

STATE OF NEW YORK

DIVISION OF TAX APPEALS

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| In the Matter of the Petition | : | |
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| of | : | |
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| VINCENT J. GILROY, JR. | : | DETERMINATION |
| | : | DTA NO. 819290 |
| for Redetermination of Deficiencies or for Refund of New | : | |
| York State Personal Income Tax under Article 22 of the | : | |
| Tax Law for the Period July 1, 1999 through March 31, | : | |
| 2000 and July 1, 2000 through September 30, 2000. | : | |

Petitioner, Vincent J. Gilroy, Jr., 258 Genesee Street, Suite 307, Utica, New York 13502, filed a petition for redetermination of deficiencies or for refund of New York State personal income tax under Article 22 of the Tax Law for the periods July 1, 1999 through March 31, 2000 and July 1, 2000 through September 30, 2000.

A small claims hearing was held before James Hoefer, Presiding Officer, at the offices of the Division of Tax Appeals, 333 East Washington Street, Syracuse, New York on October 21, 2003 at 1:15 P.M. Petitioner appeared *pro se*. The Division of Taxation appeared by Mark F. Volk, Esq. (E. Allen Smith and Kristine Skelly).

The final brief was required to be filed by November 28, 2003 and it is this date that triggers the three-month period for the issuance of this determination.

ISSUE

Whether petitioner was a person required to collect, truthfully account for and pay over the New York State income taxes withheld by StaffSource, Inc. (hereinafter "StaffSource") from the wages paid to its employees and, if so, whether he willfully failed to perform such duties and is

thus liable for a penalty equal in an amount to the taxes not collected, truthfully accounted for and paid over.

FINDINGS OF FACT

1. On January 22, 2002, the Division of Taxation (“Division”) issued five notices of deficiency to petitioner, Vincent J. Gilroy, Jr., asserting that he was “an Officer/Responsible Person of StaffSource” and, as such, was liable, pursuant to Tax Law § 685(g), “for a penalty in an amount equal to the tax not paid” by StaffSource. The following table sets forth the amount asserted due in each Notice of Deficiency and the respective period:

| PERIOD | AMOUNT |
|--------------------------|---------------|
| 07-01-1999 to 09-30-1999 | \$1,564.49 |
| 10-01-1999 to 12-31-1999 | \$16,726.50 |
| 01-01-2000 to 03-31-2000 | \$24,416.23 |
| 04-01-2000 to 06-30-2000 | \$28,980.05 |
| 07-01-2000 to 09-30-2000 | \$15,318.35 |

2. Petitioner timely protested the five notices of deficiency by filing a Request for Conciliation Conference with the Division’s Bureau of Conciliation and Mediation Services (“BCMS”). Pursuant to a Conciliation Order dated November 1, 2002, BCMS canceled in full the \$28,980.05 penalty asserted due for the period April 1, 2000 to June 30, 2000, but otherwise sustained in full the notices of deficiency for the remaining four periods in dispute. Petitioner thereafter filed a petition with the Division of Tax Appeals maintaining that he was not a responsible officer of StaffSource and therefore should not be held personally liable for the amounts asserted due in the four remaining notices of deficiency.

3. Petitioner is a certified public accountant who has maintained a small (three employees plus petitioner) private practice for some 25 years in the Utica, New York area. Robert T.

Bullock, a financial planner and majority shareholder of several corporations, had been a client of petitioner for many years. In 1998, Mr. Bullock approached petitioner about becoming involved in a business which leased employees. StaffSource is a Florida C-corporation which is involved in the staff leasing business. Mr. Bullock owns 80% of its stock. On September 10, 1998, Mr. Bullock formed StaffLink, LLC (hereinafter “StaffLink”) as a limited liability company under New York State law. StaffLink was involved in the business of leasing employees to customers in the central New York region. In 1998 StaffLink purchased 90% of the outstanding common stock of StaffSource for \$1,306,500.00.

4. StaffSource sustained significant operating losses in 1998, 1999 and 2000 which forced it into bankruptcy reorganization in July 2000. At the time that it entered bankruptcy, StaffSource owed substantial amounts to both the Internal Revenue Service and the State of New York for Federal and State taxes which it had withheld from employees’ wages but had not remitted. StaffLink likewise incurred operating losses which in turn contributed to back payroll taxes, penalties and interest due the Internal Revenue Service and the State of New York totaling approximately \$500,000.00. StaffLink discontinued business operations in September 2000.

5. When petitioner first joined forces with Mr. Bullock he did not receive any compensation for the services he individually provided to StaffSource; however, for the periods at issue herein petitioner had become a salaried employee of StaffSource receiving weekly compensation of \$1,500.00. At the time that he became a salaried employee, petitioner, in his own words, “became the day-to-day operating person.” Petitioner’s accounting firm continued to provide accounting and tax services to all of the Bullock companies, including StaffSource, for which payment was received.

6. StaffSource filed Quarterly Combined Withholding, Wage Reporting and Unemployment Insurance Returns for the four quarters at issue; however, the New York State withholding tax due as shown on the returns was not paid or only partially paid. The record herein contains the returns for the quarters ending September 30, 1999, December 31, 1999 and March 31, 2000 and all three returns were signed by petitioner. The return for the quarter ending March 31, 2000 indicated petitioner's title as "CFO" (chief financial officer), while the other two returns failed to designate a title.

