STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:
of	:
ANDREW C. RISOLI, OFFICER OF DETERMINATION FLOWERS BY PIERRE, INC.	: DTA NO. 812706
for Redetermination of a Deficiency or for Refund of New York State and New York City Personal Income Taxes under Article 22 of the Tax Law and the New York City Administrative Code for the Period March 1, 1989 through June 30, 1991.	: : : :

Petitioner, Andrew C. Risoli, officer of Flowers by Pierre, Inc., 55 Carwall Avenue, Mount Vernon, New York 10552, filed a petition for redetermination of a deficiency or for refund of New York State and New York City personal income taxes under Article 22 of the Tax Law and the New York City Administrative Code for the period March 1, 1989 through June 30, 1991.

A hearing was held before Dennis M. Galliher, Administrative Law Judge, at the offices of the Division of Tax Appeals, 500 Federal Street, Troy, New York, on November 15, 1994 at 1:15 P.M., with all briefs to be submitted by March 10, 1995. The Division of Taxation, appearing by William F. Collins, Esq. (Laura J. Witkowski, Esq., of counsel), submitted a brief on February 9, 1995. Petitioner, appearing by David Portnoy, Esq., submitted a reply brief on March 9, 1995, which date commenced the six-month period for the issuance of this determination (Tax Law § 2010[3]).

ISSUE

Whether petitioner was a person under a duty to collect, truthfully account for and pay over withholding tax on behalf of Flowers by Pierre, Inc., who willfully failed to do so thereby becoming liable for penalty equal to the amount of such unremitted tax.

FINDINGS OF FACT

The Division of Taxation ("Division") issued to petitioner, Andrew C. Risoli, nine notices of deficiency, each dated November 9, 1992, asserting penalties pursuant to Tax Law § 685(g) in the aggregate amount of $16,015.00 for the period March 1, 1989 through June 30, 1991. These notices were issued to petitioner under the premise that he was a person required to collect, truthfully account for and remit withholding taxes on behalf of an entity known as Flowers by Pierre, Inc. ("Flowers"), whose failure to do so left him personally liable for penalties equal to such unremitted tax.[1]

Flowers was a family owned retail florist business founded by petitioner's father in the 1940's. Flowers operated its business from leased premises located on the concourse level of the World Trade Center. Petitioner's father and mother operated Flowers from its inception through approximately 1974, at which time petitioner's parents decided to retire and move to Florida.

Petitioner is an attorney at law who was admitted to

[1]At the commencement of proceedings herein the parties agreed that the aggregate dollar amount of penalty asserted is not in dispute, and that the only issue is whether petitioner is a person properly responsible for such amount.

practice in New York State in 1962. Prior to his admission to the bar and during his years in law school, petitioner worked in the flower shop, generally from 2:00 P.M. until midnight five nights per week. Prior to, during and after

the period at issue herein, petitioner was engaged in a general legal practice as a solo practitioner. Petitioner's workday typically spanned 8 to 10 hours and involved court appearances.

When petitioner's father decided to retire in 1974, he divided Flowers' shares of stock equally between petitioner and his younger brother, Michael Risoli. Petitioner, who in 1974 was working in his legal practice, described the reason for the equal split of the stock with his brother Michael, who was working full time in Flowers, as reflecting his mother and father's desire and request that petitioner watch out for his brother and the business. More specifically, petitioner explained that his parents' concern stemmed from the fact that Michael Risoli had a gambling problem.

According to petitioner's testimony, in or about 1980 the Port Authority, as Flowers' landlord, notified Flowers that its lease would be terminated for nonpayment of rent. However, after discussions, the landlord consented to a continuation of the business at the premises with the issuance of a new 10-year lease on the condition that another individual, one Barbara Kissel, would become involved in the business. Petitioner noted that Ms. Kissel had developed a reputation as an interior decorator, and it was believed that her abilities and reputation

would be helpful in the planning and execution of catered parties which constituted a major part of Flowers' business. Petitioner was asked and consented to a redistribution of the shares of stock in Flowers such that he, Michael Risoli and Barbara Kissel would become equal one-third owners of Flowers. Ms. Kissel made no payment in exchange for receiving her shares of stock.

