

STATE OF NEW YORK
TAX APPEALS TRIBUNAL

In the Matter of the Petition	:	
of	:	
SALVATORE INGOGLIA	:	DECISION
	:	DTA No. 809372
for Redetermination of a Deficiency or for Refund of	:	
Personal Income Tax under Article 22 of the Tax Law for	:	
the Years 1982, 1983 and 1984.	:	

Petitioner Salvatore Ingoglia, 301 Great River Road, Great River, New York 11739, filed an exception to the determination of the Administrative Law Judge issued on September 16, 1993. Petitioner appeared by Milton Shaiman, Esq. The Division of Taxation appeared by William F. Collins, Esq. (Robert J. Jarvis, Esq., of counsel).

Petitioner did not file a brief on exception. The Division of Taxation filed a brief in opposition. The six-month period to issue this decision began on December 2, 1993, the date by which petitioner could have submitted a reply brief.

The Tax Appeals Tribunal renders the following decision per curiam.

ISSUE

Whether petitioner was a person required to collect, truthfully account for and pay over withholding taxes on behalf of 2-Pal Disposal, Inc., whose failure to do so leaves him responsible for penalty pursuant to Tax Law § 685(g).

FINDINGS OF FACT

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

On February 23, 1990, the Division of Taxation ("Division") issued to petitioner, Salvatore Ingoglia, a Notice of Deficiency and a Statement of Deficiency asserting a penalty against petitioner equal to the unpaid withholding taxes owed by a corporation known as 2-Pal

Disposal, Inc. These documents specified the particular withholding tax periods in question and the amounts due for each such period as follows:

<u>Withholding Tax Period</u>	<u>Amount</u>
1/1/82-12/31/82	\$ 500.00
1/1/83-12/31/83	1,188.15
10/1/84-10/31/84	225.00
11/1/84-11/30/84	<u>347.10</u>
Total Amount Due	\$2,260.25

The above-described amounts asserted against petitioner arise as the result of the corporation 2-Pal Disposal, Inc.'s filing of withholding tax reports (New York State and City of New York Employer's Return of Tax Withheld) for the noted periods without payment of all or parts of the amounts shown as due on such returns. Two of such withholding tax returns (those for the period January 1, 1982 through December 31, 1982 and for the period November 1, 1984 through November 30, 1984) are signed in the name of petitioner, Salvatore Ingoglia, under the titles "president" and "general manager", respectively. These returns are dated as having been signed on January 28, 1983 and on December 15, 1984, respectively.

In addition to the withholding tax reports, the Division offered certain other documents in evidence as follows:

(a) An application for highway use permits filed on behalf of 2-Pal Disposal, Inc., together with such corporation's check in payment of the fee therefor (payable to "New York State Tax Comm."), dated as signed on January 9, 1984 in the name of petitioner, Salvatore Ingoglia, under the title of president;

(b) Corporate resolutions with respect to 2-Pal Disposal, Inc.'s Long Island Trust Company bank account, dated as signed on January 27, 1983 in the name of petitioner, Salvatore Ingoglia, under the title of president;

(c) A contract between C & C Carting Corp. and 2-Pal Disposal, Inc., dated as signed on July 3, 1981 in the name of petitioner, Salvatore Ingoglia, as president of 2-Pal Disposal, Inc.; and

(d) A sales tax certificate of registration for 2-Pal Disposal, Inc. signed in the name of petitioner, Salvatore Ingoglia.

Other than a bare assertion made by petitioner's representative in his June 4, 1993 affirmation, there is no evidence in the record serving to support a claim that the signatures on the aforementioned documents are not petitioner's signatures. Moreover, careful comparison of each of such signatures to each other, and to petitioner's signature appearing on power of attorney forms attached to petitioner's request for a conciliation conference and to the petition for hearing herein, reveals all of such signatures to be very similar to each other.

The corporate resolutions described above name petitioner as the only person authorized by 2-Pal Disposal, Inc. to sign checks, borrow money, pledge security, assign obligations, etc., on behalf of the corporation. In addition, the application for highway use permits lists petitioner as the president and only principal officer of 2-Pal Disposal, Inc. The Division also introduced a copy of a transcript of proceedings taken on April 16, 1980 in Supreme Court, Suffolk County. This transcript sets forth a stipulation entered into by petitioner on April 16, 1980, under the terms of which petitioner would become full owner of 2-Pal Disposal, Inc.

