

STATE OF NEW YORK

TAX APPEALS TRIBUNAL

In the Matter of the Petition :

of :

AMERICAN FUTURES GROUP, INC., :
GEORGE J. PERK JR., OFFICER AND :
THOMAS REEVES, OFFICER :

DECISION
DTA NOS. 817993,
817994 AND 817995

for Redetermination of Deficiencies or for Refund of :
Personal Income Tax under Article 22 of the Tax Law :
and the New York City Administrative Code for the :
Period January 1, 1993 through June 30, 1994. :

Petitioners American Futures Group, Inc., George J. Perk, Jr., 715 Ashley Avenue, Brielle, New Jersey 08730 and Thomas Reeves, 225 East 73rd Street, New York, New York 10021-3654, filed exceptions to the determination of the Administrative Law Judge issued on April 5, 2002. Petitioners appeared *pro se*. The Division of Taxation appeared by Barbara G. Billet, Esq. (Barbara J. Russo, Esq., of counsel).

Petitioners filed briefs in support of their exceptions and the Division of Taxation filed a brief in opposition. Petitioners filed reply briefs. Petitioners' request for oral argument was denied.

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

ISSUES

I. Whether petitioners' motion to reopen the record to allow the introduction of new evidence should be granted.

II. Whether American Futures Group, Inc. is liable for additional withholding taxes for the period January 1, 1993 through June 30, 1994.

III. Whether George J. Perk, Jr. or Thomas Reeves were responsible persons of American Futures Group, Inc. for withholding tax purposes under Tax Law § 685(g), who willfully failed to remit withholding taxes to the Division of Taxation for the period January 1, 1993 through June 30, 1994.

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 findings of fact and the additional findings of fact are set forth below.

Petitioner American Futures Group, Inc. ("AFG") was a commodities futures brokerage company with offices in New York City, California and Chicago. AFG was founded by petitioners George J. Perk, Jr. and Thomas Reeves in 1987. Perk was an officer of AFG since it was founded, and in 1993 and 1994 he held the title of president. At some time in 1994 he became chairman. He was responsible for directing corporate operations. Reeves was also an officer of AFG in 1993 and 1994 and held the titles of vice-president and later president when Perk became chairman. He was in charge of sales. Both Perk and Reeves were on the board of directors of AFG. AFG was a wholly-owned subsidiary of American Futures Group Holding Company, Inc. The holding company owned 100% of the voting stock of AFG and was the

source of AFG's capital. The income reported on the holding company's 1994 corporate income tax return, Form 1120, in the amount of \$650,570.00 was derived entirely from AFG.

Perk and Reeves were the sole owners of the holding company, with Perk owning 52% of the stock and Reeves owning 48% of the stock. Perk invested approximately \$650,000.00 in capital in AFG in 1987, 1993 and 1994. When the holding company took out a loan on behalf of AFG, Perk and Reeves guaranteed the loan.

Perk devoted a substantial portion of his time to AFG and received compensation from AFG and the holding company in 1993 and 1994. He received compensation from AFG in the amount of \$38,500.00, which is the total amount reported as New York adjusted gross income on Perk's 1994 tax transcript.¹ During 1994, Perk received compensation in the amount of \$283,374.00 from the holding company.

Reeves devoted all of his working time to AFG and received his entire income from AFG and the holding company. In 1994, his compensation from the holding company was in the amount of \$261,576.00.

Both Perk and Reeves had and exercised their check signing authority. They could sign checks without Richard MacIntosh, who was AFG's treasurer and financial manager. Perk signed "several hundred [checks] a month" during 1993 and 1994, and he was unaware of a particular time when he questioned anything about the checks he was signing. Reeves would

¹Although Perk claimed that the percentage of his income from AFG was 30-35% in 1994, documentary evidence in the record, specifically the transcript of Perk's 1994 New York Income Tax Return indicates Perk's Federal adjusted gross income to be \$30,614.00, and New York adjusted gross income to be \$38,500.00. The amount reported by Automatic Data Processing, Inc. ("ADP") as Perk's wages for 1994 was \$38,500.00, indicating that 100% of his reported income was from AFG. It is also noted that although Perk had a copy of his federal income tax returns for 1993 and 1994, he chose not to put them into the record of this matter.

sign the checks that were placed before him without questioning whether there were sufficient funds to cover them.

Perk and Reeves had the authority to review the bank statements of AFG and they were not prevented from doing so, although neither reviewed the statements for 1993 or 1994 to determine if checks posted or cleared or if there was enough money in the account to cover the checks. Perk and Reeves had the authority to sign corporate tax returns, and Reeves had the authority to review business mail for AFG and he was never prevented from doing so.

