

STATE OF NEW YORK

DIVISION OF TAX APPEALS

---

In the Matter of the Petition	:	
of	:	
<b>SADHU SINGH AHLUWALIA,</b>	:	
<b>OFFICER OF CENTER FOR ACCELERATED</b>	:	
<b>LEARNING, INC.</b>	:	<b>DETERMINATION</b>
		DTA NO. 815236
for Redetermination of Deficiencies or for Refund of	:	
New York State and New York City Income Taxes	:	
under Article 22 of the Tax Law and the Administrative	:	
Code of the City of New York for the Period July 1,	:	
1992 through March 18, 1994.	:	

---

Petitioner, Sadhu Singh Ahluwalia, P.O. Box 637, Bronx, New York 10475, filed a petition for redetermination of deficiencies or for refund of New York State and New York City income taxes under Article 22 of the Tax Law and the Administrative Code of the City of New York for the period July 1, 1992 through March 18, 1994.

A hearing was held before Marilyn Mann Faulkner, Administrative Law Judge, at the offices of the Division of Tax Appeals, 641 Lexington Avenue, New York, New York, on March 18, 1997 at 10:15 A.M., with all briefs to be submitted by July 7, 1997, which date began the six-month period for the issuance of this determination. Petitioner appeared *pro se*. The Division of Taxation appeared by Steven U. Teitelbaum, Esq. (Herbert M. Friedman, Jr., Esq., of counsel). On September 26, 1997, this proceeding was transferred to Winifred M. Maloney, Administrative Law Judge, who renders the following determination.

***ISSUE***

Whether petitioner willfully failed to collect, truthfully account for and pay over withholding taxes on behalf of Center For Accelerated Learning, Inc.

***FINDINGS OF FACT***

1. The Division of Taxation (“Division”) issued six notices of deficiency, each dated September 25, 1995, against petitioner, Sadhu Singh Ahluwalia, as an officer or responsible person of Center For Accelerated Learning, Inc. for a penalty under Tax Law § 685(g) in an amount equal to the withholding tax not paid by the business.

Notice of Deficiency (Assessment ID L-011107799-6) asserted penalties for the period July 1, 1992 through December 31, 1992 in the total amount of \$6,141.65.

Notice of Deficiency (Assessment ID L-011107795-1) asserted penalties for the period January 1, 1993 through March 31, 1993 in the total amount of \$2,870.62.

Notice of Deficiency (Assessment ID L-011107797-8) asserted penalties for the period April 1, 1993 through June 30, 1993 in the total amount of \$3,780.56.

Notice of Deficiency (Assessment ID L-011107798-7) asserted penalties for the period July 1, 1993 through September 30, 1993 in the total amount of \$3,755.30.

Notice of Deficiency (Assessment ID L-011107796-9) asserted penalties for the period October 1, 1993 through December 31, 1993 in the total amount of \$4,648.04.

Notice of Deficiency (Assessment ID L-011107794-2) asserted penalties for the period January 1, 1994 through March 18, 1994 in the total amount of \$2,549.28.

2. At the outset of the hearing, petitioner conceded that he was the responsible person for the Center For Accelerated Learning, Inc.

3. During the periods in issue, the Center For Accelerated Learning, Inc. (“Center”), incorporated in New York State in March 1987, provided long- and short-term courses in business management, such as computer courses and secretarial courses, as well as English as a second language to adults. Its overall objective was “to prepare and motivate the student for employment.”

4. Center was licensed by the New York State Education Department as a business school.

5. Prior to and during the periods in issue, petitioner was Center’s sole officer holding the position of President/C.E.O., as well as its sole shareholder. He was responsible for any major decision made for Center.

6. When Center first began operation, it was located in Harlem. However, petitioner found that Center could not attract enough students to generate tuition revenue sufficient to cover its expenses. In an effort to attract more students, petitioner decided to relocate the school.

7. On January 24, 1992, Center leased two floors of 252 West 29<sup>th</sup> Street (near Madison Square Garden) for ten years with an annual rent as follows:

First 2 ½ years	\$130,000.00 per annum
Next 2 ½ years	\$140,000.00 per annum
Remaining 5 years	\$150,000.00 per annum.

Center also gave the landlord a security deposit of \$23,334.00.

8. All of Center’s records were maintained at the West 29<sup>th</sup> Street location.

9. During the period in issue, Center employed about 15 to 20 people, the majority of whom were teachers. The remaining employees were office workers who maintained school records and performed computer work.

10. According to petitioner, he did not do any of Center’s accounting work. Rather, he relied upon his employees to do the work.

11. At the hearing, petitioner explained that prior to the years in issue he was actively involved in the running of Center. However, in 1993 he began experiencing health problems which forced him to delegate his responsibilities to his employees in order to keep the school in operation. Subsequent to the period in issue, petitioner's health problems were diagnosed as a heart condition.

