

STATE OF NEW YORK
TAX APPEALS TRIBUNAL

In the Matter of the Petitions :
of :
THOMAS LAYDEN AND MARIE O'DONNELL :
for Redetermination of a Deficiency or for :
Refund of Personal Income Tax under Article 22 :
of the Tax Law for the Years 1985 through 1987. :

In the Matter of the Petitions :
of :
THOMAS LAYDEN AND MARIE O'DONNELL :
for Revision of a Determination or for Refund :
of Sales and Use Taxes under Articles 28 and 29 :
of the Tax Law for the Period March 1, 1987 :
through August 31, 1989. :

DECISION
DTA Nos. 809938,
809939, 809940
and 809941

Petitioners Thomas Layden and Marie O'Donnell, P.O. Box 325, Sterling Road, Greenwood Lake, New York 10925, filed an exception to the determination of the Administrative Law Judge issued on February 10, 1994. Petitioners appeared by Jay S. Goodman, Esq. The Division of Taxation appeared by William F. Collins, Esq. (Donald C. DeWitt, Esq., of counsel).

Both petitioners and the Division of Taxation filed briefs. Petitioners filed a reply brief, received on May 31, 1994, which date began the six-month period to issue this decision. Oral argument was not requested.

Commissioner Koenig delivered the decision of the Tax Appeals Tribunal. Commissioner Dugan concurs.

ISSUES

I. Whether the three-year period of limitations set forth in Tax Law § 683(a) is applicable to penalty assessments issued pursuant to Tax Law § 685(g), thereby nullifying a portion of the penalties assessed against petitioners herein.

II. Whether petitioners, who were assessed as persons responsible to collect tax under Tax Law § 1133(a), were properly subject to assessments of penalties and interest pursuant to Tax Law § 1145(a)(1)(i).

FINDINGS OF FACT

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

WITHHOLDING TAX MATTER

On June 29, 1990, the Division of Taxation ("Division") issued notices of deficiency to each of the petitioners, Thomas Layden and Marie O'Donnell. The notices asserted \$32,880.72 in penalty due under Article 22 of the Tax Law for the years 1985, 1986 and 1987.

Pursuant to a Statement of Deficiency also issued to the respective petitioners on June 29, 1990, the Division advised that the assertion of penalty against each petitioner was pursuant to Tax Law § 685(g). The Division further advised that it had determined that petitioners were persons responsible to collect and remit withholding tax on behalf of Dane & Murphy, Inc. and that, therefore, petitioners were liable for penalty equal to the amount of withholding tax not remitted by such corporate entity. The Statement of Deficiency further listed the specific withholding tax periods and the penalty amounts as follows:

<u>WITHHOLDING TAX PERIOD</u>	<u>AMOUNT</u>
10/16/85 - 10/31/85	\$ 7,624.76
03/16/87 - 03/31/87	1,679.96
01/16/87 - 01/31/87	1,066.11
01/01/87 - 01/15/87	330.08
04/01/87 - 04/15/87	1,155.02
05/01/87 - 05/15/87	1,113.34
04/16/87 - 04/30/87	1,189.56
05/16/87 - 05/31/87	905.07

06/01/87 - 06/15/87	1,076.51
06/16/87 - 06/30/87	451.31
07/01/86 - 12/31/86	15,671.79
07/16/87 - 07/31/87	295.51
07/01/87 - 07/15/87	<u>321.70</u>
	\$32,880.72

Petitioners Thomas Layden and Marie O'Donnell were president and vice-president, respectively, of Dane & Murphy, Inc. during the period at issue herein. Petitioners concede that each was a person required to insure that Dane & Murphy, Inc. remitted the withholding taxes that it deducted or withheld or was required to deduct or withhold from the wages of its employees in accordance with sections 675, 685(g) and 685(n) of the Tax Law.

The assessment herein results from withholding taxes which were withheld or required to be withheld from the wages of Dane & Murphy, Inc.'s employees and which were reported as withheld on withholding tax returns, but which were not paid over to the Division.

