

STATE OF NEW YORK

DIVISION OF TAX APPEALS

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In the Matter of the Petition	:	
of	:	
LORI ANZILOTTI, OFFICER OF	:	
PREMIERE CONCRETE STRUCTURES, INC.	:	DETERMINATION
	:	DTA NO. 812214
for Redetermination of a Deficiency or for	:	
Refund of New York State and New York City	:	
Income Taxes under Article 22 of the Tax Law	:	
and the New York City Administrative Code for	:	
the Period April 16, 1991 through July 15, 1991.	:	

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Petitioner, Lori Anzilotti, officer of Premiere Concrete Structures, Inc., filed a petition for redetermination of a deficiency or for refund of New York State and New York City income taxes under Article 22 of the Tax Law and the New York City Administrative Code for the period April 16, 1991 through July 15, 1991.

A hearing was held before Joseph W. Pinto, Jr., Administrative Law Judge, at the offices of the Division of Tax Appeals, 500 Federal Street, Troy, New York, on September 9, 1994 at 11:00 A.M., with all briefs filed by January 16, 1995. Petitioner appeared by A. Mitchell Greene, Esq. The Division of Taxation appeared by William F. Collins, Esq. (Laura Witkowski, Esq., of counsel).

ISSUES

- I. Whether petitioner should be permitted to submit new evidence with her reply brief.
- II. Whether petitioner was a person required to collect, truthfully account for, and pay over the tax imposed by Article 22 of the Tax Law, who willfully failed to collect such tax or willfully attempted to evade or defeat the tax or the payment thereof pursuant to the terms of Tax Law § 685(g) for the period in issue and therefore is subject to the penalty provided for in said section.

FINDINGS OF FACT

Petitioner, Lori Anzilotti, was the president of Premiere Concrete Structures, Inc.

("Premiere") during the period in issue, April 16, 1991 through July 15, 1991 (the "period in issue").

Premiere was a New York corporation, incorporated on November 13, 1989. It was a concrete contractor which was engaged in a \$5,600,000.00 project involving the Ramada Hotel at Times Square in New York City during the period in issue.

During the period in issue, Ms. Anzilotti kept the books of the corporation and had the authority to sign checks on each of the two checking accounts of the corporation. She signed various forms with taxing authorities, including the following: a Form CT-6, Election by a Small Business Corporation to be Treated as a New York State S Corporation, dated November 20, 1989, which listed her as president of Premiere and owner of 51% of the stock; three Federal forms 941, Employer's Quarterly Federal Tax Return, dated April 30, 1991, July 31, 1991 and October 31, 1991; New York State Form CT-5.4, Application for Automatic Six-Month Extension for Filing a Form CT-3-S or a CT-4-S, dated January 10, 1992, and listing her as president of Premiere; a Form IT-2103, Reconciliation of Tax Withheld, dated February 27, 1992, for the year 1991, listing her as president of Premiere; and 13 forms IT-2101, returns of tax withheld, for the semi-monthly periods between January 1991 through July 1991 (one for January was missing), all of which were signed by Ms. Anzilotti as president of Premiere except the return due May 3, 1991, which contained an illegible signature.

In addition, the U.S. Income Tax Return for an S Corporation for 1989 listed petitioner as Premiere's designated tax matters person and shareholder.

Further, in a letter to the Internal Revenue Service ("IRS"), dated December 5, 1991, Ms. Anzilotti signed as president of Premiere and represented to the IRS that she represented Premiere with regard to tax matters.

In the Reconciliation of Tax Withheld, Form IT-2103, dated February 27, 1992, petitioner represented that Premiere withheld State and City taxes of \$165,389.00, but paid over only \$59,095.00, leaving a balance due of \$106,294.00.

Some of the returns of tax withheld, forms IT-2101, filed during 1991 were filed late, to

wit, those filed for the the periods ending April 30, 1991, May 31, 1991, June 15, 1991 and June 30, 1991.

Petitioner issued six checks, each dated July 17, 1991, on the Premiere checking account, Marine Midland Bank Account No. 555-178099, for payment of the withholding taxes owed in the following amounts:

<u>Check Number</u>	<u>Amount</u>
2145	\$14,883.34
2146	15,526.76
2147	19,976.81
2148	12,009.21
2149	9,384.79
2150	5,247.09

The total of these checks was \$77,028.00.

