

STATE OF NEW YORK

TAX APPEALS TRIBUNAL

In the Matter of the Petition	:	
of	:	
ROGER FRENETTE	:	DECISION
	:	DTA NO. 816715
for Redetermination of a Deficiency or for Refund of	:	
Personal Income Tax under Article 22 of the Tax Law	:	
for the Period April 1994 through June 1995.	:	

Petitioner Roger Frenette, 4 Darien Place, East Northport, New York 11731, filed an exception to the determination of the Administrative Law Judge issued on June 22, 2000. Petitioner appeared by Stephen P. Silberling, Esq. The Division of Taxation appeared by Barbara G. Billet, Esq. (Margaret T. Neri, Esq., of counsel).

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

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 Classic Carpentry, Inc.

FINDINGS OF FACT

We find the facts as determined by the Administrative Law Judge and make additional findings of fact. The Administrative Law Judge’s finding of fact and the additional findings of fact are set forth below.

On October 14, 1997 the Division of Taxation (“Division”) issued to petitioner, Roger Frenette, five notices of deficiency¹ as follows:

<i>Notice Number</i>	<i>For Tax Periods</i>	<i>Penalty Assessed</i>
L-014224899	April 28, 1994 through June 30, 1994	\$15,101.69
L-014224903	July 7, 1994 through September 29, 1994	\$35,157.83
L-014224900	October 6, 1994 through December 29, 1994	\$21,790.86
L-014224902	January 1, 1995 through March 30, 1995	\$20,333.89
L-014224901	April 6, 1995 through June 29, 1995	\$13,794.47

Each notice stated that it was issued to petitioner pursuant to Tax Law § 685(g) as a responsible person or officer of Classic Carpentry, Inc. (“Classic”) “for a penalty in an amount equal to the tax not paid by” Classic. The taxes not paid by Classic were withholding taxes due pursuant to Tax Law §§ 674 and 675.

Testifying on behalf of petitioner at the hearing were Victoria Irene Kirschberg, a bookkeeper for Northwest Associates, Inc. (“Northwest”) from 1988 or 1989 until December of 1995; Anthony Mariani, the office manager of Northwest from the latter part of 1991 until April or May of 1996; Edward Ferris, a foreman and general foreman for Northwest from

¹A sixth notice of deficiency, notice number L-014224904, was also listed on the petition filed in this matter. The Division explained at the hearing that this notice had been canceled and was therefore no longer at issue in these proceedings.

approximately September of 1991 until the end of 1995 or beginning of 1996; and, petitioner himself.

Classic was a construction company operating in metropolitan New York and Long Island. It was formed in 1994 by Ken and Frank Stubbolo, two brothers who were also principals in Northwest. Northwest was not a union company and required a union company to complete construction contracts. The Stubbolos had previously operated a union company called Interborough. Interborough apparently ceased operations due to tax problems, problems with the unions and problems with other creditors. The Stubbolos approached petitioner and asked if he would be an officer of the new company, "Classic." Petitioner had worked for Northwest and for Interborough prior to becoming an officer of Classic. He knew the Stubbolos had problems with the unions, including financial problems such as failure to pay union benefits, and that they could not form Classic using their own names. Petitioner on the other hand had good relationships with the unions and knew that would be of help in operating the new company. Petitioner wanted Northwest to stay in business so that the union members could keep their jobs. Petitioner agreed to be an officer of Classic at the Stubbolos' request.

Classic employed only persons who actually worked on the construction jobs. It had no office employees, or even an office of its own. Classic utilized Northwest's office at 47 Mall Drive in Commack, together with a telephone answering service that was maintained in Classic's name and a mail service. With the exception of petitioner, Northwest's office personnel handled the administrative duties of Classic. Northwest's personnel would call for messages and would pick up the mail for Classic.

Petitioner was the only signatory listed on Classic's bank account. Petitioner was listed as the president of Classic on the account signature authorization card.

Petitioner would come to Northwest's office approximately once or twice a week. He would sign the payroll checks and certain checks for small expense items and union expenses. At least some of the checks signed by petitioner were blank checks.

