

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
SAYED A. MONSIF	:	SMALL CLAIMS DETERMINATION DTA NO. 820684
for Redetermination of Deficiencies or for Refund of New York State Personal Income Tax under Article 22 of the Tax Law and New York City Personal Income Tax pursuant to the Administrative Code of the City of New York for the Years 1999, 2000 and 2001.	:	

Petitioner, Sayed A. Monsif, 20 Church Street, B-63, Greenwich, Connecticut 06830, filed a petition for redetermination of deficiencies or for refund of New York State personal income tax under Article 22 of the Tax Law and New York City personal income tax pursuant to the Administrative Code of the City of New York for the years 1999, 2000 and 2001.

A small claims hearing was held before James Hoefer, Presiding Officer, at the offices of the Division of Tax Appeals, 90 South Ridge Street, Rye Brook, New York, on April 20, 2006 at 10:45 A.M. and continued to conclusion before the same Presiding Officer at the same location on November 16, 2006 at 9:15 A.M. Petitioner appeared at both hearings *pro se*. The Division of Taxation appeared at both hearings by Daniel Smirlock, Esq. (Steve C. Mulzac).

The final post-hearing brief in this matter was due by May 4, 2007, 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 and City income taxes withheld by Kato Worldwide, Ltd., 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 amount to the taxes not collected, truthfully accounted for and paid over.

FINDINGS OF FACT

1. Kato Worldwide, Ltd. (“Kato”) was incorporated in the State of New York in 1990, and its primary business activity involved the manufacture of fragrances for the food and beverage industry. From its inception until June 1997, Kato’s business activities were conducted from a sole office located at One Bradford Road, Mt. Vernon, New York. In June 1997, certain assets of Kato were sold to Intarome Fragrance Corporation, and at this time Kato closed its facility in Mt. Vernon, New York, and moved to another facility in Ridgefield, New Jersey. For the three years at issue in this proceeding, Kato’s only office was located in New Jersey.

2. Kato, for periods both before and after its move to New Jersey, utilized the services of an independent company to process its payroll. After it moved to New Jersey in June 1997, Kato, except for a single \$840.51 payment made to the Division of Taxation (“Division”) for the 1998 tax year, stopped filing New York withholding tax returns and paying over New York State and City income taxes withheld from employee wages. Kato was of the opinion that it was no longer required to withhold New York State and City income taxes from employee wages since its only office was located in New Jersey, and all of its employees were working in New Jersey.

3. In 2002, the Division became aware of the fact that Kato had issued wage and tax statements for the years 1998 through 2001 showing New York State and City tax withheld to those of its employees who lived in New York. Since Kato had not filed any New York withholding tax returns remitting payment of New York State and City tax withheld from wages for these four years, except for the one \$840.51 payment made in 1998, the Division, in early 2003, initiated an audit of Kato’s withholding tax records for the years 1998 through 2001.

4. Kato had ceased all business activities by the time the Division began its withholding tax audit. Although the Division's auditor requested all of Kato's withholding tax records, she was not able to obtain or review any corporate withholding tax records. Accordingly, the Division reviewed the personal income tax returns of those employees of Kato who resided in New York to determine the amount, if any, of credit said employees had claimed on their returns for New York State and City tax withheld from the wages they received from Kato. The Division, based an examination of the actual wage and tax statement attached to each New York resident personal income tax return filed by those employees of Kato who resided in New York, determined that the following amounts of New York State and City tax withheld were shown on the wage and tax statements issued by Kato for the years 1998 through 2001:

ITEM	1998	1999	2000	2001
Number of employees	3	4	4	2
New York State tax withheld	\$2,399.38	\$9,136.97	\$12,479.53	\$2,534.54
New York City tax withheld	1,750.26	2,414.01	2,366.45	1,444.71
Total	\$4,149.64	\$11,550.98	\$14,845.98	\$3,979.25

5. The employees of Kato who resided in New York claimed credit for the above amounts as New York State and City tax withheld on their respective New York personal income tax returns for the years 1998 through 2001. Since Kato, except for the one \$840.51 payment made in 1998, had not remitted payment of these amounts, the Division issued assessments to Kato seeking payment of \$33,685.34 ($\$4,149.64 + \$11,550.98 + \$14,845.98 + \$3,979.25 - \840.51), plus penalty and interest. As noted earlier, Kato had ceased all business operations by the time the audit had started and therefore the Division was unable to collect any of the amounts asserted due from the corporation.

6. During the course of its audit, the Division determined that petitioner, Sayed A. Monsif, was a person responsible for the collection and payment of the New York State and City withholding taxes at issue herein. Accordingly, on April 29, 2004, the Division issued eight notices of deficiency to petitioner asserting that he was “an Officer/Responsible Person of Kato Worldwide, Ltd.” and, as such, was liable, pursuant to Tax Law § 685(g), “for a penalty in an amount equal to the tax not paid” by Kato. The eight notices of deficiency collectively asserted that petitioner was liable for payment of \$33,685.34, the amount of New York State and City withholding taxes allegedly not remitted by Kato for the four years in question.

