

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition

of

WRY BRIGLIO

DECISION

for Redetermination of a Deficiency or for
Refund of New York State Personal Income Tax
under Article 22 of the Tax Law and New York
City Personal Income Tax under Chapter 46,
Title T of the Administrative Code of the City
of New York for the Period January 1, 1978
through December 31, 1979.

Petitioner, Nary Briglio, RD #5 Box 159, Newton, New Jersey 07860, 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 and New York City personal
income tax under Chapter 46, Title T of the Administrative Code of the City of
New York for the period January 1, 1978 through December 31, 1979 (File No.
48455).

A hearing was held before Frank A. Landers, Hearing Officer, at the
offices of the State Tax Commission, Two World Trade Center, New York, New
York, on August 4, 1986 at 2:45 P.M., with all briefs to be submitted by
November 21, 1986. Petitioner appeared by Hollyer, Jones, Pindyck, Brady &
Chira (A. Rene. Hollyer, Esq., of counsel). The Audit Division appeared by
John P. Dugan, Esq. (Thomas C. Sacca, Esq., of counsel).

ISSUE

Whether petitioner was a person required to collect, truthfully account
for and pay over the New York State and City withholding taxes of Better Buying
Service of America, Inc. and who willfully failed to do so, thus becoming liable
for a penalty equal to such unpaid withholding taxes.

FINDINGS OF FACT

1. On July **25**, 1983, the Audit Division issued a Statement of Deficiency ("statement") to petitioner, Mary Briglio, asserting that she was a person required to collect, truthfully account for and pay over the New York State and City withholding taxes of Better Buying Service of America, Inc. (hereinafter "BBS") for the period January 1, 1978 through December 31, 1979. The aforementioned statement further alleged that petitioner willfully failed to collect, truthfully account for and pay over said withholding taxes and that she was therefore subject to a penalty equal **in** amount to the unpaid withholding taxes **of** \$4,121.00. Accordingly, **on** July 25, 1983, the Audit Division issued a Notice of Deficiency to petitioner for the years 1978 and 1979 asserting a deficiency of \$4,121.00.

2. BBS was organized in 1972 by one Richard **M.** Messina, an attorney with offices at 400 Park Avenue, New York, New York. Mr. Messina, together with certain of his clients, held a controlling interest in BBS. The business of BBS was to offer discount merchandise through its catalogue to select subscribing groups for which it was paid a commission **on** sales.

3. Petitioner, prior to 1972, had been employed by one of Mr. Messina's clients who was involved **in** a business similar to that **of** BBS. After the owner of said similar business passed away, petitioner and Mr. Messina planned the creation of BBS. Upon its inception, petitioner was named president **of** BBS and Mr. Messina became its secretary/treasurer. Petitioner owned **22** percent of the outstanding stock of BBS, however, she made no cash or property contribution to BBS in exchange for the receipt of her shares in BBS. Mr. Messina and his clients owned all of the remaining shares in BBS.

4. Petitioner's primary function with BBS was to solicit sales and also solicit dealers and suppliers to participate in the service. **Ms.** Briglio did not have authority to determine which creditors of BBS were to be paid and she was not a signatory on BBS's corporate checking account.

5. Sometime in 1980, BBS was sold to United Buying Service, Inc. Petitioner was not involved in the negotiations which preceded the sale of BBS. ~~As~~ the result of said sale, **Ms.** Briglio relinquished her shares in BBS without any form of compensation.

6. Petitioner first became aware that BBS had failed to remit the proper amount **of** New York State and City withholding taxes upon her receipt of the Statement of Deficiency and Notice of Deficiency.

CONCLUSIONS OF LAW

A. That the personal income tax imposed by Chapter **46**, Title T of the Administrative Code of the City of New York is by its own terms tied into and contains essentially the same provisions as Article **22** of the Tax Law. Therefore, in addressing the issues presented herein, unless otherwise specified all references to particular sections **of** Article **22** shall be deemed references (though uncited) to the corresponding sections of Chapter **46**, Title T.

B. That where a person is required to collect, truthfully account for and pay over withholding tax and willfully fails to collect and pay over such tax, section 685(g) of the Tax Law imposes on such person "a penalty equal to the total amount of the tax evaded, or not collected, or not accounted for and paid over."

C. That section 685(n) **of** the Tax Law defines a person, for purposes of section 685(g) of the Tax Law, to include:

"an individual, corporation or partnership or an officer or employee of any 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."

D. That the question of whether petitioner was a person under a duty to collect and pay over withholding taxes must be determined on the basis of the facts presented. Some of the factors to be considered include whether petitioner signed the corporation's tax returns, possessed the right to hire and discharge employees or derived a substantial portion of her income from the corporation. Other relevant factors include the amount of stock petitioner held, the actual sphere of her duties and her authority to pay corporate obligations and/or exercise authority over the assets of the corporation. (Matter of Amengual v. State Tax Commn., 95 AD2d 949; McHugh v. State Tax Commn., 70 AD2d 987.) Finally, the test of willfulness is whether the act, default or conduct was "voluntarily done with knowledge that, as a result, trust funds of the government will not be paid over; intent to deprive the government of its money need not be shown, merely something more than accidental nonpayment." (Matter of Ragonesi v. New York State Tax Commn., 88 AD2d 707, 708 [citation omitted].)

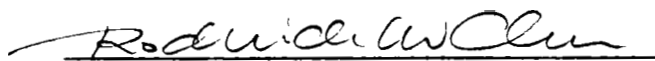
E. That petitioner, in the instant matter, was not a person under a duty to collect and pay over BBS's New York State and City withholding taxes for the years 1978 and 1979.

F. That the petition of Mary Briglio is granted and the Notice of Deficiency dated July 25, 1983 is cancelled in its entirety.


DATED: Albany, New York

STATE TAX COMMISSION

APR 06 1987


PRESIDENT


COMMISSIONER


COMMISSIONER