

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition

of

PETER ORVILLE

for Redetermination of a Deficiency or for
Refund of Personal Income Tax under Article 22 :
of the Tax Law for the Years 1979 through 1983.

In the Matter of the Petition

of

GEOFFREY ROBINSON

DECISION

for Redetermination of a Deficiency or for
Refund of Personal Income Tax under Article 22
of the Tax Law for the Years 1979 through 1983. :

In the Matter of the Petition

of

MITCHELL YOUNG

for Redetermination of a Deficiency or for
Refund of Personal Income Tax under Article 22 :
of the Tax Law for the Years 1979 through 1983.

Petitioner, Peter Orville, 1808½ Old Vestal Road, Vestal, New York 13850,
filed a petition for redetermination of a deficiency or for refund of personal
income tax under Article 22 of the Tax Law for the years 1979 through 1983
(File No. 62942).

Petitioner, Geoffrey Robinson, c/o Times Advocate of New York, Inc., 406
South Franklin Street, Syracuse, New York 13202, filed a petition for redetermi-
nation of a deficiency or for refund of personal income tax under Article 22 of

Petitioner, Mitchell Young, c/o Times Advocate of New York, Inc., 406 South Franklin Street, Syracuse, New York 13202, filed a petition for redetermination of a deficiency or for refund of personal income tax under Article 22 of the Tax Law for the years 1979 through 1983 (File No. 61955).

A consolidated hearing was held before James Hoefer, Hearing Officer, at the offices of the State Tax Commission, State Office Building, 333 East Washington Street, Syracuse, New York, on January 28, 1987 at 9:15 A.M., with all briefs to be submitted by April 11, 1987. Petitioners Geoffrey Robinson and Mitchell Young appeared by Bond, Schoeneck & King (George J. Getman, Esq., of counsel). Petitioner Peter Orville appeared by Wiggins, Holmberg, Galbraith & Holmberg (Dirk A. Galbraith, Esq., of counsel). The Audit Division appeared by John P. Dugan, Esq. (James Della Porta, Esq., of counsel).

ISSUES

I. Whether the Audit Division was barred by the three year statute of limitations found at Tax Law § 683 from imposing a penalty against petitioners under section 685(g) of the Tax Law.

II. Whether petitioners were persons required to collect, truthfully account for and pay over withholding tax and willfully failed to do so, thus becoming liable for the penalty imposed under Tax Law § 685(g).

III. Whether the aggregate amount of penalties imposed on petitioners under Tax Law § 685(g) is limited to the total amount of withholding tax due from the corporation.

FINDINGS OF FACT

1. On March 25, 1985, the Audit Division issued three identical notices of deficiency and three statements of deficiency, asserting a penalty under section 685(g) of the Tax Law against petitioners Geoffrey Robinson. Mitchell

Young and Peter Orville, as persons required to collect, truthfully account for and pay over withholding taxes of the Times Advocate of New York, Inc. ("TANY") in the total amount of \$20,625.78, calculated as follows:

<u>Withholding Tax Period</u>	<u>Amount</u>
April 1, 1979 to December 31, 1979	\$ 2,752.57
January 1, 1980 to December 31, 1980	3,766.28
January 1, 1981 to December 31, 1981	5,598.13
January 1, 1982 to December 31, 1982	6,198.17
January 1, 1983 to April 15, 1983	2,009.90
September 1, 1983 to September 15, 1983	<u>300.73</u>
Total	\$20,625.78

2. At hearing, the Audit Division conceded that previously unrecorded payments had been made on behalf of TANY for the 1979 fiscal year, totalling \$3,117.33 and reducing the penalty asserted against each petitioner to \$17,508.45

3. TANY was a New York corporation which owned and operated a weekly newspaper entitled the Syracuse New Times (the "Times"). Prior to TANY's purchase of the Times early in 1979, the newspaper was owned by another corporation, Syracuse Media, Inc. The publisher of the Times, Ken Simon, was the principal owner of the latter corporation.

