

STATE OF NEW YORK  
DIVISION OF TAX APPEALS

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In the Matter of the Petition :  
of :  
ANTHONY DIMINO : DETERMINATION  
for Redetermination of a Deficiency or for : DTA NO. 809795  
Refund of Personal Income Tax under Article 22 :  
of the Tax Law for the Years 1985 and 1986. :

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Petitioner Anthony Dimino, 7 Hewitt Drive, Northport, New York 11768 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 1985 and 1986.

A hearing was held before Timothy J. Alston, Administrative Law Judge, at the offices of the Division of Tax Appeals, Riverfront Professional Tower, 500 Federal Street, Troy, New York, on July 13, 1992 at 1:15 P.M. Petitioner appeared by Randolph W. Spelman, Esq. The Division of Taxation appeared by William F. Collins, Esq. (Lawrence A. Newman, Esq., of counsel).

ISSUES

I. Whether the Division of Taxation properly asserted penalty under Tax Law § 685(g) in the amount of the unpaid New York State withholding taxes of Plating Processes, Inc.

II. Whether the assertion of such penalty was time-barred pursuant to Tax Law § 683(a) or, if not, whether the Division of Taxation should be estopped from asserting such penalty under the circumstances herein.

FINDINGS OF FACT

On September 14, 1990, the Division of Taxation ("Division") issued to petitioner, Anthony Dimino, a Notice of Deficiency which asserted \$5,336.78 in penalty due for the years 1985 and 1986.

A Statement of Deficiency, also dated September 14, 1990, advised petitioner that the

subject deficiency resulted from the Division's assertion of penalty against petitioner under Tax Law § 685(g) as a "person required to collect, truthfully account for and pay over tax" pursuant to Tax Law § 685(n) on behalf of Plating Processes, Inc. The statement further specified withholding tax periods and penalty due as follows:

<u>Withholding Tax Period</u>	<u>Penalty Due</u>
8/1/85 - 8/31/85	\$ 791.13
9/1/85 - 9/30/85	79.64
11/1/85 - 11/30/85	658.20
12/1/85 - 12/30/85	744.35
1/1/86 - 1/31/86	536.56
2/1/86 - 2/28/86	584.57
3/1/86 - 3/31/86	564.57
4/1/86 - 4/30/86	710.07
10/1/86 - 10/31/86	<u>667.69</u>
Total	\$5,336.78

Pursuant to a Conciliation Order dated May 3, 1991, the Division cancelled its assertion of penalty for the period 10/1/86 - 10/31/86. Penalty totalling \$4,669.09 thus remains in dispute.

The calculation of penalty herein is based upon tax reported withheld by Plating Processes, Inc. on monthly withholding tax returns (Form IT-2101), but not remitted to the Division.

Plating Processes, Inc. was an electroplating service corporation. It was formed in 1978 by petitioner, Bob Grossman and Julio Molina. It employed, at various times during its existence, 15 to 50 people. Petitioner and Mr. Grossman each owned 42.5% of the corporate stock. Mr. Molina owned the remaining 15%. Petitioner and Mr. Grossman alternated in the offices of corporate president and vice-president. When the corporation was founded Mr. Grossman was president and petitioner vice-president. Throughout the period at issue petitioner was president and Mr. Grossman vice-president. Petitioner and Mr. Grossman made all major decisions regarding the corporation. Petitioner and Mr. Grossman shared responsibility for the filing of withholding tax returns. Petitioner actually signed the corporation's withholding tax returns for six of the eight monthly periods remaining at issue herein. Petitioner signed in his capacity as president. Mr. Grossman, as vice-president, signed

the corporation's withholding tax returns for the periods January 1, 1986 through January 31, 1986 and February 1, 1986 through February 28, 1986. All such returns were filed without remittance.

Petitioner was aware that the corporation was not remitting withholding tax with its IT-2101's during the eight monthly periods at issue. The corporation failed to remit such withholding tax because it was experiencing economic difficulties. At that time, petitioner, as president of the corporation, believed that the corporation would be able to meet its withholding tax obligations when its economic situation improved. The corporation had, prior to August of 1985, experienced financial problems and had been delinquent on its withholding tax payments. At that time petitioner and Mr. Grossman had worked at an installment payment arrangement with the Division which enabled the corporation to satisfy the delinquencies.

While he was an officer, petitioner had the authority to sign checks for the corporation.

In his capacity as an officer, petitioner executed documents for the corporation in order for it to obtain a bank loan.

During the period at issue, petitioner worked full time as president of the corporation. As noted, petitioner was involved in running the corporation on a day-to-day basis. His annual salary at that time was about \$16,000.00. Petitioner resigned from the corporation in June 1986, because the corporation was not providing him with a sufficient income to support his family. Petitioner had no involvement with the corporation following his resignation.

