STATE OF NEW YORK

TAX APPEALS TRIBUNAL

In the Matter of the Petition	:	
of	:	
DONALD A. HOPPER	:	DECISION DTA No. 807025
for Redetermination of a Deficiency or for Refund of Personal Income Tax under Article 22 of the Tax Law for the Period January 1, 1983 through December 31, 1984.	:	

Petitioner Donald A. Hopper, 620 East 20th Street, New York, New York 10009, filed an exception to the Administrative Law Judge's determination on remand issued on December 9, 1993. Petitioner appeared *pro se*. The Division of Taxation appeared by William F. Collins, Esq. (Mark F. Volk, Esq., of counsel).

Petitioner appended a statement to his exception. The Division of Taxation filed a letter in opposition to the exception. Petitioner filed a reply letter brief which was received on February 23, 1994, which date began the six-month period for the issuance of this decision. Oral argument was not requested.

The Tax Appeals Tribunal renders the following decision per curiam.

ISSUES

I. Whether the Administrative Law Judge correctly found facts number two, nine and eleven.

II. Whether the Administrative Law Judge properly admitted into the record Exhibit G, a statement from Bank Leumi indicating petitioner had signatory powers for an account which the Royale Towers Associates ("Royale") limited partnership maintained at Bank Leumi.

III. Whether petitioner constituted a "person" who "willfully" failed to remit the appropriate withholding taxes to the State pursuant to Tax Law § 685(g) and (n).

IV. Whether the Administrative Law Judge properly found petitioner liable for Tax Law § 685(g) penalties.

V. Whether the Tax Appeals Tribunal should bar the State from asserting Tax Law § 685(g) penalties against petitioner because, as petitioner alleges, the State collected all taxes due.

FINDINGS OF FACT

We find the facts as determined by the Administrative Law Judge except for finding of fact "9" which has been modified. The Administrative Law Judge's findings of fact and the modified finding of fact are set forth below.

A hearing in this matter was held on March 30, 1992, and a determination was issued on October 22, 1993 finding petitioner liable for penalties asserted against him under section 685(g) of the Tax Law. The Administrative Law Judge determination relied on two provisions of New York State Partnership Law to support its conclusions. On July 29, 1993, the Tax Appeals Tribunal (hereinafter the "Tribunal") held that it was an error for the Administrative Law Judge to hold petitioner liable under those provisions and directed the execution of a new determination addressing the issue of liability under Tax Law § 685(g). The Tribunal found the facts as determined by the Administrative Law Judge and those facts are set forth below, along with an additional finding of fact.

Royale Towers Associates ("Royale") was a limited partnership which owned the Taft Hotel in New York City. Petitioner, Donald A. Hopper, was Royale's only general partner. He had a two percent interest in Royale. Royale's only limited partner was Edward J. Halloran who had a 98 percent interest in Royale. Petitioner became the general partner of Royale at the request of Halloran.

Petitioner is an attorney. He graduated from Fordham Law School in 1951 and then worked as an assistant district attorney in the County of New York. In 1958, petitioner joined the law firm of Lehman, Goldmark, and Rohrlick, working in its litigation department. He

changed law firms approximately five years later. In about 1970, petitioner began working exclusively for Halloran, handling various litigation matters. In 1975, petitioner stopped working for Halloran and began a solo practice, working out of his home.

In 1978, petitioner had a chance meeting with Halloran. Halloran then owned, through an entity called Shelton Towers Associates ("Shelton"), the Halloran House, a major hotel in New York City. Mr. Halloran also owned a number of apartment houses, commercial leases, a concrete company, and other companies. In this chance encounter, Halloran complained of the high cost of litigation fees he was incurring in his various businesses. Shortly after this conversation, petitioner returned to work for Halloran, again handling litigation matters.

