

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
HENRY PICCIURRO	:	DETERMINATION
for Redetermination of a Deficiency or for	:	DTA NO. 810908
Refund of Personal Income Tax under Article 22	:	
of the Tax Law for the Years 1987, 1988 and	:	
1989.	:	

Petitioner, Henry Picciurro, 351 Ocean Terrace, Staten Island, New York 10301, 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 1987, 1988 and 1989.

A hearing was held before Thomas C. Sacca, Administrative Law Judge, at the offices of the Division of Tax Appeals, Riverfront Professional Tower, 500 Federal Street, Troy, New York, on February 1, 1993 at 1:15 P.M. Petitioner submitted a brief on April 20, 1993. The Division of Taxation filed its brief on May 11, 1993. Petitioner submitted a reply brief on June 8, 1993. Petitioner appeared by Breed, Abbott & Morgan (Paul J. Henry, Esq., of counsel). The Division of Taxation appeared by William F. Collins, Esq. (Lawrence A. Newman, Esq., of counsel).

ISSUE

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

FINDINGS OF FACT

The parties' proposed findings of fact have been incorporated herein.

On May 10, 1991, the Division of Taxation ("Division") issued to petitioner, Henry Picciurro, six notices of deficiency which asserted, in the aggregate, \$33,342.30 in penalty due for the years 1987, 1988 and 1989.

On the same date, the Division issued six statements of deficiency advising petitioner that the subject deficiencies 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 the tax" pursuant to Tax Law § 685(n) on behalf of Merit Mortgage Company of New York, Inc. ("Merit"). The statements further specified withholding tax periods and penalty due as follows:

<u>Withholding Tax Period</u>	<u>Penalty Due</u>
1/1/87 - 6/30/87	\$ 2,367.95
7/1/87 - 11/30/87	5,245.10
12/1/87 - 12/31/87	845.25
1/1/88 - 11/30/88	12,580.34
12/1/88 - 12/31/88	1,162.66
1/1/89 - 12/31/89	<u>11,141.00</u>
Total	\$33,342.30

The calculation of penalty herein is based upon tax reported withheld by Merit on monthly withholding tax returns (Form IT-2101) but not remitted to the Division. Petitioner is not challenging the amount of the penalty asserted.

Merit was incorporated by petitioner on May 16, 1984. Petitioner owned 100% of the corporate stock and was the chairman of the board of directors. During the years at issue, petitioner invested in Merit between \$50,000.00 and \$70,000.00. Petitioner was the sole investor in financing Merit's operations. Merit's primary business was the placing of residential and commercial mortgages with lending institutions on behalf of borrowers. The corporation would act as a broker in placing and servicing the mortgages with the lender.

In the early months of 1987, petitioner hired Mr. Robert Zarrilli to take over the day-to-day operations of Merit. Mr. Zarrilli, upon being hired, was made a salaried employee and the president of Merit. During the years at issue, Merit had one office location and between six and

eight employees. Prior to the hiring of Mr. Zarrilli, petitioner had placed a few mortgages through Merit but, in general, Merit was not an active business operation.

Since 1966 and continuing through the years at issue petitioner owned and operated a real estate brokerage business entitled VIP Real Estate ("VIP"). Petitioner was the only officer, director and shareholder of VIP. This business employed approximately 100 employees in four residential offices and one commercial office. Merit was located about five miles from the VIP office where petitioner worked. In addition to VIP, petitioner conducted a real estate appraisal business and was involved in the operation of the Gateway State Bank, of which he was a founder and director.

When he incorporated Merit, petitioner thought that it would be an asset to have a mortgage brokerage business he was familiar with to place difficult mortgages, but such turned out not to be the case. However, Merit was not an adjunct of VIP. Although there were times when clients of VIP obtained a mortgage through Merit, Merit's sole function was not to place mortgages in connection with the VIP real estate business. Merit and VIP had no business connection and did not operate in or out of the office of the other. In addition, Mr. Zarrilli never worked for, nor had any relationship with, VIP.

