STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
DONALD A. HOPPER	:	DETERMINATION DTA NO. 807025
for Redetermination of a Deficiency or for Refund of Personal Income Tax under Article 22 of the Tax Law for the Period January 1, 1983 through December 31, 1984.	:	

Petitioner Donald A. Hopper, 620 East 20th Street, New York, New York 10009 filed a petition for redetermination of a deficiency or for refund of personal income tax under Article 22 of the Tax Law for the period January 1, 1983 through December 31, 1984.

A hearing was held before Jean Corigliano, Administratvive Law Judge, at the offices of the Division of Tax Appeals, 500 Federal Street, Troy, New York on March 30, 1992 at 1:15 P.M., with briefs to be submitted by August 17, 1992. Petitioner filed a brief and reply brief on June 19, 1992 and August 17, 1992, respectively. The Division of Taxation filed a brief on August 3, 1992. Petitioner appeared pro se. The Division of Taxation appeared by William F. Collins, Esq. (Herbert Kamrass, Esq., of counsel).

ISSUE

Whether petitioner is liable for the penalty asserted against him pursuant to Tax Law § 685(g) with respect to withholding taxes from Royale Towers Associates.

FINDINGS OF FACT

Royale Towers Associates ("Royale") was a limited partnership which owned the Taft Hotel in New York City. Petitioner, Donald A. Hopper, was Royale's only general partner. He had a two percent interest inRoyale. Royale's only limited partner was Edward J. Halloran who had a 98 percent interest in Royale. Petitioner became the general partner of Royale at the request of Halloran.

Petitioner is an attorney. He graduated from Fordham Law School in 1951 and then

worked as an assistant district attorney in the County of New York. In 1958, petitioner joined the law firm of Lehman, Goldmark, and Rohrlick, working in its litigation department. He changed law firms approximately five years later. In about 1970, petitioner began working exclusively for Halloran, handling various litigation matters. In 1975, petitioner stopped working for Halloran and began a solo practice, working out of his home.

In 1978, petitioner had a chance meeting with Halloran. Halloran then owned, through an entity called Shelton Towers Associates ("Shelton"), the Halloran House, a major hotel in New York City. Mr. Halloran also owned a number of apartment houses, commercial leases, a concrete company, and other companies. In this chance encounter, Halloran complained of the high cost of litigation fees he was incurring in his various businesses. Shortly after this conversation, petitioner returned to work for Halloran, again handling litigation matters.

Petitioner worked out of Shelton's offices. He was paid by two companies, Shelton and Transit-Mix Concrete. The bulk of petitioner's time was spent on landlord-tenant litigation matters related to properties owned by Shelton. However, during the term of petitioner's employment, business transacted by Transit-Mix Concrete became the focus of various government investigations, and petitioner became involved in gathering documents and providing them to investigators. These were the only legal matters handled by petitioner on behalf of Halloran. Halloran employed the services of several law firms to handle other legal matters.

Halloran was eventually indicted and later convicted of various criminal activities having to do with his financial and business activities. None of the criminal investigations involved petitioner.

From 1979 through 1983, Halloran had a partnership interest in the Taft Hotel. In 1983 he obtained bank financing to purchase his partner's interest in the hotel. The hotel was purchased entirely with borrowed monies, with the possible exception of a $2,000.00 capital contribution made by Halloran to Royale. Royale was formed in 1983 for the sole purpose of acquiring, rehabilitating and operating the Taft Hotel. Petitioner performed no legal services in

connection with Halloran's acquisition of the Taft Hotel or the formation of Royale. He stated that he agreed to be the sole general partner of Royale to accommodate Halloran.

Petitioner did not participate in the operation of the Taft Hotel. He never went to the hotel. He did not perform any legal services for Royale. He received no income from Royale. He did not hire or fire employees, pay bills, maintain any records or otherwise participate in the operation of the hotel.