12. During the hearing, petitioner explained that he took affirmative steps to ensure that the withholding taxes were paid. He stated that he informed his employees that the withholding taxes were "his first liability" and therefore must be remitted to the State. He further testified that his employees informed him that withholding taxes were due. In addition to telling his employees that the withholding taxes came first, he borrowed money from his friends to pay the taxes. He could not recall the exact date or amount he borrowed from his friends. Petitioner did recall that the borrowed funds were used to pay wages, withholding taxes and the rent. He could not recall the exact amount used to pay the withholding taxes.

13. Petitioner testified that Center had financial problems in the first half of 1992 but things began to improve in mid-1992 and 1993. He explained that as student enrollment increased, Center's revenues began to cover expenses. The record corroborates his testimony.

14. Center's income came solely from student tuition, the majority of which was paid by New York State TAP grants. According to petitioner, Center had about 200 students a year.

15. Center's employees were paid their respective salaries/wages throughout the period in issue up to and including March 18, 1994.

16. Center had an outstanding secured loan with Anchor Savings Bank. The record is silent as to when this loan was first obtained; however, the monthly installment was \$807.75 plus

the applicable interest rate, payable over 60 months. In 1992 and 1993, regular payments were made on that loan.

17. During 1992 and 1993, rent was paid to the landlord for the West 29<sup>th</sup> Street location.

18. Center's fixed assets consisted of furniture and equipment. Petitioner estimated that Center owned about 40 computers. Review of the record reveals that in 1993 Center made significant fixed asset purchases and claimed depreciation of \$17,300.00 on its income statement for computer equipment purchased during the year.

19. During the period in issue, Center was treated as a New York "S" Corporation. The record is silent as to when the S Corporation election was made.

20. For the period in issue, petitioner did not receive a salary from Center. He did claim the S Corporation ordinary loss on his income tax returns.

21. The record includes copies of each Form WT-4-A, Quarterly Withholding and Wage Reporting Return ("quarterly withholding return") which Center filed for the period in issue. Review of these quarterly withholding returns reveals that while Center reported withholding New York State and New York City taxes from its employees' wages on each return, it did not include a payment with any of them. Each of these quarterly withholding returns was signed by petitioner.

22. The record includes Center's 1993 audited financial statements. Ruben G. Gonzalez, CPA, in his audit report, stated that his responsibility was to express an opinion on financial statements prepared by Center's management. He further stated that:

"these financial statements were prepared on the basis of cash receipts and disbursements, which is a comprehensive basis of accounting other than generally accepted accounting principles."

23. Note "7" in the "Notes to Financial Statements" states:

“Since the Corporation elected as Sub Chapter ‘S’ Corporation there is no Federal Income Tax. New York State and New York City Taxes were paid.”

Review of the audited financial statements indicates that Center paid \$625.00 in income tax in both 1992 and 1993.

24. As noted above, Center’s sole source of revenue was tuition. In 1994, TAP grants were reduced resulting in a decline in both student enrollment and revenue.

25. Center ceased conducting classes prior to June 7, 1994, the date on which petitioner filed for Chapter 11 bankruptcy on behalf of Center. At the hearing, petitioner explained that he hoped to revamp Center’s finances and resume classes with the fall term.

26. Upon learning that Center had filed for bankruptcy reorganization under Chapter 11, the New York State Education Department revoked Center’s license. At that point, Center could no longer operate as a business school and the United States Bankruptcy Court converted the filing into Chapter 7.

27. Petitioner did not engage an attorney to represent Center in the bankruptcy proceeding. Rather, he prepared and filed all the necessary documents. None of the papers filed with the U. S. Bankruptcy Court are part of the record.

28. According to petitioner, a portion of the rent due in 1994 was unpaid at the time of the bankruptcy filing. He was unable to recall the exact amount.

29. For a period of time after the Chapter 11 filing, petitioner had access to the school; however, he did not remove anything, including the records from the facility because of his expectation that Center would reopen in the fall. At some point, the landlord barred petitioner’s access to the building and he was unable to retrieve the records. According to petitioner, Center’s records are lost.

30. According to petitioner, the assets of Center were auctioned off. The exact date of the sale is not part of the record nor is the disposition of the proceeds.

31. After a conciliation conference, the conferee issued a Conciliation Order (CMS No. 151032), dated May 10, 1996, sustaining the statutory notices — notices of deficiency numbers L011107794, L011107795, L011107796, L011107797, L011107798 and L011107799.

32. Petitioner in his petition challenges the imposition of the penalty in the amount of \$23,745.45 and seeks its waiver. He asserts that the deficiency penalty imposed against him is erroneous and improper. In paragraph 6, petitioner alleged:

(1). “The adverse financial situation of my Business School (Center For Accelerated Learning, Inc.) landed me in a very bad financial crisis, due to which my Business School could not pay the taxes.

(2) “In 1992 my Business School shifted its operation from 2090 Adam Clayton Powell Blvd. New York to 252 West 29<sup>th</sup> Street New York, assuming that the new place would create better opportunities to upgrade the school work.

(3) “But the expenses at the new place due to very low student enrollment, exceeded the gross income. The operating expenses in 1992 were \$416,957 against the total income of \$309,425. This created a net loss of \$111,631. The losses in 1992 wiped out my stockholder’s equity and loan by (\$279,013) in 1992 which was reduced to (\$264,013) in 1993.

