

STATE OF NEW YORK

TAX APPEALS TRIBUNAL

In the Matter of the Petition	:	
of	:	
MITCHELL G. MENIK	:	DECISION
for Redetermination of a Deficiency or for Refund of	:	DTA NOS. 815718
Personal Income Taxes under Article 22 of the Tax Law	:	and 815719
and the New York City Administrative Code for the Period :		
January 7, 1994 through June 24, 1994.		

Petitioner Mitchell G. Menik, 385 Starke Avenue, East Meadow, New York 11554-2824, filed an exception to the determination of the Administrative Law Judge issued on June 25, 1998. Petitioner appeared *pro se*. The Division of Taxation appeared by Terrence M. Boyle, Esq. (Kevin R. Law, Esq., of counsel).

Petitioner did not file a brief on exception. The Division of Taxation filed a brief in opposition to the exception. Petitioner's request for oral argument was withdrawn.

After reviewing the entire record in this matter, the Tax Appeals Tribunal renders the following decision.

ISSUE

Whether petitioner is liable for penalties under Tax Law § 685(g) for the unpaid withholding taxes of CashTek Corporation.

FINDINGS OF FACT

We find the facts as determined by the Administrative Law Judge, except for finding of fact “20” which has been deleted.¹ These findings of fact are set forth below.

The Division of Taxation (“Division”) issued to petitioner, Mitchell G. Menik, seven notices of deficiency, each dated March 17, 1995. The notices assert penalties against petitioner under the authority of Tax Law § 685(g) as follows:

January 1, 1992 through December 31, 1992	\$ 37,566.18
January 8, 1993 through March 26, 1993	6,133.74
April 2, 1993 through June 25, 1993	8,591.22
July 2, 1993 through September 24, 1993	12,799.73
October 1, 1993 through December 24, 1993	14,051.71
January 7, 1994 through March 25, 1994	15,244.31
April 1, 1994 through June 24, 1994	<u>14,164.73</u>
Total:	\$ 108,551.62

Each notice explains that petitioner, as an officer or responsible person, has been found liable for a penalty in an amount equal to taxes not paid by CashTek Corporation (“CashTek”).

¹Finding of fact “20” of the Administrative Law Judge’s determination was based on documents of dubious value. One such document was a bank signature card dated March 24, 1994 where petitioner’s name appeared with those of Edward Lee and Larry Shluger on an account requiring two signatures. However, the name of the bank and the account number are unknown. Another such bank document contains petitioner’s name, but the card is undated, unsigned, does not bear the name of CashTek or the bank or financial institution to which it relates. Therefore, we have deleted this finding of fact since it does not have any probative value.

Notice number L-010143101-7, for the period ending December 31, 1992, states that payments of \$31,282.15 have been applied to the total penalty amount reducing the balance due for that period to \$6,284.03.²

Following a conference in the Bureau of Conciliation and Mediation Services, a Conciliation Order, dated December 20, 1996, was issued by the Division sustaining the statutory notices of deficiency.

CashTek is a Delaware corporation doing business in New York. It was formed on February 8, 1991 to acquire the systems and technology of Kenilworth Systems Corporation (“Kenilworth”) which was in a chapter 7 bankruptcy proceeding at the time. Kenilworth was in the business of developing a system of gaming terminals and computer software which would permit the use of cards in lieu of cash in gambling casinos. It owned certain proprietary information, patents and copyrights, and it was in the process of seeking out investors and marketing and developing its technology.

In June 1988, petitioner was hired as Kenilworth’s vice president in charge of marketing, public relations and investor relations. Kenilworth’s president was Herbert Lindo, founder of the corporation. His son, Jeffrey Lindo, was its executive vice-president. Petitioner’s primary responsibilities were responding to shareholder inquiries and assisting with marketing of CashTek’s cashless wagering system. Petitioner’s past experience includes teaching and management in casinos and gaming schools in New York and Las Vegas.

²The payment of \$31,282.15 relates to payments made by CashTek for withholding tax for the period January 1, 1992 through December 31, 1992. Since CashTek’s payments reduced the tax due, the penalty against petitioner was reduced in an amount equal to the tax paid. No other tax payments were made by or on behalf of CashTek after the notices of deficiency were issued to petitioner.