Petitioner did not testify as to the office procedures for mailing documents by Premiere. However, Ms. Anzilotti stated the checks were mailed the same day they were written. These checks, with the exception of number 2147, were stamped on the reverse side with the following: "For deposit only to credit Comptroller State of N.Y. Jul 26 91 NYS Income Tax Account NY State Tax Commission Albany New York." Check number 2147 had a similar stamp but the date on the stamp was "Jul 25 91". Each of the checks had at least one other stamp, presumably a presentment stamp, affixed by Norstar Bank, Upstate NY, Utica New York, with either a date of "AG '91' 01" or "JY '91' 31". It is noted that the checks had numerous stamps affixed to the reverse sides.

After the hearing in this matter, the Division of Taxation ("Division") submitted an affidavit of David Schaible, a head clerk in the Records and Information Section, Processing Division, Withholding Tax Unit, sworn to October 12, 1994, which indicated that, since 1990, it had not been the practice of the unit to retain the envelopes in which it received payments from taxpayers and it had followed this procedure in this matter.

However, Mr. Schaible did state that, based on his personal knowledge and based on his 14 years of employment in the Withholding Tax Unit, the stamp in the center of the back of each check, which stated "Comptroller State of N.Y. Jul 26' 91" (5 checks) and "Comptroller

State of N.Y. Jul 25' 91" (1 check), represented the date upon which each check was endorsed by the State and presented for deposit at Norstar Bank of Upstate New York, the State's depository for taxes withheld and remitted by employers, and that the general rule was that checks were endorsed the same day they were received. The other stamps which appeared on the back of the checks, to wit, "Norstar Bank of Upstate N.Y. Albany N.Y. Jul 26 91" (5 checks) and "Norstar Bank of Upstate N.Y. Albany N.Y. Jul 25 91" (1 check), represented the date on which each check was presented for payment at the taxpayer's bank (Marine Midland) by Norstar Bank.

Mr. Schaible also stated that the standard procedure of Norstar Bank during the year in issue was to present a check twice before it was dishonored. As a result, the checks in issue had the additional stamp "JY '91' 31 Norstar Bank, Norstar Bank Upstate NY Utica, New York" (3 checks) and "AG '91' 01 Norstar Bank Upstate NY Utica, New York" (3 checks), representing the dates upon which each check was presented for payment for the second time at the taxpayer's bank (Marine Midland) by Norstar Bank.

Each of the checks was signed by Lori Anzilotti and was dated July 17, 1991. Petitioner alleged that the checks were mailed on the date they were prepared, i.e., July 17, 1991.

During the year 1991, Lori Anzilotti held herself out as the "controller" and the "secy/tres" of Premiere, as well as president.

Lori Anzilotti was one of the two directors of Premiere listed on the minutes of the first meeting of the board of directors on November 20, 1989, and also signed the corporate banking resolutions as president on July 17, 1990. Her name also appeared as a signatory on the bank's form, again listed as the president of the corporation, along with Robert Anzilotti, secy/tres., Glen Werner and Martin Meyers. During the years Premiere was in business, Ms. Anzilotti owned between 37.5% and 51% of the corporate stock.

During the period in issue, the Ramada Hotel project became behind in payments to Premiere, to the point where it made a payment in excess of \$400,000.00 sometime in July of 1991. There is no evidence in the record of the exact amount paid to Premiere by Ramada or

the specific date of payment. Ms. Anzilotti stated the payment from Ramada came in late July. No bank records to that effect were introduced and neither witness could recall the date or amount of the Ramada payment. However, it is known that the account had \$20,000.00 to \$30,000.00 in it at the time the Ramada check was deposited.

One of the other directors, Martin Meyers, was a family friend who had invested in Premiere. Mr. Meyers was repaid all of his investment, which at times was about \$500,000.00, on June 25, 1991. Approximately one month later, on July 23, 1991, Mr. Meyers withdrew \$350,000.00 from Premiere's checking account, Marine Midland Bank No. 555-178099, and deposited the funds into the Marine Midland account of his wife, Joan Meyers, Account No. 013-543091. Joan Meyers was a stockholder in Premiere.

Ms. Anzilotti said Premiere treated Mr. Meyers as a "line of credit", to which it would go whenever it needed the cash to meet its payroll obligations.

Ms. Anzilotti discovered that the money was gone from the account when the bank notified her in "late July" that several checks had been presented for payment and that there were insufficient funds to pay them.