7. Petitioner protested the eight notices of deficiency by filing a Request for Conciliation Conference with the Division’s Bureau of Mediation and Conciliation Services (“BCMS”). BCMS determined that petitioner was not liable for any taxes due for the 1998 tax year and on May 27, 2005 it issued a Conciliation Order to petitioner wherein the Tax Law § 685(g) penalty asserted due for 1998 was canceled. The May 27, 2005 Conciliation Order sustained in full the \$30,376.11 of Tax Law § 685(g) penalty asserted due for the years 1999, 2000 and 2001. Petitioner timely protested the Conciliation Order dated May 27, 2005, and this small claims proceeding ultimately ensued.

8. Petitioner began his employment with Kato in 1998, apparently as an at-will employee. Effective January 1, 1999, petitioner and Kato entered into an Employment Agreement which provided that petitioner was “to perform diligently and conscientiously those duties that are customarily rendered by and required of a chief financial officer and as the Company may reasonably require.” As the chief financial officer (“CFO”) of Kato, petitioner was compensated at the rate of \$120,000.00 per year. Petitioner left the employ of Kato on or about April 19, 2002.

9. Kato's corporate checking account required two signatures, petitioner's and Nadim Shaath, who was Kato's chief executive officer, a shareholder and a member of its board of directors. Mr. Shaath received an annual salary of \$160,000.00. Effective October 7, 2000, Mr. Shaath resigned his position as Kato's chief executive officer and after this date only one signature, petitioner's, was required on the corporate checking account.

10. Petitioner has both bachelor's and master's degrees in engineering. He subsequently studied accounting and finance, and in numerous pieces of correspondence in the record he indicates that he is a "CPA" (presumably certified public accountant). Pursuant to a letter dated August 29, 2000 addressed to Dr. Ibrahim Kamel, Kato's chairman of the board of directors, petitioner states the following:

Enclosed please find the statement of the financial position of Kato Worldwide, Ltd., as of July 31, 2000, and the related statement of income for the period ended. However, the company is in continuous losing status, I am taking all the necessary steps in order to assure regaining its' [sic] profitability again. As I promised this situation will be reverted soon.

The letter is signed by petitioner as "Dr. Ahmed Monsif, CPA, Chief Financial Officer."

11. Petitioner, who was not a shareholder of Kato, was active in the day-to-day financial and business affairs of the corporation and was involved in determining which creditors were paid. Petitioner was aware of the fact that Kato had not remitted trust fund taxes to the Internal Revenue Service during the years in question.

SUMMARY OF PETITIONER'S POSITION

12. During the first hearing petitioner stated that "I believe I'm not the only one responsible for the trust taxes." At the continued hearing, petitioner adduced evidence to show that other individuals were active in Kato's business and financial affairs and he argues that

these other individuals were the ones truly responsible for payment of the withholding taxes at issue herein.

13. Petitioner also asserts that the wage and tax statements issued by Kato to its employees who resided in New York erroneously showed New York State and City taxes as having been withheld from their wages. Petitioner maintains that New Jersey income taxes were withheld from all of Kato's employees, including those employees who lived in New York, and that said New Jersey income taxes were properly remitted to the State of New Jersey. No documentary evidence was adduced, such as Kato's withholding tax records, the records of the independent company Kato used to process its payroll or the State of New Jersey, to support this argument.

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). 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, September 27, 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 was a person who willfully failed to collect and remit the New York State and City income taxes withheld by Kato from employees' wages and, as such, is liable for the penalty imposed pursuant to Tax Law § 685(g). There is substantial evidence in the record to establish that petitioner was a responsible person, specifically: his status as the CFO of the corporation, his signature on most, if not all, of the checks drawn on the corporate checking account, his participation in the financial and business affairs of the corporation, his signature on tax returns, his status as a full-time employee of Kato and his receipt of substantial compensation from the corporation, and his knowledge that withholding taxes were not being remitted by Kato (*see, Matter of Wendel*, Tax Appeals Tribunal, February 3, 2000).

E. Petitioner's assertion that other persons were involved in Kato's business and financial affairs and should be held liable for payment of the amounts in question is rejected. The entire liability is collectible from every person found liable since the penalty under Tax Law § 685(g) is joint and several, provided, however, the Division does not attempt to collect more than the total amount of tax owed for the periods in issue (*Matter of Phillips*, Tax Appeals Tribunal, May 11, 1995; *Matter of Wendel, supra*). The fact that other individuals may also be persons responsible for the collection and payment of the taxes at issue herein is immaterial and has no bearing on petitioner's status as a responsible person.

F. The petition of Sayed A. Monsif is denied and the six notices of deficiency dated April 29, 2004 pertaining to the 1999, 2000 and 2001 tax years are sustained.

DATED: Troy, New York
August 2, 2007

/s/ James Hoefler
PRESIDING OFFICER