(4) “I did not receive any wages for years 1992, 1993 and 1994 - my Federal Tax Returns reflect this.

(5) “The payment of wages and other related expenses absorbed all the operating expenses. If I had not paid wages and other related expenses, the Business School would have stopped operation immediately that time [sic]. I continued school operation waiting for the first opportunity to pay the taxes as quickly as possible should the school finances improve. But this did not happen. I did not get this opportunity.

(6) “Due to extremely difficult financial problems, my Business School filed Bankruptcy petition under Chapter 11 on June 7, 1994 to re-organize the financial affairs. But New York State Education Department cancelled the School license on this action. This closed the doors of the School for

good - a Business School cannot operate without NYS License. The Bankruptcy court converted the case from Chapter 11 to Chapter 7. This brought complete financial destruction for me as all opportunities to recover losses were finished.

(7) "I am a heart patient waiting for Triple Bypass Surgery since May 1995 but it is not done due to difficulties.

(8) "I live on Social Security & NYC Pension and have no other income from 1992 to 1996 up to now. I PRAY FOR WAIVER OF DEFICIENCY PENALTIES." (Emphasis in original.)

33. The Division, in its answer, among other things, admitted the allegations in points 1 and 5 of paragraph 6 of the petition, but was without sufficient knowledge to admit or deny the allegations in the remaining points.

### ***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 payments 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:

"[T]he 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. Petitioner admits that he was a person under a duty to collect, truthfully account for and pay over such withholding taxes for Center. Therefore, it must be determined whether his failure to do so was willful. Petitioner asserts that he did not willfully fail to collect, truthfully



account for and pay over withholding taxes on behalf of Center. Rather, he argues that he relied on his employees to do all accounting work for Center. Furthermore, when petitioner's health began to deteriorate, he had to cut back on his supervisory activities and delegate those responsibilities to his paid employees in order to keep the school running. Petitioner also contends that tax payments were made and that the amount of withholding taxes due and owing is less than the amounts asserted in the six notices of deficiency. However, because Center's records are lost, petitioner cannot supply documentary evidence for the entire period in issue. He does maintain that Note "7" to the audited 1993 financial statements establishes that all taxes due for tax year 1993 were in fact paid.

C. The fact that one is determined to be a responsible officer does not necessarily mean that the person is liable for the taxes in issue (*see, Matter of Lyon*, Tax Appeals Tribunal, June 3, 1988). The crux 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 delegated his corporate responsibilities including the responsibility to see that taxes were paid (*Matter of Capoccia v. State Tax Commn.*, 105 AD2d 528, 481 NYS2d 476; *Matter of Ragonesi v. New York State Tax Commn.*, 88 AD2d 707, 451 NYS2d 301).

The Tribunal has held that a responsible officer can make a reasonable delegation of authority (*Matter of Lyon, supra*). In *Lyon*, the record indicated that the officer to whom

fiduciary responsibilities had been delegated was experienced in running the corporation. In addition, the petitioner in that case kept himself informed as to the corporation's operations through regular meetings with such officer and also hired an outside professional, an accountant, to prepare and file corporate tax returns. I find that petitioner did not prove that, as a responsible officer, he made a reasonable delegation of authority to ensure that the withholding taxes were paid. Petitioner testified that he delegated his responsibilities to his paid employees. However, he has not specifically identified the employees to whom he delegated his duties with respect to Center's withholding tax responsibilities. Nor has he identified anyone on whom he relied within Center. Moreover, the record is silent as to these employees' qualifications and expertise in handling tax matters. In addition, petitioner has failed to prove that he took any supervisory steps to ensure that the employees were paying Center's withholding tax liabilities. Petitioner has failed to demonstrate that his reliance on these unidentified employees was in fact reasonable.

As noted above, the crux 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, supra*). It is clear from the record that petitioner was aware that trust fund monies were diverted from the State to pay Center's payroll and other creditors in order to keep the school running.

For the foregoing reasons, I find that petitioner's conduct was willful under Tax Law § 685(g).

D. As an alternative argument, petitioner contends that trust fund payments were made on Center's behalf that have not been reflected in the six notices of deficiency issued in this matter. In support of this argument petitioner has offered his testimony and one piece of

documentary evidence. Petitioner has failed to prove the amount and date of any such payments. His testimony concerning the withholding tax payments was vague and very general. Moreover, the only documentary evidence submitted by petitioner does not establish that withholding taxes were paid in 1993. Based on my review of Note "7", it is clear that the New York State and City taxes referred to in the second sentence are corporate franchise taxes not withholding taxes. While it is unfortunate that Center's records are lost, supporting documentation is necessary to prove the amount and date of any withholding tax payments. Petitioner has failed to establish that the notices of deficiency issued in this matter are incorrect.

E. The petition of Sadhu Singh Ahluwalia, Officer of Center For Accelerated Learning, Inc., is denied and the six notices of deficiency dated September 25, 1995 are sustained.

DATED: Troy, New York  
December 24, 1997

/s/ Winifred M. Maloney  
ADMINISTRATIVE LAW JUDGE