

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition :
of :
DAVID BRESLER : DETERMINATION
for Redetermination of a Deficiency or for Refund of : DTA NO. 816489
New York State and New York City Personal Income Tax :
under Article 22 of the Tax Law and the New York City :
Administrative Code for the Periods January 1, 1995 :
through June 30, 1995 and April 1, 1996 through :
June 30, 1996 and for Revision of a Determination or for :
Refund of Sales and Use Taxes under Articles 28 and 29 :
of the Tax Law for the Period March 1, 1995 through :
August 31, 1995. :

Petitioner, David Bresler, 161 Evandale Road, Scarsdale, New York 10583-1922, filed a petition for redetermination of a deficiency or for refund of New York State and New York City personal income tax under Article 22 of the Tax Law and the New York City Administrative Code for the periods January 1, 1995 through June 30, 1995 and April 1, 1996 through June 30, 1996 and for revision of a determination or for refund of sales and use taxes under Articles 28 and 29 of the Tax Law for the period March 1, 1995 through August 31, 1995.

A hearing was held before Jean Corigliano, Administrative Law Judge, at the offices of the Division of Tax Appeals, 500 Federal Street, Troy, New York, on January 7, 1999 at 10:00 A.M., with all briefs to be submitted by May 6, 1999, which date began the six-month period for the issuance of this determination. Petitioner appeared by D'Agostino, Levine & Landesman, L.L.P. (Wayne R. Landesman, Esq., of counsel). The Division of Taxation appeared by Terrence M. Boyle, Esq. (Kevin R. Law, Esq., of counsel).

ISSUES

I. Whether petitioner is a person responsible for collection of sales and use taxes pursuant to Tax Law § 1131(1) and, therefore, liable for the sales and use taxes determined to be due from Maintenance Assurance Corporation of America for the periods in issue

II. Whether petitioner is liable for penalties under Tax Law § 685(g) for the unpaid withholding taxes of Maintenance Assurance Corporation of America.

FINDINGS OF FACT

1. On March 17, 1997, the Division of Taxation (“Division”) issued to petitioner, David Bresler, two notices of determination of sales and use tax due as follows:

Period	Tax
March 1, 1995 through May 31, 1995	\$18,253.95
June 1, 1995 through August 31, 1995	\$19,918.22

Each notice explains that a sales tax return was filed without remittance of the tax shown as due on that return. The notices were issued to petitioner as a responsible person or officer of Maintenance Assurance Corporation of America (the “corporation”).

2. The Division also issued three notices of deficiency, dated March 17, 1997, to petitioner asserting penalties against him for the unpaid withholding taxes of the corporation as follows:

Period	Penalty
April 1, 1995 through June 30, 1995	\$ 4,000.00 ¹
January 1, 1995 through February 24, 1995	\$ 8,000.00
April 1, 1996 through June 30, 1996	\$11,259.37

3. The corporation was formed in 1989 by petitioner and Patrick Horan. Petitioner was the president of the corporation, and at the time the corporation was formed, he was a 50 percent shareholder. Mr. Horan was vice-president of the corporation and also a 50 percent shareholder at the inception of the corporation.

4. The only business of the corporation was the servicing of Wang computers. Mr. Horan was experienced in supervising computer technicians and in financial matters. Petitioner was an experienced salesperson. Consequently, they split the responsibilities of this small corporation by placing Mr. Horan in charge of supervising the technicians, purchasing parts, paying bills and other financial matters while petitioner was in charge of sales and marketing. When the corporation began doing business, it had one employee in addition to petitioner and Mr. Horan. At its peak, the corporation employed 17 people.

5. The corporation was formed with the services of an attorney selected by petitioner. To maintain a balance of authority, the accountant hired to perform accounting services for the corporation was selected by Mr. Horan.

6. Petitioner spent 50 percent of his time in the office and 50 percent visiting customers and performing other duties outside the office. He was a signatory on a corporate bank checking account with Norstar Bank and occasionally signed checks when he was present in the office.

¹Payments of \$2,572.63 were subtracted from this amount leaving a balance due of \$1,427.37.