Perk and Reeves were at the top of the chain of command of AFG. During the years at issue, Perk was responsible for the “general supervision and oversight” of AFG. Business decisions relating to AFG were made by Perk and Reeves. They both supervised employees of AFG, with Perk specifically supervising the financial officers, Richard MacIntosh and Patty Ayers. Perk and Reeves had the authority to hire and fire employees, and Reeves hired Richard MacIntosh. Reeves had authority to sign contracts for AFG upon conferring with Perk, and exercised that authority by signing Broker’s Clearing Agreements. Perk had authority to sign contracts on behalf of AFG “up to a certain level.”

During 1993 and 1994 AFG had approximately 25 to 30 employees and withheld taxes from their paychecks. Reeves never checked to see if withholding taxes were paid or if withholding returns were filed by AFG. Perk inquired of MacIntosh as to whether withholding taxes were being paid, but never reviewed bank statements to determine if there were sufficient funds in the bank account to cover the checks or to determine if checks had posted or cleared. Petitioners paid bills and expenses, other than withholding taxes, in 1993 and 1994, such as rent and electric bills, in addition to the payroll.

AFG was regulated by the Commodities Futures Trading Commission (CFTC), an agency of the Federal government, and the National Futures Association (NFA), a trade organization working under the authority of the CFTC. AFG was required to submit its balance sheets and profit and loss statements on a monthly and annual basis to the CFTC and the NFA. The corporation also had an outside accounting firm which audited its books and records each year and prepared its certified financial statements. During an audit to determine if AFG was meeting its minimum capital requirements, the CFTC and NFA determined that AFG had failed to maintain adequate books and financial records in 1993 and 1994, and issued a decision against AFG, Perk, Reeves and another respondent finding that, among other things, they violated record-keeping requirements.

The Division of Taxation (“Division”) commenced an audit of AFG for withholding tax purposes in 1997. During the field audit, the Division reviewed records supplied by AFG, including AFG’s payroll records, wage and tax statements, corporate returns and ADP records.² Based on the records supplied by AFG, the auditor determined the wages paid by AFG during the years at issue and how much tax was withheld by the corporation. The auditor then compared the amount of tax withheld based on AFG’s records with the Division’s records to determine how much tax was previously paid, and how much tax AFG owed for the years at issue. The auditor determined that AFG owed New York State and New York City withholding taxes for the period April 1, 1993 through June 30, 1994 in the amount of \$42,731.73.

²AFG began using ADP in the third and fourth quarter of 1994 to assist with payroll and withholding record-keeping. ADP provided an annual summary totaling the whole year, indicating the total amount of wages paid in 1994, and the total amount withheld.

AFG did not file quarterly withholding tax returns, Forms WT-4a and WT-4b, as required, for 1993 or the first and second quarter of 1994. AFG filed only a payment slip, Form WT-1, in the first quarter of 1993 accompanied by a payment of \$2,158.15, and a WT-1 in the second quarter of 1994 with a payment in the amount of \$16,645.35. These payments were deducted by the auditor from the withholding taxes owed in determining AFG's deficiency.

On May 22, 1998, the Division issued to AFG four notices of deficiency (Assessment ID L-015018658, L-015018659, L-015018660 and L-015018661) for New York State and City withholding taxes for the period April 1, 1993 through June 30, 1994, in the total amount of tax assessed of \$42,732.24, plus penalty and interest. On July 13, 1998, the Division issued to Thomas Reeves as an officer or responsible person of AFG four notices of deficiency (Assessment ID L-015352998, L-015352999, L-015353000 and L-015353001) for a penalty equal to the amount of unpaid New York State and City withholding taxes owed by AFG. On August 17, 1998, the Division issued to George J. Perk, Jr. as an officer or responsible person of AFG a Notice of Deficiency (Assessment ID L-015464922) for the period April 1, 1993 through December 31, 1993 assessing a penalty in the amount of \$1,893.15 for unpaid New York City withholding taxes owed by AFG.

Until the second half of 1994, when ADP was hired, Mr. MacIntosh, the treasurer, was responsible for the calculation and payment of the withholding taxes. All corporate checks were prepared by Mr. MacIntosh, and required the signature of any two of the three corporate officers.