According to petitioner, Ms. Kissel came in and ran all aspects of the business for a period of some seven years until her death in 1987. Petitioner alleged that Ms. Kissel hired and fired employees during such period, kept the books of the business, bought and sold goods on behalf of the business, opened bank accounts, signed checks, etc. Petitioner described Ms. Kissel as Flowers' chief operating officer during the period spanning 1980 through 1987.

Upon Ms. Kissel's death in 1987, it appears that her husband William Kissel and their three children became the owners of her shares of stock in Flowers. In turn, shortly after Ms. Kissel's death, Scarsdale National Bank ("Scarsdale") furnished notice to petitioner, as a Flowers shareholder, as well as to the estate of Barbara Kissel, that Flowers was delinquent on outstanding loans of approximately $480,000.00. Petitioner described the circumstances under which Flowers initially obtained a $20,000.00 or $25,000.00 loan from Scarsdale in approximately 1980 to meet the landlord's requirement that the front of the store location be refurbished as part of the issuance of the new lease for the premises (see,

Finding of Fact "5"). Scarsdale's agreement to issue the loan included a requirement that all Flowers' shareholders sign on as individually responsible for repayment. In turn, petitioner signed a loan agreement for the $20,000.00 or $25,000.00 loan to refurbish the front of the store. Petitioner testified that when signing for the loan he did not notice that the loan agreement included a clause that those persons signing guaranteed not only the then current loan but any future loans as well. Petitioner noted that his brother signed for and took all of the additional loans after the $20,000.00 or $25,000.00 initial refurbishing loan, and that although neither petitioner nor any of the Kissel children or Risoli children signed for the additional loans, Scarsdale took the position that all were liable as guarantors. According to petitioner's testimony, these subsequent loans were unknown to anyone involved with the business other than his brother.

Upon receiving notice from Scarsdale petitioner, accompanied by Ms. Kissel's oldest child Frank Kissel, met with Scarsdale's loan officers. At this meeting, petitioner was asked and agreed to be the only person authorized to sign documents with respect to the Scarsdale account. In turn, a Scarsdale bank resolution dated November 1, 1988 was executed listing petitioner as the sole authorized signatory on the Scarsdale account. Petitioner stated that the purpose for this resolution was to preclude petitioner's brother and/or any other parties from taking additional loans from Scarsdale. The Scarsdale Bank resolution specifically lists petitioner as

president and secretary of Flowers, and also lists Deborah Scarnati as treasurer, Frank Kissel, William Kissel, Jr., Kristen Kissel, Lucille Risoli, Susan Risoli and Donna Goode, as vice presidents, and Anne Marie Risoli as recording secretary. Only petitioner, and none of these other named individuals, is reflected as an authorized signatory on the Scarsdale Bank resolution.[2]

Petitioner testified that he pledged certain certificates of deposit owned by him and held at the Republic National Bank to pay off certain of the Scarsdale Bank loans or portions thereof totalling approximately $110,000.00, with the understanding that "they" (Flowers) would repay him "so much a week or so much a month". Petitioner noted that

the certificates of deposit are still under pledge and that he has never received any repayments from Flowers.

Petitioner testified that Flowers was open from 7:00 A.M. to 4:00 P.M. and, allegedly because of these hours and the ongoing need to be able to issue checks to pay for goods as received, a number of persons including petitioner became signatories on all of Flowers' bank accounts (other than the Scarsdale account). Specifically, petitioner noted the following persons as being authorized to sign checks on all of Flowers' accounts: Barbara Kissel's husband William, the three

[2]Frank Kissel, William Kissel, Jr., and Kristen Kissel are William and Barbara Kissel's three children. Deborah Scarnati, Susan Risoli, Donna Goode, Lucille Risoli and Anne Marie Risoli are Michael Risoli's five children.