Mr. Horan spent all of his time in the corporation's offices. He worked with the corporation's accountants in the preparation of corporate tax returns and was responsible for paying the corporation's taxes and other debts. Initially, both men were satisfied with this division of responsibilities.

7. In 1994, Mr. Horan established a separate corporate checking account at Atlantic Bank in Brooklyn which was to be used exclusively for the payment of the corporation's taxes. However, the Norstar account was also used for this purpose on occasion. Petitioner was not a signatory on the Atlantic Bank checking account, and he had no involvement in the payment of taxes or the filing of tax returns at this time.

8. In 1994, the corporation hired a second salesman who was given ten shares of stock, five shares apiece from each of the two shareholders. In 1995, Mr. Horan fired the second salesman. Petitioner was able to acquire his ten shares of stock making petitioner the majority stockholder of the corporation. The exact date on which the transfer of stock to petitioner occurred is not in the record.

9. The Division's records show that the corporation had a history of late payment of sales taxes, withholding taxes and corporation franchise taxes. The Division maintains a computer record of assessments issued to taxpayers. The Assessments History record lists all assessments issued to the corporation. This listing shows that four assessments were issued to the corporation in 1991; three of these were for withholding taxes and one was for corporation franchise tax. The listing shows that one sales tax assessment and one withholding tax assessment were issued to the corporation in 1992. Eight assessments were issued to the corporation in 1994 for periods in 1993. Five assessments were issued to the corporation for periods in 1994. All of these assessments have been paid.

10. The Division's tax compliance agents maintain a log of case contacts which briefly notes each contact made with a taxpayer or related individual. These case contact records are also maintained in the Division's computer system. The case contact sheets for the corporation show that on June 1, 1995, petitioner was present in the corporation's offices when a field visit was made by a State tax compliance agent. The agent informed petitioner of outstanding tax liabilities against the corporation and stated that certain tax returns had never been filed. According to the contact sheet, petitioner stated that the corporation was not able to pay the liabilities in full at that time. In response, the agent informed petitioner of the possibility of entering into a deferred payment agreement. He also told petitioner of pending warrants and officer liability assessments which would be issued and informed petitioner of the possibility of a seizure of assets if taxes were not paid. An entry made on June 5, 1995, shows that the tax compliance agent spoke to the corporation's accountant, Mr. Ferrier, on that date. According to this entry, Mr. Ferrier stated that sales tax returns would be filed for the periods ending May 31, 1994, August 31, 1994 and November 30, 1994 and that payments would be made in full for outstanding withholding taxes. Mr. Ferrier requested a deferred payment agreement for the sales tax liabilities and was told that an agreement could be executed only after the sales tax returns were filed and the withholding taxes were paid in full. The Division's records show that sales taxes for the periods under discussion were paid.

11. Petitioner remembered meeting with the tax compliance agent in May or June 1995. He testified that he referred the tax matter to Mr. Horan. He stated that he was not alarmed by this event because he had seen documents in the past showing outstanding State tax liabilities in small amounts and that Mr. Horan had always handled them. Petitioner eventually asked Mr. Horan about the outcome of the tax matter, and he was told that it was taken care of.

Petitioner testified that he and Mr. Horan had been in business together for over five years when the tax compliance agent visited, and petitioner believed that he had no reason not to trust his partner or to question his truthfulness at that time.

12. In early 1996, one of the corporation's employees prodded petitioner into looking into the corporation's books and records because she was certain that Mr. Horan was siphoning money from the corporation. Most of the corporation's books and records were available to petitioner in the corporate offices, and he did review them from time to time. However, the corporation's canceled checks were maintained by Mr. Horan outside of the corporation's offices, so petitioner did not have access to them. Without the canceled checks, petitioner could not verify the accuracy of the other records. When petitioner asked why the canceled checks were kept off premise, he was told that it was done for security reasons.

13. Under the pretext of needing canceled payroll checks to refinance his home mortgage, petitioner asked Mr. Horan to bring in a few checks. At first, Mr. Horan resisted petitioner's request which raised petitioner's suspicions. When petitioner insisted on seeing all of the canceled checks for one year, Mr. Horan brought in the canceled checks for 1995. As petitioner stated in his testimony, Mr. Horan had no choice but to relinquish the canceled checks because petitioner had every right to see them. Upon review of these checks, petitioner discovered that checks listed in the corporation's check register as payments to various vendors were actually checks written to "cash" and endorsed by Mr. Horan or his wife.

