

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition :
of : DETERMINATION
: DTA NOS. 817993,
: 817994 AND 817995
AMERICAN FUTURES GROUP, INC., :
GEORGE J. PERK JR., OFFICER AND :
THOMAS REEVES, OFFICER :
:
for Redetermination of Deficiencies or for Refund of :
Personal Income Tax under Article 22 of the Tax Law :
and the New York City Administrative Code for the :
Period January 1, 1993 through June 30, 1994. :

Petitioners, American Futures Group, Inc., c/o David Bunning, Greenberg Traurig, 200 Park Avenue, New York, New York 10166, George J. Perk, Jr., 715 Ashley Avenue, Brielle, New Jersey 08730 and Thomas Reeves, 225 East 73rd Street, New York, New York 10021, filed petitions for redetermination of deficiencies or for refund of personal income tax under Article 22 of the Tax Law and the New York City Administrative Code for the period January 1, 1993 through June 30, 1994.

A consolidated hearing was held before Thomas C. Sacca, Administrative Law Judge, at the offices of the Division of Tax Appeals, 500 Federal Street, Troy, New York, on April 10, 2001 at 10:30 A.M., with all briefs to be submitted by September 21, 2001, which date began the six-month period for the issuance of this determination. Petitioners appeared by David Bunning, Esq. The Division of Taxation appeared by Barbara G. Billet, Esq. (Barbara J. Russo, Esq., of counsel).

ISSUES

I. Whether American Futures Group, Inc. is liable for additional withholding taxes for the period January 1, 1993 through June 30, 1994.

II. Whether George J. Perk, Jr. or Thomas Reeves were responsible persons of American Futures Group, Inc. for withholding tax purposes under Tax Law § 685(g), who willfully failed to remit withholding taxes to the Division of Taxation for the period January 1, 1993 through June 30, 1994.

FINDINGS OF FACT

The Division of Taxation's proposed findings of fact "1" through "44" have been incorporated herein, pursuant to section 3000.15(d)(6) of the Tax Appeals Tribunal Rules of Practice and Procedure.

1. Petitioner American Futures Group, Inc. ("AFG") was a commodities futures brokerage company with offices in New York City, California and Chicago. AFG was founded by petitioners George J. Perk, Jr. and Thomas Reeves in 1987. Perk was an officer of AFG since it was founded, and in 1993 and 1994 he held the title of president. At some time in 1994 he became chairman. He was responsible for directing corporate operations. Reeves was also an officer of AFG in 1993 and 1994 and held the titles of vice-president and later president when Perk became chairman. He was in charge of sales. Both Perk and Reeves were on the board of directors of AFG. AFG was a wholly-owned subsidiary of American Futures Group Holding Company, Inc. The holding company owned 100% of the voting stock of AFG and was the source of AFG's capital. The income reported on the holding company's 1994 corporate income tax return, Form 1120, in the amount of \$650,570.00 was derived entirely from AFG.

2. Perk and Reeves were the sole owners of the holding company, with Perk owning 52% of the stock and Reeves owning 48% of the stock. Perk invested approximately \$650,000.00 in capital in AFG in 1987, 1993 and 1994. When the holding company took out a loan on behalf of AFG, Perk and Reeves guaranteed the loan.

3. Perk devoted a substantial portion of his time to AFG and received compensation from AFG and the holding company in 1993 and 1994. He received compensation from AFG in the amount of \$38,500.00, which is the total amount reported as New York adjusted gross income on Perk's 1994 tax transcript.¹ During 1994, Perk received compensation in the amount of \$283,374.00 from the holding company.

4. Reeves devoted all of his working time to AFG and received his entire income from AFG and the holding company. In 1994, his compensation from the holding company was in the amount of \$261,576.00.

5. Both Perk and Reeves had and exercised their check signing authority. They could sign checks without Richard MacIntosh, who was AFG's treasurer and financial manager. Perk signed "several hundred [checks] a month" during 1993 and 1994, and he was unaware of a particular time when he questioned anything about the checks he was signing. Reeves would sign the checks that were placed before him without questioning whether there were sufficient funds to cover them.

¹ Although Perk claimed that the percentage of his income from AFG was 30-35% in 1994, documentary evidence in the record, specifically the transcript of Perk's 1994 New York Income Tax Return indicates Perk's Federal adjusted gross income to be \$30,614.00, and New York adjusted gross income to be \$38,500.00. The amount reported by ADP as Perk's wages for 1994 was \$38,500.00, indicating that 100% of his reported income was from AFG. It is also noted that although Perk had a copy of his federal income tax returns for 1993 and 1994, he chose not to put them into the record of this matter.