Kissel children, Michael Risoli, Michael Risoli's five children and petitioner.

Petitioner's wife, Agnes Risoli, was employed at Flowers, but was not a shareholder or officer of the corporation. Petitioner testified that he would be at Flowers' business location for only 10 to 15 minutes each night to pick up his wife after work. Petitioner could not recall signing any checks, but admitted that he might have signed a check on a Flowers account on a very infrequent basis. In this regard, he noted that if an early morning delivery was expected requiring C.O.D. payment and there was no other authorized check signer at the premises at the end of the day when he was there to pick up his wife, he might have signed. He testified, however, that he signed no more than one out of every 500 checks drawn on Flowers' accounts.

Petitioner was called upon to represent Flowers as its attorney on a very occasional basis, generally with regard to disputes over the receipt of goods or the quality of goods. Petitioner explained that he represented Flowers in this capacity once or twice a year, and that he did not submit a bill for his services.

Petitioner did not request to see the books and records to check on Flowers' business, and noted that the corporation had a full-time bookkeeper. Petitioner testified that he did not know who prepared tax returns on Flowers' behalf, but alleged that he did not sign any tax returns. Petitioner also stated that Flowers was in essence a small family business and that there

were "no formal meetings or corporate officers." At or about the time that the Scarsdale loan problems surfaced, petitioner asked his brother whether Flowers' bills, including taxes, were being paid. In response, Michael Risoli advised petitioner that "things were being taken care of." Petitioner testified, with regard to this question that he [petitioner] "never took care of it, but I didn't want a problem."

Petitioner's Federal income tax return for 1989 and his Federal, New York State and New York City income tax returns for 1990 and 1991 were offered in evidence. On these returns, petitioner's net business income from his legal practice (per Federal Schedule C [Profit or Loss from Business or Profession]) was listed as $66,590.00 for 1989, $152,302.00 for 1990 and $67,366.00 for 1991. In addition, wage and tax statements ("Forms W-2") as issued to petitioner and to petitioner's wife for each of the years 1989 and 1990, and to petitioner's wife only for the year 1991, were attached to the tax returns. The Forms W-2 were issued by Flowers and by another entity known as Nosegay Flower Shop ("Nosegay"), which lists its address as Bronxville, New York. Said Forms W-2 reflect wage income paid to petitioner and to Mrs. Risoli, and reported on petitioner and Mrs. Risoli's income tax returns, as follows:

Year	Recipient	Flowers	Nosegay	Total	Combined Total
1989	Mr. Risoli	$26,000.00	$15,600.00		$41,600.00
1989	Mrs. Risoli	~~$68,900.00~~ 27,300.00	19,500.00		7,800.00
1990	Mr. Risoli	20,800.00	15,600.00		36,400.00
1990	Mrs. Risoli	~~$63,700.00~~	19,800.00		7,500.00

27,300.00

1991	Mr. Risoli	---	---	---	
1991	Mrs. Risoli		19,500.00		5,850.00
	25,350.00	---	~~$25,350.00~~		

Petitioner points out the amount of his wage income shown from Flowers decreased between 1989 and 1990 and was zero for 1991. In this regard, petitioner testified that he asked to be taken off the (Flowers) books in late 1990 when he became aware of a Federal withholding tax problem (the outcome of which was not specified). Petitioner testified that such problem "scared the hell out of me, I wanted out of the business." Petitioner testified that although the Forms W-2 report his receipt of wage income, he in fact received no such income from Flowers. Petitioner offered no information relative to Nosegay in general or as to the W-2 wage income reported as paid by that entity to petitioner. He explained the issuance of Forms W-2 as reflecting a demand or a policy set by Barbara Kissel whereby all shareholders were to be carried on the books (i.e., listed as receiving income from Flowers per Forms W-2).