Classic's payroll was completed by Paypro, an outside paid payroll service. Approximately once a week the payroll would arrive at Northwest's office after having been prepared by Paypro. Ms. Kirschberg or Mr. Mariani would review the Paypro documents. The payroll checks would then be left on petitioner's desk located in Northwest's office and he would come to the office and sign them. Included in these checks were checks for Federal and State withholding taxes.

Upon signing the payroll checks petitioner would give them to Ms. Kirschberg or Mr. Mariani who in turn would provide them to the Stubbolos. Ms. Kirschberg recalls seeing the checks on Frank and Ken Stubbolo's desks after they were signed. She was aware that the checks for Federal and State withholding taxes were never cashed because she reconciled the bank statements.

At some point prior to June 1995, Ms. Kirschberg told Mr. Ferris that there was a problem with the payment of taxes. Mr. Ferris, being a friend of petitioner's, informed petitioner as to what Ms. Kirschberg had told him. Ms. Kirschberg did not want to tell petitioner directly as she had been instructed by the Stubbolos not to provide financial information to petitioner. Also, during this time period petitioner received a notification from the Internal Revenue Service ("IRS") that withholding taxes for Classic had not been paid. Once aware that withholding taxes

were not paid, petitioner refused to sign any more checks for Classic. Classic ceased operations soon thereafter.

Petitioner provided certain documentation to the IRS to show that he was not responsible for the Federal withholding taxes of Classic, including affidavits submitted in this matter from Ms. Kirschberg, Mr. Mariani and Mr. Ferris. Petitioner received notification from the IRS that it would not take further action regarding the matters he appealed. There is no specific holding in this communication as to the reason why no further action would be taken and no statement that the IRS had found petitioner not to be responsible for the withholding taxes of Classic.

Petitioner's main function in his employment with the Stubbolos appears to have been as a job superintendent whose duties involved supervising construction jobs. Petitioner did not hire or fire employees.

Petitioner's wages for the calendar year 1994, as evidenced by his W-2 forms, were \$22,429.54 from Interboro Interiors, Inc. and \$12,467.70 from Classic.

At some point during the audit period petitioner became aware that there were some financial problems with Classic because he heard employees discussing that their paychecks from Classic had been returned for insufficient funds.

Petitioner never asked to see the bank statements or any other financial information regarding Classic.

After the hearing petitioner submitted into evidence the affidavit of Jeffrey Lubert. Petitioner was allowed time to submit this affidavit because he had not seen the tax returns submitted into evidence by the Division prior to the hearing, and petitioner testified that the signature on those returns was not his. Mr. Lubert is a forensic document examiner and diplomat

of the American Board of Forensic Document Examiners. He has a Masters of Forensic Science from George Washington University. He currently holds the title of Forensic Scientist II (Questioned Document) in the Suffolk County Crime Laboratory where he has been employed since 1984. From 1980 to 1984 he was a Staff Document Examiner - Forensic Scientist II for the Illinois State Police Crime Lab. Based on these qualifications Mr. Luber is qualified as an expert witness in forensic document examination. Mr. Luber compared known examples of petitioner's signature, such as that on his passport, with certain State and Federal tax returns and a GMAC Lease Statement (a total of 13 documents). It was Mr. Luber's opinion that five of the documents examined were not signed by petitioner,² and that while poor photocopy quality precluded a definitive comparison on the other eight documents, numerous discrepancies were still noted between petitioner's signature and the signatures on the eight comparison documents. Furthermore, Mr. Luber concluded that it appeared all of the comparison documents were signed by the same person, with the exception of one signature on the GMAC Lease Statement,³ which he could not conclusively say was signed by the same person.

The GMAC lease Statement was not signed by petitioner. The signature was forged.

Petitioner did not sign tax returns on behalf of Classic. The signatures on the tax returns submitted into evidence by the Division were forgeries.

We find the following additional facts.

Petitioner never attended high school, owned his own business or ran a company. He never made a capital contribution to Classic

²Those five documents were the GMAC Lease Statement, the Division's form CT-5 dated March 15, 1995, and three IRS forms 941 dated July 29, 1994, October 31, 1994 and January 31, 1995.

³There were three separate signatures on this document.

Carpentry, and received no benefits beyond his wages for superintendent duties. Petitioner did not sign contracts or loans on behalf of Classic, never reviewed the mail, did not negotiate with the carpenters' union, did not sign pension documents or execute lines of credit, did not submit bids and did not have day-to-day management duties. He was taken by one of the principals (Frank Stubbolo) of his employer, Northwest Associates, to North Fork Bank, where he was instructed to sign a signature card which had his name typed below the space for the signature of the president.

