

STATE OF NEW YORK

TAX APPEALS TRIBUNAL

In the Matter of the Petition	:	
of	:	
ROBERT B. OEHLER	:	DECISION
	:	DTA NO. 818059
for Redetermination of a Deficiency or for Refund of	:	
Personal Income Tax under Article 22 of the Tax Law	:	
for the Period July 1, 1996 through December 31, 1996.	:	

The Division of Taxation filed an exception to the determination of the Administrative Law Judge issued on May 9, 2002 with respect to the petition of Robert B. Oehler, 255 South Grand Avenue, # 2605, Los Angeles, California 90012. Petitioner appeared by DeGraff, Foy, Hold-Harris, Kunz & Devine, LLP (James H. Tully, Jr., Esq., of counsel). The Division of Taxation appeared by Barbara G. Billet, Esq. (Jennifer L. Hink, Esq., of counsel).

The Division of Taxation filed a brief in support of its exception, petitioner filed a brief in opposition and the Division of Taxation filed a reply brief. Oral argument, at the Division of Taxation's request, was heard on January 15, 2003 in Troy, New York.

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

ISSUE

Whether petitioner is liable for penalties imposed under Tax Law § 685(g) for the unpaid withholding taxes of Lenco Mining & Development International, Inc. for the period July 1, 1996 through December 31, 1996.

FINDINGS OF FACT

We find the facts as determined by the Administrative Law Judge except for findings of fact “4,” “5,” “6,” “7” and “9” which have been modified and “10” which has been deleted as irrelevant. The Administrative Law Judge’s remaining findings of fact and the modified findings of fact are set forth below.

Lenco Mining & Development International, Inc. (“the corporation”) was formed by James W. Lenigan as a “C” corporation in 1995 for the purpose of developing a gold mining operation in the jungles of Colombia, South America. The project initially entailed the raising of early stage money to finance an appraisal of the extent of gold reserves at the site to determine whether the quantity of gold present justified the financing of a full-scale mining operation.

Petitioner was invited to join the project, initially as a consultant to assist in the formulation of a business plan, and then to raise the early stage money. He accomplished these objectives in return for three percent of the issued stock of the corporation. Thereafter, the corporation became an S corporation and all shareholders, including petitioner, consented to have the corporation treated as a New York S corporation.

Upon filing as a New York S corporation, Mr. Lenigan retained his titles as President and Treasurer, while other titles were conferred on three of the other seven shareholders, including petitioner, who became Chief Financial Officer and Executive Vice-President of Finance and Administration. Petitioner became an employee of Lenco at this stage. The corporate office was located in Mr. Lenigan’s residence in Brant Lake, New York. At the time, petitioner resided in Lake Placid, New York.

We modify finding of fact “4” of the Administrative Law Judge’s determination to read as follows:

Prior to joining Lenco, petitioner served for 25 years in the banking industry as an employee of Citibank. From 1992 to 1997, petitioner was engaged in projects similar to Lenco, where he developed business plans and raised necessary funds. While with Lenco, petitioner established professional relationships between the corporation and Weil, Gotschal & Manges, a New York City law firm, as well as with the accounting firm Arthur Andersen. Denise Cavoli was employed by the corporation as its staff accountant/bookkeeper. Ms. Cavoli worked at the corporate office located in the basement of Mr. Lenigan’s residence. Petitioner testified that his main role with Lenco was to help raise money. Most of his time was spent with Jim Lenigan and Denise Cavoli in Lenigan’s basement trying to create a plan for raising money. Although he was chief financial officer and executive vice-president for finance and administration, petitioner’s view of his role with the company was that in a small operation like Lenco, with a majority stockholder like Jim Lenigan, that “it’s pretty much a one-person operation, in terms of the dominance of the influence of how decisions are made” (Tr., p. 26). There is no evidence in this record to show what steps, if any, petitioner took as vice president for finance and administration to ensure that proper corporate books and records were established and maintained.¹

We modify finding of fact “5” of the Administrative Law Judge’s determination to read as follows:

Petitioner raised money for Lenco in Vancouver and Nassau, the Bahamas, but it was barely sufficient to meet corporate expenses. In 1997, an engineer employed by the corporation at the site in Colombia was kidnapped by guerillas and held for ransom. His release was secured by payment of the ransom by Ross Perot and the parents of the engineer. The kidnapping brought the

¹We modified finding of fact “4” to more accurately reflect the record.

project to an abrupt end because the site, located some five miles upriver in the jungle, could no longer be safely accessed.²

We modify finding of fact “6” of the Administrative Law Judge’s determination to read as follows:

Mr. Lenigan owned 840 shares of stock in the corporation. Petitioner owned 30 shares and was a salaried employee of the corporation. Petitioner’s testimony regarding his authority was contradictory. Petitioner testified he could not hire or fire corporate employees or decide which corporate tax debts would be paid (*see*, Tr., p. 23). Later, however, he admitted that no restrictions were placed on his ability to act for the corporation (*see*, Tr., p. 35). He deferred to Mr. Lenigan as the “dominant personality” and majority stockholder (Tr., p. 35).³

We modify finding of fact “7” of the Administrative Law Judge’s determination to read as follows:

Petitioner testified that he signed documents and tax returns on behalf of the corporation when Mr. Lenigan was in Colombia. Mr. Lenigan was in Colombia most of the time. These documents which petitioner signed were prepared by Denise Cavoli. Specifically, on September 15, 1996, when Mr. Lenigan was in Colombia, petitioner signed a New York general business corporation franchise tax return as an officer of the corporation. Also, on March 15, 1996, petitioner signed a series of six New York forms CT-6, election by a Federal S corporation to be treated as a New York S corporation.