6. Perk and Reeves had the authority to review the bank statements of AFG and they were not prevented from doing so, although neither reviewed the statements for 1993 or 1994 to determine if checks posted or cleared or if there was enough money in the account to cover the checks. Perk and Reeves had the authority to sign corporate tax returns, and Reeves had the authority to review business mail for AFG and he was never prevented from doing so.

7. Perk and Reeves were at the top of the chain of command of AFG. During the years at issue, Perk was responsible for the “general supervision and oversight” of AFG. Business decisions relating to AFG were made by Perk and Reeves. They both supervised employees of AFG, with Perk specifically supervising the financial officers, Richard MacIntosh and Patty Ayers. Perk and Reeves had the authority to hire and fire employees, and Reeves hired Richard MacIntosh. Reeves had authority to sign contracts for AFG upon conferring with Perk, and exercised that authority by signing Broker’s Clearing Agreements. Perk had authority to sign contracts on behalf of AFG “up to a certain level.”

8. During 1993 and 1994 AFG had approximately 25 to 30 employees and withheld taxes from their paychecks. Reeves never checked to see if withholding taxes were paid or if withholding returns were filed by AFG. Perk inquired of MacIntosh as to whether withholding taxes were being paid, but never reviewed bank statements to determine if there were sufficient funds in the bank account to cover the checks or to determine if checks had posted or cleared. Petitioners paid bills and expenses, other than withholding taxes, in 1993 and 1994, such as rent and electric bills, in addition to the payroll.

9. AFG was regulated by the Commodities Futures Trading Commission (CFTC), an agency of the Federal government, and the National Futures Association (NFA), a trade organization working under the authority of the CFTC. AFG was required to submit its balance

sheets and profit and loss statements on a monthly and annual basis to the CFTC and the NFA. The corporation also had an outside accounting firm which audited its books and records each year and prepared its certified financial statements. During an audit to determine if AFG was meeting its minimum capital requirements, the CFTC and NFA determined that AFG had failed to maintain adequate books and financial records in 1993 and 1994, and issued a decision against AFG, Perk, Reeves and another respondent finding that, among other things, they violated record-keeping requirements.

10. The Division of Taxation (“Division”) commenced an audit of AFG for withholding tax purposes in 1997. During the field audit, the Division reviewed records supplied by AFG, including AFG’s payroll records, wage and tax statements, corporate returns and Automatic Data Processing (“ADP”) records.² Based on the records supplied by AFG, the auditor determined the wages paid by AFG during the years at issue and how much tax was withheld by the corporation. The auditor then compared the amount of tax withheld based on AFG’s records with the Division’s records to determine how much tax was previously paid, and how much tax AFG owed for the years at issue. The auditor determined that AFG owed New York State and New York City withholding taxes for the period April 1, 1993 through June 30, 1994 in the amount of \$42,731.73.

AFG did not file quarterly withholding tax returns, Forms WT-4a and WT-4b, as required, for 1993 or the first and second quarter of 1994. AFG filed only a payment slip, Form WT-1, in the first quarter of 1993 accompanied by a payment of \$2,158.15, and a WT-1 in the second

² AFG began using ADP in the third and fourth quarter of 1994 to assist with payroll and withholding record-keeping. ADP provided an annual summary totaling the whole year, indicating the total amount of wages paid in 1994, and the total amount withheld.

quarter of 1994 with a payment in the amount of \$16,645.35. These payments were deducted by the auditor from the withholding taxes owed in determining AFG's deficiency.

11. On May 22, 1998, the Division issued to AFG four notices of deficiency (Assessment ID L-015018658, L-015018659, L-015018660 and L-015018661) for New York State and City withholding taxes for the period April 1, 1993 through June 30, 1994, in the total amount of tax assessed of \$42,732.24, plus penalty and interest. On July 13, 1998, the Division issued to Thomas Reeves as an officer or responsible person of AFG four notices of deficiency (Assessment ID L-015352998, L-015352999, L-015353000 and L-015353001) for a penalty equal to the amount of unpaid New York State and City withholding taxes owed by AFG. On August 17, 1998, the Division issued to George J. Perk, Jr. as an officer or responsible person of AFG a Notice of Deficiency (Assessment ID L-015464922) for the period April 1, 1993 through December 31, 1993 assessing a penalty in the amount of \$1,893.15 for unpaid New York City withholding taxes owed by AFG.