4. At the time of its incorporation, TANY's owners consisted of the following individuals: Geoffrey Robinson, President; Christine Austin, Robinson's wife; Mitchell Young, Treasurer; Ed Matys; Linda Matys; and Ken Simon. All of these individuals (except Simon) were also owners of a Massachusetts corporation, Mass Media, Inc. ("MMI"), which owned and operated a chain of newspapers in New England.

5. Under TANY's ownership, the former publisher, Ken Simon, continued to be responsible for the day-to-day operations of the Times in Syracuse. The sales manager position and some editors were hired by TANY's owners in Massachu-

business records and production equipment were moved to Massachusetts. Tom French, the Times business manager, was moved from Syracuse to Massachusetts where he was responsible for running the business operations of both TANY and MMI> During his employment by TANY, Mr. French prepared all payrolls, tax returns and withholding information for that corporation.

6. In early spring 1980, Simon left his position at the Times. Apparently, he sold his shares of TANY to the other owners; however, the record is unclear on this point.

7. In the summer of 1980, TANY's owners entered negotiations with Peter Orville for the purpose of hiring him to replace Simon as the Syracuse manager. In the course of the negotiations, Orville sent a letter to TANY's owners, proposing a title, salary and duties for his position. The letter made several points:

(a) that the Times was not a profitable business at that time;

(b) that in order to make the Times profitable, Orville would need the authority to actually run the operation, including some budgetary control and the ability to hire and fire employees;

(c) that Orville's position should be the highest level position in the Syracuse operation.

In addition, Orville presented the owners with a series of questions to help him get started in his new position. These questions included:

"1. Are there any lawsuits pending against the SNT [Syracuse New Times]?

Are there any outstanding lawsuits brought by SNT against creditors or anyone else?

2. Who is the lawyer for the SNT?

3. List of receivables - dated

4. List of payables - with due dates

5. Budget - present operating budget with totals figured weekly monthly and yearly Include names of personal

* * *

23. Policies - classifieds, credit terms, employee policies.

* * *

32. Who is Times-Advocate, Inc.? What connections exist between Times-Advocate and New Mass Media? Who am I responsible to?"

8. It is the position of petitioners Robinson and Young that TANY's owners turned over complete responsibility for the operation of the Times to their general managers in Syracuse, Simon and Orville. Mr. Orville's letter was cited **as** evidence of the nature and scope of the duties delegated to Orville. Orville asserts that many of the questions asked in his letter were never answered and that he never assumed total control of the Times operation.

9. Peter Orville began his employment with TANY on a part-time basis in July 1980. He became the full-time general manager in August 1980 and later assumed the title of publisher.

10. Late in July 1980, the Matys's sold their interests in both TANY and MMI to MMI. They moved to New Orleans to open their own newspaper, and the business manager, Tom French, accompanied them. Thereafter, Mitchell Young assumed Mr. French's duties as business manager of TANY and MMI. Young signed TANY's 1979 and 1980 New York State corporation franchise tax returns as secretary/treasurer of the corporation. Robinson signed its 1981 return as president of the corporation.

11. When Orville was hired, TANY maintained two checking accounts, one in Syracuse and one in Massachusetts. Orville was a signatory on the Syracuse account only. He was authorized to draw funds from that account to pay for such things as printing bills and rent. At about the time Orville began his employment, a large advertiser paid TANY close to \$20,000.00 for one year of

instructed by TANY's owners to pay \$18,000.00 from that amount to the Internal Revenue Service, which he did. The record does not contain information regarding the nature of this debt.

12. TANY's income was derived from advertising. TANY's Massachusetts address appeared on bills sent to advertisers, and they were instructed to forward payment to **TANY's** Massachusetts office. That money was deposited in TANY's Massachusetts bank account. Monies collected by TANY's sales representatives in Syracuse were placed in the Syracuse account.

13. TANY employed a computerized payroll service. Each Times department head provided payroll information to Kathy Kane, the Times' Syracuse business manager, who compiled the information and forwarded it to the payroll service. The service prepared and delivered payroll checks to the Syracuse office. The checks were signed by either Orville or Kane and distributed to the employees. Quarterly payroll reports were prepared by the payroll service and sent to Young in Massachusetts. Until late in 1983, Orville believed that all withholding taxes were being paid over to the State by Young.