The Taft Hotel was sold in September 1984. Representatives of the seller, the purchaser, the mortgagees, representatives of Royale's creditors and several other individuals were present at the closing. Royale was represented by petitioner, Halloran, Brian H. Madden, Halloran's assistant, Peter Marino, the hotel's general manager, and John Horl, another Shelton employee. Petitioner appeared at the closing only to sign checks and execute documents on behalf of Royale. He received no monies from the sale of the hotel.

Petitioner signed two sales tax returns and one withholding tax return on behalf of Royale. He could not recall signing these returns, but stated in testimony that they must have been brought to him for his signature because the person who normally signed them was not available.

In a response to information requested by the Division of Taxation ("Division"), Bank Leumi identified petitioner as a person authorized to sign bank checks on behalf of Royale.

On or about March 10, 1988, the Division issued a Notice of Deficiency to petitioner, asserting a penalty of $423,461.23. A statement attached to the notice explained that the penalty was asserted against petitioner as a person required to collect, account for and pay over withholding taxes on behalf of Royale for the period January 1, 1983 through December 31, 1984.

CONCLUSIONS OF LAW

A. Tax Law § 685(g) imposes liability on those persons responsible for the collection and remittance of withholding taxes who willfully fail to collect or remit such funds. Section 685(g) provides as follows:

> "Willful 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. No addition to tax under subsections (b) or (e) shall be imposed for any offense to which this subsection applies. The tax commission shall have the power, in its discretion, to waive, reduce or compromise any penalty under this subsection."

Tax Law § 685(n) defines the term "person" as it is used in section 685(g) as follows:

> "the term person includes an individual, corporation or partnership or an officer or employee of any corporation . . ., or a member or employee of any partnership, who as such officer, employee, or member is under a duty to perform the act in respect of which the violation occurs." (Emphasis added.)

Petitioner claims that he was not a "person" required to collect and pay over tax on behalf of Royale. If he is found to be such a person, he contends that any failure to collect or pay over withholding taxes was not willful.

There is no question that petitioner was the sole general partner of Royale, with a two percent interest in the partnership. Petitioner argues that his status as a general partner is not a sufficient basis upon which to conclude that he was a person under a duty to collect and remit withholding taxes on behalf of Royale. The issue of whether a corporate officer is a "person" as defined by section 685(n) has been litigated many times (e.g., Matter of McHugh v. State Tax Commn., 70 AD2d 987, 417 NYS2d 799; Matter of MacLean v. State Tax Commn., 69 AD2d 951, 415 NYS2d 492, affd 49 NY2d 920, 428 NYS2d 675). The relevant factors to be considered in this circumstance are well defined and include the following: whether the individual signed the company's tax returns, possessed the right to hire and fire employees, derived a substantial portion of income from the company's activities, possessed a financial interest in the company and had the authority to pay the company's obligations (Matter of Amengual v. State Tax Commn., 95 AD2d 949, 464 NYS2d 272; see also, Matter of McHugh v. State Tax Commn., supra; Matter of Malkin v. Tully, 65 AD2d 228, 412 NYS2d 186; Matter of MacLean v. State Tax Commn., supra). The person's official duties in relationship to the company are also a pertinent area of inquiry (Matter of Amengual v. State Tax Commn., supra). Petitioner argues that the application of these criteria to the facts adduced at hearing supports a

conclusion that he was not a person responsible for the collection and payment over of withholding tax due from Royale.

The Division relies on two sections of the Partnership Law to support its contention that petitioner was a person liable for collection and payment over of withholding tax. Section 20 of the Partnership Law provides:

> "Every partner is an agent of the partnership for the purpose of its business, and the act of every partner, including the execution in the partnership name of any instrument, for apparently carrying on in the usual way the business of the partnership of which he is a member binds the partnership, unless the partner so acting has in fact no authority to act for the partnership in the particular matter, and the person with whom he is dealing has knowledge of the fact that he has no such authority."

Partnership Law § 98 provides that, subject to certain exceptions not at issue here, a general partner "shall have all the rights and powers and be subject to all restrictions and liabilities of a partner in a partnership without limited partners."

