

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
JOSEPH JAMIN	:	
for Redetermination of a Deficiency or Refund of	:	DETERMINATION
Personal Income Tax under Article 22 of the Tax Law for	:	DTA NO. 819820
the Period October 1, 2000 through September 30, 2001.	:	

Petitioner, Joseph Jamin, 40 Beale Road, Cold Spring, New York 10516, filed a petition for redetermination of a deficiency or for refund of personal income tax under Article 22 of the Tax Law for the period October 1, 2000 through September 30, 2001.

A hearing was held before Joseph W. Pinto, Jr., Administrative Law Judge, at the offices of the Division of Tax Appeals, 500 Federal Street, Troy, New York, on December 16, 2004 at 12:00 P.M., with all briefs to be submitted by April 25, 2005, which date began the six-month period for the issuance of this determination. Petitioner appeared by Robert L. Markovits, Esq. The Division of Taxation appeared by Christopher C. O'Brien, Esq. (Kevin R. Law, Esq., of counsel).

ISSUE

Whether petitioner was a person required to collect, truthfully account for and pay over withholding tax on behalf of Geophysical Environmental Research Corp., who willfully failed to do so, thus becoming liable for a penalty equal to the unpaid tax pursuant to Tax Law § 685(g).

FINDINGS OF FACT

1. On March 25, 2002, the Division of Taxation issued to petitioner, Joseph Jamin, four notices of deficiency which set forth penalties due pursuant to Tax Law § 685(g). The periods and amounts due were as follows:

Period Ended	Assessment No.	Penalty	Payments ¹	Balance Due
12/31/2000	L-020715830-4	19,904.02	19,904.02	0.00
3/31/2001	L-020715829-4	11,015.62	1,058.92	9,956.70
6/30/2001	L-020715828-5	10,670.57	0.00	10,670.57
9/30/2001	L-020715827-6	9,705.68	0.00	9,705.68
TOTAL				\$30,332.95

2. Each of the notices of deficiency set forth the following explanation:

This notice is issued because you are liable as an Officer/Responsible Person for a penalty in an amount equal to the tax not paid by the business indicated below.
(Section 685[g] of the New York State Tax Law).

Our records indicate that you are/were an Officer/Responsible Person of:
GEOPHYSICAL AND ENVIRONMENTAL RESEARCH CORP.

3. Petitioner, who has an undergraduate degree in accounting and a graduate degree in business administration, began work at Geophysical and Environmental Research Corp. (“GER”) in 1995, after answering a newspaper advertisement for the position of comptroller. GER was a small company which manufactured spectroradiometers, instruments used to analyze reflective light for scientific purposes. However, after starting the job, he executed an employment contract with GER which stated that his official title was that of Vice President of Finance and Chief Financial Officer, reporting directly to the Chief Executive Officer, Mark J. Westfield.

¹The payments listed in this column are those listed on the Consolidated Statement of Tax Liabilities issued to petitioner on May 14, 2003.

4. Pursuant to the employment agreement, petitioner's annual salary was \$110,000.00 with the possibility of up to a 30% bonus based on an annual review and the performances of the company and petitioner. In fact, petitioner earned \$114,000.00 in 1999 and \$63,695.00 in 2001. Petitioner did not recall how much he earned from GER in 2000, but thought it was approximately in the same range as in 1999 and 2001. In addition to the salary and bonus, petitioner was eligible under the employment contract to participate in a stock option plan, left undefined in the agreement. However, at some point in 1997, petitioner did receive stock in GER Holdings Corporation ("Holdings"), the sole shareholder of GER, amounting to approximately a 10% share. GER was the operating company.

5. Petitioner's duties at the company initially involved the day-to-day financial operations, including the maintenance of the books and records. In addition, petitioner was responsible for the preparation of the balance sheets, income statements and cash flow reports. He was also responsible for preparing executive reports for the board of directors and chief executive officer.

6. During the period in issue, October 1, 2000 through September 30, 2001, petitioner prepared the sales and use tax returns, withholding tax returns and jointly prepared the corporation tax returns with the company's other comptroller, Matthew Alexander. With respect to the withholding tax returns, forms NYS-45, for each of the four quarters in issue, petitioner not only prepared the returns but also signed the returns as the vice president of finance of GER.

7. Petitioner was a member of the board of directors of Holdings during the period in issue but not of the board of GER. The Holdings board had eight members during the period in issue and many of the other board members were also members of the GER board. Holdings

also had an executive committee² of its board of directors, of which petitioner was not a member. That committee made financial decisions without the participation of the full board of directors, but did so with knowledge of the taxes due as provided to it by petitioner, who reported cash requirements to the full board and the executive committee regularly. In addition, the executive committee and chief executive officer authorized the payment of salaries and other expenses but not the payment of taxes. The issue of paying taxes never came before the board for a vote.

