STATE OF NEW YORK

TAX APPEALS TRIBUNAL

In the Matter of the Petition	:	
of	:	
ARTHUR WENDEL	:	DECISION DTA NO. 816152
for Redetermination of a Deficiency or for Refund of Personal Income Tax under Article 22 of the Tax Law for the Year 1990 and 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 December 1, 1989 through November 30, 1990.	:	

Petitioner Arthur Wendel, 230 Hamlet Drive, Jericho, New York 11753, filed an exception to the determination of the Administrative Law Judge issued on April 22, 1999. Petitioner appeared by the Law Offices of Wallace Musoff (Wallace Musoff, Esq. and Michael J. Coyle, Esq., of counsel). The Division of Taxation appeared by Terrence M. Boyle, Esq. (Herbert M. Friedman, Jr., Esq., of counsel).

Petitioner filed a brief in support of his exception. The Division of Taxation filed a brief in opposition. Oral argument was not requested.

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

ISSUES

I. Whether petitioner was a person required to collect, truthfully account for and pay over withholding tax with respect to an entity known as MAG Investigation and Security Corp., who

willfully failed to do so, thus, becoming liable for a penalty equal to such unpaid tax under section 685(g) of the Tax Law.

II. Whether petitioner had sufficient involvement in and control over the activities of MAG Investigation and Security Corp. so as to be considered a person responsible to collect and remit sales tax on behalf of such corporation pursuant to Tax Law §§ 1131(1) and 1133(a).

III. Whether petitioner has established that penalty imposed for the untimely payment of sales tax by MAG Investigation and Security Corp. should be abated.

FINDINGS OF FACT

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

In or about January 1976, a domestic corporation known as MAG Investigation and Security Corp. ("MAG") was formed. MAG's initial shareholders and officers were Charles T. Grossberger, who died on April 3, 1996, and his son Kenneth J. Grossberger. MAG was a licensed investigation and security firm whose principal business involved providing investigative services and providing protective security guards for payroll deliveries, retail stores, cooperatives and other buildings. Charles Grossberger and Kenneth Grossberger held the required licenses without which MAG could not legally have conducted its business. Kenneth Grossberger was the full-time salaried president of MAG from 1985 until it ceased doing business in November 1990.

In late 1977, petitioner, Arthur Wendel, his brother H.B. Wendel, and Ralph Larkin joined MAG. Petitioner had been involved in various businesses for a number of years and, in addition to providing capital to MAG, could also provide general business advice as well as specific

advice on labor relations matters. Several MAG shareholders' agreements were entered into, including agreements dated August 2, 1977 and November 4, 1981, and an amendment dated August 24, 1982. While these agreements are not in evidence, the last MAG shareholders' agreement, dated August 17, 1984, is in evidence. This agreement indicates that MAG had a total of 180 issued and outstanding shares of stock which were held by five shareholders, to wit: Charles Grossberger and Kenneth Grossberger, each owning 45 shares of stock, and Arthur Wendel, H.B. Wendel, and Ralph Larkin, each owning 30 shares of stock.

The August 17, 1984 shareholders' agreement, which was in effect during the periods at issue in this proceeding, specified the members of MAG's board of directors and MAG's corporate officers, and detailed the authority and powers given to the directors, officers and shareholders of MAG. The directors of MAG were Charles Grossberger, Kenneth Grossberger, Arthur Wendel and H.B. Wendel, and these individuals held the corporate offices of president, vice-president and secretary, vice-president and treasurer, and vice-president, respectively. The agreement provided that these individuals would vote during the period of the agreement so as to insure that they would remain as MAG's directors and continue to be elected to hold the same corporate officer titles. The agreement provided that three-quarters of the directors constituted a quorum of the board, and that a vote of three-quarters of the directors was necessary in order to transact any business. Similarly, the agreement provided that three-quarters of the shareholders constituted a quorum for purposes of shareholders' meetings and that a vote of three-quarters of all outstanding shares was required for a valid shareholders' vote, except to elect a director or to remove a director, which events required the unanimous vote of all shareholders.