In or about 1992, petitioner became involved in attempts to resolve sales tax assessments issued against Flowers. Petitioner, again accompanied by Barbara Kissel's oldest child Frank Kissel, attended a conciliation conference with the Division's Bureau of Conciliation and Mediation Services ("BCMS"). As a result of this conference, certain sales tax assessments issued against Flowers were resolved. Although the periods covered and amounts of the assessments as initially issued are not specified in the record, the resolved amount

totalled $37,942.00, consisting of $18,228.00 in tax, $6,785.00 in penalty, $10,416.00 in interest, and $2,513.00 in omnibus penalty. Petitioner explained that the settlement included an agreement that certain monies collected on Flowers' accounts receivable and held in escrow were to be released in payment of the resolved amount of the sales tax assessments.

After arriving at the above settlement figures, petitioner was unable to secure a consent to release the escrowed funds from an attorney representing some of the shareholders of Flowers. In turn, and as a consequence of this inability to obtain release approval of the escrowed funds the escrowee, Wise, Lerman and Katz, Esqs., P.C., allegedly at petitioner's behest, commenced an interpleader action seeking an order allowing release of the funds. The interpleader summons and complaint names as defendants Flowers, petitioner, Rim Enterprises, Inc. ("Rim"), Gardenia Enterprises, Inc. ("Gardenia"), and Larry Kushner. As of February 1, 1992, Rim and Gardenia were each one-third shareholders of Flowers, as was petitioner.[3]

The interpleader summons and complaint details the resolved sales tax assessments, the need to pay the same, and the withheld consent barring release of the funds as the basis for seeking court intervention. The complaint also specifically

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[3]Rim Enterprises, Inc. included the interests of Michael Risoli and his five children, Deborah Scarnati, Lucy Risoli, Susan Risoli, Donna Goode and Ann Risoli. Gardenia Enterprises, Inc. included the interests of Frank Kissel, Kristen Kissel and William Kissel, Jr. (the three children of Barbara Kissel). Larry Kushner had become Flowers' attorney in place of petitioner.

references an attached agreement dated February 15, 1992 (the "surrender agreement") which details the surrender of petitioner's and Gardenia's shares of stock in Flowers (50 shares each

representing each such party's one-third ownership interest in Flowers) to Rim, and the consideration to be received in exchange therefor.

As is pertinent to this matter, the surrender agreement (at Paragraph 2[a]) specifies the consideration to be received by petitioner in exchange for the surrender of his shares as:

> (a) all of Flowers' right, title and interest in its Rainbow Room house accounts receivable and party accounts receivable for periods prior to February 15, 1992 in repayment of monies advanced by petitioner to Flowers for general operating expenses;
>
> (b) all Rainbow Room house account and party account supplies;
>
> (c) a large, white 1988 Chevrolet van subject to the General Motors Acceptance Corporation ("GMAC") loan thereon to be assumed by petitioner; and
>
> (d) all right, title and interest in two Flowers telephone lines (the numbers of which were specified).

Paragraph 6(a) of the surrender agreement required that Flowers, Rim, (and its shareholders) and Michael Risoli indemnify petitioner against any liability arising out of their conduct of business for periods after February 15, 1992. Paragraph 8(a) of the surrender agreement goes on to note that petitioner is to keep the Rainbow Room accounts as his sole and exclusive property. Finally, paragraph 11(a) of the agreement includes a restrictive covenant prohibiting the other

signatories to the agreement from soliciting any Rainbow Room floral business for a period of five years after February 15, 1992.

No testimony or other evidence was introduced with respect to the portion of the stock surrender agreement which indicates petitioner's consideration in exchange for his stock to include the Rainbow Room accounts receivable, or regarding the import of the restrictive covenant barring the other persons from soliciting Rainbow Room business after February 15, 1992. Similarly, there is no testimony or other evidence regarding monies advanced by petitioner to Flowers for general operating expenses. In fact, the only evidence regarding monies advanced from petitioner to Flowers was petitioner's testimony relating to the pledge of certificates of deposit in connection with the outstanding Scarsdale loans (see, Finding of Fact "9").