Petitioner allowed his name and reputation with the union to be used by his employers to enhance their relationship with the carpenters' union. He had an interest in seeing the "union" company succeed because many of his friends worked for Classic.

THE DETERMINATION OF THE ADMINISTRATIVE LAW JUDGE

The Administrative Law Judge determined that the issue of whether petitioner was liable for the penalties provided for in Tax Law § 685(g) turns on the facts of the matter, as supported by a wealth of case law. The Administrative Law Judge made specific conclusions as to the credibility of petitioner and the witness testifying on his behalf, finding that all were credible and that the witnesses had nothing to gain by their testimony. In addition, the Administrative Law Judge concluded that petitioner did not have a financial interest in the company, did not hire and fire employees and did not sign the tax returns submitted into evidence and that his name had been forged on said instruments.

However, the Administrative Law Judge concluded that petitioner was a person responsible for the collection and remittance of withholding taxes pursuant to Tax Law § 685(n), based on his authority to sign checks on behalf of the corporation as evidenced by his name and signature on a bank signature card and his title thereon listed as "president," the receipt of wage income from Classic for the year 1994, and his act of signing payroll checks and checks for other

expenses. The Administrative Law Judge also determined that petitioner's actions constituted "more than accidental nonpayment" and, therefore, were willful. The Administrative Law Judge opined that petitioner had failed to concern himself with whether or not the taxes were being paid and allowed himself to be used by the true owners of the business— individuals he knew or should have known were not trustworthy. The Administrative Law Judge also noted that even though other employees were under strict and explicit orders not to divulge financial information to petitioner, his failure to actually make the request for information rendered this directive irrelevant.

Finally, even though petitioner indicated that the Internal Revenue Service did not hold him liable for withholding taxes, the Administrative Law Judge determined that lack of any evidence to demonstrate that the Federal action was based on whether petitioner was a responsible person or that his conduct was willful was unpersuasive. Further, the Division is not bound to follow a Federal finding even if one has been made.

ARGUMENTS ON EXCEPTION

Petitioner argues that the Administrative Law Judge erred in finding that he was a responsible person as that term is defined in Tax Law § 685(n), noting that the Administrative Law Judge found that his testimony and that of his witness were credible; that he did not hire and fire employees; that he had no financial interest in the company; that he signed no tax returns; that he did not have the authority to pay the corporations other obligations; and that, although wage statements indicate he was paid by Classic, he never signed a payroll check to himself and there was no listing of a check payable to him in the list of checks. Petitioner relies on a former Tax Commission case, *Matter of Vose* (TSB-H-85[84]I), for support of his argument that where

a controlling party in a corporation uses an individual as a “front man,” such individual should not be held to be a person required to collect, truthfully account for and pay withholding taxes within the meaning and intent of Tax Law § 685(g) and (n).

Petitioner also contends that his failure to collect the tax was not “willful” as that term is defined in Tax Law § 685(g). Petitioner claims that he was deceived by the principals of the business and believed he had paid the taxes due, having signed checks for their payment.

Petitioner cites *Matter of Gallo* (Tax Appeals Tribunal, September 9, 1988), in support of his position that where an individual had no knowledge of the failure to pay the withholding taxes there could not be a finding that the act was voluntarily or consciously done. Any deceit by the principals in hiding non-payment of the tax also insulates petitioner from liability, as it did Mr. Gallo.

Finally, petitioner argues that New York has adopted the Federal standard of “willfulness” and Federal case law amply supports petitioner’s contention that he did not willfully fail to collect, truthfully account for and pay the withholding taxes.

The Division argues that petitioner is a person responsible for the collection, truthful accounting and payment of withholding taxes, citing his status as an officer, his remuneration from the corporation, his status as a signatory on the checking account and his agreement with the principals which allowed his name to be used to operate the company. The Division contends that petitioner knew the principals and their past difficulties and, therefore, was not manipulated or duped by them and submitted no evidence of same.

