and paying over of the taxes is the one who can consciously and voluntarily decide not to do so. However, merely because one is determined to be a responsible officer, it does not automatically follow that a failure to withhold and pay over income taxes is "willful" within the meaning of that term as used in section 685(g). More is required. The Court of Appeals held in Matter of Levin v. Gallman (42 NY2d 32), that the test 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 more than accidental non-payment is required" (Matter of Levin v. Gallman, *supra*, at 34 [emphasis added]).

The essence of the willfulness standard is that the person must voluntarily and consciously direct the trust fund monies from the State to someone else. There need not be any particular motive for doing so, only the result that the State has not received the monies held in trust for it. Mere negligence is not enough. The fact that section 685(g) imposes a penalty and is violated only by a willful failure is strong evidence that it was not intended to be imposed without personal fault. (See, e.g., Slodov v. United States, 436 US 238; Brown v. United States, 591 F2d 1136 [5th Cir 1979]; White v. United States, 372 F2d 513 [Ct Cl 1967]; Braden v. United States, 442 F2d 342 [6th Cir 1971] interpreting analogous language in section 6672 of the Internal Revenue Code.)

Proof of this conscious and voluntary action is by necessity dependent on the facts and circumstances of each case. Here, the petitioner did not know of the failure to pay over the withholding taxes at the time the failure occurred. This lack of actual knowledge negates a finding

that the act was voluntarily and consciously done by the petitioner (cf., Matter of Levin v. Gallman, supra, at 34 and Matter of MacLean v. State Tax Commn., 69 AD2d 951, 952, affd 49 NY2d 920 [where actual knowledge supported a finding of willful]).

However, a responsible officer's failure can be willful, notwithstanding his lack of actual knowledge, if it is determined the officer recklessly disregarded his corporate responsibilities including the responsibility to see that taxes were paid (Matter of Capoccia v. State Tax Commn., 105 AD2d 528, 529; Matter of Ragonese v. State Tax Commn., 88 AD2d 707, 708; Matter of Flax, Tax Appeals Tribunal, September 9, 1988; compare, Reyers v. State Tax Commn., 116 AD2d 880; Matter of Lyon, Tax Appeals Tribunal, June 3, 1988).

We conclude that petitioner recklessly disregarded her responsibilities as a responsible officer to ensure that withholding taxes were paid.

The record indicates that shortly after petitioner assumed the presidency of the corporation she was made aware of existing withholding tax deficiencies which she subsequently caused to be paid. However, the record does not reveal that petitioner made any further inquiries into the corporation's withholding tax status, other than the initial delegation of her responsibility to the comptroller, until shortly before her discharge. Corporate officers responsible for withholding taxes cannot insulate themselves from a finding of "willfulness" by disregarding their duties and leaving it to someone else to discharge (Matter of Basch v. State Tax Commn., 134 AD2d 786, 788; Matter of Capoccia v. State Tax Commn., 105 AD2d 528, 529; Matter of Ragonese v. State Tax Commn., 88 AD2d 707, 708). This is particularly applicable to petitioner since she was already aware of the corporation's poor past performance. Petitioner's notice of such past failure to pay withholding taxes required that she exercise special care and scrutiny both in her delegation of responsibility and in her supervision of the individual to whom the authority was delegated. Her delegation and supervision should have reflected her knowledge of the corporation's poor record. Instead, petitioner merely delegated away the authority to file and pay withholding taxes without bothering to inquire into the handling of the taxes until shortly before her discharge. In light of these facts, we

conclude that petitioner's conduct was "willful" as she recklessly disregarded her corporate responsibilities.

Petitioner's liability, however, should be reduced in part. Her liability for the withholding taxes accrued as she willfully failed to fulfill her obligations as a responsible officer (see, Satterlee v. Bondeson, 49 AFTR 82-361; Brown v. United States, 591 F2d 1136; Bolding v. United States, 565 F2d 663; Berman v. Scanlon, 277 F Supp 646; Seaton v. United States, 254 F Supp 161; Long v. Bacon, 239 F Supp 911). Accordingly, petitioner is only liable through April 19, 1979, the date she was discharged from the corporation, rather than through April 30, 1979 as determined by the Administrative Law Judge.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of Lillian E. Davison is denied except for the reduction in her liability for the period following April 19, 1979;
2. In all other respects the determination of the Administrative Law Judge is affirmed; and
3. The petition of Lillian E. Davison is denied, except to the extent noted in paragraph "1" above and in finding of fact "2" of the Administrative Law Judge's determination, and the Notice of Deficiency issued against her on February 27, 1984 is to be appropriately modified.

Dated: Albany, New York  
November 23, 1988

/s/John P. Dugan  
John P. Dugan  
President

/s/Francis R. Koenig  
Francis R. Koenig  
Commissioner