Petitioner worked out of Shelton's offices. He was paid by two companies, Shelton and Transit-Mix Concrete. The bulk of petitioner's time was spent on landlord-tenant litigation matters related to properties owned by Shelton. However, during the term of petitioner's employment, business transacted by Transit-Mix Concrete became the focus of various government investigations, and petitioner became involved in gathering documents and providing them to investigators. These were the only legal matters handled by petitioner on behalf of Halloran. Halloran employed the services of several law firms to handle other legal matters.

Halloran was eventually indicted and later convicted of various criminal activities having to do with his financial and business activities. None of the criminal investigations involved petitioner.

From 1979 through 1983, Halloran had a partnership interest in the Taft Hotel. In 1983 he obtained bank financing to purchase his partner's interest in the hotel. The hotel was purchased entirely with borrowed monies, with the possible exception of a $2,000.00 capital contribution made by Halloran to Royale. Royale was formed in 1983 for the sole purpose of acquiring, rehabilitating and operating the Taft Hotel. Petitioner performed no legal services in connection with Halloran's acquisition of the Taft Hotel or the formation of Royale. He stated

that he agreed to be the sole general partner of Royale to accommodate Halloran.

Petitioner did not participate in the operation of the Taft Hotel. He never went to the hotel. He did not perform any legal services for Royale. He received no income from Royale. He did not hire or fire employees, pay bills, maintain any records or otherwise participate in the operation of the hotel.

We modify finding of fact "9" of the Administrative Law Judge's determination on remand to read as follows:

> The Taft Hotel was sold in September 1984. Representatives of the seller, the purchaser, the mortgagees, representatives of Royale's creditors including Doreen Sealy of the New York State Tax Commission and several other individuals were present at the closing. Royale was represented by petitioner, Halloran, Brian H. Madden, Halloran's assistant, Peter Marino, the hotel's general manager, and John Horl, another Shelton employee. Petitioner appeared at the closing to execute documents on behalf of Royale. He received no monies from the sale of the hotel.[1]

Petitioner signed two sales tax returns and one withholding tax return on behalf of Royale. He could not recall signing these returns, but stated in testimony that they must have been brought to him for his signature because the person who normally signed them was not available.

In a response to information requested by the Division of Taxation ("Division"), Bank Leumi identified petitioner as a person authorized to sign bank checks on behalf of Royale.

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[1] Finding of fact "9" of the Administrative Law Judge's determination read as follows:

> "The Taft Hotel was sold in September 1984. Representatives of the seller, the purchaser, the mortgagees, representatives of Royale's creditors and several other individuals were present at the closing. Royale was represented by petitioner, Halloran, Brian H. Madden, Halloran's assistant, Peter Marino, the hotel's general manager, and John Horl, another Shelton employee. Petitioner appeared at the closing only to sign checks and execute documents on behalf of Royale. He received no monies from the sale of the hotel."

We modified this fact at petitioner's request in order to more accurately reflect the record.

On or about March 10, 1988, the Division issued a Notice of Deficiency to petitioner, asserting a penalty of $423,461.23. A statement attached to the notice explained that the penalty was asserted against petitioner as a person required to collect, account for and pay over withholding taxes on behalf of Royale for the period January 1, 1983 through December 31, 1984.

On exception, the Tribunal admitted into the record certain notes of a tax compliance agent concerning unpaid franchise taxes. Petitioner and the Division of Taxation were given an opportunity to address the significance of this document on remand, and neither raised any issue of law or fact with reference to it.

OPINION

The Administrative Law Judge qualified petitioner as a "person" pursuant to Tax Law § 685(n) because, as Royale's sole general partner, petitioner had the authority to act for the partnership. For example, he signed three of the partnership's tax returns, he was an authorized signatory on one of the partnership's bank accounts, and he signed various other documents on behalf of the partnership. The Administrative Law Judge then found petitioner acted "willfully" per Tax Law § 685(g) because he failed to ensure that Royale remitted the appropriate withholding taxes to the State. The Administrative Law Judge stated "[p]etitioner offered no explanation of how it was that he, as the sole general partner of Royale, lacked any authority to act for the partnership in tax matters" (Determination on Remand, conclusion of law "A"). Accordingly, the Administrative Law Judge found petitioner liable for penalties imposed by Tax Law § 685(g) and sustained the Division's Notice of Deficiency issued on March 10, 1988.