The Division also argues that petitioner’s failure to collect and pay the withholding taxes was willful in that he recklessly disregarded his duty by not taking steps to insure that the taxes

were being paid. The Division believes that petitioner knew that the principals had a checkered past and that on occasion there were insufficient funds to pay the employees, yet he chose not to exercise his authority and permitted others to dictate the affairs of the corporation.

OPINION

Tax Law § 685(g) provides:

[w]illful failure to collect and pay over tax.--Any person required to collect, truthfully account for, and pay over the tax imposed by this article who willfully fails to collect such tax or truthfully account for and pay over such tax or willfully attempts in any manner to evade or defeat the tax or the payment thereof, shall, in addition to other penalties provided by law, be liable to a penalty equal to the total amount of the tax evaded, or not collected, or not accounted for and paid over.

Tax Law § 685(n) makes the following "persons" subject to the section 685(g) penalty:

an individual, corporation, partnership or limited liability company or an officer or employee of any corporation (including a dissolved corporation), or a member or employee of any partnership, or a member, manager or employee of a limited liability company, who as such officer, employee, manager or member is under a duty to perform the act in respect of which the violation occurs.

In *Matter of Levin v. Gallman* (42 NY2d 32, 396 NYS2d 623), the Court stated that the test for willfulness is:

whether the act, default, or conduct is consciously and voluntarily done with knowledge that as a result, trust funds belonging to the Government will not be paid over but will be used for other purposes No showing of intent to deprive the Government of its money is necessary but only something more than accidental non-payment is required (*Matter of Levin v. Gallman, supra*, 396 NYS2d, at 624-625).

The Tax Appeals Tribunal noted in *Matter of Gallo (supra)* that:

a responsible officer's failure can be willful, notwithstanding his lack of actual knowledge, if it is determined the officer recklessly disregarded his corporate responsibilities including the responsibility to see that taxes were paid (*Matter of Gallo, supra, citing Matter of Capoccia v. State Tax Commn*, 105 AD2d 528, 481 NYS2d 476; *Matter of Ragonesi v. State Tax Commn.*, 88 AD2d 707, 451 NYS2d 301).

With regard to the issue of whether petitioner was a person within the definition in Tax Law §685(n), we acknowledge that the fact-based inquiry is similar to that used to determine responsibility for sales tax purposes (*Matter of Cohen v. State Tax Commn.*, 128 AD2d 1022, 513 NYS2d 564). In *Cohen*, the court noted a variety of factors as indicative of responsibility, including: status as an officer, director, or shareholder; individual's knowledge of and control over the financial affairs of the business; authorization to hire and fire employees; whether the individual signed tax returns for the corporation; and whether the individual had an economic interest in the corporation. However, the holding of corporate office alone does not, in and of itself, warrant the imposition of liability (*see, Chevlowe v. Koerner*, 95 Misc 2d 388, 407 NYS2d 427).

In *Matter of Constantino* (Tax Appeals Tribunal, September 27, 1990), we refused to hold an individual liable for sales tax where the person was a shareholder and officer of the company, had check signing authority, had signed at least one tax return, regularly signed payroll checks, was involved full time in the corporation's elevator repair business, had the authority to hire and fire employees and had invested money in the business. Further, the officer in *Constantino* knew that the corporation was not making its payment of taxes. However, since we found that other shareholders controlled the finances and operations of the corporation and that Constantino was precluded from taking any action in these areas, the significance of his officer and shareholder

status was offset by the circumstances relating to the control of the corporation. Constantino lacked the power to exercise the tax collection and payment on behalf of the corporation and the totality of the circumstances did not support a conclusion that he could have acted but chose not to.

Given the facts found in the instant matter and the specific findings of credibility by the Administrative Law Judge, we find that petitioner was not a person responsible for the collection and remittance of withholding taxes on behalf of Classic and we reverse the determination of the Administrative Law Judge on this issue.

While we are not absolutely bound by an Administrative Law Judge's determination of witness credibility (*Matter of Wachsman*, Tax Appeals Tribunal, November 30, 1995, *confirmed Matter of Wachsman v. New York State Commr. of Taxation & Fin.*, 241 AD2d 708, 660 NYS2d 462), we note that the credibility of witnesses is a determination within the domain of the trier of the facts, the person who has the opportunity to view the witness first hand and evaluate the relevance and truthfulness of their testimony (*Matter of Spallina*, Tax Appeals Tribunal, February 27, 1992). In the matter at hand, after reviewing the testimony and evidence before us, we concur with the Administrative Law Judge who found petitioner's and petitioner's witnesses' testimony credible. Credibility has two components: competency and veracity. Opportunity and capacity to perceive combined with capacity to recollect and communicate constitute the ingredients of competency. The truthfulness of the witness determines his veracity (*Matter of Avildsen*, Tax Appeals Tribunal, May 19, 1994).