The corporation subsequently filed for bankruptcy in or about the summer of 1988 and has no remaining assets.

The corporation's IT-2101's for the periods at issue were timely filed.

#### CONCLUSIONS OF LAW

A. Tax Law § 685(g) penalizes those persons responsible for the withholding and paying over of withholding taxes for willfully failing to so withhold or pay over. "Person" is defined for purposes of section 685(g) at Tax Law § 685(n) as an "officer or employee of any corporation . . . who as such officer [or] employee . . . is under a duty to perform the act in

respect of which the violation occurs."

B. The question of whether an individual is a person within the meaning of section 685(n) is a factual one (see, Matter of Ragonesi v. New York State Tax Commn., 88 AD2d 707, 451 NYS2d 301), "resolution of which turns on such factors as whether the taxpayer owned stock, signed the tax returns, exercised authority over employees and assets of the corporation, derived substantial income from the corporation, or served as an officer or employee thereof" (Matter of Capoccia v. New York State Tax Commn., 105 AD2d 528, 481 NYS2d 476).

C. The ultimate question to be resolved in any given case is whether the individual had or could have had sufficient authority and control over the affairs of the corporation to be considered a responsible officer or employee (Matter of Constantino, Tax Appeals Tribunal, September 27, 1990). Factors such as those noted above are indicia of such responsibility.

D. A review of the record compels the conclusion that petitioner was indeed a person responsible to collect, truthfully account for, and pay over withholding taxes on behalf of Plating Processes, Inc. During the period at issue petitioner was president of the corporation; worked full time at the corporation; had check-signing authority; and was one of two major shareholders of the corporation. Along with Mr. Grossman, he was responsible for running the corporation on a day-to-day basis. Petitioner and Mr. Grossman shared responsibility for the filing of withholding tax returns and petitioner signed six of the eight returns in question. Petitioner had also been involved in resolving a prior withholding tax delinquency with the Division. Based on these facts it is clear that petitioner was properly subject to Tax Law § 685(g) penalty.

Contrary to petitioner's assertion, the fact that petitioner did not sign the corporation's IT-2101's for two of the periods at issue does not result in a finding in petitioner's favor for those two periods. This fact is outweighed by the other indicia of responsibility, noted above, which are present herein throughout the period at issue.

It should also be noted that economic difficulties, the cause of the underlying withholding tax delinquencies herein, did not relieve petitioner of his duty to act on behalf of the corporation

in respect of its withholding tax obligations (see, Matter of Dworkin Construction Co., Tax Appeals Tribunal, August 4, 1988).

E. It is also clear that petitioner's failure to remit withholding taxes herein was willful within the meaning of Tax Law § 685(g). Petitioner consciously directed the withholding taxes from the State to other creditors. This constitutes willful conduct within the meaning of Tax Law § 685(g) (see, Matter of Davison, Tax Appeals Tribunal, November 23, 1988).

F. Petitioner contended that the issuance of the subject notice of deficiency was time-barred by Tax Law § 683(a), which provides, generally, that personal income taxes must be assessed within three years after a return was filed. Petitioner noted, and the record herein does establish, that the notice was issued more than three years from the filing of each of the IT-2101's for the periods at issue. Such factors notwithstanding, the notice herein was not time-barred under Tax Law § 683(a). Under circumstances not distinguishable from those herein, the Appellate Division concluded that "the penalty imposed against petitioner as a corporate officer is entirely distinct from an earlier assessment against the corporation. As a separate statutory liability, it need not be assessed within any particular period after the corporate assessment is made." (Wolfstich v. State Tax Commn., 106 AD2d 745, 483 NYS2d 779, 781.) Accordingly petitioner's assertion of a limitations defense is rejected (see also, Matter of Friedman, Tax Appeals Tribunal, July 8, 1988).

G. Petitioner also contended that the Division should be estopped from asserting the 685(g) penalty herein because of the delay in issuing its assessment against petitioner. Petitioner contended that he was harmed by such delay in that the corporation's assets were liquidated in the bankruptcy and are thus no longer available to satisfy the corporation's obligations. This contention is rejected. As noted, the penalty imposed on a corporate officer under Tax Law § 685(g) is separate and distinct from the liability of the corporation in respect of the same withholding taxes (see, Wolfstich v. State Tax Commn., *supra*; Yellin v. State Tax Commn., 81 AD2d 196, 440 NYS2d 382). It follows, therefore, that the failure of the Division to proceed against a corporation (as is apparently the case here) may not result in a bar against

proceeding against a corporate officer under section 685(g).

H. The petition of Anthony Dimino is denied, and the Notice of Deficiency dated September 14, 1990, as modified by the Conciliation Order dated May 3, 1991, is sustained.

DATED: Troy, New York  
February 4, 1993

/s/ Timothy J. Alston  
ADMINISTRATIVE LAW JUDGE