On September 30, 1997, Perk and Reeves sold all of the stock of the corporation to MacIntosh and other individuals in exchange for a promissory note. In October 1997, due to liquidity problems, the Federal government seized all accounts and liquidated the corporation's

assets. The purchasers, including Mr. MacIntosh, defaulted on the note, and Messrs. Perk and Reeves resumed ownership of the corporation. The corporation ceased all activity in early 1998.

We make the following additional findings of fact.

A determination was issued in this matter on April 5, 2002 by Administrative Law Judge Thomas Sacca. Petitioners AFG and George Perk filed an exception with the Tax Appeals Tribunal on April 30, 2002. Petitioner Thomas Reeves filed an exception with the Tax Appeals Tribunal on May 4, 2002.

Subsequent to filing an exception in this matter, petitioners AFG and George Perk made a motion on November 12, 2002 to reopen the record of the hearing to allow the introduction of newly discovered documentary evidence. Petitioners allege that this document was discovered in connection with unrelated litigation and petitioners were unaware of its existence prior to such discovery. Specifically, petitioners assert that they obtained this newly discovered evidence, a cash disbursements journal of AFG for the period March 1, 1994 through March 31, 1994, only a week before bringing this motion. Petitioners maintain that two of the checks noted in this journal demonstrate that petitioner AFG made payment of its withholding tax liability for the 2nd, 3rd and 4th quarters of 1993.

The Division, by letters dated November 18, 2002 and December 2, 2002, opposed the relief requested in this motion. The Division maintains that petitioners' motion to reopen the record is untimely and there is no statutory or regulatory authority to grant petitioners' request at this point in the proceedings. Further, the Division asserts that petitioners have failed to show that the "new evidence" could not have been discovered with the exercise of reasonable diligence in time to be offered into the record or that, if it had been offered, this "new evidence" would have produced a different result. The Division argues that the document sought to be introduced is lacking in foundation and fails to prove that payments of withholding taxes were actually made.

THE DETERMINATION OF THE ADMINISTRATIVE LAW JUDGE

In his determination, the Administrative Law Judge noted that the Tax Law requires employers who maintain an office and make payment of any taxable wages in this State to deduct and withhold taxes from such wages for each payroll period. Further, every employer

required to deduct and withhold tax must file a withholding tax return and pay over the taxes required to be deducted and withheld to the Division. Employers are liable for such tax, and the tax deducted must be held as a special fund in trust for the Tax Commissioner.

The Administrative Law Judge upheld the Division's determination that AFG failed to remit withholding taxes for the period at issue and found that the amount of tax asserted due was supported by the record in this matter. The Administrative Law Judge found that AFG did not file quarterly withholding returns, Forms WT-4a and WT-4b, for 1993 or the first and second quarters of 1994. While AFG made two payments of withholding tax during this period, the auditor credited AFG with these two payments when computing the deficiency.

The Administrative Law Judge noted that determinations made by the Division in a notice of deficiency are presumed correct, and the burden of proof is upon petitioners to establish that those determinations are erroneous. The Administrative Law Judge found that other than these two payments of withholding tax, petitioners failed to submit any evidence which refuted the amount of tax found due or which demonstrated that withholding taxes were paid for the audit period.

The Administrative Law Judge rejected petitioners' contention that ADP records indicated that the withholding taxes were paid for all quarters of 1994. The Administrative Law Judge also concluded that while the CFTC and the NFA did not find that AFG owed withholding taxes, this did not negate the Division's determination that AFG had a withholding tax liability.

The Administrative Law Judge also noted that pursuant to Tax Law § 685(g), a person responsible for the collection and payment of employee withholding taxes who willfully fails to do so is subject to personal liability in the form of a penalty for the amount of the unpaid taxes.

Former section 685(n) of the Tax Law defines a person required to collect such tax as “an individual, corporation or partnership or an officer or employee of any corporation . . . who as such officer, employee, or member is under a duty to perform the act in respect of which the violation occurs.”

Relying on relevant case law, the Administrative Law Judge found that both petitioners Perk and Reeves met the criteria for persons required to collect tax. The Administrative Law Judge noted their stock ownership, positions held as officers and directors of AFG, their powers and duties within AFG and the fact that each devoted substantial time to AFG and had substantial earnings from AFG and its holding company. Additionally, the Administrative Law Judge noted that petitioners Perk and Reeves were the only corporate officers and directors of AFG during the years at issue.

The Administrative Law Judge rejected the arguments of petitioners Perk and Reeves that their failure to pay the withholding tax was not willful. The Administrative Law Judge noted that, pursuant to applicable case law, it is not necessary to show intent to deprive the government of its money to demonstrate willfulness; it is only necessary to show something more than accidental nonpayment. Further, the Administrative Law Judge observed that a failure to collect and pay over taxes can be willful, notwithstanding the lack of actual knowledge that taxes were not paid, if the person recklessly disregarded his corporate responsibilities, including the responsibility to see that employment taxes are paid.

