

STATE OF NEW YORK

DIVISION OF TAX APPEALS

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In the Matter of the Petition	:	
of	:	
SALVATORE INGOGLIA	:	DETERMINATION
for Redetermination of a Deficiency or for	:	DTA NO. 809372
Refund of Personal Income Tax under Article 22	:	
of the Tax Law for the Years 1982, 1983 and	:	
1984.	:	

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Petitioner, Salvatore Ingoglia, 301 Great River Road, Great River, New York 11739, filed a petition for redetermination of a deficiency or for refund of personal income tax under Article 22 of the Tax Law for the years 1982, 1983 and 1984.

On March 23, 1993 and May 3, 1993, respectively, petitioner by his duly appointed representative, Milton Shaiman, Esq., and the Division of Taxation by William F. Collins, Esq. (Robert J. Jarvis, Esq., of counsel) waived a hearing and agreed to submit the matter for determination based upon documents and briefs to be submitted by July 30, 1993. The Division of Taxation submitted its documents on May 6, 1993. Petitioner submitted a two-page affirmation in reply outlining his position on June 11, 1993. In response, the Division of Taxation submitted a letter brief on July 6, 1993. Thereafter, by a one-page letter dated July 27, 1993, petitioner responded to the Division of Taxation's letter brief. In turn, the Division of Taxation submitted a three-page letter dated July 30, 1993 in reply to petitioner's arguments. After due consideration of the evidence and arguments, Dennis M. Galliher, Administrative Law Judge, renders the following determination.

ISSUE

Whether petitioner was a person required to collect, truthfully account for and pay over withholding taxes on behalf of 2-Pal Disposal, Inc., whose failure to do so leaves him responsible for penalty pursuant to Tax Law § 685(g).

FINDINGS OF FACT

On February 23, 1990, the Division of Taxation ("Division") issued to petitioner, Salvatore Ingoglia, a Notice of Deficiency and a Statement of Deficiency asserting a penalty against petitioner equal to the unpaid withholding taxes owed by a corporation known as 2-Pal Disposal, Inc. These documents specified the particular withholding tax periods in question and the amounts due for each such period as follows:

<u>Withholding Tax Period</u>	<u>Amount</u>
1/1/82-12/31/82	\$ 500.00
1/1/83-12/31/83	1,188.15
10/1/84-10/31/84	225.00
11/1/84-11/30/84	347.10
Total Amount Due	\$2,260.25

The above-described amounts asserted against petitioner arise as the result of the corporation 2-Pal Disposal, Inc.'s filing of withholding tax reports (New York State and City of New York Employer's Return of Tax Withheld) for the noted periods without payment of all or parts of the amounts shown as due on such returns. Two of such withholding tax returns (those for the period January 1, 1982 through December 31, 1982 and for the period November 1, 1984 through November 30, 1984) are signed in the name of petitioner, Salvatore Ingoglia, under the titles "president" and "general manager", respectively. These returns are dated as having been signed on January 28, 1983 and on December 15, 1984, respectively.

In addition to the withholding tax reports, the Division offered certain other documents in evidence as follows:

(a) An application for highway use permits filed on behalf of 2-Pal Disposal, Inc., together with such corporation's check in payment of the fee therefor (payable to "New York State Tax Comm."), dated as signed on January 9, 1984 in the name of petitioner, Salvatore Ingoglia, under the title of president;

(b) Corporate resolutions with respect to 2-Pal Disposal, Inc.'s Long Island Trust Company bank account, dated as signed on January 27, 1983 in the name of petitioner, Salvatore Ingoglia, under the title of president;

(c) A contract between C & C Carting Corp. and 2-Pal Disposal, Inc., dated as signed

on July 3, 1981 in the name of petitioner, Salvatore Ingoglia, as president of 2-Pal Disposal, Inc.; and

(d) A sales tax certificate of registration for 2-Pal Disposal, Inc. signed in the name of petitioner, Salvatore Ingoglia.

Other than a bare assertion made by petitioner's representative in his June 4, 1993 affirmation, there is no evidence in the record serving to support a claim that the signatures on the aforementioned documents are not petitioner's signatures. Moreover, careful comparison of each of such signatures to each other, and to petitioner's signature appearing on power of attorney forms attached to petitioner's request for a conciliation conference and to the petition for hearing herein, reveals all of such signatures to be very similar to each other.

The corporate resolutions described above name petitioner as the only person authorized by 2-Pal Disposal, Inc. to sign checks, borrow money, pledge security, assign obligations, etc., on behalf of the corporation. In addition, the application for highway use permits lists petitioner as the president and only principal officer of 2-Pal Disposal, Inc. The Division also introduced a copy of a transcript of proceedings taken on April 16, 1980 in Supreme Court, Suffolk County. This transcript sets forth a stipulation entered into by petitioner on April 16, 1980, under the terms of which petitioner would become full owner of 2-Pal Disposal, Inc.