14. Petitioner hired his own accounting firm to review the corporation's records since he did not trust the corporation's accountant any longer. When his accountants confirmed his suspicion that Mr. Horan had skimmed money from the corporation's accounts, petitioner hired an attorney. In June 1996, that attorney sent Mr. Horan a letter stating that a board of directors

meeting was to take place ten days from the date of the letter to elect a board of directors and that Mr. Horan's employment was suspended pending the outcome of an investigation into financial irregularities.

15. After being confronted in this way by petitioner, Mr. Horan at first alleged that the unaccounted for money was used to buy "hot" merchandise. Ultimately, however, he agreed to transfer his interest in the corporation to petitioner for no remuneration in return for petitioner's promise not to prosecute. Petitioner and Mr. Horan and his wife, Jean Horan, executed an agreement, dated June 24, 1996, whereby the Horans conveyed their shares of stock back to the corporation, surrendered all personal property of the corporation then in their possession (e.g., a laptop computer, a rental car, tools, financial records, keys to the building) and relinquished any claim that they might have, present or future, against the corporation or petitioner.

16. Upon taking control of the corporation, petitioner attempted to continue operation. After Mr. Horan's departure, petitioner filed New York State tax returns and paid all New York State taxes as required. However, he soon discovered that the corporation had large withholding tax and sales tax liabilities and was unable to meet its financial obligations. Petitioner stopped all corporate operations in October 1996.

17. Petitioner received a salary of \$50,904.24 in 1995 and \$39,833.28 in 1996. During those years he had use of the corporation's automobile.

18. Petitioner testified that he was not aware of any significant deficiencies in the corporation's tax payment history until after he assumed responsibility for the corporation in June 1996.

CONCLUSIONS OF LAW

A. Tax Law § 1133(a) imposes personal liability for taxes required to be collected under articles 28 and 29 of the Tax Law upon a person required to collect such tax. A person required to collect such tax is defined as:

any officer, director, or employee of a corporation . . . who as such officer, director or employee is under a duty to act for such corporation . . . in complying with any requirement of [Article 28] (Tax Law § 1131[1]).

Whether an individual is under a duty to act for a corporation with regard to its tax collection responsibilities so that the individual would have personal liability for the taxes not collected or paid depends on the particular facts of the case (*Matter of Cohen v. State Tax Commn.*, 128 AD2d 1022, 513 NYS2d 564).

The question to be resolved in any particular case is whether the individual had or could have had sufficient authority and control over the affairs of the corporation to be considered a responsible officer or employee. The case law and the decisions of the Tax Appeals Tribunal have identified a variety of factors as indicia of responsibility: the individual's status as an officer, director, or shareholder; authorization to write checks on behalf of the corporation; the individual's knowledge of and control over the financial affairs of the corporation; authorization to hire and fire employees; whether the individual signed tax returns for the corporation; and the individual's economic interests in the corporation (*see, Matter of Martin v. Commr. of Taxation & Fin.*, 162 AD2d 890, 558 NYS2d 239; *Matter of Cohen v. State Tax Commn.*, *supra*, 513 NYS2d at 565; *Matter of Blodnick v. State Tax Commn.*, 124 AD2d 437, 507 NYS2d 536, 538, *appeal dismissed* 69 NY2d 822, 513 NYS2d 1027; *Matter of Vogel v. New York State Dept. of Taxation & Fin.*, 98 Misc 2d 222, 413 NYS2d 862, 865; *Chevlowe v. Koerner*, 95 Misc 2d 388, 407 NYS2d 427, 429; *Matter of Constantino*, Tax Appeals Tribunal, September 27, 1990).