In February 1991, petitioner was appointed to the position of secretary of CashTek. When he was asked to accept this position, he was told that the corporation needed someone to take minutes at meetings. He also executed corporate documents that required the signature of the secretary. From its formation in 1991 until April 1993, CashTek's president, board chairman and treasurer was Herbert Lindo, with his son Jeffrey holding the office of executive vice-president.

Petitioner is listed as an officer on CashTek's Federal income tax returns for the calendar years 1991, 1992 and 1993. This includes the period covered by the Division's assessment. The returns show that petitioner drew a salary of \$50,962.00 in the 1991 tax year, of \$54,904.00 in the 1992 tax year and of \$67,019.00 in the 1993 tax year. In addition, petitioner was provided with a company car. The corporate tax returns do not show salaries paid to Harold Lindo or Jeffrey Lindo.

Petitioner is shown as an authorized signatory on a Bank of New York checking account opened on September 17, 1992, account number 500-1-073229. His title on the bank signature card is shown as vice-president. He also signed the card as secretary of CashTek. This is the earliest evidence of petitioner's name appearing on a bank signature card as an officer of CashTek. Harold Lindo and Jeffrey Lindo are also signatories on the account. Only one of the three authorized signatures was required on a corporate check. Petitioner states that he was added as a signatory to the account as a convenience to the Lindos.

Upon its formation, CashTek engaged a firm of investment bankers, Josephthal, Lyon and Ross, to obtain financing for the company. A private placement of securities brought in approximately \$6.8 million of start-up capital. Most of these funds were contributed by a group

of foreign investors who were represented by Edward Lee, a venture capitalist. Approximately \$3.8 million of these funds was used to purchase the assets of Kenilworth.

In March 1993, Herbert Lindo was convicted in Federal court of three violations of the Securities Act of 1933. He resigned his positions at CashTek, and Jeffrey Lindo became president and treasurer. Petitioner believed that Jeffrey Lindo continued to allow his father to control cash and write checks on the CashTek bank accounts after his father's resignation from the corporation, and he was dissatisfied with this arrangement.

On July 13, 1993, petitioner resigned from his positions as secretary and vice-president of CashTek. He was acting in these positions without any authority or control over corporate affairs, and, when he asked, he was denied information about the financial affairs of CashTek. In a letter to Jeffrey Lindo, he states: "My current title does not accurately reflect my duties. As per our discussion please accept my resignation as Secretary and Vice President of Marketing and Public Relations." Apparently, petitioner continued to be a signatory on the Bank of New York account.

On August 31, 1993, CashTek's Board of Directors asked petitioner to accept the position of temporary treasurer. The primary purpose for this was to have petitioner act as a safeguard by requiring his signature on all checks. In actuality, petitioner was unable to prevent Jeffrey Lindo from giving his father access to CashTek's corporate accounts.

In a letter to the Securities and Exchange Commission dated September 23, 1994, CashTek's representative, Andrew B. Weissman (a Washington D.C. attorney), explained the circumstances surrounding the firing of Harold Lindo and his son, Jeffrey Lindo. The following facts are taken primarily from that letter. In September 1993, three new directors, including

Edward Lee, joined the CashTek board. At their insistence, the accounting firm of Dalessio, Millner and Leben was engaged to audit CashTek's books and records. The audit uncovered financial improprieties and shortcomings in the finances of CashTek, and these findings were reported to the board in December 1993. After investigating the problems, the board fired Jeffrey Lindo and had him physically removed from the offices of CashTek on January 4, 1994. The board named Edward Lee as president and chairman of the board.

On January 28, 1994, the CashTek board sued the Lindos in the Supreme Court of Nassau County seeking reimbursement of over \$3 million. In its complaint, CashTek alleged: "From on or about April 15, 1993, to and including January 4, 1994, defendant Jeffrey Lindo was Treasurer of CashTek." This allegation conflicts with petitioner's own admission that he was appointed as temporary treasurer on August 31, 1993. It is, however, consistent with his testimony that he had no real authority during the period in which Harold Lindo and Jeffrey Lindo were in control of CashTek.