When asked who supervised Ms. Cavoli, petitioner equivocated. He testified that Ms. Cavoli did not need much supervision, but she could reach Mr. Lenigan or petitioner by phone (*see*, Tr., p. 29). The record is silent as to what the substance of such phone call might include in terms of supervision.

²We modified finding of fact “5” to more accurately reflect the record.

³We modified finding of fact “6” to more accurately reflect the record.

The record is also silent with regard to Ms. Cavoli's education and experience.⁴

A list of accounts payable as of November 22, 1996 contains the names of 85 creditors of the corporation including New York State, petitioner and James W. Lenigan. Some of the creditor's names appear on the list more than once. In the far right column of the list is a space for comments. In that space for a creditor named "Action Mining" is an entry reading "Do Not Pay Per JWL." Further down in that same space next to the name of a different creditor is an entry reading "[h]old per Jim 11/15." Both entries refer to Mr. Lenigan. There are no entries in this document whereby petitioner or anyone other than Mr. Lenigan directs that a particular corporate debt be paid or not paid.

We modify finding of fact "9" of the Administrative Law Judge's determination to read as follows:

Petitioner had access to the corporate books and records merely by asking Ms. Cavoli to see them. However, petitioner never asked to see the books and records. Nor did he ever inquire as to whether taxes were being paid. Petitioner and Mr. Lenigan each had check signing authority on behalf of the corporation. The record is silent as to whether petitioner ever signed any corporate checks.⁵

Petitioner was unaware that withholding taxes were not being paid until he received two notices of deficiency issued to him by the Division on February 16, 1999. The two notices were in the amounts of \$4,684.05 and \$2,202.52.

⁴We modified finding of fact "7" to more accurately reflect the record.

⁵We modified finding of fact "9" by incorporating a portion of its substance in finding of fact "4."

THE DETERMINATION OF THE ADMINISTRATIVE LAW JUDGE

The Administrative Law Judge recounted that the Division determined that petitioner was a person as defined in Tax Law § 685(n) who willfully failed to collect or truthfully account for and pay over withholding tax due from the corporation for the period July 1, 1996 through December 31, 1996, and who was, therefore, liable for a penalty equal to the total amount of the tax evaded, not collected or not accounted for and paid over in accordance with Tax Law § 685(g).

The Administrative Law Judge summarized the applicable legal authority governing whether an individual willfully failed to collect or truthfully account for and pay over withholding tax due from a corporation.

The Administrative Law Judge determined that in the matter here under review, the authority to make the important decisions relating to the day-to-day operations of Lenco was centralized in its president and majority shareholder, Mr. Lenigan. The corporate books and records were maintained at the corporate office located in Mr. Lenigan's residence. The Administrative Law Judge found that petitioner testified credibly that he was unaware withholding taxes were not being paid until he received the notices from the Division. The Administrative Law Judge reasoned that working in his area of responsibility, corporate fund-raising, would not have exposed petitioner to knowledge of the status of the corporate withholding tax liabilities. The Administrative Law Judge noted that the Lenco accounts payable document received in evidence contains an entry that shows Mr. Lenigan giving instructions that a particular corporate debt was not to be paid.

Finally, the Administrative Law Judge determined that since petitioner lacked the authority within the corporate structure to direct that withholding taxes be paid, he was not a person under a duty to pay over the taxes due in accordance with Tax Law § 685(n), and because he was not aware that the taxes had not been paid, his failure to pay over the taxes could not have been willful as required by Tax Law § 685(g).

ARGUMENTS ON EXCEPTION

The Division asserts that petitioner, by virtue of his status as a corporate officer with check signing authority and access to corporate books and records, had, or could have had, knowledge that withholding taxes were in arrears, which made him a person as defined in Tax Law § 685(n) who willfully failed to collect, truthfully account for and pay over withholding tax due. The Division argues that petitioner is a person responsible for the collection, truthful accounting and payment of withholding taxes, citing his status as Chief Financial Officer, his remuneration as an employee of the corporation, and his status as a signatory on the checking account. The Division also maintains 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.

In opposition, petitioner argues that he did not have the authority to determine which corporate debts were to be paid and which debts were to be deferred, because his responsibilities within the corporate hierarchy were limited to fund-raising, while Mr. Lenigan, the majority shareholder and corporate president, was the dominant force within the corporation who made all important corporate decisions. Petitioner also contends that his failure to collect the tax was not "willful" as that term is defined in Tax Law § 685(g).

