

STATE OF NEW YORK
TAX APPEALS TRIBUNAL

In the Matter of the Petition	:	
of	:	
GEORGE N. STAMAS	:	DECISION
for Redetermination of a Deficiency or for Refund of	:	DTA No. 809954
Personal Income Tax under Article 22 of the Tax Law	:	
for the Years 1985 and 1986.	:	

Petitioner George N. Stamas, 1623 Third Avenue, Apt. 34J, New York, New York 10128, filed an exception to the determination of the Administrative Law Judge issued on July 1, 1993. Petitioner appeared pro se. The Division of Taxation appeared by William F. Collins, Esq. (Gary Palmer, Esq., of counsel).

Petitioner filed a brief in support of his exception. The Division of Taxation submitted a letter in lieu of a brief, relying on its brief below, which was received on December 9, 1993 and which began the six-month period for the issuance of this decision. Petitioner's request for oral argument was denied.

The Tax Appeals Tribunal renders the following decision per curiam.

ISSUE

Whether petitioner is liable for penalties under Tax Law § 685(g) for the unpaid withholding taxes of Advanced Care Systems, Inc.

FINDINGS OF FACT

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

On August 24, 1990, the Division of Taxation ("Division") issued to George Stamas a Statement of Deficiency which set forth penalty due under Tax Law § 685(g) in the sum of \$10,646.00 for the withholding tax period July 1, 1985 through December 31, 1985. Said

statement also provided the definition of the term "person" as defined in Tax Law § 685(n) and the provisions of Tax Law § 685(g) which provide that any person required to collect, truthfully account for, and pay over the tax imposed by the income tax law who willfully fails to do so shall be liable to a penalty equal to the total amount of the tax due. The Statement of Deficiency indicated that available information indicated that Mr. Stamas was a person liable for this penalty.

Along with the issuance of said Statement of Deficiency, on August 24, 1990, a Notice of Deficiency was issued to George Stamas which set forth a total penalty due of \$10,646.00.

On August 24, 1990, the Division issued to George Stamas a second Statement of Deficiency which set forth penalty due under Tax Law § 685(g) in the sum of \$359.00, for the withholding tax period January 1, 1986 through December 31, 1986. On the same date, the Division issued to George Stamas a Notice of Deficiency which set forth penalty due for the year 1986 in the sum of \$359.00.

Once again, the Statement of Deficiency for the year 1986, dated August 24, 1990, indicated that available information indicated that Mr. Stamas was the person liable for the penalty under section 685(g).

On or about June 25, 1982, two individuals, Dr. Leonard Primes and Thomas Young, assigned all of their right, title and interest to a composition for detoxification, "Miratox", to Syeco Research and Development Corporation, a Delaware corporation having a principal place of business in Massapequa, New York. The compound "Miratox" allegedly had the potential for providing major breakthroughs in the detoxification of alcoholics and drug abusers.

Syeco Research and Development Corporation was incorporated on May 14, 1982 in the State of Delaware, and was authorized to do business in the State of New York on August 4, 1983. Subsequently, on January 8, 1985, Syeco filed a Notice of Change of Name with the New York State Department of State, indicating that its new name was Advanced Care Systems, Inc.

Pursuant to an employment agreement between Sypco and petitioner, dated July 26, 1984, petitioner was hired as the president, chief operating officer and chief financial officer of Sypco Research and Development Corporation for a period of 24 months.

Pursuant to paragraph "4" of said employment agreement, petitioner's specific duties were defined as follows:

"4. Employee's duties. During the period of employment Employee shall devote his full business time and energies to the business and affairs of Employer and shall perform his duties on a full time basis utilizing his best efforts, skills and abilities to promote Employer's interests. Employee's primary area of responsibility shall be the management operations, and financial affairs of the Employer subject to direction and control of the Chief Executive Officer and the Board of Directors."

Petitioner agreed to accept a salary of \$60,000.00 per annum with at least an annual review and adjustment. The agreement specifically provided in paragraph "5(d)" that all compensation was to be subject to the customary withholding tax and other employment tax.