An article in Newsday, dated February 4, 1994, reported the lawsuit brought by CashTek against Herbert and Jeffrey Lindo. In that article, petitioner is identified as a company vice president. Information in the article concerning Edward Lee's ascension to leadership of the company is attributed to petitioner. He is not quoted in the article or identified as a spokesperson for the company.

In their answer to CashTek's complaint, the Lindos served counterclaims against CashTek. In addition, the Lindos sued each of the directors of CashTek individually, and petitioner as secretary and treasurer of CashTek, alleging that the CashTek press release was issued with malice and ill will and damaged the business reputation of the Lindos.

After the ouster of the Lindos, Edward Lee became active in raising capital for CashTek and managing the corporation. In order to raise capital, Lee traveled widely, particularly in Asia. Petitioner was asked to be a signatory on all corporate checks and to perform certain administrative functions in Lee's absence. Petitioner held the titles of vice-president, secretary and treasurer of CashTek after Lee's appointment as president.

After January 1994, petitioner's name appears on a number of financial documents. He executed a "Financing Statement" on behalf of CashTek, dated February 22, 1994, as vice-president of CashTek. A bank signature card for Bank of New York account number 6900023705 was executed on or about March 24, 1994. The authorized signatures are Edward Lee, as president of CashTek, petitioner as vice-president, secretary and treasurer of CashTek; and Larry Shluger³. All three signatures were initially required on a check, but this was changed to two signatures as of July 24, 1994. The account was closed on March 14, 1995. Petitioner is shown on a safe deposit box leasing card, dated January 28, 1994, as vice-president, secretary and treasurer of CashTek, and Edward Lee is shown as president on the same document. One signature was required for access to the safe deposit box.

In a letter to Edward Lee dated July 13, 1994, petitioner tendered his resignation as treasurer of CashTek. He states in that letter that he has never acted without the supervision and direction of management. On August 31, 1994, Edward Lee issued a memorandum to all employees stating that as of September 1, 1994 Steve Keenan would serve as executive vice-president in charge of Marketing and Sales.

³Larry Shluger was CashTek's Director of Personnel.

After petitioner's resignation as treasurer, the two Bank of New York accounts previously identified were updated to require only Edward Lee's signature on corporate checks. These updates were signed by petitioner on September 7, 1994 as secretary of CashTek. From January 1994, petitioner was aware that CashTek was unable to meet its financial obligations and was not paying over withholding taxes to the State.

In a memo to Edward Lee, dated March 29, 1994, petitioner asked Lee to provide funds with which to pay some of CashTek's obligations. The memorandum requests Lee's authorization to write a check for the employees' medical insurance and states that he and Larry Shluger are willing to write such a check only if Lee could assure that funds would be in place to cover the check. Petitioner listed other pressing obligations of CashTek including: \$20,833.33 for rent; \$15,000.00 for an unidentified individual; \$40,043.39 for the IRS; and money for a COD that was turned away because of lack of funds. Lee replied in a fax from Taiwan with a promise to have the funds in place for rent, employee insurance and salaries. In a fax to Shepard Lane, CashTek's outside counsel, petitioner reported the contents of the Lee memorandum.

In a second memo to Edward Lee, dated May 4, 1994, petitioner stated:

Regarding the bank account at The China Trust Bank you opened while I was away. The Board authorized that any bank account must have two signatures. I suggest we amend the corporate resolution you submitted to that bank to reflect the appropriate required signatures or close the account. Please advise.

Both before and after tendering his resignation as treasurer of CashTek, petitioner wrote checks payable to the Department of Taxation and Finance; corresponded with the Division regarding CashTek's outstanding tax liabilities and executed Deferred Payment Agreements on

behalf of CashTek. In a letter dated May 27, 1994, petitioner, as vice president, secretary and treasurer, acknowledged a telephone conversation about outstanding 1992 withholding tax liabilities of CashTek corporation, and he extended assurances to the Division that CashTek would pay \$1,267.62 per month until the outstanding liability was paid. Petitioner executed deferred payment agreements on June 3, 1994 and August 15, 1994. He signed corporate checks on October 17, 1994 and October 26, 1994.

