

STATE OF NEW YORK
TAX APPEALS TRIBUNAL

In the Matter of the Petition	:	
of	:	
ISAAC LEVIN	:	DECISION
for Redetermination of a Deficiency or for	:	DTA No. 810327
Refund of Personal Income Tax under Article 22	:	
of the Tax Law for the Years 1985 through 1986.	:	

Petitioner Isaac Levin, 960 Cliffside Avenue, North Woodmere, New York 11581, filed an exception to the determination of the Administrative Law Judge issued on September 23, 1993. Petitioner appeared pro se. The Division of Taxation appeared by William F. Collins, Esq. (Lawrence A. Newman, Esq., of counsel).

Petitioner filed a brief. The Division of Taxation filed a letter brief in opposition. The six-month period to issue this decision began on April 28, 1994, the date by which petitioner could submit a reply brief. Oral argument was not requested.

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

ISSUES

I. Whether petitioner may be held liable for the penalty asserted against him pursuant to Tax Law § 685(g).

II. Whether the failure of the Division of Taxation to file a claim for unpaid withholding taxes in a bankruptcy proceeding involving Mactek Industries Corporation bars it from asserting a penalty against petitioner, the corporation's primary officer, under Tax Law § 685(g).

III. Whether issuance of the Notice of Deficiency was barred by the statute of limitations in section 683(a) of the Tax Law.

FINDINGS OF FACT

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

The Division of Taxation ("Division") issued to petitioner, Isaac Levin, a Notice of Deficiency, dated August 25, 1989, asserting penalties in the amount of \$24,126.11 under Tax Law § 685(g). At the same time, the Division issued to petitioner a Statement of Deficiency which explained that petitioner was liable for a penalty equal to the total amount of tax due from Mactek Industries Corporation ("Mactek") for the periods May 1, 1985 through December 31, 1985 and January 1, 1986 through December 31, 1986. Following a conference, the Division issued a Conciliation Order dated September 27, 1991 sustaining the statutory notice.

Petitioner was the president of Mactek. Mactek filed a voluntary petition in bankruptcy under Chapter 11 of title 11 of the United States Code in June 1987. It had previously filed a petition under Chapter 7. The Division filed a claim for taxes due from Mactek, dated December 20, 1991, in the United States Bankruptcy Court in Brooklyn. Included in that claim were withholding taxes in the amount of \$24,126.11 for the periods in issue here. Apparently, there were no funds available with which to pay the Division's claim.

The Division's claim for taxes due from Mactek is based on withholding tax returns filed without remittance of the tax shown as due. For the year 1986, Mactek issued wage and tax statements showing total taxes withheld of \$10,403.00. None of this amount was paid over to the Division. For the year 1985, Mactek issued withholding wage and tax statements showing total taxes withheld of \$14,629.00. The Division asserts that \$905.89 was paid over to the Division.

The Division asserts that it was not listed as a creditor when Mactek filed its bankruptcy petition in 1987 and, therefore, was unaware of the proceeding and unable to file a claim against Mactek at the outset of the bankruptcy proceeding. Petitioner does not dispute that the Division was initially omitted from the bankruptcy filing; however, petitioner notes that the Division was

made aware of the existence of the bankruptcy proceeding in 1989 and still did not file a claim in bankruptcy court until 1991.

OPINION

In the determination below, the Administrative Law Judge held that Tax Law § 689 (e) provides that, except for certain specified issues not pertinent here, the burden of proof is upon the petitioner in any case before the Tax Appeals Tribunal under Article 22 of the Tax Law and, further, it has been held repeatedly that a presumption of correctness attaches to a notice of deficiency when it is properly issued by the Division. The Administrative Law Judge then held: 1) it was essential for petitioner to offer evidence to support the various positions put forth in his brief; 2) no evidence was offered; 3) petitioner's brief, while containing arguments of fact and law, contained very little in the way of factual material; and 4) petitioner failed to carry his burden of proof to overcome the presumption of correctness which attaches to the notice of deficiency (Determination, conclusion of law "A").

The Administrative Law Judge also addressed each point made by petitioner. As to petitioner's claim that he should be given credit for any taxes which were paid by Mactek Industries Corp., the Administrative Law Judge held that "I cannot assume, as does petitioner, that Mactek paid some amount of tax which the Division has failed to account for," and with reference to the bankruptcy proceedings, the Administrative Law Judge held that "[p]etitioner's arguments are purely speculative. I have no way of knowing what would have happened if the Division had filed a claim in the bankruptcy proceeding in 1989. I cannot cancel the penalty based on speculation about what might have occurred had the Division filed such a claim. The record simply shows that Mactek failed to pay over withholding taxes due to the State" (Determination, conclusion of law "A").