The Administrative Law Judge concluded that petitioners Perk and Reeves had access to the corporate books and records, but elected to concern themselves only with other operations of the business. The Administrative Law Judge determined that petitioners cannot absolve

themselves merely by disregarding their duty and leaving it to someone else to discharge. The Administrative Law Judge found that petitioners had the authority and the opportunity to determine if the withholding taxes were being paid, but chose not to exercise this corporate authority and, therefore, willfully failed to remit the withholding taxes due from AFG during the period at issue.

ARGUMENTS ON EXCEPTION

On exception, petitioners argue that the methodology used by the Division to calculate the withholding tax due for the first two quarters of 1994 was flawed. Petitioners assert that the auditor relied on the unaudited records of ADP rather than on petitioner AFG's own accurate records. Petitioners maintain that the amount of tax due for 1994 was overstated by the auditor and that they should be given credit for having paid all tax due. Petitioners allege that they should be allowed to submit into evidence a document referred to as the "payroll document," which was appended to petitioners' brief on exception, as petitioners claim it is the only true and accurate record of payroll taxes withheld by AFG between January 1, 1993 and June 30, 1994. Petitioners also argue that they were prejudiced at the hearing by the submission into evidence of certain documents concerning CFTC and NFA. Petitioners Perk and Reeves argue that they were not responsible for collecting and remitting withholding tax on behalf of AFG.

In opposition, the Division argues that the Administrative Law Judge correctly determined that petitioners were liable for additional withholding tax for the period at issue. The Division asserts that the new evidence sought to be introduced by petitioners in their briefs on exception should be rejected. The Division maintains that these records could have been produced at the hearing had petitioners made a diligent search for them and, by themselves, these records are not

dispositive of the amount of withholding taxes collected or remitted by petitioners during the audit period. The Division argues that the NFA and CFTC decisions were properly admitted into the record by the Administrative Law Judge as petitioners themselves raised the issue of these audits in their attempt to imply that if there had been unpaid liabilities by AFG, these audits would have revealed them. The Division further asserts that petitioners Perk and Reeves were persons responsible for collecting and remitting withholding taxes on behalf of AFG and their failure to do so was “willful” within the meaning of Tax Law § 685(g). Therefore, the Division maintains that they are properly held liable for the unpaid tax.

OPINION

Section 3000.16 of the Tribunal’s Rules of Practice and Procedure provides for motions to reopen the record or for reargument, and states, in pertinent part, that:

(a) Determinations. An Administrative Law Judge may, upon motion of a party, issue an order vacating a determination rendered by such administrative law judge upon the grounds of:

(1) newly discovered evidence which, if introduced into the record, would probably have produced a different result and which could not have been discovered with the exercise of reasonable diligence in time to be offered into the record of the proceeding, or

(2) fraud, misrepresentation, or other misconduct of an opposing party.

(b) Procedure. A motion to reopen the record or for reargument, with or without a new hearing, shall be made to the Administrative Law Judge who rendered the determination within thirty days after the determination has been served. A timely motion to reopen or reargue shall not extend the time limit for taking an exception to such determination; however, upon application for an extension of time to file an exception pursuant to section 3000.20 of this Part, “good cause” shall be deemed to include the timely filing of a motion to reopen the record or reargue. An Administrative Law Judge shall have no power to

grant a motion made pursuant to this section after the filing of an exception with the tax appeals tribunal.

Our rules of practice anticipate that a motion to reopen will be made to the Administrative Law Judge who rendered the determination (20 NYCRR 3000.16[b]). The determination of the Administrative Law Judge was issued on April 5, 2002. Petitioners did not make this motion until November 12, 2002. Thus, the motion was made more than 30 days after the issuance of the determination and after an exception to that determination had been filed with the Tribunal. Our regulations prohibit the Administrative Law Judge from granting a motion to reopen after the filing of an exception with the Tribunal (20 NYCRR 3000.16[b]; *see, Matter of Frenette*, Tax Appeals Tribunal, February 1, 2001).

In addition, even if timely filed with the Administrative Law Judge, the motion presented no facts which would constitute a basis for reopening the record. Our authority is limited by the principle articulated in *Evans v. Monaghan* (306 NY 312, 118 NE2d 452, 457), which stated that:

[t]he rule which forbids the reopening of a matter once judicially determined by a competent jurisdiction, applies as well to the decisions of special and subordinate tribunals as to decisions of courts exercising general judicial powers. . . . Security of person and property requires that determinations in the field of administrative law should be given as much finality as is reasonably possible.

