

STATE OF NEW YORK
TAX APPEALS TRIBUNAL

In the Matter of the Petition	:	
of	:	
RICHARD W. KRONE	:	DECISION
	:	DTA No. 806485
for Redetermination of a Deficiency or for Refund of New York State Personal Income Tax under Article 22 of the Tax Law and New York City Personal Income Tax under Chapter 46, Title T of the Administrative Code of the City of New York for the Period February 1, 1984 through March 31, 1987.	:	

Petitioner Richard W. Krone, 1755 York Avenue, New York, New York 10128 filed an exception to the determination of the Administrative Law Judge issued on September 27, 1990 with respect to his petition for redetermination of a deficiency or for refund of New York State personal income tax under Article 22 of the Tax Law and New York City personal income tax under Chapter 46, Title T of the Administrative Code of the City of New York for the period February 1, 1984 through March 31, 1987. Petitioner appeared by Feldman, Radin, Feinsod & Co. (Lester S. Caesar, C.P.A.). The Division of Taxation appeared by William F. Collins, Esq. (Lawrence A. Newman, Esq., of counsel).

Petitioner filed a brief and an amended brief. The Division of Taxation submitted letters in response to both briefs. Oral argument, requested by petitioner, was denied.

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

ISSUE

Whether petitioner Richard W. Krone is liable for penalties under Tax Law § 685(g) and Administrative Code of the City of New York former § T46-185.0(g) for the unpaid withholding taxes of Kenrich Restaurant Corp.

FINDINGS OF FACT

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

On November 20, 1987, the Division of Taxation issued a Statement of Deficiency to petitioner, Richard W. Krone, asserting that he was liable for penalties with respect to the unpaid withholding taxes of Kenrich Restaurant Corp. for the period February 1, 1984 through March 31, 1987. The amount due was \$19,186.94.

Also on November 20, 1987, the Division of Taxation issued a Notice of Deficiency to petitioner imposing a deficiency in the sum of \$19,186.94, based on the aforementioned penalties.

At a Bureau of Conciliation and Mediation Services ("BCMS") conference, the deficiency against petitioner was reduced to \$4,279.51, by cancelling the penalties for any quarter commencing after June 30, 1985.

In 1983, petitioner, who had sold his stock brokerage firm, was searching for another business opportunity. He entered into an agreement with one Kenneth Meisler to open a restaurant. Petitioner, who had no restaurant experience, was to finance the restaurant while Meisler, who purportedly had restaurant experience, was to operate it.

Kenrich Restaurant Corp. ("the corporation") was incorporated on or about August 30, 1983. It issued 100 shares of stock, 50 shares to petitioner and 50 shares to Kenneth Meisler. Petitioner was elected president and director of the corporation, while Kenneth Meisler was elected secretary/treasurer and director.

On December 19, 1983, the corporation purchased a restaurant and bar business from Nagio Restaurant, Inc. for a purchase price of \$350,000.00, plus security payments and liquor inventory payments of \$18,451.08, for a total of \$368,451.08. The corporation paid \$15,000.00 in cash on the execution of the contract and \$53,615.50 at the closing. The balance of the

purchaser's consideration was in the form of promissory notes. Petitioner and Meisler guaranteed the corporation's lease for two years.

The cash paid on contract and at closing was paid by petitioner. Kenneth Meisler contributed little, if any, cash to the corporation. Meisler, however, executed a demand note payable to petitioner for \$45,000.00, secured by his 50% interest in the corporation.

The restaurant, a seafood restaurant called "Harbour House", opened for business on January 7, 1984. Its location was at 410 Avenue of the Americas in the Greenwich Village section of Manhattan.

Apparently the restaurant did not generate enough sales to cover its expenses. To make up the difference, petitioner loaned cash to the corporation. The 1984 loans were as follows:¹

<u>Month - 1984</u>	<u>Amount</u>
January	\$ 3,000.00
February	10,000.00
April	14,337.00
May	4,500.00
July	1,700.00
August	500.00
September	5,000.00
October	1,300.00
Total	<u>\$40,337.00</u>

The corporation also borrowed \$20,000.00 in June of 1984, but the corporation's books do not indicate the source of the loan.

The corporation's books reflect that petitioner received the following loan repayments and interest on loans:²

<u>Month</u>	<u>Amount</u>	<u>Loan Repayment or Interest</u>
<u>1984</u>		
April	\$ 80.92	Interest
"	146.96	Interest
May	319.68	Interest
"	46.80	Unknown

¹See petitioner's Exhibit "10", Income Ledger, "Other Income" column.

