

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition :
of :
SADIE TALLIE : DETERMINATION
for Redetermination of a Deficiency or for Refund of : DTA NO. 816992
New York State Personal Income Tax under Article 22 :
of the Tax Law for the Period June 30, 1995 :
through June 28, 1996. :
:

Petitioner, Sadie Tallie, 1 Carriage Drive, Newburgh, New York 12550, filed a petition for redetermination of a deficiency or for refund of New York State personal income tax under Article 22 of the Tax Law for the period June 30, 1995 through June 28, 1996.

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 October 27, 1999 at 10:30 A.M., with all briefs to be submitted by January 14, 2000, which date commenced the six-month period for the issuance of this determination. Petitioner appeared *pro se*. The Division of Taxation appeared by Barbara G. Billet, Esq. (Kevin R. Law, Esq., of counsel).

ISSUE

Whether petitioner was a person required to collect, truthfully account for and pay over withholding tax with respect to an entity known as Coalition For Peoples' Rights, who willfully failed to do so thus becoming liable for a penalty equal to such unpaid tax under section 685(g) of the Tax Law.

FINDINGS OF FACT

1. The Division of Taxation (“Division”) issued four notices of deficiency to petitioner, Sadie Tallie. Each of these notices was dated December 29, 1997, and each asserted that petitioner was a person responsible to collect, account for and remit withholding tax on behalf of the organization Coalition For Peoples’ Rights (“the organization”) who failed to do so, thus becoming liable for a penalty equal to the unpaid withholding tax due from such organization.

The notices, particular periods and dollar amounts at issue are as follows:

<u>NOTICE NUMBER</u>	<u>TAX PERIOD ENDED</u>	<u>PENALTY AMOUNT</u>
L-014559863-9	06/30/95	\$2,507.20
L-014559862-1	09/30/95	\$2,241.80
L-014559861-2	12/22/95	\$3,970.50
L-014559860-3	03/31/96	\$ 647.50
L-014559859-3	06/28/96	\$ 717.10

2. The foregoing dollar amounts match the dollar amounts shown on Forms WT-4-A (“Quarterly Withholding and Wage Reporting Return”) filed by the Coalition For Peoples’ Rights for the periods in question. Petitioner signed each of these returns, and it is undisputed that the amount of withholding tax due with respect to each return was not remitted.

3. The Coalition For Peoples’ Rights was a community based organization which began its operations in 1975, and continued through approximately 1998 when it ceased operations. The organization began as an advocacy group and, after about two years, changed its focus to providing housing and other services, including tutoring, employment, career counseling and referrals, to young persons in the Newburgh, New York community. The organization’s tax problems stemmed from its budget and finance practices. Specifically, the organization’s

funding was received through the New York State Department of Labor. Although funds were allocated and ultimately paid to the organization, such funding often was not actually received until sometime after the organization had been operating its programs for a particular year or period. Under these circumstances the organization, and sometimes petitioner individually, would borrow funds for program operations from local banks or private funding sources in anticipation of ultimately receiving the allocated Department of Labor funds. However, while the borrowed funds were used to pay for the programs, no provision was made for interest on the loans or interest and penalties which were ultimately levied by the Internal Revenue Service for late payment of Federal withholding taxes. Stated differently, the organization borrowed funds sufficient only to operate its programs, in anticipation of receiving allocated State monies in the future to pay off the borrowed amounts, but did not budget for funds to cover interim interest costs or consequential costs of late payment of Federal taxes. Consequently, while the staff and program participants were paid such that the community programs the organization was obligated to provide could continue, withholding taxes were not, for lack of funds, remitted as required. Specifically, it appears that Federal withholding taxes were paid, although not in a timely manner, and that New York State withholding taxes were not paid.

4. Petitioner admitted, in her petition and in testimony at hearing, that she was the person responsible to collect, account for and remit withholding tax on behalf of the Coalition For Peoples' Rights during the periods in issue and that she did not do so, instead using the available funds to ensure that the community programs would be fulfilled.

CONCLUSIONS OF LAW

A. With regard to the withholding tax penalties asserted against petitioner, 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:

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. 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 organization to be considered a person under a duty to collect and remit the unpaid taxes in question (*Matter of Constantino, supra; Matter of Chin*, Tax Appeals Tribunal, December 20, 1990). In addition, where one is determined to be a person under a duty as described, it must then be decided whether the failure to withhold and pay over such taxes was willful. As the Court of Appeals indicated in *Matter of Levin v. Gallman* (42 NY2d 32, 396 NYS2d 623), the test is:

[w]hether the act, default, or conduct is consciously and voluntarily done with knowledge that as a result, trust funds belonging to the Government will not be paid over but will be used for other purposes No showing of intent to deprive the Government of its money is necessary but only something more than accidental non-payment is required (*id.*, 396 NYS2d at 624-625; *see, Matter of Lyon*, Tax Appeals Tribunal, June 3, 1988).

C. In this case, it is clear that petitioner was properly held responsible for the withholding tax obligations of the Coalition For Peoples' Rights. In fact, petitioner admitted that she chose not to scale back the organization's programs, but rather to pay the organization's staff and program participants so that the programs the organization was obligated to provide, and which she believed were vital to the community, could continue. This choice not to limit the organization's programs, coupled with borrowing funds sufficient to pay operating costs but without budget provisions for loan interest and late tax payment charges incurred, left petitioner without sufficient funds and thus unable to pay New York State withholding taxes on behalf of the organization. Unfortunately, petitioner remains liable for the consequences of this choice.

D. The petition of Sadie Tallie is hereby denied and the notices of deficiency dated December 29, 1997 are sustained.

DATED: Troy, New York
June 22, 2000

/s/ Dennis M. Galliher
ADMINISTRATIVE LAW JUDGE