On exception, petitioner challenges the Administrative Law Judge's finding of fact "2" in which she found: "[p]etitioner, Donald A. Hopper, was Royale's only general partner . . . Royale's only limited partner was Edward J. Halloran" (Determination on Remand, finding of fact "2").

Petitioner also challenges the Administrative Law Judge's finding of fact "11" where she

identified petitioner as an authorized signatory of the partnership's Bank Leumi account. Petitioner asserts that because the Bank Leumi document is hearsay, the Tribunal should strike it from the record. Alternatively, he argues the Tribunal should give this document little weight due to its incomplete nature. Furthermore, he urges us to modify the Administrative Law Judge's finding of fact "11" by finding that his testimony, as well as affidavits from Brian Madden and John Horl, contradict this finding of fact.

On exception, petitioner argues the Administrative Law Judge incorrectly found him liable for penalties assessed by the Division pursuant to Tax Law § 685(g). Petitioner maintains that he was not a "person" nor did he act "willfully" for purposes of Tax Law § 685(g) and (n). Therefore, petitioner requests the Tribunal reverse the Administrative Law Judge's determination finding him liable for § 685(g) penalties and cancel the Division's Notice of Deficiency.

On exception, petitioner contends the Division has already collected all taxes due; therefore, he asks the Tribunal to bar the State from asserting § 685(g) penalties against him.

On exception, the Division requests the Tribunal affirm the Administrative Law Judge's determination finding petitioner liable for the § 685(g) penalties.

We affirm the determination of the Administrative Law Judge.

First, we address petitioner's request for the modification of findings of fact "2," "9" and "11." As previously noted, we modify finding of fact "9," as petitioner requested. However, we refuse to modify either finding of fact number "2" or "11." Instead, we address petitioner's arguments concerning his status as Royale's general partner in the body of our decision.

Petitioner requests that we modify finding of fact "11" because Exhibit "G," the Bank Leumi document indicating petitioner possessed signatory powers for the partnership's Bank Leumi account, is hearsay evidence. Alternatively, petitioner argues that "Exhibit G should be given little probative value since it is incomplete and inconclusive on it face" (Statement appended to petitioner's exception, p. 3). We refuse to modify this finding of fact. In an

administrative hearing, hearsay evidence is admissible (Matter of Gray v. Adduci, 73 NY2d 741, 536 NYS2d 40; Matter of Mira Oil Co. v. Chu, 114 AD2d 619, 494 NYS2d 458, appeal dismissed 67 NY2d 756, 500 NYS2d 1027; Matter of Seguin, Tax Appeals Tribunal, October 22, 1992). Therefore, the Administrative Law Judge properly allowed the Bank Leumi statement into the record.

Petitioner maintains that even if the statement is admissible, the Tribunal should accord it little weight. Additionally, as noted above, petitioner urges us to modify finding of fact "11" indicating that his testimony and the affidavits of Messrs. Madden and Horl contradict this fact. In his testimony, petitioner stated: "Mr. Kamrass [attorney for the Division] told me there was a bank account at Bank Leumi where I appeared to be a signatory. I didn't remember that, but I'm sure that maybe very likely happened" (Tr., p. 10). Evidently, the Administrative Law Judge relied on petitioner's testimony as well as the document itself when assessing the document's validity. We defer to this finding of fact because it was partially based on the Administrative Law Judge's evaluation of petitioner's testimony (see, Matter of Spallina, Tax Appeals Tribunal, February 27, 1992) and because petitioner has not shown the existence of special circumstances which would merit our modification of finding of fact "11" (see, Matter of Constantino, Tax Appeals Tribunal, September 27, 1990). Thus, we leave finding of fact "11" as the Administrative Law Judge found it.