Although petitioner was the sole owner of Merit, he left the day-to-day responsibility of operating the business to Mr. Zarrilli. Mr. Zarrilli would occasionally stop by or telephone the VIP office to discuss with petitioner the business affairs of Merit. These contacts were initiated by Mr. Zarrilli when he had a question of petitioner. On occasion, petitioner would stop in at Merit's office if he happened to be in the area on other business. None of the meetings appear to have been scheduled in advance and they occurred on the average of once every other month. There is no information in the record which details the topics discussed at these meetings.

Both petitioner and Mr. Zarrilli had check-signing authority on Merit's business account. However, Mr. Zarrilli, and not petitioner, signed the checks for the business because the checkbook was maintained by Mr. Zarrilli at the Merit office.

The annual tax returns, such as the Reconciliation of Tax Withheld (Form IT-2103), were

prepared by the business's accounting firm and forwarded to petitioner at his VIP office for signature. After signing the return, petitioner would send it to Mr. Zarrilli at Merit for the issuance of a check. It was the expectation of petitioner that upon receipt of the return and the issuance of the check, both would be mailed to the appropriate authorities. The accounting firm had been hired by petitioner.

The Return of Tax Withheld (Form IT-2101) for the period December 1, 1988 through December 31, 1988 bears the signature of Mr. Zarrilli.

Petitioner was not aware that Merit's withholding tax returns for the years at issue had been filed without remittance until sometime in 1990.

During the years at issue, Merit was a Subchapter S corporation for Federal tax purposes. In 1988 and 1989, Merit had ordinary losses of \$39,659.00 and \$17,718.00, respectively. For the years 1987, 1988 and 1989, petitioner did not receive any salary, bonuses, dividends, expense reimbursements or funds of any description from Merit.

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 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."

Tax Law § 685(n), in turn, furnishes the following definition of "person" 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 (see, Matter of Ragonesi v. New York State Tax Commn., 88 AD2d 707, 451 NYS2d 301), 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 (Matter of Constantino, Tax Appeals Tribunal, September 27, 1990). 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:

"[W]hether 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. As previously stated, the determination of whether petitioner is a "person" within the meaning of section 685(n) is a factual one. The record shows that petitioner was the chairman of the board of directors of the corporation, he was a 100% shareholder of the corporation, he was the sole investor in financing the corporation's operations, he was directly involved in the hiring of the corporation's president, he signed the annual tax returns of the corporation, including the withholding tax returns, and he had check-signing authority. Petitioner had or

could have had sufficient authority and control over the affairs of Merit to be considered a person under a duty to collect and remit the unpaid withholding taxes in question (Matter of Capoccia v. State Tax Commn., 105 AD2d 528, 481 NYS2d 476; Matter of Ragonesi v. New York State Tax Commn., supra; Matter of Lyon, supra).

E. The fact that one is determined to be a person under a duty to collect tax does not necessarily mean that the person is liable for the taxes in issue (see, e.g., Reyers v. New York State Tax Commn., 116 AD2d 880, 498 NYS2d 199; Matter of Lyon, supra). Tax Law § 685(g) penalizes responsible persons who willfully fail to withhold and pay over withholding taxes.

The essence of the willfulness standard "is that the person must voluntarily and consciously direct the trust monies from the State to someone else" (Matter of Gallo, Tax Appeals Tribunal, September 9, 1988). Therefore, a lack of knowledge that withholding taxes were not being paid over at the time of the failure would negate a finding of willfulness (Matter of Gallo, supra; Matter of Flax, Tax Appeals Tribunal, September 9, 1988; Matter of Lyon, supra). Nevertheless, a person's failure to withhold and pay over the tax has been held to be willful, notwithstanding his lack of knowledge, because the person disregarded his corporate responsibilities including the responsibility to see that taxes were paid (Matter of Capoccia, supra; Matter of Ragonesi v. New York State Tax Commn., supra; Matter of Krone, Tax Appeals Tribunal, September 19, 1991).

Thus, the principle has been developed that a reckless disregard of corporate responsibilities can constitute willful conduct. It is an "appropriate equivalence" that a person responsible to collect tax should not be able to insulate himself from liability by abandoning his responsibilities. However, it can be found that, under certain circumstances, such a person can make an appropriate delegation of authority sufficient to meet the responsibilities of a person under a duty to act (see, Matter of Lyon, supra). This would require the responsible person to make a reasonable delegation of authority, exercise reasonable supervision over the delegate and reasonably rely on the information requested of and provided by the delegate (Matter of Gallo, supra).