In accepting the facts adduced through the credible testimony and the documents submitted in evidence, there are many reasons petitioner is not a person required to collect and remit

withholding tax on behalf of Classic. Petitioner was a carpenter with a very limited education and no experience in managing or operating a business. However, because of his good relationship with the carpenters' union, he was approached by the principals of Classic to be a "front" for the company, which was organized to perform union jobs. Petitioner allowed his name and reputation with the union to be used by his employers to enhance their relationship with the carpenters union. He made no capital investments in the company and received nothing for his corporate duties, which amounted to signing payroll, tax and limited expense checks, all of which had been prepared by a payroll company in advance, with the exception of a few checks that were signed in blank to accommodate the bookkeeper in paying incidental expenses. Although petitioner received a wage statement from Classic, there was no record of any payroll checks paid to him and he explained that he never worked for that entity. Petitioner was taken to the North Fork Bank where he was instructed to sign a signature card which had been prepared with his office title: "president." This is the only place petitioner signed where his office was indicated. All the tax returns and loan documents were deemed forgeries.

Petitioner was not a shareholder, did not have the authority to hire and fire employees, did not sign contracts or loans on behalf of Classic, he did not sign tax returns, never reviewed the mail, did not negotiate with the carpenters' union, did not sign pension documents or execute lines of credit, did not submit bids and did not have day-to-day management duties. He was deliberately denied all access to the financial information of the corporation. Since he was performing his duties by signing payroll checks and those payable to the State and Federal governments for withholding taxes, he was justified in his belief that the payments were being

made and had no reason to think otherwise until hearing through third parties that the taxes had not been paid.

Petitioner's signature was forged on numerous official documents without his knowledge, further supporting the conclusion that he was deceived and manipulated by the principals of Classic.

In comparison to the officer in *Constantino*, petitioner had almost none of the attributes normally ascribed to responsible officers, and any he did possess fall short of conferring liability.

Petitioner's actions also fall short of being "willful" as that term is used in Tax Law § 685(g). In *Gallo*, we said that this question of willfulness is directly related to the issue of responsibility because only a responsible officer can consciously and voluntarily decide not to collect and pay over the tax. Although our decision with respect to whether petitioner was a responsible officer is determinative of this matter, we also find that his actions did not constitute willful behavior. In *Gallo*, we stated:

The essence of the willfulness standard is that the person must voluntarily and consciously direct the trust fund monies from the State to someone else. There need not be any particular motive for doing so, only the result that the State has not received the monies held in trust for it. Mere negligence is not enough (*Matter of Gallo, supra*).

Lack of actual knowledge negates a finding that the act was voluntarily or consciously done by petitioner unless it is determined that the officer recklessly disregarded his corporate responsibilities including the responsibility to see that taxes were paid (*Matter of Capoccia v. State Tax Commn., supra; Matter of Ragonesi v. State Tax Commn., supra*).

Once again, just as in the case of personal responsibility, the resolution of the issue is driven by the facts and circumstances of each case. In *Gallo*, the responsible officer had delegated responsibility for the payment of withholding tax to his business manager, who proceeded to conceal the fact that he was not paying the taxes. Such deceit was found to negate a finding that the failure to pay the withholding tax arose from Mr. Gallo's reckless disregard for his responsibility, i.e., his actions were not considered willful. In the instant matter, we find that petitioner fully discharged his responsibilities and duties to the best of his ability and in a conscious effort to pay the withholding taxes. Surreptitious plans by others, beyond his power, control and knowledge, do not negate this, and his actions cannot be considered willful.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of Roger Frenette is granted;
2. The determination of the Administrative Law Judge is reversed;
3. The petition of Roger Frenette is granted; and

4. The five notices of deficiency dated October 14, 1997 are canceled.

DATED: Troy, New York
August 23, 2001

/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