We turn to the issue of whether petitioner constituted a "person" for purposes of Tax Law § 685(g) and (n). We agree with the Administrative Law Judge's classification of petitioner as a "person." Tax Law § 685(n) defines a person "[f]or purposes of subsections (g) . . . [as] . . . an individual, corporation or partnership . . . or a member or employee of any partnership, who as such . . . is under a duty to perform the act in respect of which the violation occurs." In Matter of Malkin v. Tully (65 AD2d 228, 412 NYS2d 186, 188), the Court held that the following factors indicate an individual's status as a section 685(n) "person": "whether the petitioner signed the tax return . . . derived a substantial part of his income from the corporation [or in this

case from the partnership] . . . or had the right to hire and fire employees." While petitioner ostensibly derived no income from the partnership and signed only a small number of tax returns, he still qualifies as a person due to Durant v. Abendroth (97 NY 132, 144) where the Court stated "[i]n [the] case of [a] limited partnership the management of the property and business of the firm is vested exclusively in the general partners." Therefore, as Royale's sole general partner with the responsibility to manage the business of the firm, petitioner had a duty to ensure the partnership remitted the appropriate withholding taxes to the State. Consequently, petitioner qualifies as a "person" pursuant to Tax Law § 685(n).

Alternatively, petitioner contends that he is not a "person" pursuant to § 685(n) because he did not exercise any authority to act for the partnership. When applying the comparable provision of Article 28, the Appellate Division, Third Department has clearly stated that a person's failure to exercise authority will not absolve that person from liability for an entity's taxes (see, Matter of Blodnick v. New York State Tax Commn., 124 AD2d 437, 507 NYS2d 536). In reaching this conclusion, the Court relied on Matter of Ragonesi v. New York State Tax Commn. (88 AD2d 707, 451 NYS2d 301) and Matter of Capoccia v. New York State Tax Commn. (105 AD2d 528, 481 NYS2d 476). Consequently, we conclude that the principle of Blodnick applies here; petitioner's failure to exercise his authority as general partner does not relieve him of liability for the taxes at issue.

Additionally, petitioner asserts that, pursuant to the Partnership Law §§ 96 and 101, the fact Mr. Halloran assumed the partnership's management prevents his qualification as a limited partner. Accordingly, petitioner asks us to modify finding of fact "2" where it is found: "[p]etitioner, Donald A. Hopper, was Royale's only general partner" (Determination on Remand, finding of fact "2"). Petitioner argues that: "[t]he Division's repeated assertions that Petitioner was the sole general partner of Royale Towers Associates are misleading in view of the overwhelming proof and findings of the Administrative Law Judge that another partner, Edward J. Halloran, ran the partnership" (Petitioner's letter in reply, p. 2). We decline to modify

this fact. Mr. Halloran's status does not determine the issue of petitioner's liability for section 685(g) penalties. Mr. Halloran may have exposed himself to personal liability for the partnership's taxes by acting as a general partner would; however, this does not preclude the State from assessing section 685(g) penalties against petitioner because there may be more than one responsible person in an entity (see, Matter of Ragonesi v. New York State Tax Commn., supra).

Petitioner claims he did not act "willfully" vis-a-vis the partnership's failure to remit the appropriate withholding taxes and the Administrative Law Judge incorrectly found his actions willful. We agree with the Administrative Law Judge's determination that petitioner acted willfully.

Tax Law § 685(g) states:

> "[a]ny 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."

In Matter of Levin v. Gallman (42 NY2d 32, 396 NYS2d 623, 624-625), the Court held that the test for willfulness:

> "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 nonpayment is required."

Additionally, in Matter of Ragonesi v. New York State Tax Commn. (supra, 451 NYS2d 301, 303), the court stated that persons with a duty to collect and pay withholding taxes to the State cannot escape liability merely by ignoring their responsibility and leaving it to others.

