STATE OF NEW YORK

TAX APPEALS TRIBUNAL

In the Matter of the Petition	:	
of	:	
SHI YING TAN	:	DECISION DTA NO. 824462
for Redetermination of a Deficiency or for Refund of New York State and New York City Personal Income Tax under Article 22 of the Tax Law and the Administrative Code of the City of New York for the Period January 1, 2003 through December 31, 2004.	:	

Petitioner, Shi Ying Tan, filed an exception to the determination of the Administrative Law Judge issued on October 17, 2013. Petitioner appeared by Miu & Co. (Louis Miu, CPA), and the Division of Taxation appeared by Amanda Hiller, Esq. (Peter B. Ostwald, Esq., of counsel). Petitioner filed a brief in support of his exception. The Division of Taxation filed a brief in opposition. Petitioner filed a reply brief. Petitioner waived oral argument.

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

ISSUE

Whether the subject notices of deficiency asserting penalties against petitioner under Tax Law § 685 (g) should be canceled pursuant to Tax Law § 681 (a) or § 683.

FINDINGS OF FACT

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

1. Kingston Fashion, Inc. (Kingston Fashion), a company that operated as a sewing

contractor, was incorporated in the State of New York on March 28, 2003. Between that date and December 31, 2004, it had an address of 28 Crosby Street, New York, New York. Kingston Fashion began operation sometime during the summer of 2003.

2. Petitioner, Shi Ying Tan, was president of Kingston Fashion at all relevant times. He also signed tax returns and checks on behalf Kingston Fashion throughout the audit period.

3. In accordance with Internal Revenue Code § 6103 (d), the Division of Taxation (Division) received from the Internal Revenue Service (IRS) an IRS Employment Tax Examination Changes Report dated May 18, 2006 (IRS Report). The IRS Report stated that Kingston Fashion paid additional New York State taxable wages to its employees between July 1, 2003 and December 31, 2004 and that, as a result, federal audit changes occurred. The Division did not have a record of either Kingston Fashion or petitioner notifying it of the federal changes.

4. Pursuant to the IRS Report, below are the differences between the wages reported by Kingston Fashion and those found by the federal audit:

	Audited	***Reported***	***Difference***
1st Qtr 2003	-	-	-
2nd Qtr 2003	-	-	-
3rd Qtr 2003	$462,417.00	$101,905.00	$360,512.00
4th Qtr 2003	$462,417.00	$141,541.00	$320,876.00
1st Qtr 2004	$253,916.00	$124,959.00	$128,957.00
2nd Qtr 2004	$253,916.00	$146,584.00	$107,332.00
3rd Qtr 2004	$253,916.00	-	$253,916.00
4th Qtr 2004	$404,651.00	-	$404,651.00
Total			$1,576,244.00

5. Kingston Fashion filed New York State quarterly combined withholding, wage reporting and unemployment insurance returns (Form NYS-45) for the third and fourth quarters of 2003 and the first and second quarters of 2004. The amount of wages reported to New York State were exactly the same as reported to the IRS in the chart in Finding of Fact 4. Kingston Fashion did not file a withholding tax return with New York State after the second quarter of 2004 or a New York State corporation franchise tax return for that calendar year.

6. Based on the IRS Report and the federal audit changes therein, the Division computed the amount of New York State and New York City withholding taxes that Kingston Fashion should have withheld and remitted to the Division for the period January 1, 2003 through December 31, 2004.

7. On March 1, 2011, the Division issued four notices of deficiency to petitioner, numbered L-035403658, L-035403659, L-035403660, and L-035403661, each asserting that he was an officer or responsible person of Kingston Fashion and, as such, was liable, pursuant to Tax Law § 685 (g), "for a penalty in an amount equal to the tax not paid by the business . . . ." The notices asserted New York State personal income tax penalty of $54,243.00 and New York City personal income tax penalty of $31,636.00, each broken up into 12 monthly increments, for the period January 1, 2003 through December 31, 2003 and New York State personal income tax penalty of $70,779.00 and New York City personal income tax penalty of $41,180.00, each also broken up into 12 monthly increments, for the period January 1, 2004 through December 31, 2004. All of the notices of deficiency were sent to petitioner at "1724 77th ST FL 2, BROOKLYN, NY 11214-1112."