The employment agreement also provided in paragraph "12" that the employee would receive, in consideration of accepting the position of president and chief operating officer, 5,000 shares of Sypco common stock at the price of \$.01 per share.

The employment agreement also provided in paragraph "14" that the employee:

"warrants and represents that he has had full and complete access to the books and records of the company, has had the opportunity to review a preliminary draft of a Form S-18 registration statement the Corporation plans to file with the Securities and Exchange Commission (the 'Commission') and that he is aware that the Corporation is totally dependent upon the receipt of the proceeds of the shares to be sold pursuant to said registration statement for its future activities and that there can be no assurance that any of such shares will in fact be sold."

The employment agreement also provided that petitioner would be elected to Sypco's board of directors following execution of the employment agreement.

Petitioner explained that he was hired by Sypco in order to develop a business plan for the corporation and to guide the corporation through the Food and Drug Administration's application

process for the corporation's chief asset, the compound "Miratox". It is noted that the Food and Drug Administration's testing process involves three separate phases. The first phase, only achieved after significant testing, is one in which the compound is proved safe. The second phase requires a demonstration of the compound's efficacy. The third phase is the time period in which the compound must be demonstrated to be safe and efficacious on human beings.

There were four original partners in the corporate entity Sypco: Dr. Leonard Primes, Murray Corn, Thomas Young and John Sullivan. In 1983 they were joined by an entrepreneur by the name of Donald McShane who was granted 15% of the stock for his \$500,000.00 investment contribution. The original four partners retained 15% each, and granted 25% of the stock to a group of 45 to 50 investors.

In 1983, petitioner purchased 1,000 additional shares of Sypco stock for \$3,000.00 as part of a group led by Donald McShane, bringing his total investment to 6,000 shares. Petitioner actually worked for Sypco and its successor, Advanced Care Systems, Inc., between March of 1984 and September of 1986, receiving compensation for only about half of that period.

During the term of his employment, petitioner appeared to carry out his duties as president and chief operating officer of the corporation. He was a signatory on the corporation's only operating bank account, a checking account at the Chase Manhattan Bank on East 42nd Street in New York City. Petitioner was authorized to issue checks with a maximum value of \$500.00 to \$1,000.00. The secretary-treasurer of the company, Mr. Alfred Welsome, was also a signatory on the same account.¹ Petitioner signed various filings with the New York State Department of Taxation and Finance, including two applications for three-month extension for filing tax reports on July 17, 1985 and September 19, 1985, as president of Advanced Care Systems, Inc.; two metropolitan transportation business tax surcharge reports for the periods ended April 30, 1985 and April 30, 1986, signed as president of Advanced Care Systems, Inc.; and the corporation franchise tax reports filed for the fiscal years ended April 30, 1985 and April 30, 1986.

¹Petitioner speculated that Dr. Primes also was a signatory on the checking account.

On the Schedule "F" attached to the New York Corporation Franchise Tax Report for the fiscal year ended April 30, 1985, Mr. Stamas was listed as an officer of the corporation receiving a salary or other compensation in the sum of \$35,000.00. On the New York Corporation Franchise Tax Report for the fiscal year ended April 30, 1986, Schedule "F" listed Mr. Stamas as an officer receiving salary or compensation in the sum of \$65,000.00.

With regard to the withholding tax at issue herein for the year 1985 and 1986, Advanced Care Systems, Inc. filed reconciliation statements indicating total New York State and New York City taxes withheld and the balance due for each year. The reconciliation statement submitted for the year 1985 indicated a balance due of \$10,646.00 and was signed on "2/15" by Alfred W. Welsome. The 1985 statement indicated a tax due in June of that year in the sum of \$582.98. The reconciliation statement for the year 1986 was filed on February 2, 1987 and was signed by George N. Stamas, as president. The latter statement indicated total New York State and New York City taxes withheld in the sum of \$359.00.

Throughout the time petitioner was employed by the company, there were never more than four or five employees.