12. Until the second half of 1994, when Automatic Data Processing, Inc. was hired, Mr. MacIntosh, the treasurer, was responsible for the calculation and payment of the withholding taxes. All corporate checks were prepared by Mr. MacIntosh, and required the signature of any two of the three corporate officers.

13. On September 30, 1997, Perk and Reeves sold all of the stock of the corporation to MacIntosh and other individuals in exchange for a promissory note. In October 1997, due to liquidity problems, the Federal government seized all accounts and liquidated the corporation's assets. The purchasers, including Mr. MacIntosh, defaulted on the note, and Messrs. Perk and Reeves resumed ownership of the corporation. The corporation ceased all activity in early 1998.

CONCLUSIONS OF LAW

A. Determinations made by the Division in a notice of deficiency are presumed correct, and the burden of proof is upon petitioners to establish that those determinations are erroneous (*Matter of Leogrande v. Tax Appeals Tribunal*, 187 AD2d 768, 589 NYS2d 383, *lv denied*, 81 NY2d 704, 595 NYS2d 398). The burden does not rest with the Division to demonstrate the propriety of the deficiency (*Matter of Scarpulla v. State Tax Commission*, 120 AD2d 842, 502 NYS2d 113), and if there are any facts or reasonable inferences from the facts to support the Division's determination, the assessment should be confirmed (*Matter of Levin v. Gallman*, 42 NY2d 32, 396 NYS2d 693).

B. Section 671(a)(1) of the Tax Law requires every employer maintaining an office or transacting business in the State and making payment of any taxable wages to deduct and withhold from such wages for each payroll period a tax in an amount substantially equal to the tax reasonably estimated to be due from the employee's New York adjusted gross income or New York source income received during the calendar year. Pursuant to Section 674 of the Tax Law, every employer required to deduct and withhold tax shall file a withholding return and pay over to the Division the taxes required to be deducted and withheld. Section 675 of the Tax Law provides that every employer required to deduct and withhold tax is made liable for such tax, and any amount of tax actually deducted and withheld shall be held to be a special fund in trust for the tax commissioner.

The Division's determination that AFG failed to remit withholding taxes for the period at issue and the amount due is supported by the record in this matter. During the field audit, the auditor reviewed the records provided by AFG, which included AFG's payroll records, WT-2's and annual wage and withholding records from ADP. Based on AFG's records, the auditor

determined the total amount of wages paid for 1993 and 1994, and the total amount of taxes withheld. The auditor then compared the amount of tax withheld as indicated by AFG's own records with the Division's records to determine how much tax had been previously paid, and how much tax AFG owed for the period at issue. The auditor conducted a thorough search of the Department of Taxation and Finance's records, which revealed that AFG did not file quarterly withholding returns, Forms WT-4a and WT-4b, for 1993 or the first and second quarters of 1994. AFG filed only a WT-1, a payment slip, in the first quarter of 1993 accompanied by a payment of \$2,158.15, and a WT-1 in the second quarter of 1994 with a payment in the amount of \$16,645.35. The auditor credited AFG with these two payments when computing the deficiency. Other than these two payments, petitioners failed to provide any canceled checks indicating any further payments to the Division of withholding taxes, nor have they submitted any evidence indicating that funds were transferred from AFG's bank accounts to the Division.

C. Petitioners contend that the ADP records indicate that the taxes were paid for all quarters of 1994. It is first noted that ADP was not hired by AFG until the third quarter of 1994, a period of time not in issue in this matter. The ADP records include the Quarterly Combined Withholding and Wage Reporting Return, Form WT-4-B-MN, for the fourth quarter of 1994, which shows the gross wages paid for that quarter, as well as the annual total of gross wages subject to withholding and the total tax withheld. The records also include a wage and tax register, which indicates employees' wages and taxes withheld, and W-2 magnetic tape printouts showing wages and Federal, State and local taxes withheld. None of these records indicate that any payments were made to the State for withholding taxes for the first or second quarter of 1994.

Petitioners also contend that audits conducted by CFTC and NFA revealed no discrepancies in the withholding tax account. However, the audits performed by CFTC and NFA revealed that AFG had failed to maintain adequate books and financial records in 1993 and 1994. The decision issued by the CFTC and the NFA against petitioners found, in part, that AFG, Perk and Reeves had violated record-keeping requirements. The lack of a finding by the CFTC and the NFA that AFG owed withholding taxes does not negate the finding by the Division following an audit of AFG's records relating specifically to such taxes that a liability existed.