The withdrawal by Mr. Meyers prevented many checks written on the Premiere account at Marine Midland (Account No. 555-178099) from being paid. Six of these checks, returned for insufficient funds, were the checks written to New York State Income Tax for payment of the withholding taxes in issue, and set forth in more detail in Finding of Fact "4" above. As a result of Mr. Meyers' withdrawal, and liens filed by other subcontractors against the Ramada project, Ramada refused to pay Premiere directly for work done by Premiere's subcontractors. Rather, it paid the subcontractors directly.

Despite this arrangement, Premiere remained in business into 1992, making its last payroll on April 7, 1992. Throughout the period from August of 1991 through April of 1992, Premiere was able to pay its withholding taxes and conduct business, albeit on a much smaller scale. Further, the business survived because of loans from Robert and Lori Anzilotti.

During the period in issue, Premiere had a separate account for payroll and a money

market account to take advantage of the float, if the opportunity presented itself.

On September, 14, 1992, the Division issued to Lori Anzilotti seven notices of deficiency for the following periods and in the following amounts:

<u>Assessment Number</u>	<u>Period Ended</u>	<u>Amount Due</u>
L-006345939-7	6/30/91	\$29,265.79
L-006345940-7	4/30/91	10,849.25
L-006345941-6	5/31/91	19,976.81
L-006345942-5	6/15/91	12,009.21
L-006345943-4	5/15/91	15,526.76
L-006345944-3	7/15/91	5,247.09
L-006345945-2	6/30/91	9,384.79

Petitioner timely filed for a conciliation conference which was held on May 20, 1993. A Conciliation Order was issued on July 2, 1993 which sustained the statutory notices in full. Petitioner filed a petition for a formal hearing in the Division of Tax Appeals which was answered by the Division of Taxation on November 8, 1993.

Petitioner believed that the withdrawal of funds by Mr. Meyers was unauthorized and asked the Westchester County District Attorney's office to investigate the act. However, the Westchester County District Attorney's office said it did not have jurisdiction over the matter and referred petitioner to the Manhattan District Attorney's office. That office refused to prosecute based on the evidence presented to it.

Premiere made no further corporate distributions after the withdrawal by Mr. Meyers on July 23, 1991.

#### SUMMARY OF THE PARTIES' POSITIONS

Petitioner argues that, although she was a person required to collect the withholding taxes defined in Tax Law § 685(g), she is not personally liable for the penalties imposed by Tax Law § 685(g) because her conduct was not willfull. She contends that she filed the returns on time, albeit without payment, and then paid the amount due with a belief that the funds were available in her account to meet Premiere's withholding tax obligations. Therefore, she believes she intended to pay the tax and thought she had done just that. But for the actions of Mr. Meyers and the fact that New York State did not promptly deposit said checks, Premiere would

have paid its withholding taxes. Further, once Ms. Anzilotti learned of the actions of Mr. Meyers, she took every step she could to protect the rights of Premiere and recover the withholding taxes.

The Division argues that Ms. Anzilotti conceded she was a responsible person under Tax Law § 685(g) and that her conduct was indeed willful. It contends that she kept the books of the corporation and knowingly failed to file the returns on time, and in fact admitted to that; she indicated that there were other sources of revenue which could have been used to pay the withholding taxes in a timely fashion; that petitioner paid other corporate liabilities and salaries after the period in issue and ignored the outstanding withholding taxes.

Also, the Division objected to the submission of a complaint in an action brought by Premiere against Martin Meyers and Joan Carole Meyers in the U.S. Bankruptcy Court for the Southern District of New York with petitioner's reply brief after the record was closed.

#### CONCLUSIONS OF LAW

A. Even though the record in this matter had been held open until October 15, 1994, petitioner submitted a copy of a complaint in an action brought by Premiere in the United States Bankruptcy Court for the Southern District of New York against Martin Meyers and Joan Carole Meyers.

The record had been held open until October 15, 1994 only for the submission of an affidavit by the Division with regard to the issue of what the date stamps signified on the checks issued by Premiere to the State Tax Department in payment of withholding tax.

The hearing transcript was clear when the Administrative Law Judge told the parties that once the hearing was closed on September 9, 1994, nothing further, either documentation or testimony, would be accepted by either party, except the affidavit referred to above.

Further, the Tax Appeals Tribunal has stated:

"In order to maintain a fair and efficient hearing system, it is essential that the hearing process be both defined and final. If the parties are able to submit additional evidence after the record is closed, there is neither definition nor finality to the hearing. Further, the submission of evidence after the closing of the record denies the adversary the right to question the evidence on the record. For these reasons we must follow our policy of not allowing the submission of evidence after

the closing of the record" (Matter of Schoonover, Tax Appeals Tribunal, August 15, 1991).