Emphasizing petitioner's stature with the company, and his position as president and chief operating officer, was his July 31, 1984 letter to Mr. John Sullivan, accepting Mr. Sullivan's resignation as secretary- treasurer and director of Sypco. Mr. Stamas signed the letter as president of Sypco Research and Development Corp. and accepted the resignation on behalf of himself and "Lenny" (Dr. Leonard Primes, chairman of the board of directors and chief executive officer of Sypco).

The initial capital contributions to the corporation were quickly consumed by the cost of testing, salaries and administration. Over the period October 1, 1984 through October 27, 1986, Donald McShane made additional contributions in the sum of \$67,510.00. Whenever additional contributions were made to the corporation, their specific use was authorized and directed by

Mr. McShane and Dr. Primes. Petitioner had no authority to make any payments without the specific authority and direction of Dr. Primes or Mr. McShane.

Petitioner believed that the flow of funds ended approximately the same time his salary ended in the fall of 1985. From that point on, all funds flowing to the corporation were used for administrative costs such as rent, telephone, electricity and laboratory costs. Neither taxes nor salaries were paid from investment funds directed to the corporation after the fall of 1985.

Petitioner testified that he notified both Dr. Primes and Mr. McShane of the Federal and New York State tax liabilities and was successful in resolving all taxes due with the Federal government. However, he was never successful in acquiring the funds from Dr. Primes or Mr. McShane to pay the New York State withholding taxes due.

During the years in issue, the board of directors of Advanced Care Systems, Inc. was composed of Dr. Primes, Mr. Stamas, Dr. Bernard Bihari and a fourth individual whose identity was not disclosed in the record. Board of directors meetings were held approximately every six months at Donald McShane's residence in New York City and it was at these meetings that the company's business agenda was set.

Petitioner testified that the corporation utilized the services of an accounting firm by the name of Bernard Wind and Company. The accounting firm prepared all filings made to the New York State Department of Taxation and Finance on behalf of the corporation, including the withholding tax reconciliation statements and returns. Either petitioner or Mr. Welsome prepared the checks for payment of the taxes due to both the Federal and New York State authorities.

Mr. Stamas submitted into evidence two letters to Dr. Primes written by himself on July 2, 1992 and August 17, 1992 pleading with Dr. Primes to resolve the instant matter by paying the outstanding taxes due. Allegedly, neither of these letters was responded to by Dr. Primes.

Petitioner testified that he received a salary until approximately November of 1985. He was also aware that withholding taxes were not being paid sometime earlier in the year 1985. However, petitioner testified that he was confident at that time that the company would be able to meet its tax obligations. As the incoming funds were directed to the payment of rent, telephone and electric bills and laboratory costs, it became apparent that there were insufficient funds to meet the tax obligations.

The conciliation conference was held on May 22, 1991 and, as a result, the statutory notices of deficiency at issue herein were sustained in full by order dated June 21, 1991.

OPINION

The Administrative Law Judge determined that petitioner was a person required to collect, truthfully account for and pay the withholding taxes at issue. The Administrative Law Judge found that petitioner met the following indicia of responsibility to support a finding of responsibility: (1) he was the president of the corporation; (2) he was a member of the board of directors; (3) he derived substantial income from the corporation (he received the highest salary of any officer); (4) he had authority to sign tax returns; (5) he was a signatory on the checking account; (6) he had knowledge of the day-to-day operations of the business; and (7) he was a shareholder and investor in the corporation. The Administrative Law Judge rejected petitioner's assertion, that he was under the control and direction of Dr. Primes and the board of directors, as unconvincing. The Administrative Law Judge stated that petitioner was "one of the four board members and also had the knowledge of the taxes due and the ability and authority to pay them" (Determination, conclusion of law "A"). The Administrative Law Judge also noted that petitioner drew the largest salary of any corporate employee during the audit period until November of 1985 and drew this salary in 1985 when he was aware of the withholding tax difficulties of the corporation. The Administrative Law Judge further rejected petitioner's argument that the corporation is a going concern and should be liable for the withholding tax as that argument does not take into account petitioner's personal liability under section 685(g). The

Administrative Law Judge, citing Allen v. State Tax Commn. (126 AD2d 51, 512 NYS2d 916), further found that the corporation's "economic difficulties did not relieve petitioner of his authority to act on behalf of the corporation in respect of its withholding tax obligations while there were available funds" (Determination, conclusion of law "A").