D. The Division's calculation of tax due was supported by a reasonable factual basis, and no evidence was submitted by petitioners which refuted the deficiencies of tax due or which established that the withholding taxes had been paid. Therefore, the deficiencies of withholding taxes issued to AFG are sustained.

E. Tax Law § 685(g) provides that a person responsible for the collection and payment of employee withholding taxes who willfully fails to do so is subject to personal liability in the form of a penalty for the amount of the unpaid taxes. Section 685(n) of the Tax Law defines a person required to collect such tax as "an individual, corporation or partnership or an officer or employee of any corporation . . . who as such officer, employee or member is under a duty to perform the act in respect of which the violation occurs."

The determination of whether an individual qualifies as a "person" is factual in nature and must be sustained if supported by substantial evidence (*Matter of Hopper v. Commr. of Taxation and Finance*, 224 AD2d 733, 637 NYS2d 494, *lv denied* 88 NY2d 1065, 651 NYS2d 409). The relevant factors to be considered include the following: whether the taxpayer signed or had the authority to sign tax returns, owned stock or served as an officer or employee of the corporation, derived a substantial portion of income from the company, possessed a financial

interest in the company, possessed the right to hire and fire employees or had authority to pay the corporate obligations (*Matter of Capoccia v. New York State Tax Commn.*, 105 AD2d 528, 481 NYS2d 476; *Matter of Amengual v. State Tax Commn.*, 95 AD2d 949, 464 NYS2d 272; *Matter of Shah*, Tax Appeals Tribunal, February 25, 1999). The issue to be resolved in each 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” (*Matter of Constantino*, Tax Appeals Tribunal, September 27, 1990).

Petitioners Perk and Reeves founded AFG. Perk owned 52% and Reeves 48% of the stock in the holding company which in turn owned 100% of the voting stock in AFG. Perk was an officer of AFG since its founding, was on the board of directors and held the titles of president and chairman. He was responsible for the general supervision and oversight of the corporation, was at the top of the chain of command and made business decisions for AFG. Perk invested substantial capital in AFG and along with Reeves guaranteed a loan on behalf of the corporation. Perk devoted a substantial portion of his time to AFG and earned a substantial portion of his salary from the corporation and the holding company. He had authority to sign corporate returns and had check signing authority, signing several hundred checks a month, including checks to other creditors. Perk had authority to review AFG’s bank statements and to enter into contracts on behalf of AFG. Perk supervised employees of AFG, including its financial officers, and had the authority to hire and fire employees.

Reeves was also an officer of AFG, was on the board of directors and held the titles of vice-president and president. He was also at the top of the chain of command and made business decisions on behalf of the corporation. Reeves devoted all of his working time to AFG and earned his entire income from the corporation and the holding company. He had authority to

sign corporate returns, had check signing authority, could review AFG's bank statements and business mail and could sign contracts after conferring with Perk. Reeves supervised employees and hired MacIntosh.

The facts support the conclusion that Perk and Reeves were responsible persons pursuant to Tax Law § 685(n). It is also noted that there were not any other corporate officers or directors during the years at issue (*see, Matter of Blodnick v. New York State Tax Commn.*, 124 AD2d 437, 507 NYS2d 536).

F. The Court of Appeals, in *Matter of Levin v. Gallman (supra)*, stated that the test in determining whether the actions of a responsible officer are "willful" under section 685(g) of the Tax Law:

is whether the act, default or conduct is consciously and voluntarily done with knowledge that as a result, trust fund monies 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.

It is further held that a failure to collect and pay over taxes can be willful, notwithstanding the lack of actual knowledge, if the person recklessly disregarded his corporate responsibilities, including the responsibility to see that employment taxes are paid (*Matter of Capoccia v. State Tax Commn., supra; Matter of Ragonesi v. State Tax Commn.*, 88 AD2d 707, 451 NYS2d 301) and that "corporate officials . . . cannot absolve themselves merely by disregarding their duty and leaving it to someone else to discharge" (*Matter of Risoli v. Commr.*, 237 AD2d 675, 654 NYS2d 218, quoting, *Matter of Ragonesi v. State Tax Commn., supra*).