The Administrative Law Judge, in referring to Tax Law § 685(g) which imposes liability on those persons responsible for the collection and remittance of withholding taxes who willfully fail to collect or remit such funds, rejected petitioner's claim that he "lacked the intent required in order to justify the imposition of the penalty for willful failure to withhold and pay

employment taxes" (Determination, conclusion of law "A") and held that petitioner has provided no information which would support a finding that he was not a person required to collect and pay over withholding taxes on behalf of Mactek.

On exception, petitioner "requests that the Tax Appeals Tribunal review the finding of fact based on existing and new information which will be provided by petitioner in his brief" (Petitioner's exception). Petitioner, who submitted exhibits, letters and notices as part of his brief in support of his exception argues: 1) the Department had definite knowledge of the bankruptcy filing in August of 1989 while the proceedings were still pending but refused to file a claim; 2) the penalty for failure to file was based upon willful, deliberate conduct, however, in 1985 and 1986 his primary full time position was to develop and manage contracts, his duties did not include hiring or firing or determining the payment to various suppliers as he counted on professionals to do so, and at the time of filing he "did not know nor did he have any reason to know" that the taxes in question were not paid; and 3) the Department was time-barred in assessing taxes, interest and penalties for the period of 1985 since its Notice of Deficiency was dated August 25, 1989.

The Division, in reply, argues: 1) when the corporation filed bankruptcy it failed to list the State of New York as a creditor, consequently the Tax Department, unaware of the bankruptcy, could not file its claim; 2) petitioner has acknowledged his personal liability as sole operator of the business and responsible officer, but claims the corporation had sufficient assets to satisfy the tax claim; 3) the record contains copies of unpaid withholding returns signed by petitioner which demonstrates his participation in and awareness of the liabilities of the corporation; 4) the new issue raised by petitioner relating to the Department being time-barred in assessing tax interest and penalties for 1985 does not apply in this situation; 5) the several exhibits appended to petitioner's brief should be disregarded as factual material outside the hearing record; and 6) the Department agrees with and supports the reasoning in the determination of the Administrative Law Judge.

We affirm the determination of the Administrative Law Judge.

We will first address petitioner's claim that the Department was time barred in assessing tax, interest and penalties for the period of 1985 since its Notice of Deficiency was dated August 25, 1989.

Tax Law § 685(g) was modeled upon Federal tax Law (see, Matter of Wolfstich v. New York State Tax Commn., 106 AD2d 745, 483 NYS2d 779), and we cannot ignore the precedence of Wolfstich, where the Appellate Division, Third Department directly addressed whether the three-year period of limitations of section 683 applied to the assessment of penalty under section 685(g) and concluded that it did not. The Appellate Division's holding in Wolfstich controls our decisions regarding issues of timeliness because the Third Department sets precedent for the Tax Appeals Tribunal. We have affirmed this position (see, Matter of Byram, Tax Appeals Tribunal, August 11, 1994 and Matter of Friedman, Tax Appeals Tribunal, July 8, 1988), therefore, petitioner's argument that the Division did not timely assert the deficiency against him fails.

Next, we must address petitioner's attempt at this late date to place before this Tribunal additional evidence in the form of exhibits, letters, and notices made a part of his brief on exception, all of which were not part of the record below.

As we held in Matter of Schoonover (Tax Appeals Tribunal, August 15, 1991):

"[i]n order to maintain a fair and efficient hearing system, it is essential that the hearing process be both defined and final. If the parties are able to submit additional evidence after the record is closed, there is neither definition nor finality to the hearing. Further, the submission of evidence after the closing of the record denies the adversary the right to question the evidence on the record. For these reasons we must follow our policy of not allowing the submission of evidence after the closing of the record (see, Matter of Oggi Rest., Tax Appeals Tribunal November 30, 1990; Matter of Morgan Guar. Trust Co. of N.Y., Tax Appeals Tribunal, May 10, 1990; Matter of International Ore & Fertilizer Corp., Tax Appeals Tribunal, March 1, 1990; Matter of Ronnie's Suburban Inn, Tax Appeals Tribunal, May 11, 1989; Matter of Modern Refractories, Tax Appeals Tribunal, December 15, 1988)."

Finally, because we find that the Administrative Law Judge completely and adequately addressed the issues before her, 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 her determination.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of Isaac Levin is denied;
2. The determination of the Administrative Law Judge is affirmed;
3. The petition of Isaac Levin is denied; and
4. The Notice of Deficiency dated August 25, 1989 is sustained.

DATED: Troy, New York
September 29, 1994

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

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