Finally, the Administrative Law Judge found that petitioner's failure to withhold and pay over the withholding taxes was willful under Tax Law § 685(g). The Administrative Law Judge, citing Matter of Davison (Tax Appeals Tribunal, November 23, 1988), found that "petitioner consciously directed the withholding taxes in question for the payment of administrative costs (including his own salary until November 1985) and lab fees" (Determination, conclusion of law "B").

On exception, petitioner continues to assert that he is not a responsible person and did not willfully direct withholding taxes to pay administrative costs. Petitioner continues to argue that, pursuant to his employment contract, he was under the direction and control of Dr. Prime and Mr. McShane. Further, petitioner argues that even though he had the title of president he "wielded no influence over the expenditure of funds over \$500-1,000" (Petitioner's brief, p. 2). Finally, petitioner repeats his argument that the corporation should pay the taxes or that Dr. Prime or Mr. McShane, as responsible persons, should pay the taxes.

In response, the Division relies on its hearing brief below.

The pertinent inquiry in a responsible officer case is not whether a person held a corporate office, but whether that person had sufficient authority and control over the affairs of the corporation to insure that taxes were paid (see, Matter of Taylor, Tax Appeals Tribunal, October 24, 1991; Matter of Constantino, Tax Appeals Tribunal, September 27, 1990). As we stated in Matter of Constantino (*supra*):

"[t]he question to be resolved in any particular case is whether the individual had or could have had sufficient authority to be considered a responsible officer or employee. The case law and the decisions of this Tribunal have identified a variety of factors as indicia of responsibility: the individual's status as an officer,

director, or shareholder; authorization to write checks on behalf of the corporation; the individual's knowledge of and control over the financial affairs of the corporation; authorization to hire and fire employees; whether the individual signed tax returns for the corporation; the individual's economic interest in the corporation."

We reverse the determination of the Administrative Law Judge. While the Administrative Law Judge found that many of the indicia of responsibility were present here, he made a finding that "[p]etitioner had no authority to make any payments without the specific authority and direction of Dr. Primes or Mr. McShane" (Determination, finding of fact "12"). In view of this finding which is supported by the record, we conclude that the facts do not support a conclusion that petitioner had sufficient authority and control over the affairs of the corporation to insure that the taxes were paid. As we stated in Matter of Moschetto (Tax Appeals Tribunal, March 17, 1994), "our reversal is based on the facts as found by the Administrative Law Judge; therefore, we are not overruling the Administrative Law Judge's conclusions as to the credibility of the witnesses."

We are unable to reconcile the Administrative Law Judge's finding that petitioner had no independent authority to make payments with the Administrative Law Judge's conclusion of law that petitioner's

"assertion that he was subject to the control and direction of Dr. Primes and the board of directors is unconvincing since he was one of the four board members and also had the knowledge of the taxes due and the ability and authority to pay them in 1985, but chose not to in reliance upon his confidence that the corporation would be able to pay later in the year. This same rationale holds true for 1986 as well" (Determination, conclusion of law "A").

Because we defer to the Administrative Law Judge's evaluation of credibility (Matter of American Express Co., Tax Appeals Tribunal, April 23, 1992), we have found the facts as found by the Administrative Law Judge and reached a legal conclusion that we think is harmonious with these facts.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of George N. Stamas is granted;

2. The determination of the Administrative Law Judge is reversed;
3. The petition of George N. Stamas is granted; and
4. The notices of deficiency dated August 24, 1990 are cancelled.

DATED: Troy, New York
May 19, 1994

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

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