There is no dispute that the notices of deficiency herein were issued more than three years from the dates of filing of the withholding tax returns of Dane & Murphy, Inc. pertaining to the periods October 16 through October 31, 1985 and July 1 through December 31, 1986.

There is also no dispute herein that Dane & Murphy, Inc. did in fact fail to pay over to the Division withholding taxes in the amounts set forth in the statements and notices of deficiency.

SALES TAX MATTER

On June 22, 1990 and July 13, 1990, the Division issued to petitioners Thomas Layden and Marie O'Donnell, respectively, notices of determination and demands for payment of sales and use taxes due which assessed against each petitioner an aggregate amount of \$16,816.14 in tax due, plus penalty and interest for the period March 1, 1987 through August 31, 1989.

The notices of determination indicated that petitioners were being assessed as officers of Dane & Murphy, Inc. pursuant to sections 1131(1) and 1133 of the Tax Law.

Except for the quarterly period March 1 through May 31, 1988, the notices of determination were premised on the filed sales tax returns of Dane & Murphy, Inc., which were filed without payment of tax. The assessment of \$7,745.82 for the period March 1 through May 31, 1988 was estimated.

Pursuant to conciliation orders dated June 14, 1991, the assessments against each petitioner were reduced to \$9,651.42, plus penalty and interest. This reduction resulted from the filing of Dane & Murphy, Inc.'s sales tax return for the period March 1 through May 31, 1988 which indicated \$581.10 in tax due for that quarter. In accordance with the return, the conciliation orders reduced the assessments for this quarter from \$7,745.82 to \$581.10.

During the relevant period, petitioner Thomas Layden was president of Dane & Murphy, Inc. and petitioner Marie O'Donnell was vice-president.

Petitioners concede that they were persons required to collect sales and use tax on behalf of Dane & Murphy, Inc. under section 1131(1) of the Tax Law and that they were personally liable for the payment of such tax pursuant to section 1133(a) of the Tax Law.

OPINION

In the determination below, the Administrative Law Judge rejected petitioners' argument that the three-year period of limitations contained in section 683(a) of the Tax Law is applicable to penalties imposed under Tax Law § 685(g), holding that "the three-year statute does not apply to assessments made under section 685(g) and that, therefore, no portion of the assessments herein were time-barred" (Determination, conclusion of law "B"). The Administrative Law Judge stated that the decision in Matter of Wolfstich v. New York State Tax Commn. (106 AD2d 745, 483 NYS2d 779) compelled this result.

The Administrative Law Judge also rejected petitioners' contention that "their liability under Tax Law §§ 1131 and 1133 is limited to the tax and does not extend to the penalties and interest" even though they concede their liability for the sales tax assessed. Citing Matter of Hall v. Tax Appeals Tribunal (176 AD2d 1006, 574 NYS2d 862), the Administrative Law Judge held that "as persons required to collect tax, petitioners were properly liable for penalties and interest as persons who failed to timely file returns or pay tax" (Determination, conclusions of law "D" & "E").

On exception, petitioners argue that the Division relies on Matter of Wolfstich v. New York State Tax Commn. (*supra*) for its position that there is no statute of limitations controlling

when an assessment of withholding tax is made under section 685(g) of the Tax Law, however, "a careful reading and analysis of the Wolfstich case will support the conclusion that the Court did not address the fundamental issue involving the applicability of the three year Statute of Limitations to assessments under Section 685(g)" (Petitioners' brief, p. 6). Petitioners further argue that while the Court in Wolfstich recognized that assessments against the corporation and assessments against its responsible officers were separate and distinct assessments and did not derive from each other but were provided for separately within the Tax Law, the Court did not address the provisions contained in section 683 of the Tax Law or the issue of the relationship of section 683 to section 685(g). Petitioners also argue that a reading of the record of the case shows that neither Wolfstich's counsel nor the State Tax Commission argued about the application of section 683 to assessments under section 685(g).