Paragraph "1-d" of the Shareholders' Agreement specified that two signatures would be required on all of MAG's notes, checks, drafts, agreements and certificates of stock, with one of such signatures being that of either Arthur Wendel or H.B. Wendel and the other such signature being that of either Kenneth Grossberger or Charles Grossberger. Paragraph "2" of the Agreement provided that any of the stockholders could be employed by MAG, that Charles Grossberger and Kenneth Grossberger were to "devote their best efforts to the affairs of [MAG]," and that any of the stockholders could engage in any other business of any kind and nature except that they could not compete with MAG or with its business. Paragraph "4" of the Agreement provided that the shareholders were divided into two groups for purposes of transferring stock, or purchasing stock upon the death of a stockholder, with Group A consisting of Charles Grossberger and Kenneth Grossberger and Group B consisting of Arthur Wendel, H.B. Wendel and Ralph Larkin. Ensuing paragraphs specified in detail how shares of MAG stock could be transferred or purchased upon the death of a stockholder. Paragraph 17 of the Agreement provided that MAG was to keep full and accurate books and records and that each of the stockholders was entitled to have access to such records without limitation for inspection and copying.

Kenneth Grossberger and Charles Grossberger were most directly involved in carrying out the daily operation of MAG's business of providing security and investigations. Petitioner was not employed by MAG, did not receive a salary from MAG, and did not have a separate office at, or report to, MAG's offices on a daily or other set basis. Rather, petitioner stated that his other businesses, which included a building maintenance business, took up most of his time. Petitioner was described as involved in providing general business advice to MAG directed toward sales,

business growth, marketing, "client relations," "troubleshooting in the field" and union and other labor issues involving MAG's security employees. Petitioner's visits to MAG's offices were described as "a couple of times per month" to discuss the "state of the business."

MAG's board of directors met informally to discuss business matters, sometimes over lunches or when petitioner and his brother H.B. Wendel would visit MAG's offices. MAG employed an office manager and a bookkeeper, and engaged an accountant to periodically review its books and to assist in the preparation of financial statements. Payroll duties were generally handled by MAG's office manager or bookkeeper.

The two-signature requirement noted above was put in place when petitioner's group first invested in MAG and became stockholders. This provision was instituted for the general protection of the two described groups of stockholders. In practice, in order to comply with this two-signature requirement in the Shareholders' Agreement, rubber stamps bearing facsimile signatures of petitioner, and of his brother H.B. Wendel, were created to be used such that payroll and other checks could be issued as frequently as was needed notwithstanding the absence of one of the required signing parties from MAG's offices. Petitioner authorized the use of his signature stamp in this fashion, although he was not in fact advised of each particular instance when his signature stamp was used.

MAG's tax returns would be prepared by its office manager or bookkeeper and submitted to either Kenneth Grossberger or Charles Grossberger for signature. Petitioner undertook no responsibility for reviewing or signing MAG's payroll or its tax returns, nor did petitioner undertake to review the books and records of MAG. Petitioner never exercised any authority to hire or fire any of MAG's employees.

According to petitioner, and to deposition testimony provided by Kenneth Grossberger, petitioner and his group were brought into MAG's business as investors while Kenneth Grossberger and Charles Grossberger were to handle the actual operation of MAG's business. In this regard, petitioner testified as follows:

> It was always the intent of the shareholders that Charles and Kenneth Grossberger would be the actual operators of the entire business and we would be strictly on the basis of helping to finance things and also to help them with any labor problems they had, because we had some experience in that field.

Sometime during 1989 MAG came to have financial difficulties, including problems in meeting its sales tax and withholding tax obligations, as a result of slowed collections on its accounts receivable. MAG's board of directors, including petitioner, discussed these problems. Petitioner lent, or contributed, money to MAG at various times when "collections were slow," and he noted that he was repaid in some although not all instances. Petitioner specified that he received nothing back on his investment in MAG from 1985 through 1990 when MAG ceased operations. His return on his investments in MAG between 1977 and 1985, if any, was not specified in the record. Similarly, the actual amounts of petitioner's investments in or loans to MAG are not detailed.