OPINION

To prevail in this case, petitioner is required to establish by clear and convincing evidence that he was not an officer having a duty to act on behalf of the corporation, i.e., that he lacked the necessary authority or he had the necessary authority, but he was thwarted by others in carrying out his corporate duties through no fault of his own (*cf.*, ***Matter of Moschetto***, Tax Appeals Tribunal, March 17, 1994; ***Matter of Turiansky***, Tax Appeals Tribunal, January 20, 1994).

Tax Law § 685(n) defines, in relevant part, the "persons" subject to the section 685(g) penalty:

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

Whether a corporate officer comes within the definition set forth in Tax Law § 685(n) is a fact-based inquiry 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; an 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 a financial interest in the company and had check signing authority. 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), petitioner 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 business, had

the authority to hire and fire employees and had invested money in the business. Further, Constantino knew that the corporation was not making its tax payments. However, we found Constantino not liable for taxes due, since other shareholders not only controlled the finances and operations of the corporation but *precluded* Constantino from taking any action in these areas. We determined that Constantino lacked the power to ensure that taxes were paid on behalf of the corporation.

In the instant case, Mr. Oehler was an officer and employee of Lenco, specifically, he was Executive Vice-President of Finance and Administration and the Chief Financial Officer. Petitioner, as a shareholder in Lenco, had a direct financial interest in its success. Mr. Oehler admitted he had authority to sign checks written on the corporate account and also signed documents and tax returns for the company prepared by Denise Cavoli, Lenco's bookkeeper/accountant. Petitioner testified he signed these documents because Mr. Lenigan was in Colombia most of the time and that he deferred to Mr. Lenigan, the "dominant personality" and major shareholder, in deciding anything substantive with regard to the company (Tr., p. 35). We find significant petitioner's testimony that he had access to the corporate books and records merely by asking Ms. Cavoli, but did not ask. We also find significant the fact that petitioner never inquired into whether withholding and other taxes were being paid. Although petitioner claimed that he did not have authority to hire or fire employees or to ensure which taxes were paid (*see*, Tr., p. 23), he later admitted that there were no restrictions on his authority to act for the company (*see*, Tr., p. 35). The Administrative Law Judge found petitioner's testimony that he did not know the taxes were unpaid to be credible.

We are not bound by the Administrative Law Judge's determination of 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). In light of petitioner's contradictory testimony, we find the Administrative Law Judge's finding of credibility to be, at best, incongruous. In any event, it is not merely petitioner's credibility, but rather his evidence, that is dispositive here.

Petitioner directly participated in the management of the corporation, i.e., he signed tax returns, he established a relationship with the company's accountants and he had check signing authority on the corporation's account. In addition, he was a stockholder and Lenco's Chief Financial Officer. Most importantly, *there were no restrictions placed on his ability to act for the corporation*. Contrary to petitioner's claim, the evidence does not establish that he lacked authority to make decisions on behalf of the corporation, but merely that he elected not to do so. Petitioner deferred to Mr. Lenigan. Even though petitioner was the corporation's Chief Financial Officer, he did not even ask if taxes were being paid. He did not ask to see the books and records. Petitioner's deference to Mr. Lenigan must take a back seat to his legal authority and his fiduciary duty to act as Chief Financial Officer and Executive Vice-President for Finance and Administration of the corporation. One with a duty to act for a corporation cannot avoid liability by failing to concern himself with whether or not taxes are being paid (*see, Matter of Malkin v. Tully*, 65 AD2d 228, 412 NYS2d 186). We accept petitioner's testimony that there were no restrictions placed on his authority to act for the corporation, and there is no evidence in the record that any third party thwarted his ability to carry out his authority. Accordingly, we reverse the

determination of the Administrative Law Judge and conclude that petitioner was a “person” under a duty to act for the corporation within the meaning of Tax Law § 685(n).

Having concluded that petitioner was under a duty to act for the corporation to ensure that withholding taxes were paid, we must now determine whether his failure to do so was willful within the meaning of Tax Law § 685(g).

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.

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*, 42 NY2d 32, 396 NYS2d 623, 624-625).

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*, Tax Appeals Tribunal, September 9, 1988, *citing Matter of Capoccia v. New York State Tax Commn.*, 105 AD2d 528, 481 NYS2d 476; *Matter of Ragonesi v. New York State Tax Commn.*, 88 AD2d 707, 451 NYS2d 301). As Chief Financial Officer and Executive Vice-President of Finance and Administration, petitioner's admitted failure to inquire as to whether withholding taxes were being paid to the State constitutes a

reckless disregard of his corporate responsibility, and was willful within the meaning of Tax Law § 685(g) (*cf.*, *Matter of Gallo, supra*).

Accordingly, it is ORDERED, ADJUDGED, and DECREED that:

1. The exception of the Division of Taxation is granted;
2. The determination of the Administrative Law Judge is reversed;
3. The petition of Robert B. Oehler is denied; and
4. The notices of deficiency dated February 16, 1999 are sustained.

DATED: Troy, New York
July 10, 2003

/s/Donald C. DeWitt

Donald C. DeWitt
President

/s/Carroll R. Jenkins

Carroll R. Jenkins
Commissioner