The Division points out that petitioner had statutory authority under the Partnership Law to bind the partnership, and that he held himself out as a person with authority to act for the partnership by signing two sales tax returns and a withholding tax return and by appearing at the sale of the Taft Hotel as the general partner of Royale. Based on these facts, the Division argues that petitioner was a "person" under Tax Law § 685(n).

I conclude that the 685(g) penalty was properly imposed on petitioner for the following reasons.

Royale was a limited partnership with one general partner, petitioner, and one limited partner, Halloran. A limited partnership is defined as "a partnership formed by two or more persons . . ., having as members one or more general partners and one or more limited partners" (Partnership Law § 90). In general, limited partners are not bound by the obligations of the partnership (Partnership Law § 90); however, a limited partner may be found liable as a general partner if he takes part in the control of the business (Partnership Law § 96). Petitioner's position is based on the premise that Halloran actually controlled all of the business of Royale and that it is Halloran, and not petitioner, who should be held liable for any wrongful acts of the

partnership.

Section 24 of the Partnership Law provides as follows:

> "Where, by any wrongful act or omission of any partner acting in the ordinary course of the business of the partnership, or with the authority of his copartners, loss or injury is caused to any person, not being a partner in the partnership, or any penalty is incurred, the partnership is liable therefor to the same extent as the partner so acting or omitting to act." (Emphasis added.)

Section 26(1) of the Partnership Law provides that all partners are "[j]ointly and severally liable for everything chargeable to the partnership under [section 24]".

Under these provisions, all partners are jointly and severably liable for any penalty incurred by the partnership. The penalty imposed upon petitioner is a penalty incurred by the partnership for failure to collect and pay over withholding taxes. Therefore, even if the evidence established that Halloran ultimately exercised all control over Royale, petitioner, as a general partner, would still be jointly and severally liable for the penalty imposed under section 685(g), as a consequence of sections 24 and 26 of the Partnership Law.

Petitioner claims that the 685(g) penalty was wrongfully imposed because there was no "willful failure" to collect and pay over the withholding tax. A Federal District Court considered a similar argument in Garity v. U.S. (81-2 US Tax Cas ¶ 9598 [ED Mich]). In that case, the penalty in question was assessed under IRC § 6672 which contains language almost identical to that of section 685(g). The taxpayers in Garity argued that to impose joint and several partnership liability for nonpayment of withholding taxes would contravene the Supreme Court's holding in Slodov v. United States (436 US 238, 78-1 US Tax Cas ¶ 9447) where the Court held that a penalty could not be imposed for failure to collect or pay over withholding taxes where the failure occurred before the taxpayer became associated with the business involved. In so holding, the Court stated, with regard to section 6672:

> "The fact that the provision imposes a 'penalty' and is violated only by a 'willful failure' is itself strong evidence that it was not intended to impose liability without personal fault."

Relying on provisions of the Michigan State Partnership Law identical to the provisions of the New York law quoted above, the Garity court held the taxpayers jointly and severally

liable for the penalty imposed. The court stated that the imposition of "vicarious" liability on the partners did not contravene the holding in Slodov, "because liability without fault may be imposed here independently of section 6672 because of the application of the Michigan partnership law" (Garity v. U.S., supra at 88,003).

The cases relied on by petitioner, Matter of Amengual v. State Tax Commn. (supra) and Matter of Levin v. Gallman (42 NY2d 32, 396 NYS2d 623), were decided under section 685 of the Tax Law and involved corporate officers rather than partners (see also, Matter of Rounick, Tax Appeals Tribunal, October 17, 1991; Matter of Lyon, Tax Appeals Tribunal, June 3, 1988; Matter of Gallo, Tax Appeals Tribunal, September 9, 1988). Petitioner's liability for the penalty imposed under section 685(g) results from the operation of New York's Partnership Law; therefore, the holdings in those cases are not determinative of the outcome of this case.

B. The petition of Donald J. Hopper is denied, and the Notice of Deficiency issued on March 10, 1988 is sustained.

DATED: Troy, New York
October 22, 1992

/s/ Jean Corigliano
ADMINISTRATIVE LAW JUDGE