

STATE OF NEW YORK

TAX APPEALS TRIBUNAL

In the Matter of the Petition :
of :
JOSE L. TAVERAS : DECISION
 : DTA NO. 824348
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 :
under the Administrative Code of the City of New York :
for the years 2000 through 2005. :

Petitioner, Jose L. Taveras, filed an exception to the determination of the Administrative Law Judge issued on November 14, 2013. Petitioner appeared pro se and the Division of Taxation appeared by Amanda Hiller, Esq. (Peter B. Ostwald, Esq., of counsel). Petitioner filed a letter brief in support of his exception. The Division of Taxation filed a brief in opposition. Petitioner did not file a reply brief. Petitioner's request for oral argument was denied.

After reviewing the entire record in this matter, the Tax Appeals Tribunal renders the following decision.

ISSUE

Whether petitioner is liable for a penalty pursuant to Tax Law § 685 (g) as a person required to collect, truthfully account for and pay over withholding tax with respect to Santiago's Agency Corporation, who willfully failed to do so.

FINDINGS OF FACT

We find the facts as determined by the Administrative Law Judge. These facts are set forth below.

1. The Division of Taxation (Division) issued six notices of deficiency, each dated June 7, 2007, against petitioner, Jose Taveras, as an officer or responsible person of Santiago's Agency Corporation for a penalty under Tax Law § 685 (g) in an amount equal to the withholding tax not paid by the business, as follows:

Notice No.	Year	Total Penalty	less assessment payments/credits	Total Amount Due
L-028582824	2000	\$4,273.00	\$8.96	\$4,264.00
L-028582825	2001	\$4,273.00		\$4,273.00
L-028582826	2002	\$4,273.00		\$4,273.00
L-028582827	2003	\$9,517.00		\$9,517.00
L-028582828	2004	\$7,347.00		\$7,347.00
L-028582829	2005	\$8,664.00		\$8,664.00

2. On October 1, 2007, the Division issued to petitioner six notices and demands for payments of tax due, also numbered L-028582824, L-028582825, L-028582826, L-028582827, L-028582828 and L-028582829, each demanding payment of the liabilities asserted in the corresponding notices of deficiency referenced in Finding of Fact 1.

3. On April 28, 2011, petitioner filed a petition challenging the notices of deficiency and seeking a refund of "excess forced payments on withholding taxes." In his petition, petitioner claimed that he took over his brother Santiago's tax preparation business, Santiago's Agency Corporation, in June of 2002, and was responsible for same until November of 2006, at which point Santiago took back the business. Petitioner further claimed that he filed all required federal employment tax returns and paid all required federal employment taxes for the period of his ownership of the corporation. However, petitioner admitted that he failed to file the required New York State employment tax returns because Claudio Fernandez, an accountant employed as

the corporation's office manager, failed to advise that such returns needed to be filed. In addition, petitioner asserted that after the Division issued the tax deficiencies, he and his brother prepared the corporation's New York State tax returns and submitted them to the Division's Binghamton office. He further asserted that he never received any feedback from that office, despite sending numerous pieces of correspondence that asked for details of the returns filed and the status of the taxes due. Petitioner maintained that he was not responsible for any unpaid New York State withholding taxes for the years 2000, 2001 and the period January 1, 2002 through May 31, 2002. He further maintained that the unpaid New York State taxes withheld from his employees' salaries during the period June 2002 through November 2006 totaled no more than \$14,000.00. Therefore, he requested that the correct amount of tax, plus applicable interest, be applied against the amounts already levied and garnished via the Division's collection action, and a refund be issued.

4. No correspondence addressed to the Division was attached to the petition. However, copies of the following documents were attached to the petition: one single-sided page of an Account Adjustment Notice - Personal Income Tax, dated September 24, 2009, issued to petitioner and his wife, Raidily Taveras, for the tax period ended December 31, 2008 (refund denial - all or part of the refund was "applied toward another New York State tax liability"); a single-sided Consolidated Statement of Tax Liabilities issued to Santiago's Agency Corporation, dated December 11, 2009; the year 2009 Cover Sheet for form IT-201 Resident Income Tax Return for petitioner and Mrs. Taveras; a two-page Lexis/Nexis printout of petitioner's bankruptcy filing; and an unidentified bank's account histories for three different accounts in the names of petitioner and his wife for the date April 15, 2011.

5. At the hearing, petitioner conceded that he was the responsible person for Santiago's Agency Corporation from at least June of 2002 through at least November of 2006. According to petitioner, at all relevant times, Santiago's Agency Corporation's employees provided personal income tax preparation services and immigration documentation translation and preparation services. Petitioner described his role as the manager and the administrator, who signed the corporation's checks and each of the personal income tax returns prepared by the corporation's employees.