Therefore, the complaint referred to above is not permitted into the record.

B. Tax Law § 685(g) provides, in pertinent part, as follows:

"[a]ny person required to collect, truthfully account for, and pay over the tax imposed by [Article 22] 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."

In the instant matter, petitioner conceded that she was a "person required to collect, truthfully account for, and pay over" the withholding taxes of Premiere during the period in issue. Therefore, the only remaining issue is whether petitioner's actions were "willful" within the meaning and intent of Tax Law § 685(g).

Both parties cited the case of Levin v. Gallman (42 NY2d 32, 396 NYS2d 623 [1977]) as a landmark New York Court of Appeals decision which set forth the accepted standard for willfulness as follows:

"[T]he 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 (citations omitted). No showing of intent to deprive the Government of its money is necessary but only something more than accidental nonpayment is required (citations omitted)" (id., 396 NYS2d at 624-625).

The facts in this matter reveal that petitioner did not make all withholding tax payments in a timely manner. Petitioner conceded on cross examination, after being confronted with the returns she prepared, that they had been prepared after the due dates. Specifically, the returns for the periods ended April 30, 1991, May 31, 1991, June 15, 1991 and June 30, 1991 were filed late, the last three being filed on or after July 17, 1991.

Added to this, it was apparent from the record that Premiere, through Ms. Anzilotti, remitted the six checks in payment of withholding taxes due at one time, on or after July 17, 1991; and this means that only one of the payments would have been timely. Therefore, it is certain that petitioner, as keeper of the books, knew that returns were filed late and that payments were remitted late and that she was not complying with Tax Law §§ 671 and 674,



which require that every employer maintaining an office or transacting business in the State and paying wages must withhold taxes from their employees' wages reasonably calculated to be due from the employees' New York source income during the taxable year and the return of such taxes must be made with payment in the amount of the taxes required to be deducted and withheld.

Given these provisions and the facts of this matter, subsequent events are moot.

However, prior to the withdrawal of funds from the corporation's checking account, Premiere had many employees for whom it was under a duty to file a withholding tax return and pay the tax owed. Clearly, until Premiere met with the failure of Ramada Hotel to pay it in the spring of 1991, it was doing just that. However, it can be inferred from the facts that it paid its employees' wages but did not withhold taxes, or, in the alternative, withheld taxes and used them for other purposes.

Petitioner testified that Premiere used Mr. Meyers as a line of credit to meet payroll, yet that was not considered a source of revenue to pay withholding taxes. This is another indication that the failure to pay the tax and file the returns when due was a conscious decision by petitioner, i.e., willful conduct.

In addition, even after the withdrawal of funds by Mr. Meyers, Premiere continued in business and continued to work on the Ramada Hotel. Its last payroll was not until April 7, 1992 and Ms. Anzilotti testified that, after the period in issue, returns of withholding taxes were filed on time along with the proper remittances. The question then remains why none of the unpaid taxes were remitted. By her own admission, there was between \$20,000.00 and \$30,000.00 in Premiere's account prior to the Meyers withdrawal, but no explanation of why none of those funds were used to satisfy the outstanding withholding tax liability. The clear inference is that Premiere, by Ms. Anzilotti, chose to pay other liabilities rather than the withholding tax, and thus willfully failed to pay the taxes within the meaning of Tax Law § 685(g) (see, Levin v. Gallman, *supra*).

The question that begs to be answered in this matter is, if Premiere was obligated to

withhold employee income taxes and petitioner was the corporate officer responsible for those deductions, and taxes were deducted as required and held in trust for the Tax Commissioner, what became of those funds? With so many unanswered questions, it cannot be concluded that petitioner has carried her burden of proving that the deficiencies herein were improper (Tax Law § 689[e]). In fact, the reverse is true, that if there are inferences from the facts to support the Commissioner's determination, the assessments should be confirmed (Levin v. Gallman, supra, 396 NYS2d at 625).

Finally, petitioner contends that she could not have willfully failed to remit the withholding taxes because if Mr. Meyers had not withdrawn the \$350,000.00 from the corporate checking account, all the taxes would have been paid. First, it has been demonstrated from the facts that, prior to this withdrawal on July 23, 1991, funds were available or could have been made available to pay the taxes.

Further, although Mr. Schaible's affidavit is not conclusive evidence of when the checks were received from petitioner, his statement of office procedure and explanation of the bank stamps is more credible than petitioner's assertion that the checks were mailed on the same date they were written. This conclusion is further supported by Ms. Anzilotti's statement that Premiere did not receive payment from Ramada until "late July", which would be presumably after the 17th of July.