8. GER was primarily funded by customer contracts, investments and loans. Some loans came from a company called Spacevest, which invested in companies involved with technology related to space. As a result of Spacevest's investment, it garnered several positions on the board of directors of Holdings held by Mark Westfield, Charles Wasaff and John Higgenbotham.

9. Despite knowledge of New York State tax liabilities, the board of Holdings, including petitioner, chose to direct funds to other liabilities, including salaries and marketing expenses. The board's rationale for this decision was that it believed marketing its new satellite system would substantially increase the value of the corporation and ultimately enable it to meet all its obligations. In fact, the board was relying on the sale of a satellite system to the country of Kuwait to produce revenues sufficient to turn the company around.

10. Petitioner had the authority to sign checks on behalf of GER. Those checks in excess of \$5,000.00 had to be approved by the board of directors and co-signed by another officer. Those checks below \$5,000.00 needed only the approval of the board of directors. In addition to petitioner, four other board members were authorized to sign checks. In all instances, petitioner submitted a cash requirement report to the board and then waited to be told which checks to pay.

²There is no evidence of when or how the executive committee was created. It appears it was a creation of the full board of directors to handle specific matters in a more efficient manner.

Although the board did not direct petitioner to pay the taxes underlying the notices in issue, petitioner did inform the board of the company's tax liabilities and continued to file withholding tax returns without payment, thereby placing the State of New York on notice that the taxes had not been paid. The board was aware of these filings.

11. Beginning in 1998, GER had difficulty meeting its payroll and the company never recovered financially. In May 2002, William Goffe, a former board member of Holdings, offered to purchase the outstanding shares of Holdings from each of its board members. In exchange for their shares and resignations, members were to be held harmless for an \$80,000.00 New York State tax liability. Petitioner tendered his shares and resigned in July 2002.

SUMMARY OF PETITIONER'S POSITION

12. Petitioner contends that his authority to pay the taxes in issue was severely limited and restricted by the board of directors and the executive committee which decided what liabilities would be paid. Although he dutifully filed the payroll tax returns, petitioner noted that he could issue no checks without authorization from the board and, therefore, it cannot be said that he "willfully" failed to pay the payroll taxes.

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) defines "persons" subject to the section 685(g) penalty as follows:

[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. The question of whether someone is a "person" under a duty to collect and pay over withholding taxes is a factual one, similar in scope and analysis to the question of whether one is a responsible individual for sales and use tax purposes. Factors which should be considered are, *inter alia*, whether the particular individual signed tax returns, derived a substantial part of his income from the corporation, or had the right to hire and fire employees (*Matter of Malkin v. Tully*, 65 AD2d 228, 412 NYS2d 186; *see, Matter of MacLean v. State Tax Commn.*, 69 AD2d 951, 415 NYS2d 492, 494, *affd* 49 NY2d 920, 428 NYS2d 675). Other pertinent areas of inquiry include the person's official duties, the amount of corporation stock he owned, and his 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. In this matter, it was established that petitioner was a person under a duty to collect and pay over the withholding tax on behalf of GER. The positions he held during his tenure at the company gave him a unique and in-depth view of the company's financial position.

He occupied executive managerial positions which, pursuant to the terms of his employment agreement, compensated him handsomely with the possibility of annual bonuses based on his performance and that of the company. Additionally, he received stock in Holdings which represented a 10% ownership share in the company, which, although not a controlling interest, was a significant one in such a small company.

As vice president of finance and chief financial officer, petitioner was directly responsible for the day-to-day operations of the company, including maintenance of the books and records, preparation of balance sheets, income statements and cash flow reports which he reported to the chief executive officer, board of directors and executive committee of the board. The individuals

to whom he reported utilized the data to make critical and strategic decisions on behalf of GER, highlighting petitioner's sensitive, trusted and important position within the enterprise. Petitioner was well aware of his duties and obligations and that the other executives relied on his reports.

In addition, petitioner conceded that he prepared and signed the withholding tax returns for the periods in issue and prepared the sales and use tax and corporation income tax returns as well. Petitioner knowingly filed the withholding tax returns with no remittance, an action which immediately created a self-assessed tax liability for the corporation and its responsible officers and employees. Whether or not petitioner realized that individuals, including himself, would be held liable for the taxes is irrelevant, for ignorance of the law is not a valid excuse. (*Genesee Brewing Co. v. Village of Sodus Point*, 126 Misc 2d 827, 482 NYS2d 693, 700, *affd* 115 AD2d 313, 496 NYS2d 720; *accord, Matter of Nathel v. Commissioner of Taxation & Fin.*, 232 AD2d 826, 649 NYS2d 196 [wherein it was held that ignorance of the law is no excuse and that a taxpayer is charged with knowledge of the law, including subsequent judicial interpretation thereof].)