CashTek's quarterly combined withholding and wage reporting returns (forms WT-4-A) for the assessment period were entered in evidence. Each return shows New York State tax withheld from gross wages, and no remittance to the State. The withholding tax owed by CashTek is based on the tax withheld per these returns. The quarterly returns for the period January 1992 through December 1992 are signed by Harold Lindo. The quarterly returns for the period January 1993 through June 1993 are signed by Jeffrey Lindo. The quarterly returns for the period July 1993 through September 1993 and October 1993 through December 1993 are signed by Edward Lee, and each is dated March 5, 1994. The quarterly returns for the period January 1994 through June 1994 are also signed by Edward Lee. There is no evidence that petitioner signed withholding tax returns, or any other tax returns, on behalf of CashTek.

A CashTek business plan published in September 1994 lists petitioner as one of four members of the CashTek "Management Team" describing him as "Vice President and Secretary of the Company with responsibilities in Marketing and Investor Relations since June 1988." The other members of the team are Edward Lee, described as CEO of the company, Stephen R. Keenan, executive vice president, and Paul Swers, "Vice-President of Product Development". The members of the board of directors are also identified in the business plan, but no one is

identified as treasurer of the corporation. CashTek's articles of incorporation, by-laws and minutes were not introduced into evidence.

In November 1994, petitioner loaned CashTek \$30,000.00 with an interest rate on the loan of 10 percent per annum. At that time, he still held the titles of vice president and secretary of CashTek. In November 1994, petitioner was repaid \$15,000.00 and in January 1995 he was repaid the balance due him.

In its December 31, 1994 filing with the Securities and Exchange Commission, CashTek reported that it had issued 86,900 shares of preferred stock and 26,010,005 shares of common stock. Petitioner owned 20,000 shares of CashTek stock, less than one-tenth of one percent of the shares outstanding.

As CashTek was in a developmental stage, it had little revenue from sales of products. It attempted to bridge the gap in capital deficiencies through short term loans from Edward Lee, petitioner and certain foreign investors. In addition, certain legal proceedings instituted by CashTek held the promise of bringing funds into the company. The suit against the Lindos asked for damages of \$4 million plus punitive damages. In addition, CashTek sued the Totalizer Agency Board (the "TAB"), a board of the government of Australia, for alleged infringements on CashTek's copyrighted gaming technology. That suit was settled on December 23, 1994. By the terms of the settlement agreement, CashTek received \$1.5 million before expenses associated with the law suit. The settlement also confirmed the TAB's license to sell gaming terminals using CashTek's technology, subject to the payment of a royalty of \$300 per terminal. In addition, CashTek was engaged in settlement negotiations with the Kenilworth bankruptcy trustee over payments allegedly owed by CashTek to the Kenilworth estate.

In a letter to Edward Lee dated January 20, 1995, petitioner urged the use of the TAB settlement funds to satisfy outstanding tax liabilities. The letter states, in relevant part:

I am aware that we recently settled with the TAB and received \$1,200,000 which is a figure that is well in excess of any taxes which we owe.

I understand that, as an officer of CashTek, it is my fiduciary responsibility to do everything in my power to insure that all taxes are paid. Therefore, I am requesting you to pay all back taxes owed before paying off any loans. I am writing this letter to you in order to go on record that I have requested that you pay all back taxes in full or, if payment terms are arranged, that at all times you should have enough money to pay those taxes in full just in case the outlook to raise additional funding becomes uncertain. You are completely in control of all operations and the CashTek funds and it is understood that I have absolutely no say as to how those funds are utilized. My signature on the CashTek Bank of New York Accounts, as well as Larry Shlугers', is only as a convenience to you and the way you operate. At no time do either of us have any say so or control outside your approval or verbal authorization.

This letter will serve to advise you that if you fail to pay any taxes which are owed to the taxing authorities, it will be understood that you have done so without my cooperation and against my insistence that you pay all taxes when due. If the taxing authorities come after me, under the assumption that I am a responsible person, I intend to use this letter to help prove that I am not a responsible person.

By letter to Edward Lee dated January 31, 1995, petitioner requested that he be removed as an authorized signatory on any CashTek bank accounts.

By letter to Edward Lee dated March 16, 1995, petitioner resigned as secretary and vice president of CashTek. He gives two reasons for his resignation: Lee's failure to satisfy back taxes and Lee's "lack of faith and support for CashTek."