7. The record establishes that StaffSource maintained at least two corporate checking accounts, one with Bank of Utica and the second one with Charter One (formerly Albank). Both petitioner and Mr. Bullock were designated as authorized signers on these accounts with only one signature required on either checking account. The Charter One checking account was a dedicated account used only for expenses related to the conversion of a warehouse to new office space, while the Bank of Utica checking account was used as the operating account. The record reflects that the Charter One checking account was opened on December 9, 1999 and that petitioner signed 10 checks between December 9, 1999 and December 23, 1999. The Bank of Utica checking account was opened on May 4, 1998, and the checks submitted in evidence for this account contained Mr. Bullock's signature made by an authorized signature stamp.

8. Petitioner had no independent authority to direct payment of creditors and, in fact, he needed specific authorization from Mr. Bullock to make any payment. Mr. Bullock required that StaffSource bills be paid in a specific order: first was net payroll; then the American Express bill; then the cell phone bill; and lastly, advertising bills submitted by Mr. Bullock's wife, Constance, for services she provided to StaffSource. After these bills were paid, no funds were left for other bills, including the past due withholding taxes at issue in this proceeding.

Petitioner did not have authority to hire or fire employees nor could he give authorization for any purchases.

9. In late July or early August of 2000 petitioner's employment with StaffSource ended when Mr. Bullock had his attorney retrieve all StaffSource files and materials in petitioner's possession. Petitioner was then personally escorted from StaffSource's office.

10. As a practicing certified public accountant with more than 25 years experience, petitioner was fully aware of the fact that StaffSource was not remitting both the Federal and New York State taxes that had been withheld from its employees' wages, yet he believed that he was completely without authority to direct payment of these liabilities. Petitioner, in his capacity as an employee of StaffSource and also through his accounting firm, attempted to set up a system which would enable StaffSource to timely remit taxes and also get caught up on the back due taxes; however, these efforts were circumvented by Mr. Bullock, the majority owner of the company and the one who had control of the finances.

11. The Division also determined that petitioner was a responsible person of StaffLink, the limited liability company which owned 90% of the outstanding stock of StaffSource, and thus issued assessments against him for the past due withholding taxes owed by StaffLink. The Division later concluded that petitioner was "not involved" with StaffLink and it therefore canceled the assessments issued to him.

12. The Internal Revenue Service ("IRS") likewise assessed petitioner as a responsible person for the past due Federal taxes owed by StaffSource and StaffLink. The IRS matter, involving a liability of approximately \$2,000,000.00, was settled by a \$3,000.00 Offer in Compromise submitted by petitioner on the basis of doubt as to liability.

CONCLUSIONS OF LAW

A. Tax Law § 685(g) provides as follows:

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 a “person” subject to the section 685(g) penalty:

the term person includes an individual, corporation, partnership or limited liability company or an officer or employee of any corporation (including a dissolved corporation), or a member or employee of any partnership, or a member, manager or employee of a limited liability company, who as such officer, employee, manager 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. Factors which should be considered are, *inter alia*, whether the particular individual signed tax returns, derived a substantial part of his or her income from the corporation, or had the right to hire and fire employees (*Matter of Malkin v. Tully*, 65 AD2d 228, 412 NYS2d 186, 188, *affd* 49 NY2d 920, 428 NYS2d 675). Other pertinent areas of inquiry include the person’s official duties, the amount of corporation stock he or she owned, and their authority to pay corporate obligations (*Matter of Amengual v. State Tax Commn.*, 95 AD2d 949, 464 NYS2d 272,273; *see, Matter of McHugh v. State Tax Commn.*, 70 AD2d 987, 417 NYS2d 799, 801).

C. 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 and remit the unpaid taxes in question (*Matter of Constantino*, Tax Appeals Tribunal, October 22, 1990; *Matter of Chin*, Tax

Appeals Tribunal, December 20, 1990). Furthermore, if petitioner is found 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). 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 non-payment is required (*id.*, 396 NYS2d at 624-625; *see, Matter of Lyon*, Tax Appeals Tribunal, June 3, 1988).

D. After careful consideration of the entire record, I conclude that petitioner has sustained his burden of proof (Tax Law § 689[e]) to demonstrate that he was not a person required to collect and remit the New York State income taxes withheld by StaffSource from employees’ wages. While there exists some evidence which would suggest that petitioner was a responsible person, specifically his status as an authorized signer on two corporate checking accounts, his title as chief financial officer and the fact that he signed three withholding tax returns, this evidence is, in my view, outweighed by the fact that petitioner was not an officer of the corporation, owned no stock of the corporation and, notwithstanding the fact that he could sign checks, had no independent authority or control over the financial affairs of the company (*see, e.g., Matter of Turiansky*, Tax Appeals Tribunal, January 20, 1994; *Matter of Moschetto*, Tax

Appeals Tribunal, March 17, 1994; *Matter of Constantino, supra*). The documentary evidence coupled with petitioner's credible testimony supports that he was not a person required to collect and remit the New York State income taxes withheld by StaffSource.

E. The petition of Vincent J. Gilroy, Jr. is granted and the four notices of deficiency dated January 22, 2002 are hereby canceled.

DATED: Troy, New York

February 19, 2004

/s/ James Hoefer
PRESIDING OFFICER