STATE OF NEW YORK

TAX APPEALS TRIBUNAL

In the Matter of the Petition	:	
of	:	
ALBERT PLANIT	:	DECISION
for Redetermination of a Deficiency or for Refund of Personal Income Tax under Article 22 of the Tax Law for the Years 1974 and 1975.	:	

The Division of Taxation filed an exception to the determination of the Administrative Law Judge, issued on March 22, 1990, with respect to a petition filed by Albert Planit, 111 Yukon Drive, Woodbury, New York 11797, for redetermination of a deficiency or for refund of personal income tax under Article 22 of the Tax Law for the years 1974 and 1975 (File Nos. 802899 and 803158). The Division of Taxation appeared by Williams F. Collins, Esq. (Irwin Levy, Esq., of counsel). Petitioner appeared pro se.

The Division of Taxation (hereinafter referred to as "the Division") filed a brief in support of its exception. Petitioner did not file a brief in response.

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

ISSUES

I. Whether a decision of a bankruptcy court dismissing claims for withholding taxes against a corporation is by reason of collateral estoppel binding on subsequent claims for a penalty under Tax Law § 685(g) against a responsible officer of the corporation.

II. Whether the penalty asserted against petitioner for withholding taxes owed by his corporate employer was time-barred by the statute of limitations.

FINDINGS OF FACT

We find the facts as determined by the Administrative Law Judge. These facts are set forth below.

Petitioner Albert Planit was sole shareholder and president of Worldco Distributors, Inc. ("Worldco"). He signed its sales tax returns and issued checks in payment of taxes. He has not contested his liability for any withholding taxes due from Worldco.

Worldco operated a chain of retail stores selling housewares and giftware on Long Island. In 1975 it had 18 stores. Each store had from 4 to 10 employees. Beginning in 1974, the energy crisis caused rents in shopping malls to escalate tremendously. One mall sued for back rent from Worldco. In 1975, Worldco filed for protection under Chapter 11 of the Bankruptcy Act. Mr. Planit claims the reason for the filing was to avoid the lease payments on a number of stores.

A plan of reorganization was submitted by Worldco on March 16, 1977. During the course of the Chapter 11 proceedings, the State Tax Commission filed a claim (No. 21) for $828.31, another claim (No. 101) for $26,180.32 and another claim (No. 105) for $22,045.39. The first and third such claims were expunged by court order dated December 17, 1980. The second said claim was expunged by court order dated March 22, 1979. Mr. Planit claims that the court did this after it made repeated demands, to no avail, for the State Tax Commission to state the nature of its claims.

The plan of reorganization was confirmed on September 10, 1981 by the Bankruptcy Court for the Eastern District of Long Island. The last day to file claims was set at October 21, 1981. The plan provided for all priority creditors, including taxing authorities, to be paid in full.

Worldco was discharged from bankruptcy sometime in 1981. It continued in business for a while with merely one store. It ceased doing business in 1983 or 1984.

The Division of Taxation issued a Notice of Deficiency and a Statement of Deficiency against petitioner on December 23, 1985 with regard to the withholding taxes of Worldco Distributors, Inc. The notice was for the following periods and amounts:

April 1974	$ 309.40
July 1974 through October 1974	1,313.70
December 1974	608.00
January 1975 and February 1975	1,013.20
April 1975 and May 1975	756.50
Total	$4,000.80

A second Statement of Deficiency was issued on March 31, 1986 for the following periods and amounts:

July through September 1974	$1,113.70
May 1975	249.50
Total	$1,363.20

The claims for withholding taxes asserted against petitioner as a penalty are listed on the Division's worksheets for claims in bankruptcy against Worldco dated September 19, 1975. The amounts listed are derived from monthly withholding statements. It is accordingly found that Worldco did file the withholding tax returns from which the amounts were derived and did so sometime prior to 1976.

OPINION

The Administrative Law Judge determined that the doctrine of collateral estoppel was applicable in the instant matter. Specifically, the Administrative Law Judge held that collateral estoppel could be properly invoked to prohibit the retrial of issues of fact or of law actually determined in a case involving a different cause of action even where the parties to the first proceeding were different from those to the second. Because the Administrative Law Judge concluded that the factual questions at issue in the instant controversy were the same as those in the prior bankruptcy proceeding, he held that the application of the rule of collateral estoppel was appropriate. Since the Administrative Law Judge ruled in petitioner's favor on this issue, he did not address the separate issue of whether the assessment was timely.

On exception, the Division argues that the requirements for the invocation of the doctrine of collateral estoppel have not been met. The Division contends that the bankruptcy court did not make a decision on the merits in the prior bankruptcy proceeding; therefore, a dismissal of the

claim against Worldco in that proceeding cannot collaterally estop the Division from bringing an action against the officer of the corporation.

We reverse the determination of the Administrative Law Judge.

Underlying the instant controversy is Tax Law § 685(g) which imposes personal liability in the form of a penalty on any person within the corporation who is required to and fails to collect or pay over withholding taxes to the State. Here, we are called upon to determine the effect of the bankruptcy court's order, expunging the bankrupt corporation's withholding tax debts, on the penalty assessed against petitioner, the sole shareholder and president of the corporation.