As Exhibit "I", the Division introduced a number of withholding tax returns including monthly returns (Forms IT-2101) and year-end reconciliation returns (Form IT-2103). The first three of such returns, (Forms IT-2101 for the months of February 1989 and January 1989 and a Form IT-2103 for the year 1989) reflect a signature which is illegible, followed by the title "president". Two additional forms IT-2103, for the years 1990 and 1991, respectively, also bear signatures which are illegible followed by the title "president". With regard to these documents, the Division argues that the signature on the first three described returns closely resembles petitioner's signature as appearing on the surrender agreement. Petitioner,

in contrast, testified that the signature appearing on the first three returns is not his signature, that the fourth return (the Form IT-2103 for 1990) bears the signature of his brother, Michael Risoli, and that the signature on the fifth return (the Form IT-2103 for 1991) is a signature not familiar to petitioner. Careful review of all of such documents reveals that: (a) the signature on the fourth return is distinctly different from the signature on the first three returns; (b) the signature on the first three returns bears a remarkably close resemblance to petitioner's signature as appearing on the surrender agreement; and (c) all of the signatures on all of such returns are illegible.

Petitioner placed in evidence photocopies of 274 checks. Of this total, 273 checks were drawn between March 1988 and May 1991, with one check drawn in June 1993. These checks were drawn on: (a) two bank accounts with Republic National Bank of New York, specifically consisting of one account for Flowers listing Republic's Hunts Point Cooperative Market, Bronx, New York branch, and one account for an entity known as 1070 Madison Avenue Flower Shop listing Republic's 420 World Trade Center Concourse branch; (b) one account for Flowers with Citibank listing Citibank's 101 World Trade Center Concourse branch; and (c) the one additional check drawn in June 1993 on a Flowers account with Chemical Bank listing Chemical's 100 World Trade Center Concourse branch office. Of the 274 checks offered in evidence, 64 bear the signature of Frank Kissel, 1 bears the signature of Michael Risoli (the one check drawn on the Chemical

Bank 100 World Trade Center Concourse account), and 209 checks bear the signature of Deborah Scarnati. These checks were submitted to show the absence of petitioner's signature thereon, in support of his claim that he only very rarely if ever would sign a check on behalf of Flowers. Petitioner does not claim, nor does his testimony support, that these checks represent all checks drawn on all of Flowers accounts during the period in question.[4]

Petitioner noted that Flowers ultimately discontinued its business for a period of time after the World Trade Center explosion, thereafter resumed operations under Chapter 11 Bankruptcy status (reorganization), and finally "faded into oblivion".

SUMMARY OF THE PARTIES' POSITIONS

Petitioner argues that he provided forthright and credible testimony that he was involved full time in the operation of his legal practice and therefore did not have the time to be involved in the operation of Flowers' business. Petitioner argues that Flowers was a small family business the operation of which was in essence assumed by his brother, Michael, in 1974, and that there were no formal transfers, procedures or meetings.

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[4]On this score, petitioner testified that:

> "[w]hen we got notice there was a [sales tax] problem, right, I went down there [Flowers' premises] and while he [Michael Risoli] was in the office, I took some of the checks because I thought that I might need them, they are not in order or anything, I only brought them for one purpose, just to show that I wasn't the sole signatory" (tr., p. 23).

Petitioner claims his stock ownership stems from the fact that as Michael Risoli's older brother, petitioner was cast by his parents in the role of watching out for his brother vis-a-vis operating Flowers. Petitioner maintains that his ownership interest in Flowers was reduced when Barbara Kissel became involved, that he was an owner in name only, and that he was under no responsibility to assure that taxes were collected, accounted for and remitted on behalf of Flowers at any time. Petitioner contends, in sum, that his involvement was in attempting to extricate his brother, his brother's family members, his friend William Kissel and children, and their business from problems caused largely by his brother's misoperation of the business due to personal problems with gambling.