6. On March 31, 2003, the Division received Santiago's Agency Corporation's CT-3 General Business Corporation Franchise Tax Return for the year 2002, which was signed by petitioner on March 15, 2003. Included with the franchise tax return was the corporation's Fleet Bank account check, dated March 15, 2003, payable to "NYS CORPORATION TAX" in the amount of \$762.00 that was signed by petitioner. Review of this corporation franchise tax return indicates that Santiago's Agency Corporation, a New York State corporation incorporated on November 25, 1997, had a principal business activity of "LEGAL SERVICES."

7. For the year 2002, Santiago's Agency Corporation reported gross payroll in the amount of \$75,155.00; total receipts in the amount of \$136,276.00; zero gross assets; and entire net income in the amount of \$10,170.00 on the corporation franchise tax return that it filed.

8. Petitioner submitted copies of the following documents allegedly related to Santiago's Agency Corporation into the record:

- a. a handwritten Form W-3 Transmittal of Wage and Tax Statements for the year 2002 indicating wages, tips, other compensation in the amount of \$43,270.03 and what appears to be petitioner's signature, as chairman, and the date "01/31/03";¹
- b. an unsigned and undated Form W-3, Transmittal of Wage and Tax Statements for the year 2003 and four employees' forms W-2, wage and tax statements for the year 2003;
- c. an unsigned and undated Form W-3, Transmittal of Wage and Tax Statements for the year 2004 and four employees' forms W-2, wage and tax statements for the year 2004;
- d. three employees' forms W-2, wage and tax statements for the year 2005; and
- e. a Form W-3, Transmittal of Wage and Tax Statements, for the year 2006 bearing the faint signature of Santiago Taveras and the date "02/28/07."

The record does not include the supporting source records used to prepare these forms W-3 and W-2, or any proof that these forms were filed with the Social Security Administration.

9. Petitioner also submitted 19 quarterly combined withholding wage reporting and unemployment insurance returns (Form NYS-45) allegedly for Santiago's Agency Corporation for the quarters ending March 31, 2002; June 30, 2002; March 31, 2003; June 30, 2003; September 30, 2003; December 31, 2003; March 31, 2004; June 30, 2004; September 30, 2004; December 31, 2004; March 31, 2005; June 30, 2005; September 30, 2005; December 31, 2005; March 31, 2006; June 30, 2006; September 30, 2006; December 31, 2006; and June 30, 2007. With the exception of the return for the quarter ending June 30, 2007, each of these returns bore the typed name "SANTIAGO'S AGENCY CORPORATION" and a different withholding

¹ A blank Form W-2 Wage and Tax Statement for the year 2002 is superimposed over this barely legible Form W-3.

identification number from the documents described in Finding of Fact 8.² Duplicate quarterly combined withholding wage reporting and unemployment insurance returns were submitted for the quarters ending June 30, 2002 (one unsigned); March 31, 2005 (one signed by Santiago Taveras, as president, with the handwritten date October 8, 2006); June 30, 2005 (one unsigned); March 31, 2006 (one unsigned and one signed by Santiago Taveras, as president, with the handwritten date October 8, 2006); and September 30, 2006 (two unsigned).³ All the duplicate returns bore the typed withholding identification number 113XXXXXX, except for the duplicate return for the quarter ending June 30, 2005 and one of the duplicate returns for the quarter ending September 30, 2005, each of which bore the handwritten withholding identification number 27XXXXXXX. The record does not include the supporting source records used to prepare any of the quarterly combined withholding wage reporting and unemployment insurance returns submitted into the record, or any proof that these withholding tax returns were filed with New York State.

10. The record does not include any correspondence regarding the employer identification number assigned to the corporation during the years 2000 through 2006. It also does not include any correspondence regarding the assignment of a New York State identification number to Santiago's Agency Corporation during the years 2000 through 2006.

² On the return for the quarter ending June 30, 2007, the typed number 113XXXXXX had a line drawn through it and the number "27XXXXXXX" was handwritten above. Santiago Taveras's signature, handwritten title of "president" and the date "9/12/07" also appear on this return.

³ It is noted that a total of 26 quarterly withholding wage reporting and unemployment insurance returns were marked and received into evidence as Petitioner's exhibit 6 (*see* transcript pages 50 and 51). However, the six Mineola Free School District payroll deduction reports for Jose L. Taveras were inadvertently collectively received into evidence as Petitioner's exhibit 6, as well (*see* transcript page 68).

11. At the hearing, petitioner did not submit any general books and ledgers or bank statements and canceled checks for the corporation for the years 2000 through 2006 into the record. He also did not submit any documentation that would indicate the filing of the corporation's withholding tax returns with New York State and the remittance of the withholding tax reported on same for the years 2000 through 2006.