Petitioners argue that the three-year statute of limitations for assessment of tax under section 683(a) applies to penalties imposed under section 685(g) and:

"[t]his interpretation is consistent with the interpretations of the Internal Revenue Code where the cases have held that assessment of the 100% penalty against corporate officers is an assessment which is separate and distinct from the assessment against the corporation and is subject to the three year Statute of Limitations on assessments" (Petitioners' brief, pp. 8, 9).

Petitioners' argument also: 1) stresses that the Wolfstich decision warrants further study; 2) refers to an Opinion of Counsel of the Department of Taxation and Finance dated December 4, 1967 NYTB - V.4, p.65; and 3) makes reference to a May 2, 1991 determination of an Administrative Law Judge, Matter of Riegel (Division of Tax Appeals, May 2, 1991).

The Division, in response, in referring to Matter of Wolfstich v. New York State Tax Commn. (supra), argues the question of whether the three-year statute of limitations for the assessment of taxes under section 683 was a bar to the imposition of a penalty pursuant to section 685(g) was squarely before the Appellate Division and was decided in the negative. The Division further argues that no portion of the assessments herein were time-barred and, therefore, the assessments against petitioners for withholding tax penalty should be upheld.

Petitioners, in reply, again argue that they have no disagreement with the basic finding in the Wolfstich case. Petitioners do, however, argue:

"[i]t does not, however, follow that there is no time limitation during which the separate assessments can be made. In Wolfstich, the Court did not consider and made no comment concerning the applicability of Section 683(a) on the three year limitation on deficiencies imposed on corporate officers under Section 685(g). The running of the three year Statute of Limitations commences when the applicable tax returns were deemed filed. The timing is in no way limited to when the corporate assessment was made" (Petitioners' reply brief, p. 2).

Petitioners' reply brief quotes a section of the Tax Appeals Tribunal decision in Matter of Friedman (Tax Appeals Tribunal, July 8, 1988) which was referenced in the Division's brief. Petitioners also refer to an Opinion of Counsel issued by the Division on December 4, 1967 and question why the Division made no mention of same in their brief or why said Opinion has not been modified or cancelled. Petitioners state that this Opinion held that the three-year period of limitations was applicable to § 685(g) assessments.

We affirm the determination of the Administrative Law Judge.

First, we note that an Administrative Law Judge's determination cannot be considered as precedent (Tax Law § 2010[5]).

We also find it necessary to address petitioners' quoting of a section of our decision in Matter of Friedman (*supra*), namely:

"[t]hus, it would appear at first blush, that the issuance of the Statement of Deficiency and Notice of Deficiency against petitioner on November 26, 1984, which was more than three years after the return was filed, would be barred by the general three year period of limitation set forth in section 683(a)."

We hasten to add that the decision continued as follows:

"[h]owever, under similar circumstances in Wolfstich, the Appellate Division concluded that 'the penalty imposed against petitioner as a corporate officer is entirely distinct from an earlier assessment against the corporation. As a separate statutory liability, it need not be assessed within any particular period after the corporate assessment is made' (Wolfstich v. State Tax Commn., *supra*, at 747). We find Wolfstich dispositive of the issue."

As to the matter at hand, we also find Wolfstich dispositive of the issue and because we further find that the Administrative Law Judge completely and adequately addressed the issues

before him, we see no reason to analyze these issues further nor do we see any reason to hold otherwise and, therefore, affirm the Administrative Law Judge based on his determination.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of petitioners Thomas Layden and Marie O'Donnell is denied;
2. The determination of the Administrative Law Judge is affirmed;
3. The petitions of Thomas Layden and Marie O'Donnell are denied;
4. The notices of deficiency dated June 29, 1990 are sustained; and
5. The notices of determination and demand for payment of sales and use taxes due dated June 22, 1990 and July 13, 1990, as modified by conciliation orders dated June 14, 1991, are sustained.

DATED: Troy, New York
November 3, 1994

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

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