As can be gleaned from the documents submitted in evidence, petitioner's position appears to rest upon the claim that he was not a responsible person with respect to the withholding tax obligations of 2-Pal Disposal, Inc., but rather was merely an employee who possessed no authority to determine what debts were to be paid. More specifically, the petition filed in this matter alleges that petitioner is not responsible "as [he] did not have anything to do with Two Pals." In addition, petitioner's counsel's affirmation in reply appears to take the position that petitioner is a "transferee" and that the burden of proof therefore rests with the Division to establish petitioner's liability for the amounts in question. It is unclear as to whether petitioner is arguing that the amounts asserted as due represent liabilities assumed or undertaken by petitioner as a transferee in light of the April 16, 1980 court-approved stipulation or, rather, whether petitioner is arguing that assertion of a deficiency against a responsible person for the

unpaid withholding tax obligations of a corporation is the equivalent of holding such person to be a "transferee" of such corporation.

OPINION

The Administrative Law Judge determined from the evidence presented that petitioner was a person required to collect tax and was properly liable for the penalty provided for in Tax Law § 685(g). The Administrative Law Judge found, from the documents submitted, that "petitioner was the corporation's only officer, was the only person authorized to sign checks and was the only person with any apparent ability to exercise authority over the corporation's assets and affairs" (Determination, conclusion of law "E"). The Administrative Law further found that, because petitioner was the only officer and the only person authorized to sign checks, "it follows that petitioner would have been in a position to know whether or not taxes such as those at issue herein were being paid" (Determination, conclusion of law "E").

The Administrative Law Judge further determined that "the burden of proof to establish that the actions of the Division are in error rests with petitioner (see, Matter of Tivolacci v. State Tax Commn., 77 AD2d 759, 431 NYS2d 174; see also, Matter of Fortunato, Tax Appeals Tribunal, February 22, 1990)" (Determination, conclusion of law "D").

Finally, the Administrative Law Judge rejected petitioner's argument that the Division bears the burden of proof in this matter pursuant to Tax Law § 689(e)(2). The Administrative Law Judge stated that there was no evidence of a transferee liability situation which would make Tax Law § 689(e)(2) applicable.

On exception, petitioner continues to argue that he is not a person responsible for collection of the tax. Petitioner asserts that the State adjudged him to be a responsible person without granting him a hearing or any due process. Petitioner also continues to argue that the State transferred liability to him and, therefore, the burden of proof is on the Division pursuant to Tax Law § 689(e)(2). Petitioner asserts that the Division's rejection of this case as a transferee situation defies logic (Petitioner's exception, p. 2). Finally, petitioner argues that the assertions made by the Division regarding his signature on various documents have no

relevance.

In response, the Division argues that the burden of proof is on petitioner to show that the assessment is erroneous (see, Matter of Petroleum Sales & Serv. v. Bouchard, 98 AD2d 882, 470 NYS2d 865, affd 64 NY2d 671, 485 NYS2d 252) and that petitioner must present sufficient evidence to overcome a notice of deficiency's presumption of correctness (see, Matter of Tavalacci v. State Tax Commn., supra).

With regard to petitioner's argument that the burden of proof has shifted to the Division because this is a transferee situation, the Division states that "petitioner clearly has not been deemed liable as a transferee . . . but rather on the basis of the statutory language contained in Tax Law §§ 685(g) and 685(n)" (Division's brief, p. 6). The Division further argues that petitioner's reliance on Tax Law § 689(e)(2) is misplaced. That provision, argues the Division, "is only applicable to situations where petitioner is the transferee of property of the taxpayer" and no such transfer of property exists here (Division's brief, p. 7).

The Division also argues that petitioner has not been denied due process because a hearing process has been afforded and there was no deprivation of property before the hearing process.

Finally, the Division argues that petitioner has failed to submit any evidence to show he was not a person required to act on behalf of the corporation. The Division also asserts that it is not reasonable to believe that petitioner did not sign the documents submitted by the Division and that the only evidence submitted to dispute this claim was the affirmation of petitioner's representative that the signatures were not petitioner's.

With respect to petitioner's argument that he was denied a hearing, we point out that petitioner, through his representative, agreed to have this matter decided on submission without a hearing. Petitioner's remaining arguments are the same arguments made before the Administrative Law Judge. Because the Administrative Law Judge adequately addressed these arguments, we affirm the determination of the Administrative Law Judge for the reasons stated in said determination.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of Salvatore Ingoglia is denied;
2. The determination of the Administrative Law Judge is affirmed;
3. The petition of Salvatore Ingoglia is denied; and
4. The Notice of Deficiency dated February 23, 1990 is sustained.

DATED: Troy, New York
April 28, 1994

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

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