12. At the hearing, petitioner submitted six Mineola Union Free School District payroll deduction reports for employee Jose L. Taveras. Review of these payroll deduction reports indicates that as a result of a garnishment of petitioner's wages, "New York State Tax" has received a total of \$22,353.82 between the pay period check date of April 30, 2008 and the pay period check date of December 14, 2012. No other supporting documents related to the garnishment by "New York State Tax" were submitted into the record.

13. The record does not include Santiago's Agency Corporation's articles of incorporation or its corporate minute book. It also does not include any contracts for the purchase or sale of Santiago's Agency Corporation during the years 2000 through 2006.

14. Petitioner requested and received additional time post-hearing to submit the following documentation: Santiago's Agency Corporation's bank statements for the years 2000 through 2005; a copy of the tax return bearing EI No. beginning with "113"; copies of the Form W-2 file from the Social Security Administration; and proof of the amount of petitioner's mutual funds levied by the Department of Taxation and Finance. Petitioner did not submit any additional documentation and the record closed on January 31, 2013.

THE DETERMINATION OF THE ADMINISTRATIVE LAW JUDGE

The Administrative Law Judge first noted that a presumption of correctness attaches to a notice of deficiency and that petitioner had the burden to prove wherein the subject notices of deficiency are in error. Next, the Administrative Law Judge reviewed the statutory basis for asserting liability against individuals responsible for the collection and payment of withholding taxes. The Administrative Law Judge cited Tax Law § 685 (g), which provides that such individuals who willfully fail to do so are subject to personal liability in the form of a penalty for the amount of the unpaid taxes. The Administrative Law Judge also noted the definition of a person required to collect withholding tax in Tax Law § 685 (n) as “an individual, corporation, partnership or . . . an officer or employee of any corporation . . . who as such officer, employee . . . or member is under a duty to perform the act in respect of which the violation occurs.”

The Administrative Law Judge noted that petitioner conceded that he was a responsible person for Santiago’s Agency Corporation from about June 1, 2002 through the balance of the period at issue. The Administrative Law Judge determined that petitioner failed to prove that he was not a responsible officer of the corporation for the period January 1, 2000 through about May 31, 2002. The Administrative Law Judge noted petitioner’s claim that he purchased the corporation from his brother in June 2002 and further noted the absence of any contract of sale or other documentation pertaining to such sale in the record. The Administrative Law Judge also noted the lack of any corporate records of Santiago’s Agency Corporation, such as corporate minutes, general books and ledgers, bank statements or canceled checks, that might have provided some indication of corporate ownership. The Administrative Law Judge gave little

evidentiary weight to the testimony presented at the hearing asserting that such sale occurred as claimed. The Administrative Law Judge specifically found the testimony of petitioner's brother, Santiago, regarding his alleged ownership of the corporation and his sale of the corporation to petitioner, to be vague and evasive. The Administrative Law Judge also cited petitioner's testimony as vague, noting that neither petitioner nor Santiago provided any specifics regarding the alleged sale, such as a price or a date of sale.

Next, the Administrative Law Judge reviewed the test for determining whether the actions of a responsible officer are "willful" under the Tax Law, citing the well-established standards set forth in *Matter of Levin v Gallman* (42 NY2d 32 [1977]) and *Matter of Capoccia v New York State Tax Commn.* (105 AD2d 528 [1984]). Applying such standards to the facts herein, the Administrative Law Judge concluded that petitioner recklessly disregarded his duty to ensure that withholding taxes were collected and paid during the period at issue and that, accordingly, his failure was willful within the meaning of Tax Law § 685 (g). In reaching this conclusion, the Administrative Law Judge noted that petitioner offered no evidence to show that his failure was not willful and that petitioner did not establish that the corporation filed withholding tax returns and remitted tax for the period January 1, 2000 through May 31, 2002.

The Administrative Law Judge also rejected petitioner's claim that the penalties asserted herein exceed the unpaid withholding taxes for the period at issue or that any adjustments to the notices of deficiency herein are warranted. The Administrative Law Judge noted that petitioner offered no documentary evidence to support Santiago's vague testimony that the corporation timely filed withholding tax returns and paid withholding taxes during the January 1, 2000 through May 31, 2002 period. With respect to the remainder of the period at issue, the

Administrative Law Judge dismissed the various copies of the transmittals of wage and tax statements (forms W-3), wage and tax statements (forms W-2), and quarterly combined withholding wage reporting and unemployment insurance returns (forms NYS-45) as unsigned and, in some cases, contradictory. The Administrative Law Judge also noted that no source documents used to prepare such tax documents were offered and that there was no evidence that any of these documents were filed. Additionally, the Administrative Law Judge noted that petitioner offered no corporate books or bank statements, although he was granted additional time, post-hearing, to do so.

Pursuant to the foregoing analysis, the Administrative Law Judge sustained the subject notices of deficiency in full.