The Division argues, in contrast, that the evidence is more than sufficient to establish that petitioner was involved in many aspects of the business, that he was named as an officer, that he owned shares of stock, that he knew of and became involved in the financial matters of the business, and that he was an authorized signatory on all of the business's bank accounts. The Division notes that the submission of checks by petitioner does not include evidence establishing that those checks represented all of the checks drawn by the business. In sum, the Division asserts that petitioner was an owner of the business and was involved to such a degree that he should properly be held responsible for the unpaid taxes in question.

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 "persons" subject to the section (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, and has been litigated many times (see, 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 are well defined and include, inter alia, 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). Summarized in terms of 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, account for and remit the unpaid taxes in question (Matter of Constantino, Tax Appeals Tribunal, September 27, 1990; Matter of Chin, Tax Appeals Tribunal, December 20, 1990).

C. In addition to the foregoing, if petitioner is held to be a person under a duty as described, it must then be decided whether his failure to withhold and pay over such 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. However, merely because one is determined to be a person under a duty, it does not automatically follow that a failure to withhold and pay over income taxes is "willful" within the meaning of that term as used in Tax Law § 685(g) (Matter of Chin, supra). 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

> nonpayment is required" (id., 396 NYS2d at 624-625; see, Matter of Lyon, Tax Appeals Tribunal, June 3, 1988).

It is well established that "corporate officials responsible as fiduciaries for tax revenues cannot absolve themselves merely by disregarding their duty and leaving it for someone else to discharge" (Matter of Ragonesi v. State Tax Commn., 88 AD2d 707, 451 NYS2d 301, 303). In this regard, a failure to collect and pay over taxes can be willful, notwithstanding a lack of actual knowledge, if it is determined that one with a duty to act, recklessly disregarded that duty (see, Matter of Capoccia v. State Tax Commn., 105 AD2d 528, 481 NYS2d 476; Matter of Ragonesi v. State Tax Commn., supra). The Tax Appeals Tribunal has stated that "[t]he essence of the willfulness standard is that the person must voluntarily and consciously direct the trust fund monies from the State to someone else" (Matter of Gallo, Tax Appeals Tribunal, September 9, 1988).

D. Turning to the facts of this case, petitioner was properly subjected to liability as a person responsible to collect, account for and remit taxes on behalf of Flowers. At the outset, petitioner was in fact cast in (and apparently accepted) the role of "watchdog" for the business and for his brother at the time of petitioner's father's retirement. Petitioner was one of three equal shareholders during the period at issue, was listed on Forms W-2 as receiving fairly substantial amounts of compensation from the business, was an authorized signatory on all of the business's bank accounts, and clearly was involved in a good deal of the corporation's

financial affairs during and after the period in question. Petitioner not only held, but in a number of instances exercised, authority on behalf of Flowers, and petitioner's involvement cannot reasonably be held to be simply passive ownership. The record shows that from shortly before and on through the period in question, petitioner became increasingly involved in the financial aspects of the business, apparently in an effort to not only rectify past problems but to keep the business operating. In this regard, petitioner not only pledged money against overdue loans but also (as indicated in the surrender agreement) advanced money to cover ongoing operating expenses.

Petitioner's statement that there were really no officers, no directors, no formal meetings or procedures and that Flowers was a small family-operated business, must be contrasted against the fact that Flowers' shares of stock were split upon petitioner's father's retirement and were again split when Barbara Kissel entered the business. It is undoubtedly true that many small, family-owned businesses organized in corporate form are in fact operated in a very informal manner. However, to accept petitioner's argument with regard to the size, composition and operation of Flowers' business as itself a basis to avoid responsibility would be to conclude, in essence, that such informality excuses anyone involved in such a business from responsibility.