As can be gleaned from the documents submitted in evidence, petitioner's position appears to rest upon the claim that he was not a responsible person with respect to the withholding tax obligations of 2-Pal Disposal, Inc., but rather was merely an employee who possessed no authority to determine what debts were to be paid. More specifically, the petition filed in this matter alleges that petitioner is not responsible "as [he] did not have anything to do with Two Pals." In addition, petitioner's counsel's affirmation in reply appears to take the position that petitioner is a "transferee" and that the burden of proof therefore rests with the Division to establish petitioner's liability for the amounts in question. It is unclear as to whether petitioner is arguing that the amounts asserted as due represent liabilities assumed or undertaken by petitioner as a transferee in light of the April 16, 1980 court-approved stipulation or, rather,

whether petitioner is arguing that assertion of a deficiency against a responsible person for the unpaid withholding tax obligations of a corporation is the equivalent of holding such person to be a "transferee" of such corporation.

#### CONCLUSIONS OF LAW

A. Tax Law § 685(g) provides:

"Willful failure to collect or 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 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), in turn, furnishes the following definition of "persons" subject to the section 685(g) penalty:

"the term person includes an individual, corporation or partnership or an officer or employee of any corporation (including a dissolved 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."

B. The question of whether someone is a "person" under a duty to collect and pay over withholding taxes is a factual one, similar in scope and analysis to the question of whether one is a responsible individual for sales and use tax purposes. Factors which should be considered are, inter alia, whether the particular individual signed the tax return, derived a substantial part of his income from the corporation, or had the right to hire and fire employees (Matter of Malkin v. Tully, 65 AD2d 228, 412 NYS2d 186; see, Matter of MacLean v. State Tax Commn., 69 AD2d 951, 415 NYS2d 492, 494, affd 49 NY2d 920, 428 NYS2d 675). Other pertinent areas of inquiry include the person's official duties, the amount of corporation stock he owns, and his authority to pay corporate obligations (Matter of Amengual v. State Tax Commn., 95 AD2d 949, 464 NYS2d 272, 273; see, Matter of McHugh v. State Tax Commn., 70 AD2d 987, 417 NYS2d 799, 801).

C. Summarized as a general proposition, the issue to be resolved is whether petitioner had or could have had sufficient authority and control over the affairs of the corporation to be considered a person under a duty to collect and remit the unpaid taxes in question. In addition,

if petitioner is held to be a person under a duty as described, the question follows as to whether the failure to withhold and pay over the taxes was willful. The question of willfulness is related directly to the question of whether petitioner was a person under a duty, since clearly a person under a duty to collect and pay over the taxes is the one who can consciously and voluntarily decide not to do so. As the Court of Appeals indicated in Matter of Levin v. Gallman (42 NY2d 32, 396 NYS2d 623), the test 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." (Id., 396 NYS2d at 624-625; see, Matter of Lyon, Tax Appeals Tribunal, June 3, 1988.)

D. Petitioner's argument that the Division and not petitioner bears the burden of proof is misplaced. Pursuant to Tax Law § 689(e) and State Administrative Procedure Act § 306(1), the burden of proof to establish that the actions of the Division are in error rests with petitioner (see, Tavalacci v. State Tax Commn., 77 AD2d 759, 431 NYS2d 174; see also, Matter of Fortunato, Tax Appeals Tribunal, February 22, 1990). While it is true that the Division bears the burden of proof in instances where liability as a transferee is asserted (Tax Law § 689[e][2]), petitioner's argument that the present facts constitute such a transferee liability situation is rejected. First, there is no authority cited for the proposition that a person alleged to be responsible to collect and remit withholding taxes on behalf of a corporation stands as a transferee as to the penalty imposed for failure to carry out such an obligation. Furthermore, any argument that in the present situation petitioner is being held liable as a transferee of obligations undertaken or owed by prior owners of 2-Pal Disposal, Inc. in accordance with the April 16, 1980 stipulation is not supported by the facts. The stipulation by which petitioner was to gain ownership of the corporation occurred in April of 1980, while the liabilities in question here are for periods thereafter, specifically during the years 1982, 1983 and 1984. Hence, transferee liability would potentially apply only to periods well prior to those at issue here.

E. Turning to the question of petitioner's status as a responsible person, the Division's documentary submission more than supports a conclusion that petitioner was such a person.

From the documents, it appears that petitioner was the corporation's only officer, was the only person authorized to sign checks and was the only person with any apparent ability to exercise authority over the corporation's assets and affairs. He signed numerous documents as described, including withholding tax returns, a highway use tax application and a sales tax registration certificate. In response, petitioner has offered no evidence to counter this documentary submission, including specifically the documents bearing (or signed in) petitioner's name (see, Finding of Fact "4"). Furthermore, since petitioner was apparently the corporation's only officer and the only person authorized to sign its checks, it follows that petitioner would have been in a position to know whether or not taxes such as those at issue herein were being paid. In view of these circumstances, the Division properly subjected petitioner to penalty pursuant to Tax Law § 685(g) as a person required to collect, account for and pay over such taxes who willfully failed to do so (see, Matter of Schochet, Tax Appeals Tribunal, March 11, 1993).

F. The petition of Salvatore Ingoglia is hereby denied and the Notice of Deficiency dated February 23, 1990 is sustained.

DATED: Troy, New York  
September 16, 1993

/s/ Dennis M. Galliher  
ADMINISTRATIVE LAW JUDGE