

STATE OF NEW YORK  
TAX APPEALS TRIBUNAL

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In the Matter of the Petition	:	
of	:	
<b>AARON SCHOCHET</b>	:	DECISION
for Redetermination of a Deficiency or for Refund of	:	DTA No. 806874
Personal Income Tax under Article 22 of the Tax Law for	:	
the Year 1982.	:	

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Petitioner Aaron Schochet, P.O. Box 625, Frederick, Maryland 21701, filed an exception to the determination of the Administrative Law Judge issued on June 4, 1992 with respect to his petition for redetermination of a deficiency or for refund of personal income tax under Article 22 of the Tax Law for the year 1982. Petitioner appeared pro se. The Division of Taxation appeared by William F. Collins, Esq. (Arnold M. Glass, Esq., of counsel).

Petitioner filed a letter in support of his exception. The Division of Taxation filed a letter in response. Oral argument was not requested.

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

***ISSUES***

I. Whether petitioner is liable for income tax withheld by Brookfield Clothes, Inc. from the wages of its employees if the corporation, which is in bankruptcy, has sufficient funds to pay any unpaid taxes.

II. Whether petitioner was a person required to collect, account for and pay over income tax withheld by Brookfield Clothes, Inc. from the wages of its employees and, if so, whether he willfully failed to do so.

***FINDINGS OF FACT***

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

The Division of Taxation issued to petitioner, Aaron Schochet, a Statement of Deficiency dated January 29, 1988 asserting penalties under Tax Law § 685(g) on the basis that he was a person required to collect, truthfully account for and pay over withholding tax imposed under Article 22 of the Tax Law on behalf of Brookfield Clothes, Inc. (hereinafter "Brookfield Clothes"). Penalties were shown as follows:

<u>Withholding Tax Period</u>	<u>Amount</u>
6/23/82 - 6/30/82	\$ 8,340.95
1982	40,796.72
9/16/82 - 9/22/82	<u>3,246.25</u>
Total	\$52,383.92

The Division of Taxation issued a Notice of Deficiency also dated January 29, 1988 to petitioner, asserting penalties under Tax Law § 685(g) of \$52,383.92 for the taxable year 1982. The notice referenced the Statement of Deficiency, supra.

A Conciliation Order dated February 10, 1989 reduced the assessment from \$52,383.92 to \$11,511.35 as the result of a printout of Brookfield Clothes' liability (Accounts Receivable System printouts), which showed tax due of \$45,030.36, less payments of \$33,519.01, for a balance due of \$11,511.35.

A Form DO-656, "Preparation of Personal Penalty Assessments - Sec. 685(g) Withholding Deficiency" dated January 14, 1988 lists petitioner as one of three "responsible officers or individuals". It also provides the following "basis for holding [petitioner] as a responsible officer":

"W. T. cancelled check dated 8/4/82 signed by Aaron Schochet."

A letter dated July 13, 1988 of Chester B. Salomon on the letterhead of the New York City law firm of Salomon, Green & Ostrow, P.C. provided as follows:

"Mr. Aaron Schochet, former officer of Brookfield Clothes, Inc., has referred to us certain correspondence relating to an alleged tax claim for the year 1982 against Mr. Schochet deriving from Brookfield Clothes, Inc.

On August 30, 1982 an involuntary chapter 11 petition was filed against Brookfield Clothes, Inc., which formerly did business at 34-02 Queens Boulevard, Long Island City, New York. On September 2, 1982, on consent, an order for relief under chapter 11 was entered. On September 26, 1986,<sup>1</sup> the undersigned was appointed as chapter 11 trustee....

...If there is a claim against Brookfield, we are certainly interested in that claim inasmuch it may represent a priority claim against the bankrupt estate. Before filing the claim, you should be aware that pursuant to order, dated November 15, 1982, the assets and business of Brookfield were transferred to Jason Gibbs, Inc., now merged into Abraham Zion Corporation. Therefore, it is critical to know the timing and the amounts of the alleged underpayment of withholding tax."

The record on submission herein is extremely bare. Petitioner noted that he was "unable to produce any subsequent substantiation since all books and records of Brookfield Clothes for 1982 were completely destroyed in a fire."

Petitioner's submission consisted of a three-page written argument that includes a statement of facts. Although petitioner's argument noted that facts presented in such argument were made "under penalties of perjury", such facts were not submitted in the form of an affidavit.

### ***OPINION***

The Administrative Law Judge determined that petitioner was a person required to collect tax under Article 22. Further, the Administrative Law Judge found that the liability of an individual for the collection of tax on behalf of a corporation under Article 22 was separate and independent from the liability of the corporation itself and that, therefore, petitioner's position is not affected by bankruptcy proceedings involving Brookfield Clothes, Inc., the corporation related to this matter. Finally, the Administrative Law Judge concluded that the Notice of

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<sup>1</sup>It would seem that the year referenced was a typographical error and should read 1982.

Deficiency issued to petitioner carried with it a presumption of correctness which petitioner had failed to overcome.

On exception, petitioner asserts that the Division of Taxation (hereinafter the "Division") is a priority creditor of Brookfield Clothes, Inc., and that responsible officer liability cannot be asserted against petitioner until after it has been determined that the funds are not available from the bankruptcy estate of Brookfield Clothes, Inc.

In response, the Division states that petitioner has failed to preserve his objections to liability as a responsible officer, instead choosing to focus solely on whether an individual, as a responsible officer, can be pursued for a tax liability prior to the exhaustion of all means available to collect said liability from the corporation. The Division relies on the Administrative Law Judge's determination of this issue.

We affirm the determination of the Administrative Law Judge for the reasons set forth below.

Petitioner has not excepted to the Administrative Law Judge's determination that he is a person required to collect tax pursuant to Tax Law § 685(g). Therefore, the sole issue raised on exception concerns petitioner's contention that the Division cannot assess him for tax liability until all avenues available to collect from the corporation have been exhausted. We conclude that the Administrative Law Judge addressed this issue in a full and complete manner. As petitioner has not raised any new arguments on exception, we affirm the Administrative Law Judge's resolution of this issue for the reasons set forth in his determination.

One point that does require clarification is the assertion in petitioner's brief that an administrative error or errors may have occurred given the varying amounts for which the Division asserted petitioner was liable. We reject petitioner's assertion of administrative error.

Initially, we note that a notice of deficiency carries with it a presumption of correctness that may be overcome if the taxpayer satisfies its burden of proof (see, Matter of Tavolacci v. State Tax Commn., 77 AD2d 759, 431 NYS2d 174; Matter of Denn, Tax Appeals Tribunal,

October 25, 1990; Matter of Schneier, Tax Appeals Tribunal, November 9, 1989; Matter of Cousins Serv. Sta., Tax Appeals Tribunal, August 11, 1988). As set forth in the determination of the Administrative Law Judge, petitioner has failed to offer any evidence in support of his position. Therefore, petitioner has failed to meet his burden of proof to overcome the Notice of Deficiency and is, thus, in no position to assert that the Division made a computational error or errors.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of petitioner Aaron Schochet is denied;
2. The determination of the Administrative Law Judge is affirmed;
3. The petition of petitioner Aaron Schochet is denied; and
4. The Notice of Deficiency issued on January 29, 1988 is sustained.

DATED: Troy, New York  
March 11, 1993

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

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