F. It is held herein that petitioner recklessly disregarded his responsibilities because as a responsible person he did not make a reasonable delegation of authority to ensure that the withholding taxes were paid. Petitioner has attempted to place responsibility upon Mr. Zarrilli. However, even if petitioner did in fact delegate this responsibility to Mr. Zarrilli, petitioner has not demonstrated that this was a reasonable delegation of the authority to ensure that the withholding taxes were paid. There was little or no evidence presented about Mr. Zarrilli beyond the statement by petitioner that Mr. Zarrilli was much more knowledgeable about the type of business that Merit was engaged in than petitioner. The supervision provided by petitioner was haphazard and sporadic, with meetings occurring with Mr. Zarrilli seemingly by chance, often initiated by Mr. Zarrilli and only occurring every few months. In addition, the record does not provide a description of the information requested of or provided by Mr. Zarrilli during these meetings. Therefore, petitioner has not proven that he made a reasonable delegation of authority, that he exercised reasonable supervision over the delegate and that he reasonably relied on the information provided (Matter of Lyon, supra).

In comparison to the present matter where petitioner failed to exercise his authority or reasonably delegate his authority to ensure that the withholding taxes were paid are those situations where the responsible person's actions were sufficient to negate a finding of willful conduct. These situations generally involve the responsible person's delegating to one or more reliable individuals the authority to manage and ensure that the correct returns were filed and the appropriate amount of taxes were paid. This person would also keep informed about the affairs of the corporation and would inquire as to whether the delegate was taking appropriate action to ensure that his/her responsibilities were being carried out (see, *Reyers v. New York State Tax Commn., supra*; *Matter of Lyon, supra*). Such direct involvement in assuring that the taxes were being paid contrasts markedly with petitioner's own lack of concern about these matters.

Petitioner has also not established that he could not easily have determined that the taxes were not paid. Petitioner was unaware of the failure to pay the taxes only because he failed to

inquire. A responsible person cannot insulate himself from liability by disregarding his duty and leaving it to someone else to discharge (Matter of Capoccia, *supra*; Matter of Ragonesi, *supra*).

G. Petitioner's reliance upon Pototzky v. United States (85-1 US Tax Cas ¶ 9438 [US Ct])¹ as an illustration of a similar factual pattern is misplaced. In Pototzky, prior to the period at issue, it was not disputed that Mr. Pototzky was a responsible person. He was in charge of ensuring that the taxes were paid. He was directly involved in the day-to-day operations of the corporation, he prioritized the order of paying creditors, he signed almost all the checks and he was receiving a salary. However, due to the demands of his other business interests and conflicts with the majority shareholder of the corporation, Mr. Pototzky, by the period at issue, had relinquished the authority and lost the control he once had at the corporation. While still at the corporation, he began to be overruled by the president and majority shareholder. Thereafter, he ceased signing checks, resigned as vice-president, moved from the business premises, had his salary reduced to a minimal amount and relinquished all of his day-to-day responsibilities. His responsibilities were assumed by the president and majority shareholder, who had become the day-to-day business and financial manager of the corporation. Mr. Pototzky was eventually locked out of the business premises. The court found as most important in its determination that Mr. Pototzky was not a responsible person and did not act willfully the fact that he had relinquished the authority and had lost the control over the corporation that he had once exercised. Unlike the present matter, where petitioner had complete authority over Merit but failed to exercise it, Mr. Pototzky had no power to compel or prohibit the allocation of corporate funds.

H. The petition of Henry Picciurro is denied, and the notices of deficiency, dated May 10, 1991, are sustained.

DATED: Troy, New York

¹Although Pototzky involves an individual being held responsible for Federal withholding taxes under Internal Revenue Code § 6672(a), such section and Tax Law § 685(g) are nearly identical.

November 4, 1993

/s/ Thomas C. Sacca
ADMINISTRATIVE LAW JUDGE