June	479.55	Interest
July	508.33	Interest
"	1,700.00	Loan repayment
August	525.70	Interest
"	55.60	Interest
October	41.67	Interest
November	58.72	Interest
December	64.17	Interest
"	400.00	Unknown
<u>1985</u>		
January	64.17	Interest
March	59.88	Interest
"	700.00	Unknown

The record does not show if any loan repayments were made or interest paid after March 1985.

The only wage or salary income received by petitioner from the corporation was \$300.00 in salary for 1984. He received no dividends, bonuses or distributions from the corporation, other than the interest and loan repayments.

Petitioner acted as the restaurant's host for the first two weeks of its operation, but soon became bored and relinquished that role. He visited the restaurant only infrequently after the first two weeks of its operation.

By mid-1984, petitioner realized that the corporation was in financial difficulty. At one point, petitioner learned from the landlord that the corporation's rent was not being paid and it was then that he decided to take action. Petitioner discussed the business with another restaurateur, Robert Farley. Farley said that if petitioner could get 100% control, he (Farley) would enter into an agreement with petitioner and take over operation of the restaurant.

Petitioner demanded payment from Kenneth Meisler under the above-mentioned note and, as Meisler could not pay the \$45,000.00, petitioner obtained Meisler's 50% of corporate stock.

Petitioner then entered into an agreement with Farley whereby Farley was to receive 90% of the stock and was to assume all of the obligations of the corporation.

Farley took over the operation of the restaurant changing the name to "Black Rock Cafe" and turning it into a "Tex-Mex" restaurant.

It is unclear exactly when the changeover took place. From the corporation's books and checking account records, however, it would appear that Harbour House ceased functioning in or shortly after April 1985.

Petitioner was a signatory on the corporation's checking accounts. During the period February 1, 1984 through April 30, 1985 (which is basically the period remaining at issue after the BCMS conference) almost all of the corporation's checks were signed by Kenneth Meisler. Petitioner signed very few of the checks.

Petitioner did not hire or fire employees, pay vendors or handle the corporation's books and records. These tasks were performed by Kenneth Meisler during the Harbour House period and by Robert Farley during the Black Rock Cafe period.

Petitioner did not sign any tax returns. The corporation's 1984 income tax returns are not in the record. The 1985 return was signed by Robert Farley, as president. The 1986 return was signed by Robert Farley, as vice-president. While petitioner's name was signed to applications for extensions of time to file for 1984 and 1985, the signatures are not that of petitioner. The 1985 and 1986 returns also carry the name of Frank Van Buren, C.P.A., who evidently prepared them.

While the Division of Taxation submitted copies of withholding tax returns (Form 2101) and reconciliations (Form 2103) filed by the corporation for 1984, it did not submit copies of the backs of the Form 2101's showing the signatures, if any. The Form 2103 for 1984 is unsigned and shows \$3,235.94 withheld with zero remitted.

For 1985, copies of the backs of the Form 2101's were not submitted and the Form 2103 was unsigned. The reconciliation for 1985 shows \$5,186.05 withheld and remitted. However, the withholding tax accounts receivable transcript shows only \$1,043.57 remitted.

Copies of the backs of the quarterly withholding tax returns filed for January 1 through December 31, 1986 are in the record and contain no signatures. A monthly return was also filed for October 1986 showing a remittance of \$1,000.00 and it was signed by Frank Van Buren,

C.P.A. There is no 1986 reconciliation in the record. The withholding tax accounts receivable transcript shows \$10,273.44 withheld and \$1,000.00 remitted.

The record contains one unsigned Form 2101 for 1987 covering January 1 through March 31, 1987. The withholding tax accounts receivable transcript shows \$1,761.99 remitted with \$5,398.77 assessed.

Petitioner deducted his portion of the corporation's subchapter S losses on his own personal income tax returns.

OPINION

In the determination below, the Administrative Law Judge held that petitioner was a person required to collect, truthfully account for and pay over withholding taxes on behalf of Kenrich Restaurant Corp. during the period February 1, 1984 through June 30, 1985 and, further, that petitioner willfully failed to perform said duties and is, thus, liable for the penalties under Tax Law § 685(g) and Administrative Code former § T46-185.0(g). The Administrative Law Judge sustained the Notice of Deficiency issued against petitioner on November 20, 1987, as reduced to \$4,279.51 per the Bureau of Conciliation and Mediation Services conference.

On exception, petitioner alleges the Administrative Law Judge appears to have reached his decision that petitioner was a responsible person solely on Matter of Blodnick v. New York State Tax Commn. (124 AD2d 437, 507 NYS2d 536) and this case is distinguishable from the Blodnick case as the petitioners in Blodnick were the sole shareholders of the corporation and, therefore, could not abdicate that responsibility. Petitioner cites cases which he believes are more closely analogous to the situation as described in the Administrative Law Judge's findings of fact. Finally, petitioner alleges that since he did not perform acts that would have made him a responsible person, and in view of the Administrative Law Judge's misinterpretation of the Blodnick case, the determination rendered by the Division of Tax Appeals should be overturned and petitioner's petition should be granted.