In a letter to Edward Lee dated April 19, 1995, petitioner wrote to explain his reasons for terminating his relationship with CashTek. He explains that his last pay check was for the period ending March 8, 1995 and that he was laid off due to lack of funds to pay his salary as of April 6,

1995. Apparently, Lee expected petitioner to remain with CashTek as an uncompensated consultant, and petitioner refused to do so. Petitioner explained his position as follows:

The reason for my resignation was mainly due to your failure to pay the back taxes which has caused my personal life a great deal of harm. You had funds available to pay those taxes but elected to re-pay your investors instead. Now the taxing authorities are suggesting that I am personally responsible for those back taxes. You know very well that I had no control or say so as to how the funds are managed or spent for CashTek. You were the only party in control of CashTek funds and you continuously assured me that upon receipt of any financing of the TAB settlement that you would take care of the Taxing Authorities. As you know, I worked very hard and did everything in my power to help you with the settlement. Why should I have to be held accountable for something that was not under my control?

In a letter dated July 28, 1995, with the salutation "To Whom It May Concern," Larry Shluger states that petitioner did not have any control over the financial decisions of CashTek. He states that petitioner was never an executive vice-president and that matters pertaining to taxes were supervised entirely by Edward Lee or former presidents or executive vice presidents of CashTek.

CashTek had an account with Safra National Bank (account number 42470210). The funds from the TAB settlement were deposited in this account, and Edward Lee was the sole signatory on that account.

Petitioner believes that \$1 million remains in the Kenilworth estate under the control of the bankruptcy trustee. It is his belief that this money is available to satisfy any outstanding tax obligations of CashTek.

Petitioner provided an analysis of deposits in the Bank of New York account for the period September 14, 1993 through December 31, 1994 which shows total deposits of \$2,659,834.00.

This was offered as evidence that Edward Lee deposited into the Bank of New York account the bare minimum necessary to pay those items that Edward Lee decided should be paid.

CashTek filed a chapter 11 bankruptcy plan of reorganization on November 12, 1996, and an order confirming that plan was docketed in the United States Bankruptcy Court of the Southern District of New York on September 5, 1997. New York State filed a proof of claim asserting a priority claim of \$129,260.34 for taxes owed without penalties. The bankruptcy court's order directs the payment of these taxes. Petitioner made a claim for unpaid wages in the bankruptcy proceeding.

THE DETERMINATION OF THE ADMINISTRATIVE LAW JUDGE

The Administrative Law Judge examined petitioner's association with CashTek during two different periods: the period during which the Lindos were in control of the corporation (relevant tax periods from January 1, 1992 through January 4, 1994), and the period following Lindo's control (from January 7, 1994 through June 24, 1994). The Administrative Law Judge concluded that petitioner was not a person responsible for the collection and paying over of withholding taxes during the Lindo period.

The Administrative Law Judge noted that although petitioner was a vice president and secretary of the corporation and had check signing authority, he did not sign any tax returns, did not represent himself as a principal of the corporation, had no responsibility for the financial affairs of the corporation, did not hire or fire employees and had no authority to pay corporate obligations. The Administrative Law Judge stated that the amount of stock owned by petitioner was so small as to be totally insignificant. Furthermore, Harold Lindo and Jeffrey Lindo signed the withholding tax returns. Weighing these facts against the relevant standard, the

Administrative Law Judge found that petitioner was not a person required to collect and pay over withholding tax for the period January 1, 1992 through December 24, 1993.