E. In addition to the foregoing, the stock surrender agreement clearly indicates, contrary to petitioner's testimony,

that petitioner was to receive compensation in exchange for his shares. Such compensation included not only past amounts due but also, potentially, future floral business with regard to the Rainbow Room accounts (see, Finding of Fact "19"). Petitioner testified that he possibly signed only one or two checks on Flowers' bank accounts. However, it is clear (and admitted) that not all checks and accounts are accounted for in evidence. Moreover, the fact that petitioner was included as authorized to sign on all of Flowers' accounts certainly indicates authority to act, and there is no evidence that such authority was in any way restricted. What emerges most clearly from a review of all the evidence is that petitioner at the latest became aware of problems in the business in or about November 1988, with the advent of the Scarsdale loan problems. Thereafter, petitioner became increasingly involved in operations of the business, at least from a financial standpoint. There is no evidence that petitioner disassociated himself from the business during the period in question, save for the lack of receipt of a Form W2 for the year 1991. Given all of the factors, it does not emerge clear that petitioner's only real involvement with Flowers was in the role of an attorney/advisor (compare, Matter of Fisher v. State Tax Commn., 90 AD2d 910, 456 NYS2d 881).

Two matters cause particular difficulty in accepting petitioner's position that he was essentially uninvolved and should bear no responsibility. First, the record contains no plausible or even clear explanation as to why petitioner would have accepted a Form W-2 showing the receipt of not

insubstantial wage income from Flowers, thus requiring petitioner to report and pay tax on such income while petitioner claims to have received no such income in fact. There is no claimed or obvious benefit to petitioner from such an arrangement and the only explanation offered - that Barbara Kissel insisted all shareholders be carried on the books as receiving a salary - falls short of explaining why petitioner would accept the detriment of paying tax on income he never received.[5] In sum, the explanation as to the income shown on the Forms W-2 is not particularly convincing.

The second item involves the combination of circumstances surrounding the stock surrender. Petitioner testified that he received no consideration for his stock. However, the surrender agreement specifies certain items of consideration, including the Rainbow Room accounts, supplies, a delivery van and phone lines (see, Finding of Fact "19"). The agreement also includes a restrictive covenant barring the other Flowers shareholders from pursuing Rainbow Room business. Given petitioner's prior experience in Flowers' business, the noted consideration for his stock and the unexplained W-2 income shown from Nosegay (another florist), there arises a question not only as to whether petitioner would engage in floral business after the stock surrender but also whether petitioner was engaged in

[5]Viewed in the harshest light, the insistence on institution of such a policy by Ms. Kissel upon her involvement in the business could lead to an inference that the shareholders were receiving income "off the books" prior to her involvement.

such business during the period in question. In any event, petitioner at the least clearly appears to have received value for the surrender of his stock.

F. As to the issue of willfulness, it is sufficient to point out that petitioner was clearly on notice of problems prior to the period at issue due to the Scarsdale situation, and thereafter in fact made inquiries as to payments, specifically including inquiries as to the payment of taxes. In turn, petitioner testified that his brother stated that everything was being paid. Given the known problems of the business at that time, and also noting specifically petitioner's knowledge of his brother's gambling habits, simply accepting Michael Risoli's assurances as to payment is not reasonable under the circumstances. In fact, petitioner described Michael Risoli as an "irresponsible person" with an acknowledged gambling problem. In short, petitioner should reasonably have anticipated problems in remitting taxes and should have, as a person on notice, done more than simply accept Michael Risoli's assurance that all taxes were being paid. Petitioner's steps to end his involvement with the business took place well after the period in question and do not absolve petitioner from liability during the period in question. Accordingly, in view of all of the evidence presented, petitioner is properly held responsible for penalties equal to the unpaid withholding taxes owed by Flowers.

G. The petition of Andrew C. Risoli, officer of Flowers by Pierre, Inc., is hereby denied and the nine notices of deficiency, dated November 9, 1992, are sustained.

DATED: Troy, New York
August 10, 1995

/s/ Dennis M. Galliher

ADMINISTRATIVE LAW JUDGE