The Division of Taxation ("Division") determined that certain sales and withholding taxes had not been remitted by MAG during 1990. As a result, the Division issued the following notices to petitioner:

Notice Number	Tax Year or Period	Type of Tax	Amount [1]
L-007031189-8	Year ended 12/31/90	Withholding	$3,644.28
L-007031160-8	Quarter ended 05/31/90	Sales	$5,002.12
L-007031161-7	Quarter ended 11/30/90	Sales	$9,353.11
L-007031162-6	Quarter ended 02/28/90	Sales	$5,665.20
L-007031163-5	Quarter ended 08/31/90	Sales	$4,218.56

Each of the above described sales tax notices of determination issued to petitioner is dated February 16, 1993 on its face, explains that each such notice was issued to petitioner as an officer or person responsible for taxes owed by MAG, and specifies that "[petitioner] must file the Request for Conciliation Conference or a Petition For A Tax Appeals Hearing by 05/17/93."

According to the Division, petitioner failed to file a petition or a request for a conciliation conference within the 90-day period allowed therefor, and that the notices matured to assessments subject to collection. In the case of the sales tax assessments, petitioner's account at the Green Point Savings Bank was levied upon on April 16, 1996 in the amount of $51,153.25, representing the $24,238.99 aggregate amount of MAG's unpaid sales tax for the quarterly periods in issue, plus penalty and interest accrued thereon until the date of the payment by levy. In the case of withholding tax, petitioner paid the sum of $4,858.17 by a check dated May 2, 1996, representing the $3,644.28 amount of the penalty equal to MAG's unpaid withholding tax for the year 1990, plus interest accrued thereon until the date of such payment.

Petitioner filed an Application for Refund of Employer's Withholding Tax, seeking a refund of the $4,858.17 amount of withholding tax penalty and interest paid, and an Application

[1]The amount column lists the penalty equal to the amount of unpaid withholding tax for the year 1990 and the amounts of unpaid sales tax for each of the noted sales tax quarterly periods. These listed amounts are exclusive of the amount of interest on the withholding tax penalty, and the amounts of penalty and interest on the unpaid sales tax amounts, which accrued until the dates of payment thereof (***compare*** below which specifies the total amounts paid by petitioner).

for Credit or Refund, seeking a refund of the $51,153.25 amount of sales tax, penalty and interest paid plus interest thereon. Each of these refund applications is dated October 9, 1996, and each included a nearly identical attached statement in support of the refund claims providing, in relevant part, as follows:

> On June 17, 1993 a protest was filed (attached hereto). Although no response denying the protest was issued, collection was enforced . . . .
>
> The assessment and collection against the taxpayer of the liability involved was made upon the erroneous basis that the taxpayer was a responsible person for the tax obligations of Mag Investigation & Security Corp., 280 Degraw St., Brooklyn, N.Y. 11231, ID # 13-2848065, when the taxpayer was only a minority shareholder of the corporation and was not permitted to exercise discretion with respect to whom corporate disbursements should be made or in what amount.
>
> The same issue was raised by the Internal Revenue Service, which agency, after investigation, determined that the taxpayer was not a responsible person of the corporation (IRS letter attached).

The June 17, 1993 protest referred to in the statements attached to petitioner's refund claims appears to be a June 17, 1993 letter to the Division under the letterhead of petitioner's former representative. This letter refers to the underlying notices at issue in this proceeding according to their specific notice numbers and respective periods at issue, and explains that the IRS had ultimately determined that petitioner was not responsible for MAG's federal tax obligations. It is noteworthy that this letter specifically protests "the 'attached notice and demand

for payment of tax due,'" as opposed to the sales tax notices of determination or withholding tax notice. [2]

The Division denied petitioner's refund claims in full, as set forth in letters dated December 6, 1996 and February 21, 1997. Petitioner, in turn, commenced these proceedings by filing a timely petition challenging the denial of the refund claims and asserting that he was not a person responsible for the collection and remittance of either sales or withholding taxes on behalf of MAG.