8. On June 22, 2011, the Division issued four notices and demands to petitioner, also numbered L-035403658, L-035403659, L-035403660, and L-035403661, each compelling

payment of the liabilities asserted in the corresponding notices of deficiency referenced in Finding of Fact 7. All of the notices and demands were sent to petitioner at "1841 80TH ST FL 2, BROOKLYN, NY 11214-1713."

9. Petitioner submitted into the record a copy of a document purporting to be his 2010 New York State resident income tax return. The return is dated February 18, 2011 and signed by a paid preparer, but not by petitioner. Petitioner's address on the return is "1841 80TH ST FL 2, BROOKLYN, NY 11214." There was no proof of mailing or delivery offered with the return.

10. The Division submitted into the record a copy of petitioner's 2004 New York State resident income tax return, signed by petitioner, with a filing date of April 15, 2005. Petitioner's address on this return is listed as "1724 77th ST FL 2, BROOKLYN, NY 11214-1112."

THE DETERMINATION OF THE ADMINISTRATIVE LAW JUDGE

The Administrative Law Judge first reviewed withholding tax requirements for employers under the Tax Law. The Administrative Law Judge noted that, pursuant to Tax Law § 671 (a), every employer maintaining an office or transacting business in New York and making payments of any taxable wages must deduct and withhold from such wages for each payroll period a tax in an amount substantially equal to the tax reasonably estimated to be due from the employee's adjusted New York gross income received during the calendar year. The Administrative Law Judge further noted that, pursuant to Tax Law § 674, such employer must file a withholding tax return and pay over to the Division the taxes required to be deducted and withheld. The Administrative Law Judge also noted that, under Tax Law § 675, every employer required to deduct and withhold tax is made liable for such tax, and any amount of tax actually deducted and withheld shall be held to be a special fund in trust for the tax commissioner.

As to the liability of individuals responsible for 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 did not contest that he was a responsible person for Kingston Fashion pursuant to Tax Law § 685 (g) and (n) during the period at issue. Nonetheless, the Administrative Law Judge reviewed the record and concluded that, under the facts, petitioner was such a person during the relevant period.

The Administrative Law Judge rejected petitioner's argument that the assessment was time-barred. The basis for this claim is that petitioner received notice of the relevant deficiencies in June 2011, or more than six years after cessation of Kingston Fashion's operation and long after the termination of the three-year statute of limitations under Tax Law § 683 (a). The Administrative Law Judge noted that Tax Law § 659 provides that, if the amount an employer is required to deduct and withhold from wages for federal income tax withholding purposes is changed or corrected, the taxpayer or employer must report such change or correction to the Division within 90 days after the final determination of such change or correction. The Administrative Law Judge also noted that, if the taxpayer fails to comply with such provision, Tax Law § 683 (c) (1) (C) authorizes the Division to assess the additional tax due at any time. The Administrative Law Judge found that petitioner did fail to report the federal changes as required under Tax Law § 659 and that, therefore, the subject notices were not time-barred

pursuant to Tax Law § 683 (a).

As a separate basis for rejecting petitioner's statute of limitations claim, the Administrative Law Judge determined that the relevant notices were not subject to the three-year limitations period in Tax Law § 683 (a) because that statute is not applicable to the assertion of penalties pursuant to Tax Law § 685 (g). The Administrative Law Judge cited ***Matter of Wolfstich v New York State Tax Commn.*** (106 AD2d 745 [1984]) in support of this conclusion.

The Administrative Law Judge also rejected petitioner's argument that the notices of deficiency herein should be canceled because they were mailed to the wrong address. Such notices were issued to petitioner at the address listed on his filed 2004 New York income tax return. Petitioner contended that his correct and last known address was that which was listed on the purported copy of his 2010 New York income tax return submitted in evidence. The Administrative Law Judge determined, however, that petitioner failed to establish the authenticity of the copy of the 2010 return because it was not signed by petitioner and there was no evidence submitted, such as an affidavit, to establish its authenticity. The Administrative Law Judge concluded that, without the 2010 return, the last known address for petitioner in the record is listed on his 2004 return, which was the address to which the notices were mailed.