However, the Administrative Law Judge concluded that petitioner was a person responsible for the collection and paying over of withholding taxes during the last two quarterly assessment periods ending March 25, 1994 and June 24, 1994. This conclusion was based on the Administrative Law Judge's finding that petitioner's authority within the corporation changed significantly after the ouster of Jeffrey Lindo. From that point in time, petitioner was the treasurer of CashTek, and in that position, he knew, or should have known, the details of the financial affairs of CashTek. Beginning early in January 1994, the Administrative Law Judge noted, petitioner's name frequently appeared on corporate bank documents. Petitioner signed a financing agreement on behalf of CashTek, he was given access to the corporation's safe deposit box, and he corresponded with CashTek's attorney. No corporate obligations could be paid without his signature. The Administrative Law Judge also viewed as significant the fact that petitioner executed deferred payment agreements on behalf of the corporation and signed checks payable to the Division. The Administrative Law Judge found that petitioner's status and authority within the corporation changed when Edward Lee became president. The Administrative Law Judge stated that by accepting the position of treasurer and acting on behalf of CashTek in Edward Lee's absence, petitioner accepted responsibility for CashTek's tax obligations. Although petitioner testified that he had no authority to act without Edward Lee's direction, the Administrative Law Judge found that petitioner as corporate treasurer had a responsibility to see to it that the corporation's withholding taxes were paid. The Administrative

Law Judge concluded that petitioner's failure to exercise his authority allowing Edward Lee to dictate the affairs of the corporation did not relieve him of liability.

The Administrative Law Judge also rejected as unpersuasive petitioner's assertion that his failure to pay over the withholding taxes was not willful. The Administrative Law Judge concluded that petitioner failed to demonstrate that he took any affirmative steps to ensure payment of taxes withheld during the assessment period. The Administrative Law Judge found that the evidence established that petitioner had actual knowledge that withholding taxes were not paid when due, and that he took no steps to insure the timely payment of withholding taxes during the assessment period. The Administrative Law Judge noted that none of petitioner's requests that withholding taxes be paid were made until after the assessment period and after petitioner had resigned as treasurer of the corporation.

The Administrative Law Judge also rejected petitioner's argument that the Division should seek to collect the tax due from CashTek or the Kenilworth estate before asserting penalties against him is without merit. The Administrative Law Judge pointed out that the liability imposed under Tax Law § 685(g) is neither derivative nor secondary to the employer's liability (*Matter of Yellin v. New York State Tax Commn.*, 81 AD2d 196, 440 NYS2d 382).

Thus, the Administrative Law Judge cancelled the notices of deficiency issued to petitioner for the period January 1, 1992 through December 24, 1993, but sustained the notices of deficiency issued to petitioner for the period January 7, 1994 through June 24, 1994.⁴

⁴Notice of determination Nos. L-010143097-1 (DTA No. 815718) and L-010143098-8 (DTA No. 815719) were sustained by the Administrative Law Judge.

ARGUMENTS ON EXCEPTION

Regarding the period during which he served as treasurer of CashTek, August 1993 through July 1994, petitioner contends, as he did below, that he had no authority over any employees and did not exercise control over the fiscal matters of the corporation. He claims that the fiscal affairs of the corporation were completely under the control of the president and executive vice-president of the corporation, Edward Lee and Stephen R. Keenan.

In opposition, the Division argues that the Administrative Law Judge properly determined that petitioner was a responsible person pursuant to Tax Law § 685(n). The Division asserts that petitioner cannot escape liability by merely shifting the blame to someone else. The Division states that petitioner failed to present any evidence to demonstrate that he was precluded from acting.

Moreover, the Division agrees with the Administrative Law Judge's conclusion that petitioner's conduct with respect to his withholding tax obligations was willful pursuant to Tax Law § 685(g). Thus, the Division respectfully requests that the determination of the Administrative Law Judge be sustained.

OPINION

We affirm the determination of the Administrative Law Judge. After a thorough review of the evidence and arguments presented, we can find no basis to modify the determination of the Administrative Law Judge in any respect.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of Mitchell G. Menik is denied;
2. The determination of the Administrative Law Judge is affirmed;

3. The petition of Mitchell G. Menik is granted to the extent that he is not liable for penalties under Tax Law § 685(g) for the periods January 1, 1992 through December 24, 1993, but is otherwise denied; and

4. The notices of deficiency, L-010143095-2, L-010143096-1, L-010143099-7, L-010143100-8, and L-010143101-7 are cancelled, but notices of deficiency L-010143097-9 and L-010143098-8 are sustained.

DATED: Troy, New York
July 1, 1999

/s/Donald C. DeWitt

Donald C. DeWitt
President

/s/Carroll R. Jenkins

Carroll R. Jenkins
Commissioner

/s/Joseph W. Pinto, Jr.

Joseph W. Pinto, Jr.
Commissioner