In addition to the substantive issue of whether petitioner should be held responsible for the tax, penalties and interest at issue herein, the Division also amended its answer at the commencement of the hearing to raise the issue of whether Tax Law § 1139 (former [c]) poses a bar to reaching the substantive merits of petitioner's claim for refund of sales tax paid. More specifically, the Division argues that in this case petitioner failed to file either a petition or a request for a conciliation conference challenging the sales tax notices of determination within 90 days after the February 16, 1993 date on the face of such notices. Accordingly, the Division maintains that such notices thus became fixed and final assessments subject to collection after 90 days from February 16, 1993, that the Division properly collected on the same by bank account levy on April 16, 1996 as described, and that petitioner was barred from filing a claim for refund of such levied amount pursuant to Tax Law § 1139 (former [c]). The Division notes that petitioner's only reference to a protest is to the June 17, 1993 letter from his former representative protesting certain notices and demands and that such protest letter is not timely

[2]The record does not include the Notice and Demand for Payment of Tax Due referred to as "attached" to the June 17, 1993 letter.

since its date falls more than 90 days after the February 16, 1993 date of the notices of determination. The Division goes on to point out that the language of Tax Law § 1139 (former [c]) specifically precludes entitlement to a refund where, under the circumstances alleged here, a taxpayer has failed to timely challenge a sales tax notice of determination. Accordingly, the Division argues that there is a statutory bar to addressing the merits of petitioner's sales tax refund claim.

Petitioner, in response, argues that he has not exhausted his administrative remedies, that it would be inequitable to allow the requested amendment to the pleadings to afford the Division an opportunity to raise this timeliness issue at the last moment given that petitioner has been under the belief that his protest (the petition) would be heard on the merits, and that in any event the statute provides for discretion to hear and decide the matter notwithstanding the lateness of any protest.

THE DETERMINATION OF THE ADMINISTRATIVE LAW JUDGE

The Administrative Law Judge first addressed the issue of whether petitioner's refund claim was barred by Tax Law § 1138 (former [a][1]) and Tax Law § 1139 (former [c]), which sections provided that if a notice of determination was not petitioned within 90 days, the determination "shall finally and irrevocably fix the tax" and that once fixed and final, petitioner was no longer entitled to a refund. The Administrative Law Judge reasoned that the Division could only prevail on its argument that the Division of Tax Appeals lacked jurisdiction to hear this case if it could establish that the notices giving rise to the assessments had been properly issued thereby establishing the commencement date for the 90-day protest period provided by Tax Law §1138(a)(1). Since the Division did not establish the fact or date of mailing the notices,

the time within which a protest should have been filed was likewise not established, and the Division's contention that the Division of Tax Appeals lacks jurisdiction to hear the sales tax portion of this matter was rejected.

The Administrative Law Judge then focused on the issue of whether petitioner was a person liable for the unpaid sales and use taxes and withholding taxes due from MAG. After noting the statutory sections in Article 28 of the Tax Law pertinent to this inquiry, i.e., Tax Law §§ 1133(a) and 1131(1), and Article 22 of the Tax Law, i.e., Tax Law § 685(g) and (n), and the similarity between them, the Administrative Law Judge considered the individual factors presented in this case which impacted on petitioner's liability (***Matter of Cohen v. State Tax Commn.***, 128 AD2d 1022, 513 NYS2d 564). Of particular importance to the Administrative Law Judge was whether petitioner had or could have had sufficient authority and control over the affairs of the business to be considered an officer (***Matter of Constantino***, Tax Appeals Tribunal, September 27, 1990). For purposes of the withholding tax, it was also considered important to determine if the failure to pay the tax was willful - whether the person was under a duty to collect and pay over the tax and whether the person disregarded his duty by delegating it.

The Administrative Law Judge found that petitioner was responsible for the sales and withholding tax obligations of MAG and rejected his contention that he was merely a passive investor. Of particular importance to the Administrative Law Judge were petitioner's shareholder status, position as an officer, director and business advisor and bank account signatory. In addition he attended frequent meetings with the board of directors and was well aware of the business's financial difficulties and the decision not to pay taxes. In addition, petitioner advised the company on labor issues, loaned or contributed money when needed and

was unfettered in his ability to inspect the books and records of the business. Finally, the shareholder agreement provided that petitioner and two other shareholders would be protected by a two-signature requirement on each check. All of these factors convinced the Administrative Law Judge that petitioner was responsible for the collection of sales and withholding taxes.