Perk and Reeves contend that their failure to pay the withholding tax due was not "willful," in that they did not know that the taxes were not being paid. However, lack of actual knowledge does not preclude a finding of willfulness if it is determined that one with a duty to

act recklessly disregarded that duty (*Matter of Capoccia v. State Tax Commn., supra; Matter of Ragonesi v. State Tax Commn., supra; Matter of Hussain*, Tax Appeals Tribunal, December 6, 1990). Although Perk had access to the corporate books and records and bank statements, he failed to review them. He signed several hundred checks a month, but could not recall questioning anything about the checks he had signed. Reeves also had the authority to review AFG's bank statements and financial statements; he was never prevented from doing so, but he never reviewed them. He signed the checks placed before him without questioning them. Reeves never checked to see if withholding tax returns were being filed and if the taxes were being paid, claiming that this was not his responsibility.

Petitioners claim that they relied on MacIntosh to file the withholding tax returns and pay the tax due. However, they have failed to establish that such reliance was reasonable. MacIntosh had no ownership interest in AFG or the holding company during the years at issue. He was hired by Reeves and was under the supervision of Perk. No showing has been made as to why petitioners' reliance on MacIntosh should be considered reasonable. In addition, petitioners failed to establish that they adequately supervised MacIntosh. Perk and Reeves did not review the bank statements or financial records of AFG. They both signed checks placed before them without question. Reeves never checked to see if the withholding returns were being filed and the taxes paid. In sum, petitioners Perk and Reeves had access to the corporate books and records, but elected to concern themselves only with other operations of the business. Under these circumstances, petitioners cannot "absolve themselves merely by disregarding their duty and leaving it to someone else to discharge" (*Matter of Capoccia v. State Tax Commn., supra; Matter of Ragonesi v. State Tax Commn., supra*). This matter is similar to the factual situation in *Matter of Hussain (supra)*, where petitioner attempted to place responsibility on the

corporation's comptroller for the failure to pay the taxes due. The Tribunal rejected petitioner's argument, finding petitioner willful because he failed to prove he had made a reasonable delegation of authority to ensure that the taxes were paid, that he did not prove that it was reasonable to rely on the comptroller and failed to prove that he reasonably supervised the comptroller's work. For the same reasons, petitioners are determined to have willfully failed to file withholding tax returns and pay the taxes due.

G. This matter is distinguishable from the cases cited by petitioners. In *Matter of Gallo*, (Tax Appeals Tribunal, September 9, 1988), the Tribunal found that petitioner made a reasonable delegation of authority, exercised reasonable supervision and reasonably relied on the information provided by his delegate, where the delegate was a professional business manager and accountant and had run the day-to-day operations of the business for 14 years. Here, there is no evidence of MacIntosh's education, and petitioners failed to exercise reasonable supervision over his activities by reviewing corporate bank statements to determine if checks written for withholding taxes had actually cleared. In addition, in *Matter of Gallo*, the delegate effectively concealed his failure to pay the corporation's creditors, whereas in the present matter, no such concealment was alleged.

The factual circumstances in *Matter of Reyers v. State Tax Commn.* (116 AD2d 880, 498 NYS2d 199) and *Matter of Russack* (Tax Appeals Tribunal, February 8, 1996) are also distinguishable from the present matter. In *Reyers*, petitioner disassociated himself from the corporate operations, delegated his responsibility for paying taxes to another *owner* of the corporation, and periodically inquired if the taxes were being paid. Although Perk testified that he inquired of MacIntosh regarding the payment of taxes, he never attempted to verify the payment by reviewing the bank statements, or taking any other active step to ensure that the

taxes were in fact being paid. Reeves never even inquired as to whether the taxes were being paid, and did not take any steps to ensure such payment. In *Russack*, the comptroller lied to petitioner, withheld financial records and made incorrect entries into the corporate books to hide his failure to pay the taxes due. Under these circumstances, petitioner was unable to determine if the taxes were being paid. Here, there is no evidence of deception, and petitioners were free to examine the books and records of AFG to determine if the withholding taxes were being paid, but simply decided not to address the issue of whether the tax obligations of the corporation were being satisfied. Petitioners had the authority and the opportunity to determine if the withholding taxes were being paid, but chose not to exercise this corporate authority, and are therefore determined to have willfully failed to remit the withholding taxes due from AFG during the period at issue.

H. The petitions of American Futures Group, Inc., George J. Perk, Jr. and Thomas Reeves are denied; and the notices of deficiency issued on May 22, 1998, July 13, 1998 and August 17, 1998 are sustained.

DATED: Troy, New York
April 4, 2002

/s/ Thomas C. Sacca
ADMINISTRATIVE LAW JUDGE