14. In November 1982, TANY received a notice from the Audit Division informing it that it was delinquent in its payment of 1979 State withholding taxes. Because the notice was sent to the Syracuse office, it was received by Orville. It was the first time Orville became aware of **TANY's** State tax delinquencies. **TANY's** owners instructed Orville to negotiate a payment agreement with the State, and he did so. Thereafter, Orville made a monthly payment of \$242.31 on a total tax due for 1979 of \$2,752.57 plus interest. At the time, he believed that this represented the full extent of TANY's tax liabilities.

15. Starting in December 1982, Orville was no longer able to cash the paychecks he received from TANY. In February 1983, Orville was given 10 shares

of stock as inducement to stay in his position as publisher of the Times until a buyer could be found for the newspaper. The stock represented 10 percent of the corporation's outstanding shares. It had no market or par value.

16. Orville participated with Robinson and Young in the preparation of TANY's budgets. He reviewed a 1982 year end financial statement prepared by TANY's independent accountants. The statement showed a profit of \$20,000.00 and no outstanding tax liabilities. Orville believed the statement to be accurate at the time he reviewed it. Orville, Robinson and Young met several times with TANY's accountants in 1982; however, the subject of these meetings is unknown.

17. The Times' departmental managers were hired by TANY's Massachusetts owners. Orville possessed the authority to hire and fire lower level employees, but never exercised that authority.

18. Late in 1983, TANY's principals decided to **sell** the Times. They instructed Orville to keep the newspaper operating at minimal cost until a buyer could be found. They also instructed Orville to prepare all New York State withholding tax returns and pay over the tax withheld on behalf of TANY. On November 15, 1983, Orville signed returns and paid the tax for the months of August, September, October and November 1983. He continued to timely file returns and remit tax due until May 1984. These were the only tax returns prepared and signed by Orville. At the time that he undertook the collection and payment of withholding taxes, Orville was not informed of any outstanding tax liabilities other than the 1979 taxes which were eventually paid.

19. In 1984, TANY's principals sold the Times to an individual named Arthur Zimmer. Orville did not participate in the negotiations leading to the

sale and was not made aware of the final terms of the sale. Mr. Orville was told that monies from the sale would be used by TANY to pay its secured creditors

20. Orville was not paid for his services during 1983 and most of 1984. At present, he has an unsatisfied wage claim against TANY for approximately \$30,000.00. The ten shares of stock he owned are worthless since TANY sold all of its assets and is now defunct. Apparently, Orville remained with TANY in the hope that his back wages would be paid from the proceeds of the sale of TANY's assets. This did not occur, and in June 1984, Orville accepted other employment.

21. For four years prior to taking a position with TANY, Orville worked as the sales manager and associate publisher of the Ithaca New Times.

22. Petitioners challenge the notices of deficiency on three alternative grounds: (a) that none of the petitioners were responsible officers or employees of the corporation; (b) that the Audit Division was barred by the three year statute of limitation from issuing notices against the petitioners; and (3) that, as a matter of law, the aggregate amount of the penalties asserted against the three petitioners could not exceed the total amount of tax due from the corporation.

CONCLUSIONS OF LAW

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

"Any person required to collect, truthfully account for, and pay over the tax imposed by [Article 22] 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."

B. That the three year statute of limitations for the assessment of taxes provided for at section 683 of the Tax Law does not apply to the imposition of

penalty under section 685(g) (Wolfstich v. New York State Tax Commn., 106 AD2d 745).

C. That the penalty assessed under Tax Law § 685(g) is separate and independent of the corporate employer's liability for withholding taxes due to the State Tax Commission. The liability imposed in the **form** of such a penalty is a personal liability which may be imposed on each and every person who is required and fails to pay over such taxes (Matter of Yellin v. New York State Tax Commn., 81 AD2d 196). Accordingly, the aggregate amount of the penalties asserted against petitioners may exceed the tax liabilities of the corporation.