B. Consideration of these factors leads inevitably to the conclusion that petitioner was a person responsible for collection of sales and use taxes on behalf of the corporation. Petitioner was president of the corporation; held 50 percent or more of the corporate stock at all times; derived substantial income from the corporation; and had authority to sign checks on one corporate bank account. In addition, petitioner had the actual authority to oversee the corporation's finances whenever he chose to exercise this authority. This last factor is proven by the fact that Mr. Horan turned over the canceled checks that proved his wrongdoing when he was required to do so by petitioner. As petitioner himself testified, he had a right to review those records, and Mr. Horan could not refuse to disclose them.

Petitioner argues that the person responsible for collection and payment of sales taxes was Mr. Horan. He testified that from the corporation's formation Mr. Horan was responsible for the financial affairs of the corporation—that he placed the orders, paid the bills, maintained the books and records, hired the accountant and oversaw the preparation of sales tax returns and the payment of the taxes. Even if this is an accurate description of Mr. Horan's responsibilities within the corporation, the delegation of duties to Mr. Horan does not relieve petitioner of his own liability for the unpaid taxes of the corporation. Inasmuch as petitioner was an officer and major shareholder of the corporation, he had a fiduciary duty to insure the payment of sales taxes, and he could not relieve himself of that duty by allowing another individual to oversee the financial affairs of the corporation (*see, Matter of Martin v. Commr. of Taxation & Fin., supra*).

An individual with the outward indicia of responsibility may be relieved from sales tax liability where it is found that he or she was denied the authority to act for the corporation by the deliberate action of others (*see, Matter of Russack*, Tax Appeals Tribunal, February 8, 1996

[where the Tribunal held that the deliberate deception of the corporate president and treasurer regarding the financial affairs of the corporation effectively precluded the petitioner, the majority stockholder and chairman of the board, from exercising his authority]; *Matter of Constantino, supra* [where the Tribunal held that a minority stockholder did not simply fail to act but was prevented from doing so by another]). There are no facts in this record that demonstrate that Mr. Horan prevented petitioner from carrying out his responsibility for collection and payment of sales tax. Rather, the record demonstrates that petitioner simply failed to pay adequate attention to the financial affairs of the corporation. Petitioner was alerted by a tax compliance agent that the corporation had substantial outstanding tax liabilities, and he chose not to investigate further. An employee revealed her suspicions that Mr. Horan was skimming money from the corporation, and petitioner again failed to act until she prodded him to do so. The fact that Mr. Horan acceded to petitioner's request to see the corporation's canceled checks establishes that petitioner had the actual authority to oversee the corporate finances and chose not to do so. This is not a ground for finding that he was not responsible for collection and payment of sales and use taxes. As the court in *Blodnick* noted, "corporate officials responsible as fiduciaries for tax revenues cannot absolve themselves merely by disregarding their duty and leaving it to someone else to discharge" (*Matter of Blodnick v. New York State Tax Commn., supra*, 507 NYS2d at 538, quoting *Matter of Ragonesi v. New York State Tax Commn.*, 88 AD2d 707, 451 NYS2d 301).

C. Tax Law § 685(g)² imposes liability on those persons responsible for the collection and remittance of withholding taxes who willfully fail to collect or remit such funds.

²The personal income tax provisions of the Administrative Code of the City of New York are almost identical to corresponding provisions of Article 22. In this determination references to Article 22 shall be deemed references, though uncited, to the corresponding sections of the Administrative Code.

Tax Law § 685(n) defines the term "person" as it is used in section 685(g) as follows:

the term person includes an individual, corporation or partnership or an officer or employee of any 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.

The issue of whether a corporate officer is a person as defined by section 685(n) has been litigated many times (*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 similar to those considered in the context of sales tax liability. They include 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 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*).

Although there is no evidence that petitioner directly participated in the management of the corporation, i.e., that he hired or fired employees, signed tax returns; or worked with the corporation's accountants, he was, nonetheless, a person under a duty to collect and pay over withholding taxes on behalf of the corporation. As president and a 50 percent shareholder of the corporation, petitioner had the authority to act for it in financial and tax matters. His income was derived from the corporation; he had a direct financial stake in its success or failure; and he was an authorized signatory on the corporation's bank account. Petitioner's lack

of active involvement in the financial affairs of the corporation is of little importance when weighed against his legal authority and his fiduciary duty to act for the corporation.