The Division of Taxation (hereinafter the "Division") asserts that petitioner's reliance on Matter of Amengual v. State Tax Commn. (95 AD2d 949, 464 NYS2d 272) and Matter of

Fisher v. State Tax Commn. (90 AD2d 910, 456 NYS2d 881) is clearly misplaced and that petitioner has failed to carry the burden of proving that the notice of deficiency is incorrect. The Division further asserts that petitioner had authority to sign checks which gave him a control which he may or may not have chosen to exercise and, further, he also benefited to some extent from the losses of the corporation since they reduced his personal income tax. Thus, the Division asserts that within the purview of Article 22, petitioner is a responsible officer and responsible for the withheld, but unpaid, income tax deducted from the employees' salaries by the corporation.

We affirm the determination of the Administrative Law Judge.

Tax Law § 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 in pertinent 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 total amount of the tax evaded, or not collected, or not accounted for and paid over."

Tax Law § 685(n) defines persons subject to the § 685(g) penalty as follows:

"Person defined.--For purposes of subsections (g), (i), (o), (q) and (r), the term person includes an individual, corporation or partnership or an officer or employee of any corporation (including a dissolved 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."

We affirm the determination of the Administrative Law Judge on the basis that petitioner has not established that he was not a person required to pay over withholding tax and that he did not prove that his failure was not willful.

The question of whether an individual is a person within the meaning of section 685(n) is a factual one (see, Matter of Ragonesi v. New York State Tax Commn., 88 AD2d 707, 451 NYS2d 301), "resolution of which turns on such factors as whether the taxpayer owned stock, signed the tax returns, exercised authority over employees and assets of the corporation, derived

substantial income from the corporation, or served as an officer or employee thereof" (Matter of Capoccia v. New York State Tax Commn., 105 AD2d 528, 481 NYS2d 476). Here the factors that indicate that petitioner was a responsible person are that he was a director and president of the corporation, he was a 50% shareholder, he financed the operation of the corporation and he was authorized to sign checks.

Petitioner's testimony indicates that he elected not to exercise his considerable power and authority over the corporation.

Petitioner testified that:

"At the beginning, for the first couple of weeks that the restaurant opened, I went down there. I basically greeted people, played host, since I had never been anything but a customer in a restaurant. After two weeks, I became incredibly bored doing that . . . Pretty much after the first two weeks, I never was at the restaurant again" (Tr., p. 11).

Petitioner further testified that:

"I was strictly a passive investor, and I certainly was not in a position to exercise authority over the assets of the corporation, since I was never there" (Tr., p. 19).

Petitioner's decision not to be involved in the corporation's affairs does not act to relieve him from liability, because "corporate officials responsible as fiduciaries for tax revenues cannot absolve themselves merely by disregarding their duty and leaving it to someone else to discharge" (Matter of Ragonesi v. New York State Tax Commn., supra, 451 NYS2d 301, 303; see also, Matter of Capoccia v. New York State Tax Commn., supra).

Petitioner argues that Matter of Amengual v. State Tax Commn. (supra) is more closely analogous to the situation described here than is the case relied on by the Administrative Law Judge. A closer review shows that Amengual is distinguishable from that before us. In Amengual, the petitioner was not a stockholder, nor a director, nor an investor in the corporation, but was simply the Secretary of the corporation with the duties of the Secretary defined in the company by-laws, said duties being merely secretarial in nature.

Petitioner further argues that Matter of Fisher v. State Tax Commn. (supra) should control the outcome of the instant case. The court in Fisher found that:

"[r]esolution of the issues is more difficult because respondent's determination rests upon evidence and testimony adduced at a hearing in which most of petitioner's activities can be as easily identified as those of the attorney for the corporation as those of an officer thereof" (Matter of Fisher v. State Tax Commn., supra, 456 NYS2d 881, 882).

However, unlike the evidence and facts before us, the court in Fisher found that:

"[t]here is no proof in this record to demonstrate that petitioner was a corporate officer responsible as a fiduciary for tax revenues who tried to absolve himself merely by disregarding his duty and leaving it to someone else to discharge" (Matter of Fisher v. State Tax Commn., supra, 456 NYS2d 881, 883).

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of Richard W. Krone is denied;
2. The determination of the Administrative Law Judge is affirmed;
3. The petition of Richard W. Krone is denied; and
4. The Notice of Deficiency dated November 20, 1987 and reduced pursuant to a Conciliation Order dated October 7, 1988 is sustained.

DATED: Troy, New York
September 19, 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