ARGUMENTS ON EXCEPTION

Petitioner continues to argue that he purchased Santiago's Agency Corporation from his brother in June 2002 and, accordingly, was not a responsible person prior to such purchase. He also continues to argue that he did not willfully fail to discharge his duty as a responsible person during the period that he owned the corporation because the responsibility for filing withholding tax returns and paying withholding tax was delegated to an employee. He also continues to contend that the penalties asserted herein exceed the unpaid withholding taxes for the period at issue. Petitioner sought to introduce evidence related to his status as a responsible person with his brief on exception.

Petitioner contends on exception that the notices of deficiency asserting penalties for the years 2000, 2001 and 2002 should be barred by the statute of limitations. Petitioner also contends, contrary to the determination, that he submitted post-hearing evidence in accordance

with the Administrative Law Judge's direction and that such evidence supports his position herein.

The Division argues that the Administrative Law Judge correctly determined that petitioner was a person responsible for the collection and payment of employee withholding taxes who willfully failed to do so, and thus is liable for a penalty equal to the unpaid taxes pursuant to Tax Law § 685 (g). The Division also asserts that petitioner has failed to show that any adjustments to the subject notices are warranted.

OPINION

We affirm the determination of the Administrative Law Judge.

We find that the Administrative Law Judge completely and adequately addressed the issues presented below, properly analyzed the evidence presented, and correctly applied the relevant law to the facts of this case. We see no reason to discuss these issues further.

We note that the Administrative Law Judge's determination rested, in significant part, on specific findings that the testimony of petitioner and petitioner's witness lacked credibility. This Tribunal has consistently deferred findings of witness credibility to the Administrative Law Judge. We have long held that:

“the credibility of witnesses is a determination within the domain of the trier of the facts, the person who has the opportunity to view the witnesses first hand and evaluate the relevance and truthfulness of their testimony (*see Matter of Berenhaus v. Ward*, 70 NY2d 436, 522 NYS2d 478). While this Tribunal is not absolutely bound by an Administrative Law Judge's assessment of credibility and is free to differ with the Administrative Law Judge to make its own assessment, we find nothing in the record here to justify such action on our part (*see Matter of Stevens v. Axelrod*, 162 AD2d 1025, 557 NYS2d 809)” (*Matter of Spallina*, Tax Appeals Tribunal, February 27, 1992).

Similarly, there is nothing in the present record to disturb the Administrative Law Judge's findings with respect to witness credibility.

With respect to the statute of limitations issue raised on exception, we reject petitioner's assertion that the notices of deficiency asserting penalties for the years 2000, 2001 and 2002 should be time-barred. While Tax Law § 683 (a) provides, generally, for a three-year limitations period for assessments under Article 22 of the Tax Law, that statute does not apply to the assertion of penalties against responsible persons pursuant to Tax Law § 685 (g) (*see Matter of Layden v Tax Appeals Trib. of State of N.Y.*, 227 AD2d 794 [1996]). Petitioner has pointed to no other statutory authority imposing a limitations period on the assertion of penalties under Tax Law § 685 (g).

Finally, we address petitioner's effort to introduce additional evidence with his brief on exception. We note that, at the December 7, 2012 hearing in this matter, the Administrative Law Judge set a deadline of January 31, 2013 for petitioner to submit certain specific documents. Notwithstanding petitioner's claim on exception that he did submit such documents to the Administrative Law Judge, there is no indication in the record that any such documents were submitted. We advised petitioner by letter dated January 24, 2014 that we would not consider the evidence submitted with his brief on exception in rendering our decision in this matter. "We have held that a fair and efficient hearing process must be defined and final, and that the acceptance of evidence after the record is closed is not conducive to that end and does not provide an opportunity for the adversary to question the evidence on the record [citations omitted]" (*Matter of Ippolito*, Tax Appeals Tribunal, August 23, 2012, *affd sub nom Matter of Ippolito v Commissioner of N.Y. State Dept. of Taxation and Fin.* 116 AD3d 1176 [2014]).

Accordingly, we reaffirm our longstanding policy against considering evidence that was not made part of the record below (*see Matter of Schoonover*, Tax Appeals Tribunal, August 15, 1991).

Accordingly, it is ORDERED, ADJUDGED AND DECREED, that:

1. The exception of Jose L. Taveras is denied;
2. The determination of the Administrative Law Judge is affirmed;
3. The notices of deficiency dated June 7, 2007 are sustained; and
4. The petition of Jose L. Taveras is denied.

DATED: Albany, New York
October 9, 2014

/s/ Roberta Moseley Nero
Roberta Moseley Nero
President

/s/ Charles H. Nesbitt
Charles H. Nesbitt
Commissioner

/s/ James H. Tully, Jr.
James H. Tully, Jr.
Commissioner