Accordingly, I find that petitioner was a "person" pursuant to Tax Law § 685(n).

D. The conclusion that petitioner was under a duty to act for the corporation in collecting and paying over taxes does not automatically lead to a determination that his failure to do so was willful within the meaning of Tax Law § 685(g). In *Matter of Levin v. Gallman* (42 NY2d 32, 34, 396 NYS2d 623, 624), the Court of Appeals held that the test of willfulness 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 non-payment is required (*id.* at 34, 396 NYS2d at 624-625).

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. . . . Mere negligence is not enough.” (*Matter of Gallo*, Tax Appeals Tribunal, September 9, 1988.) Lack of actual knowledge that withholding taxes have not been remitted to the State may, under certain circumstances, support a finding that a corporate officer did not act consciously and voluntarily (*id.*). However, the failure to collect and pay over taxes can be willful, notwithstanding the 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.*, 88 AD2d 707, 451 NYS2d 301, *supra*).

Based on the evidence in this record, I conclude that petitioner recklessly disregarded his duty to ensure that withholding taxes were collected and paid over to the State. Initially, it may have been reasonable for the two shareholders to divide corporate responsibilities so that

Mr. Horan was placed in charge of financial matters. It was not reasonable for petitioner to absent himself from the day-to-day operation of the corporation so that Mr. Horan had free rein to conduct the business of the corporation as he pleased. One with a duty to act for a corporation cannot avoid liability by failing to concern himself with whether or not taxes are being paid (*see, Matter of Malkin v. Tully*, 65 AD2d 228, 412 NYS2d 186, 188). In addition, certain events occurred that should have put petitioner on notice that the corporation was not meeting its obligations to collect and remit tax in a timely fashion. Numerous notices and demands were issued to the corporation prior to the periods in issue, and on June 1, 1995, a tax compliance agent personally spoke with petitioner about outstanding tax liabilities. According to the agent's log, petitioner stated that the taxes could not be paid in full at that time, and the agent responded by informing petitioner of the possibility of seizure of corporate assets and the issuance of responsible officer assessments. In light of these entries, the credibility of petitioner's assertion that he was not aware of any significant deficiencies in the corporation's tax payment history until Mr. Horan resigned is doubtful. Credibility aside, petitioner's failure to review corporate records or to look into the corporation's tax history after this meeting with a tax compliance agent demonstrates a reckless disregard for his responsibility to see that taxes were paid. Moreover, one of the withholding tax periods under review here, April 1, 1996 through June 30, 1996, encompasses the time during which petitioner and Mr. Horan were in dispute over Mr. Horan's apparent theft of corporate funds. Although petitioner had the authority to act, was alerted by a tax compliance agent to the corporation's deficiencies in meeting its tax obligations and believed that Mr. Horan was skimming funds from the corporation's accounts, he took no steps during this period to insure the payment of corporate taxes. If his testimony is believed, he never asked to meet with the corporation's accountants,

never asked for an accounting of corporate funds and never asked to see tax returns or proof that taxes were being paid purportedly because he trusted Mr. Horan to pay all taxes. In fact, petitioner testified that when he learned of the existence of tax deficiencies in June 1995 he referred the matter to Mr. Horan and then, after a single inquiry, accepted his assurance that the matter had been taken care of.

Petitioner likens his own situation to that of the petitioner in *Matter of Gallo*, who was found not to have acted willfully in regard to a corporation's failure to remit withheld taxes. But there are sharp contrasts between petitioner's conduct and that of the petitioner in *Gallo*. A comparison of the facts of both cases demonstrates why petitioner must be found liable for the Tax Law § 685(g) penalty when Mr. Gallo was not.