Neither Mr. nor Ms. Anzilotti could say when they got the check from Ramada. Ms. Anzilotti thought it was the end of July 1991. Nor could they remember how much the check was for. No bank records concerning the deposit of that check were produced. They only realized that checks began to bounce when the bank notified them in late July. This proof does not rise to the level of clear and convincing evidence which would be necessary to establish that petitioner's failure to pay the withholding tax was not willful within the meaning of Tax Law § 685(g) (Matter of Krone, Tax Appeals Tribunal, September 19, 1991).

Petitioner's circumstances are not as harsh as those found in Matter of Byram (Tax Appeals Tribunal, August 1, 1994), where the petitioner was found to be a person who willfully

failed to remit withholding taxes and was subject to the penalty imposed by Tax Law § 685(g) despite his position as the executive director of the Baptist Medical Center of N.Y., Inc., a not-for-profit corporation which operated a hospital in a poor, high crime neighborhood with about 1,000 employees, and his assertion that he was precluded from using the monies for payment of withholding tax as opposed to paying the bills which kept the hospital open.

Petitioner cites to the former State Tax Commission case of Matter of Rosenberg (State Tax Commission, June 19, 1984), where the petitioner was unable to pay withholding tax and not liable for same because money had been embezzled by the collection agency to collect outstanding accounts receivable while the corporation was in Chapter 11 bankruptcy. The distinction between the Rosenberg case and the instant matter is that there is no evidence in the record that money was "stolen" by Mr. Meyers. In fact, the Westchester and Manhattan District Attorneys' offices refused to prosecute Mr. Meyers and there has been no evidence of wrongdoing by Mr. Meyers other than Ms. Anzilotti's and Mr. Anzilotti's statements that the withdrawal was "unauthorized". Clearly, the withdrawal did not rise to a criminal level. Further, at the time of the withdrawal, it is not known how much of the stock of Premiere Mr. Meyers controlled.

In any event, petitioner has not established that her failure to file returns and pay the withholding tax due was not willful.

C. Although it was determined above that petitioner met the willful standard set forth in Levin v. Gallman (supra), petitioner argues that the definition of willful conduct should be broadened, consistent with Federal law, citing Kalb v. United States (505 F2d 506 [2d Cir 1974], cert denied 421 US 979, 44 L Ed 2d 471). Petitioner argues that Tax Law § 607 provides that any term used in Article 22 should have the same meaning as that used in comparable context in the laws of the United States relating to income taxes. Specifically, petitioner argues that the term "willful conduct" includes the failure to investigate or to correct mismanagement after discovery that the withholding taxes were not paid. Petitioner maintains she did investigate and tried to correct mismanagement. However, the Levin case defined the

term "willful conduct" for New York purposes and used the Federal definition found in Kalb. Therefore, petitioner's contention that this forum should adopt the "more broad" definition of the Federal government and courts is erroneous. The Federal definition is rooted in such cases as Monday v. United States (421 F2d 1210, 1215, cert denied 400 US 821, 91 S Ct 38, 27 L Ed 2d 48) and Thomsen v. United States (887 F2d 12, 18 [1st Cir 1989]). Although willfulness has been found where there was a failure to investigate or correct mismanagement after notice that the withholding taxes were not paid (Internal Revenue Service v. Blais, 612 F Supp 700, 710), that was not the case herein. Here, petitioner did not timely file returns and pay withholding tax before the money was withdrawn from the account when funds were available and after the withdrawal when funds were also available. Her "investigation" amounted to asking for the money back from Mr. Meyers and unsuccessfully trying to convince two district attorneys that Mr. Meyers had done something criminal, a conclusion neither they nor this forum have reached. Further, where willful conduct has been defined by the Tax Appeals Tribunal consistent with Levin and the Federal courts, this forum will not abandon that interpretation (Matter of Boshes, Tax Appeals Tribunal, November 29, 1990 [where the Tribunal did analyze the willfulness standard and noted the analogous language in section 6672 of the Internal Revenue Code]); and it is determined that petitioner's actions and conduct were "willful" as so defined.

D. The petition of Lori Anzilotti, officer of Premiere Concrete Structures, Inc., is denied and the six notices of deficiency dated September 14, 1992 are sustained.

DATED: Troy, New York  
May 18, 1995

/s/ Joseph W. Pinto, Jr.  
ADMINISTRATIVE LAW JUDGE