Alternatively, the Administrative Law Judge determined that, even if the notices were not mailed to petitioner's last known address as required pursuant to Tax Law § 681 (a), such notices remain valid because petitioner received actual notice of the deficiencies in time to avail himself of the administrative hearing process. The Administrative Law Judge cited ***Matter of Riehm v Tax Appeals Trib. of State of N.Y.*** (179 AD2d 970 [1992], ***lv denied*** 79 NY2d 759 [1992], ***rearg denied*** 80 NY2d 893 [1992]) in support of this conclusion.

The Administrative Law Judge made an adjustment to the subject notices of deficiency for

the first two quarters of 2003. The Administrative Law Judge noted that, based on the evidence, it did not appear that Kingston Fashion was in operation during the first two quarters of 2003. The IRS report, upon which the statutory notices were based, did not indicate any adjustment for the first two quarters of 2003. Accordingly, the Administrative Law Judge adjusted the notices by canceling all penalties assessed to petitioner for the period January 1, 2003 through June 30, 2003.

ARGUMENTS ON EXCEPTION

Petitioner continues to argue that the subject notices of deficiency for the period July 1, 2003 through June 30, 2004 were untimely under Tax Law § 683 (a) because they were issued more than three years from the date of filing of withholding tax returns. On exception, petitioner also contends that the failure by Kingston Fashion to comply with Tax Law § 659, which failure authorized an assessment at any time pursuant to Tax Law § 683 (c) (1) (C), should not apply here because the business was no longer in operation in 2006 when the federal changes were made.

In his exception, petitioner expressly waives any statute of limitations challenge to the assessments for the period July 1, 2004 through December 31, 2004.

Petitioner also continues to argue that the subject notices should be canceled because they were improperly mailed. Additionally, petitioner continues to assert that his last known address at the time the notices were issued was the address listed on the purported copy of his 2010 New York income tax return that was received in evidence. Petitioner sought to introduce evidence pertaining to his address with his brief in support of his exception and with his reply brief on exception.

Petitioner does not take exception to the Administrative Law Judge's conclusion that he

was a responsible person for Kingston Fashion pursuant to Tax Law § 685 (g) and (n) during the period at issue, but does assert on exception that "there was no willful intent on the part of petitioner to evade tax."

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 is thus liable for a penalty equal to the unpaid taxes pursuant to Tax Law § 685 (g). The Division also contends that the Administrative Law Judge correctly determined that the subject notices of deficiency were not subject to the three-year limitations period under Tax Law § 683 (a) and were therefore not time-barred. Additionally, the Division asserts that the Administrative Law Judge correctly rejected petitioner's argument that the subject notices of deficiency should be canceled because, according to petitioner, they were improperly mailed. The Division thus maintains that the Administrative Law Judge's determination should be sustained in full.

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 and correctly applied the relevant law to the facts of this case. We see no reason to analyze these issues further.

With respect to issues raised on exception, we find no statutory support for petitioner's argument that Tax Law § 683 (c) (1) (C) should not apply because the business had ceased operations by the time of the federal audit.

With respect to petitioner's claim that "there was no willful intent to evade tax," we note that an individual under a duty to act on behalf of a corporation within the meaning of Tax Law

§ 685 (n) with respect to collecting and remitting withholding taxes may be subject to a penalty under Tax Law § 685 (g) if that individual "willfully fails" to do so. Petitioner, however, offered no evidence on the question of willfulness. He has therefore failed to meet his burden of proof to show that his conduct was not willful for purposes of Tax Law § 685 (g) (***see Matter of Muffoletto***, Tax Appeals Tribunal, June 19, 1997).

Finally, we find it necessary to address petitioner's effort to introduce additional evidence pertaining to his address with his brief in support of his exception and with his reply brief. We advised petitioner by letter that we would not consider such evidence in rendering our decision in this matter. We further note that, by letter dated January 3, 2013, the Administrative Law Judge set a deadline of March 14, 2013 for petitioner to submit his evidence in this matter, which was conducted as a submission without hearing (***see*** 20 NYCRR 3000.12). "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 & 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 Shi Ying Tan is denied;

2. The determination of the Administrative Law Judge is affirmed;

3. The petition of Shi Ying Tan is denied; and

4. The notices of deficiency dated March 1, 2011, as modified pursuant to conclusion of law G of the Administrative Law Judge's determination, are sustained.

DATED: Albany, New York
October 16, 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