Mr. Gallo, with other responsible persons, hired an experienced bookkeeper, Darwin Martin, as an office manager. The corporation also retained the services of an independent certified public accounting firm which conducted a full audit of the corporation's operations on an annual basis and prepared the corporate tax returns. Mr. Gallo and others met with the corporation's accountants and Mr. Martin twice a year. Shortly after the accounting firm completed an audit of the corporation's operations, a review of the corporation's finances in connection with another matter revealed that the corporation was in serious financial difficulty. Shortly thereafter, the corporation filed a bankruptcy petition. It was not disputed by the Department of Taxation and Finance that had it filed a claim in accordance with an order of the Bankruptcy Court it would have received approximately 78 percent of the claim from the proceeds of the bankrupt estate. The Tribunal held that the corporation's failure to pay withholding taxes was not because of Mr. Gallo's willful conduct. The factors it relied on were these: (1) that Mr. Gallo reasonably delegated authority to Mr. Martin who had been

responsible for running the day-to-day operations of the corporation for 14 years; (2) that Mr. Gallo adequately supervised Mr. Martin through an annual audit performed by an independent certified public accounting firm and through periodic meetings with the firm and Mr. Martin; (3) that Gallo kept abreast of the corporation's finances through these meetings; (4) that Mr. Gallo was not alerted to the financial problems of the corporation by any outside source, such as the accounting firm, suppliers and other creditors, or the Division; (5) that Mr. Gallo was not in a position to determine whether withholding taxes were paid because Mr. Martin effectively concealed his failure to pay corporate creditors.

The overriding factor present in *Matter of Gallo* and missing here is the alleged wrongdoer's ability to effectively conceal the nonpayment of corporate taxes in the face of reasonable oversight of corporate finances by the person responsible for collection and payment of those taxes. Here, petitioner allowed the co-owner of the corporation free rein over the corporation's finances. Mr. Horan selected the accounting firm hired by the corporation, and, according to petitioner's testimony, petitioner took no steps to keep himself informed of the corporation's financial situation. He did not meet with the corporation's accountants, did not receive regular financial reports, and did not review the corporation's finances with Mr. Horan. Petitioner received information that the corporation was experiencing financial difficulty, in the guise of a visit from a tax compliance agent, yet he purportedly trusted Mr. Horan's assurance that the matter was taken care of and still did not ask to meet with the corporation's accountants or to review tax returns or other financial records. Petitioner took steps to investigate the corporation's books and records only after an employee warned petitioner of Mr. Horan's deceit. Since Mr. Horan's behavior was revealed as soon as petitioner demanded to see the canceled checks, it cannot be found that Mr. Horan effectively concealed his wrongdoing. Even

at this point, petitioner took no steps to insure the payment of withheld taxes. The bulk of the penalty asserted against petitioner derives from withholding taxes due for the period of time during which petitioner was investigating Mr. Horan's conduct and taking steps to remove him from the corporation. Even during this period, petitioner did not investigate the corporation's tax compliance history or undertake to insure the payment of withholding taxes. Therefore, petitioner did recklessly disregard his duty to the corporation and by doing so willfully failed to collect or pay over tax within the meaning of Tax Law § 685(g).

Petitioner's reliance on *Matter of Rounick* (Tax Appeals Tribunal, October 17, 1991) is also unpersuasive. There, a responsible officer delegated authority to collect and pay withholding taxes to his chief financial officer who was an experienced certified public accountant knowledgeable in the financial affairs of the corporation. The Tribunal found this delegation of authority to be reasonable in light of the fact that the petitioner was obligated to be out of the United States to conduct business at least 50 percent of the time. More importantly, the Tribunal found, as an ultimate fact, that the petitioner "was aware of and satisfied his obligations with respect to the payment of the withholding taxes" (*id.*). The evidence showed that the petitioner was assured by his chief financial officer that the withholding taxes had been paid, that investigation of the matter would have revealed that checks had been mailed for the outstanding periods and that funds were available to honor those checks at the time they were submitted. Therefore, the Tribunal held that the tax deficiency was caused by subsequent events beyond the petitioner's control (the Division's delay in cashing the checks) rather than the petitioner's willful failure to collect and remit taxes due. In this case, there is no evidence that petitioner made any attempt to pay the withholding taxes or to insure that the taxes were paid by the corporation.

D. The petition of David Bresler is denied and the notices of determination and notices of deficiency issued on March 17, 1997 are sustained.

DATED: Troy, New York
July 22, 1999

/s/ Jean Corigliano
ADMINISTRATIVE LAW JUDGE