Evans establishes that it is appropriate to reopen an administrative hearing where one party offers important, newly discovered evidence which due diligence would not have uncovered in time to be used at the previous hearing (*Evans v. Monaghan, supra*).

In the instant matter, petitioners have not provided adequate explanation why this cash disbursements journal, if it were relevant to petitioners' proof, could not have been discovered

with due diligence in time to produce it at the hearing. Therefore, petitioners' motion to reopen the record for the purpose of introducing new evidence is denied.

We have held that a fair and efficient hearing process must be defined and final, and the acceptance of evidence after the record is closed is not helpful towards that end and does not provide an opportunity for the adversary to question the evidence on the record (*Matter of Purvin*, Tax Appeals Tribunal, October 9, 1997; *see also, Matter of Schoonover*, Tax Appeals Tribunal, August 15, 1991). As a result, we reject petitioners' attempts to introduce additional evidence into the record via its briefs on exception and after the determination had been issued by the Administrative Law Judge.

Next, we address petitioners' argument that the auditor incorrectly calculated AFG's withholding tax liability for the first two quarters of 1994 because he relied on ADP documents which were "inherently flawed." We reject this argument as there is no evidence in the record to support it. A review of the documents in the record as well as the auditor's testimony indicates that the calculation of AFG's withholding tax liability was based on information contained in AFG's own records. There is no indication that the data contained on the ADP documents presented to the auditor was flawed or in any way inaccurate. Petitioners bore the burden of demonstrating that the Division's calculation of withholding tax was incorrect and they failed to meet this burden.

Petitioners also allege that the appropriate amount of withholding tax was collected and remitted for 1993 and the first two quarters of 1994 by AFG. The record discloses that AFG remitted two payments to the Division for withholding taxes during the audit period, without accompanying returns. Although petitioners argue that additional payments were made, the

record indicates, at best, that a check was prepared for an additional payment but there is no evidence that it was ever remitted to the Division or negotiated by the Division.

Although petitioners Perk and Reeves argue that they were not responsible for the collection and remittance of withholding taxes by AFG, they assert that they reviewed the books and records of AFG on a monthly basis, employed a staff of competent professionals and were assured that all required withholding taxes were paid. Their alleged diligence does not absolve them of liability for such unpaid taxes. Despite their lack of misgivings concerning timely and accurate payment of withholding taxes, required tax returns were neither prepared nor filed and payments were not remitted. We note with approval the Administrative Law Judge's determination concerning petitioners' arguments:

Petitioners claim that they relied on MacIntosh to file the withholding tax returns and pay the tax due. However, they have failed to establish that such reliance was reasonable. MacIntosh had no ownership interest in AFG or the holding company during the years at issue. He was hired by Reeves and was under the supervision of Perk. No showing has been made as to why petitioners' reliance on MacIntosh should be considered reasonable. In addition, petitioners failed to establish that they adequately supervised MacIntosh. Perk and Reeves did not review the bank statements or financial records of AFG. They both signed checks placed before them without question. Reeves never checked to see if the withholding returns were being filed and the taxes paid. In sum, petitioners Perk and Reeves had access to the corporate books and records, but elected to concern themselves only with other operations of the business. Under these circumstances, petitioners cannot "absolve themselves merely by disregarding their duty and leaving it to someone else to discharge" (*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) (Determination, conclusion of law "F").

Petitioners have offered no evidence below, and no argument on exception, that demonstrates that the Administrative Law Judge's determination is incorrect. We find that the Administrative Law Judge completely and adequately addressed the issues presented to him and

we see no reason to modify them in any respect. As a result, we affirm the determination of the Administrative Law Judge.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exceptions of American Futures Group, Inc., George J. Perk, Jr., and Thomas Reeves are denied;
2. The determination of the Administrative Law Judge is affirmed;
3. The petitions of American Futures Group, Inc., George J. Perk, Jr., and Thomas Reeves are denied; and
4. The notices of deficiency issued on May 22, 1998 to American Futures Group, Inc., on July 13, 1998 to Thomas Reeves and on August 17, 1998 to George J. Perk, Jr. are sustained.

DATED: Troy, New York
February 6, 2003

/s/Donald C. DeWitt

Donald C. DeWitt
President

/s/Carroll R. Jenkins

Carroll R. Jenkins
Commissioner