D. That Tax Law § 685(n) defines the word "person", as it is used in section 685(g), as follows:

“[T]heterm person includes an individual, corporation or partnership or an officer or employee of any corporation (including a dissolved corporation)...who as such officer [or] employee is under a duty to perform the act in respect of which the violation occurs.”

E. That determining whether a corporate officer or an employee is a "person" required to collect and pay over withholding taxes requires a factual inquiry. Relevant factors to be considered are whether he signed the company's tax returns, exercised authority over employees and assets of the corporation or derived a substantial portion of his income from the corporation (Matter of MacLean v. State Tax Commn., 69 AD2d 951, affd 49 NY2d 920; Matter of Fisher v. State Tax Commn., 90 AD2d 910; Matter of Amengual v. State Tax Commn., 95 AD2d 949). 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 Fisher v. State Tax Commn., 90 Ad2d 910, supra).

F. That under Tax Law § 689(e), each petitioner bears the burden of proof to show either that he was not a "person" responsible to collect and pay over

not willful behavior under section 685(g). "The term 'willful' as used in the statute means an act, default or conduct voluntarily done with knowledge that, as a result, trust funds belonging to the government will be used for other purposes" (Matter of Levin v. Gallman, 42 NY2d 32). Corporate officials responsible as fiduciaries for tax returns cannot absolve themselves by disregarding their duty and leaving it to someone else to discharge (Matter of Ragonese v. New York State Tax Comm., 88 AD2d 707). There is evidence in the record that petitioners Mitchell and Young were corporate officers and major stockholder of TANY and that each signed tax returns on behalf of the corporation. Orville testified that Mitchell and Young hired employees, controlled the corporate assets, appeared as signatories on TANY's Massachusetts bank account and at all times remained actively involved in the operation of the corporation. Neither individual appeared at hearing to present contradictory testimony. Accordingly, petitioners Mitchell and Young are each liable for the penalty imposed under section 685(g).

G. That the question of whether Orville was a person required to collect and pay over withholding taxes is more difficult to resolve, but finally, it must be answered in his favor. Some of Orville's official duties are indicative of a high degree of managerial responsibility. He had the authority to hire and fire employees, whether or not he exercised it; he appeared as a signatory on the Syracuse account; he signed payroll checks; he participated in the preparation of the Times' budget; and he paid some of the corporation's debts from the corporate account. However, the scope of Orville's responsibilities was confined to the day-to-day operations of the Times. He had no corporation-wide decision making authority. As an employee, Orville's only duties and responsibilities were those delegated to him by the corporations officers

Until November 1983, he was not responsible for collecting or paying over withholding taxes, and he had no reason to know that TANY was not discharging its duties with respect to those taxes. As the Syracuse manager, Orville did not have access to the payroll accounts, tax records or other business and financial records of TANY which were kept in Massachusetts. He was neither an officer nor a director of the corporation, and his ownership share was small (10 percent) and not acquired until February 1983. In November 1983 the duty to collect and pay over withholding taxes was delegated to Orville, and he carried it out with the result that no withholding taxes are due from TANY after September 15, 1983. On balance, it is concluded that Orville was not an employee under a duty to collect and pay over withholding taxes during the period in question.

H. That the Audit Division has conceded that the tax not paid over to the State for the period April 1, 1979 through September 15, 1983 totals \$17,508.45. Therefore, the total penalty asserted against petitioners Robinson and Young is reduced to \$17,508.45 for each individual.


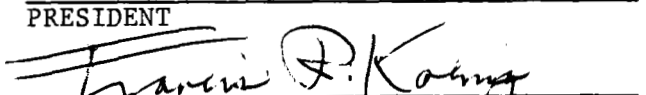
I. That the petitions of Geoffrey Robinson and Mitchell Young are granted to the extent indicated in Conclusion of Law "H"; that the notices of deficiency issued on March 25, 1985 shall be modified accordingly; and that in all other respects the petitions are denied.

J. That the petition of Peter Orville is granted and the Notice of Deficiency issued to him on March 25, 1985 is cancelled.

DATED: Albany, New York

STATE TAX COMMISSION

AUG 27 1987


PRESIDENT

COMMISSIONER