Petitioner argues he did not act willfully because:

> "[i]n the day-to-day functioning of that company, I never had anything to do with it. I was not a person who was in any position to collect any money. I didn't pay any money out. And certainly -- There was never any

> time when I ever exercised any judgement about any money that would or would not be paid to anybody, including the State Tax Commission" (Tr., pp. 30, 31).

Moreover, he argues Matter of Reyers v. New York State Tax Commn. (116 AD2d 880, 498 NYS2d 199) absolves him of liability for the following reasons. First, petitioner asserts he "disassociated" himself from the business during the applicable tax period (Statement appended to petitioner's exception, p. 11). Therefore, based on Reyers, he argues this prevents the State from holding him liable for the section 685(g) penalties. However, the petitioner in Reyers sold his entire interest in the corporation, thus severing all ties to it. In this case, petitioner remained in the position of general partner for the periods in controversy. Accordingly, he did not disassociate himself from the business in the same manner the petitioner in Reyers had. Petitioner fails to appreciate the difference between disassociating one's self through termination of ownership and disassociating one's self through neglect.

Second, petitioner asserts he did not act willfully due to his ignorance of Mr. Halloran's failure to remit the appropriate withholding taxes to the State. Petitioner compares his situation to the petitioner's in Reyers where the petitioner did not know of his co-owner's failure to remit the appropriate taxes. Again, petitioner incorrectly likens his case to Reyers. The petitioner in Reyers delegated the responsibility for paying the taxes to another owner of the corporation. After doing this, the petitioner periodically inquired of the other owner whether he paid the appropriate taxes. The other owner consistently maintained that he had. Moreover, the petitioner in Reyers engaged an accounting firm to handle the corporation's financial matters. In that case, the petitioner reasonably relied on both the other officer's assurances that he paid the taxes and the failure of the accounting firm to indicate otherwise. In this matter, petitioner did nothing more than assume Mr. Halloran remitted the taxes. While petitioner argues he did not act willfully and that Reyers supports his assertion, he ignores the Court's holding in which it stated that the following circumstances showed a lack of willfulness: (1) regular inquiry of the party to whom the "person" (for purposes of Tax Law § 685[g]) delegated the duty to remit the

withholding taxes to the State; and (2) use of an independent party to assess whether the proper financial transactions occurred (Matter of Reyers v. New York State Tax Commn., supra, 498 NYS2d 199, 201).

Obviously, petitioner overlooked that the Court did not include negligence in its list of actions showing a lack of willfulness. Since petitioner made no efforts to ensure that Mr. Halloran remitted the withholding taxes to the State nor took any other steps to determine if Mr. Halloran paid the taxes, he cannot successfully claim that he did not act willfully. Petitioner's attempt to use Reyers as a defense fails because he did not exercise the same level of care that the petitioner in Reyers exercised. Furthermore, the courts have clearly stated that mere dereliction of duty will not protect one from liability under Tax Law § 685(g) (Matter of Levin v. Gallman, supra, 396 NYS2d 623; Matter of Ragonesi v. New York State Tax Commn., supra). Accordingly, petitioner acted willfully for purposes of Tax Law § 685(g).

Finally, petitioner argues that because the New York State Tax Commission had a representative attend the closing of the Taft Hotel's sale, the State collected all taxes due. Therefore, petitioner asks the Tribunal to bar the State from asserting section 685(g) penalties against him. However, pursuant to Tax Law § 689(e), petitioner carries the burden of proof regarding his contentions. Since petitioner offers no supporting evidence showing the partnership paid all taxes due, this argument fails.

Therefore, because petitioner constituted a person who willfully failed to remit Royale's withholding taxes to the State, we affirm the Administrative Law Judge's determination finding petitioner liable for section 685(g) penalties as assessed by the Division.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of Donald A. Hopper is denied;

2. The determination of the Administrative Law Judge is affirmed;

3. The petition of Donald A. Hopper is denied; and

4. The Notice of Deficiency issued March 10, 1988 is sustained.

DATED: Troy, New York
August 18, 1994

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

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