In Matter of Yellin v. New York State Tax Commn. (81 AD2d 196, 440 NYS2d 382), the Appellate Division held that a bankruptcy court's order expunging claims asserted by the State against a corporation for its failure to pay the withheld income taxes did not preclude the State from collecting a penalty in an amount equal to the sum of such claims from the corporation's president pursuant to section 685(g) of the Tax Law. We find Yellin controlling. The general rule stated in Yellin is that the penalty assessed against a responsible officer is separate and independent from the liability imposed upon the corporation (Matter of Yellin v. New York State Tax Commn., supra). This does not mean that the proceedings in bankruptcy will never affect the amount of the liability of a responsible officer for payment of taxes (see, Matter of Trachtenberg v. New York State Tax Commn., 107 AD2d 57, 485 NYS2d 621; Matter of Kadish, Tax Appeals Tribunal, November 15, 1990). Thus, if there were a redetermination decreasing the corporation's tax liability or a payment of the same by the corporation pursuant to a settlement agreement reached in a bankruptcy proceeding, such decrease or payment would result in a decrease of petitioner's outstanding liability (see, Matter of Halperin v. Chu, 134 Misc 2d 105, 509 NYS2d 692, 694, affd 138 AD2d 915, 526 NYS2d 660, lv denied, appeal dismissed 72 NY2d 938, 532 NYS2d 845; Matter of Trachtenberg v. New York State Tax Commn., supra; Matter of Kadish, supra; Matter of Yegnukian, Tax Appeals Tribunal, March 22, 1990). These would be instances where, unlike the facts in Yellin, the bankruptcy court's order would negate

the factual basis or the validity of the withholding tax debt (cf., Matter of Yellin v. New York State Tax Commn., supra, 440 NYS2d 382, 384).

We conclude that the Division is not collaterally estopped from asserting the instant deficiency. The doctrine of collateral estoppel precludes a party from relitigating in a subsequent action an issue clearly raised in a prior action and decided against that party or those in privity with that party (Matter of Choi v. State of New York, 74 NY2d 933, 550 NYS2d 267, 269; Ryan v. New York Tel. Co., 62 NY2d 494, 478 NYS2d 823, 826). In order to invoke this doctrine there must be an identity of issue which has necessarily been decided in the prior action and is decisive of the present action and there must have been a full and fair opportunity to contest the prior decision (Staatsburg Water Co. v. Staatsburg Fire Dist., 72 NY2d 147, 531 NYS2d 876, 878; Schwartz v. Public Adm'r of County of Bronx, 24 NY2d 65, 298 NYS2d 955, 960). The party seeking the benefit of collateral estoppel must meet the burden of showing the identity of the issues in the present litigation and the prior determination (Kaufman v. Eli Lilly & Co., 65 NY2d 449, 492 NYS2d 584, 588).

In this case, the record reveals that in the course of prior bankruptcy proceedings, the court issued orders expunging certain claims filed by the State Tax Commission. Based on the transcript of those proceedings and petitioner's testimony at the hearing below, the most that can be established was that in that previous action, the bankruptcy court ordered those claims be expunged upon the State's failure to respond to its order to show cause for the same. There is nothing in the record to indicate that any factual issues related to the validity of the claims had actually been litigated or determined in the prior proceeding. This State's highest court had consistently held that "an issue is not actually litigated if, for example, there has been a default, a confession of liability, a failure to place a matter in issue by proper pleading or even because of a stipulation" (Kaufman v. Eli Lilly & Co., supra, 492 NYS2d 584, 589, citing Restatement [Second] of Judgments § 27 comments d, e, at 255-257; see, Matter of Halyalkar v. Board of Regents of State of New York, 72 NY2d 261, 532 NYS2d 85, 88). Where, as here, the issue has not been litigated at all, there can be no identity of issues between the present action and the prior

determination (Matter of Halyalkar v. Board of Regents of State of New York, supra; Kaufman v. Lilly & Co., supra). Absent a showing that specific factual issues had been litigated and necessarily decided in the previous bankruptcy proceedings and that those same issues are decisive in determining the outcome of the instant action, we hold that the doctrine of collateral estoppel may not be invoked to bar the State from relitigating any issues of facts in the present proceeding. Accordingly, we conclude petitioner has failed to meet the burden of proving that the rule of collateral estoppel was invoked properly to refute the asserted deficiency.

In the determination below, the Administrative Law Judge did not decide the statute of limitations issue due to his holding for petitioner on the question of collateral estoppel. Although we are disturbed by the facts presented here, that the Division waited until December 23, 1985 to issue a Notice of Deficiency to petitioner for the withholding taxes due in 1974 and 1975, the Appellate Division has established that the three year statute of limitations in section 683(a) of the Tax Law does not apply in this situation (Matter of Wolfstich v. New York State Tax Commn., 106 AD2d 745, 483 NYS2d 779, 781; Matter of Friedman, Tax Appeals Tribunal, July 8, 1988). Therefore, we must conclude that the statute of limitations did not bar the State from assessing the penalty against petitioner as a responsible officer.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of the Division of Taxation is in all respects granted;
2. The determination of the Administrative Law Judge is reversed;
3. The petition of Albert Planit is denied; and

4. The notice of deficiency dated December 23, 1985 is sustained.

DATED: Troy, New York
February 7, 1991

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

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

/s/Maria T. Jones
Maria T. Jones
Commissioner