Although petitioner argued to the Administrative Law Judge that he was merely a passive investor, the facts belied such a conclusion. Petitioner contended that the other shareholders who ran the day-to-day operations should be liable, but this was rejected because the law provides for joint and several liability (***Matter of Phillips***, Tax Appeals Tribunal, May 11, 1995; ***see also,*** Tax Law §§ 685[g] and 1133[a]). Also rejected was petitioner's argument that the Internal Revenue Service had concluded that he was not responsible for unpaid Federal withholding taxes, since that case is not binding in this proceeding (***Matter of Volpe***, Tax Appeals Tribunal, September 15, 1988).

ARGUMENTS ON EXCEPTION

On exception, petitioner contends that he was not a responsible person as a matter of law or fact for either the sales or withholding taxes. Petitioner argues that he was merely an investor and had no effective control over the financial affairs of MAG. In addition, petitioner believes it is persuasive that he never received any remuneration from MAG or signed or filed any tax returns. Petitioner relies on the case of ***Matter of Risoli v. Commissioner of Taxation & Fin.*** (237 AD2d 675, 654 NYS2d 218) and the factors cited therein to dispute his status as a responsible person. In addition, petitioner relies on the determination of the Internal Revenue Service that he was not a person liable for the collection and payment of Federal withholding taxes as compelling evidence that he was not a responsible person.

Petitioner noted the similarity of the criteria under Tax Law § 685 and Internal Revenue Code § 6672 and the fact that the most persuasive factor of a responsible person is the person's control over the enterprises' finances. Petitioner reasons that if the Internal Revenue Service, using the same standard and applying them to the same facts, found petitioner not to be liable for the taxes, then the Division should reach the same conclusion.

The Division echoes the reasoning of the Administrative Law Judge. It contends that the statutes and case law, when applied to the facts of this matter, fully support the determination of the Administrative Law Judge with regard to both the sales and withholding taxes.

OPINION

We affirm the determination of the Administrative Law Judge for the reasons set forth therein. The Administrative Law Judge properly analyzed the pertinent statutes and relevant case law and petitioner has not provided us with any reason to modify the determination in any respect.

Petitioner was unsuccessful in his attempt to distinquish his facts from those in ***Matter of Risoli*** (***supra***). There the Appellate Division confirmed the decision of the Tribunal which held that Risoli, even though not an officer, not involved in the day-to-day operation and management of the business and not remunerated by the business, was responsible for the collection of withholding taxes. The Court found persuasive that Risoli had check-signing authority (exercised only on occasion), was a one-third shareholder and tried to resolve the corporation's financial problems. Risoli's delegation of his duties did not shield him from liability or change the Court's finding that his failure to pay the tax was "willful." These facts are virtually identical to the instant matter and the same reasoning employed by the Appellate Division in ***Risoli*** and

the Administrative Law Judge below persuades us to agree with the Administrative Law Judge's conclusion regarding petitioner's liability for the withholding taxes.

Also, we reject petitioner's argument that he should not be liable for the withholding taxes as a person responsible for those taxes because the Internal Revenue Service did not find him liable for withholding taxes under Internal Revenue Code § 6672, a section very similar to the New York provision found in Tax Law § 685(g). The failure in petitioner's argument is that a finding of responsibility under both sections turns on the individual facts of the case and we believe that the facts of the instant matter support the finding that petitioner was responsible, as more fully discussed by the Administrative Law Judge. We are not privy to the analysis of the Internal Revenue Service regarding petitioner's liability for the taxes in the years in issue (since the only information submitted on this topic was a one-page letter from the Internal Revenue Service attached to his petition) and, therefore, cannot be bound by its conclusions. What we do know is that in circumstances very similar to those herein (where a petitioner's signature was required on checks; where the petitioner was the secretary-treasurer of the corporation; where the petitioner has a significant interest in the corporation; and where the petitioner knew of the financial and tax difficulties of the business), Internal Revenue Code § 6672 has been construed to find such a person liable for withholding taxes (***see***, ***Ruth v. United States***, 823 F2d 1091, 87-2 USTC ¶ 9408). Without more information on the Federal matter, it cannot and should not be accorded significant weight.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of Arthur Wendel is denied;

2. The determination of the Administrative Law Judge is sustained;

3. The petition of Arthur Wendel is denied; and

4. The Division of Taxation's denials of petitioner's claims for refund, dated December 6, 1996 and February 21, 1997, are sustained.

DATED: Troy, New York
February 3, 2000

/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