Although expenditures were reviewed and approved by the board of directors, petitioner was one of very few persons in the company with authorization to sign and co-sign checks. He contends that his signatory authority was merely ministerial and that he only issued checks as directed by the board. Despite petitioner's credible testimony to these facts, his argument demands a leap of faith which this forum is not inclined to take without further evidence.

The same factual situation presented itself in *Matter of Byram* (Tax Appeals Tribunal, August 11, 1994), where the petitioner, an executive director of a not-for-profit hospital corporation, was held liable for withholding taxes because he did not establish that the board of directors precluded him from paying the taxes. In *Byram*, petitioner claimed that the United

States Bankruptcy Court and the New York State Department of Health had directed that any monies available be used to keep the hospital running, necessarily excluding the payment of withholding taxes. This is analogous to the instant situation, where the board of directors made the choice to fund the marketing of a satellite system which it believed would sell and salvage the company from its demise. Unfortunately, the system was not sold, the funds never materialized and the taxes were never paid.

Petitioner knew or should have known that abetting such a risky decision would have consequences and that individuals as well as the company would be liable. Despite petitioner's discontent with collection action against other board members, the entire liability is collectible from every person found liable. (*See, Matter of Phillips*, Tax Appeals Tribunal, May 11, 1995 [where the Tribunal held that liability for penalty under Tax Law § 685(g) is joint and several, provided the Division is not attempting to collect more than the total amount of tax owed for the periods in issue].)

Finally, petitioner received a salary during the periods in issue. Expenditures for salaries were authorized by the same board which chose not to make any payments to the State of New York with its tax returns due to insufficient funds. As mentioned, petitioner was a member of this board and chose to continue his employment with GER with the hope that the company would prosper once it sold the satellite system.

By choosing to continue his employment with a company he knew was paying salaries, including his own, but not taxes, petitioner acknowledged his consent to the board's decision. No one knew the financial situation of the company better than petitioner, including its ability to pay its liabilities, and it is difficult to believe that he would advise the board with any conviction to

authorize payment of taxes and not his own salary. In fact, there is no evidence that he advocated for the payment of taxes, only that he informed the board of its tax liability.

D. With respect to withholding tax, having decided that petitioner is a person under a duty to collect and pay the tax, it must now be decided whether his failure was willful. The question of willfulness is related directly to the question of whether petitioner was a person under a duty, since 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.)

Petitioner's defense that he did not have the authority to pay the tax is not convincing. To accept his argument, one would have to disregard his place on the board of directors and his willingness to accept a salary and continue with the company while fully aware of its refusal to pay taxes. Petitioner was a trusted executive charged with the preparation of financial and cash flow statements. As a member of the board he condoned the actions taken by that body, including its decision not to pay taxes, and must bear responsibility for them. There is simply no evidence to the contrary in the record. Petitioner cannot shield himself from liability by shifting all responsibility for the collection and payment of taxes to the board, as if it were some independent and distant body. Just as one cannot not shield oneself from liability by disregarding a duty and leaving it for someone else to discharge (*Matter of Ragonesi v. State*

Tax Commn., 88 AD2d 707, 451 NYS2d 301), petitioner cannot hide behind the board of directors here.

The board of directors controlled the chief executive officer, Mr. Westfield, and the executive committee. It decided ultimately which risks to take and how the dwindling finances of the corporation would be expended. As a member of the board, a ten percent owner of Holdings and chief financial officer of GER, petitioner had some measure of control over those decisions which satisfies the test set forth in the *Levin* case.

Further, as found by the Tribunal in *Matter of Byram (supra)*, a critical factor in holding Byram liable for the withholding taxes was that he had not established that the board of directors had precluded him from paying the taxes, i.e., taken a proactive step to thwart the payment of taxes. Likewise, Mr. Jamin has not demonstrated that the board herein took any such action.

In *Matter of Muffoletto* (Tax Appeals Tribunal, June 19, 1997), the Tribunal expressly rejected a similar argument made by a petitioner who, while in desperate need of cash to keep his companies alive, stayed on and operated the business under circumstances which he knew, or should reasonably have known, did not include the payment of taxes. Here, petitioner made the same choice and must accept the same consequence.

E. The petition of Joseph Jamin is denied and the four notices of deficiency, dated March 25, 2002, are sustained.

DATED: Troy, New York
May 12, 2005

/s/ Joseph W. Pinto, Jr.
ADMINISTRATIVE LAW JUDGE