

STATE OF NEW YORK

TAX APPEALS TRIBUNAL

In the Matter of the Petitions	:	
of	:	
MARTIN M. HOPWOOD, JR.	:	DECISION
For Redetermination of Deficiencies or for Refund of	:	DTA NOS. 825756
New York State Personal Income Tax under Article 22	:	AND 825757
of the Tax Law for the Period March 1, 2009 through	:	
March 31, 2011, and for Revision of Determinations or	:	
for Refund of Sales and Use Taxes under Articles 28	:	
and 29 of the Tax Law for the Period June 1, 2009	:	
through November 30, 2011.	:	

Petitioner, Martin M. Hopwood, Jr., filed an exception to the determination of the Administrative Law Judge issued on September 3, 2015. Petitioner appeared pro se. The Division of Taxation appeared by Amanda Hiller, Esq. (David Gannon, Esq., of counsel).

Petitioner filed a brief in support of his exception. The Division of Taxation filed a letter brief in opposition. Petitioner did not file a reply brief. The six-month period for issuance of this decision began on August 18, 2016, the date that petitioner withdrew his request for oral argument.

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

ISSUES

I. Whether petitioner was a person required to collect, truthfully account for and pay over withholding taxes with respect to Richards Conditioning Corp., for the period of March 1, 2009

through March 31, 2011, and willfully failed to do so, thereby becoming liable for a penalty imposed pursuant to Tax Law § 685 (g).

II. Whether petitioner was personally liable for the sales and use taxes due on behalf of Richards Conditioning Corp., as a person required to collect and pay such taxes under Tax Law §§ 1131 (1) and 1133 (a) for the period June 1, 2009 through November 30, 2011.

FINDINGS OF FACT

We find the facts as determined by the Administrative Law Judge, except that we have modified findings of fact 15 and 18 to more clearly reflect the record. Also, we have not restated finding of fact 20, as that finding is a statement of petitioner's position. As so modified, the Administrative Law Judge's findings of fact are set forth below.

1. During the period of March 1, 2009 through November 30, 2011, petitioner, Martin M. Hopwood, Jr., was an officer and shareholder of Richards Conditioning Corp. (Richards), a mechanical contracting business that performed heating, ventilation, and air conditioning installation and maintenance. Richards' income was based on work it performed as a subcontractor for general contractors on numerous projects in the greater New York metropolitan area.

2. Richards was a family business, created in 1951, and originally wholly-owned by petitioner's parents. Petitioner, a licensed attorney, joined Richards in the late 1990s as counsel. By 2008, petitioner's brother, Larry Hopwood, had become president of Richards and petitioner, chief financial officer. In addition, at that time, Larry and petitioner's other brother, Richie, each owned 28 percent of Richards, while petitioner owned 22 percent. Petitioner's parents owned the remaining shares of the company.

3. In November 2006, Richards entered into a contract with general contractor F.J. Sciame Construction Co., Inc. (Sciame), to perform work on the construction project at the new academic building for The Cooper Union for the Advancement of Science and Art (Cooper Union) in New York City. The Cooper Union project was worth approximately \$15 million to Richards, more than double the size of any previous project the company had undertaken. Larry Hopwood negotiated the contract with Sciame for the Cooper Union project on behalf of Richards.

4. In March 2008, Larry Hopwood relinquished his role with Richards. The departure was acrimonious, and spurred on in part by Larry's significant mistake in Richards' bid for the contract with Sciame. Essentially, Richards' bid underestimated the Cooper Union project's cost by approximately \$4 million, causing significant financial hardship for Richards. Upon Larry's departure, petitioner assumed control of Richards and, along with it, responsibility for all phases of its work on the Cooper Union project.

5. Despite the financial difficulties, Richards continued to work on the Cooper Union project under the direction of petitioner. However, petitioner testified that Sciame began to renege on payments to Richards required under the contract. Further, in January 2009, petitioner maintained that he was forced by Sciame to replace several of his own employees with those from a company named F. W. Sims (Sims), on a time and material basis. According to petitioner, Sims overcharged for the work it performed and abused its overtime allowance, further hampering Richards. Sciame paid Sims directly from funds allocated for Richards under their contract rather than simultaneously paying Richards. These efforts, according to petitioner, were made to force Richards to fail to complete the project and allow Sciame to collect on an insurance bond that would have provided the general contractor with a windfall.

6. As a result of the difficulties arising from the Cooper Union project, in April 2009, Richards filed a voluntary petition for relief under Chapter 11 of the Bankruptcy Code in the United States Bankruptcy Court for the Southern District of New York. Richards continued to operate as debtor in possession while in bankruptcy throughout the remaining relevant time.

7. Petitioner did not file a personal bankruptcy petition.

8. Richards also performed other projects during the period at issue. Nevertheless, petitioner estimated that the Cooper Union project constituted 80 to 90 percent of Richards' revenue during the applicable period.

9. Despite Richards' financial turmoil, it timely filed its quarterly withholding tax returns from March 31, 2009 through March 31, 2011. Richards, however, did not pay the corresponding withholding tax it reported as due.

10. Richards also filed sales and use tax returns for all but one of the relevant quarters from August 31, 2009 through November 30, 2011, but did not pay the corresponding sales tax it reported as due. Richards neither filed the requisite return nor paid the necessary tax for the sales tax quarter ending May 31, 2010.

11. Petitioner signed the withholding tax and sales and use tax returns for Richards during the periods at issue.

12. Petitioner testified at the hearing that Sciamè's withholding of funds due Richards, as well as the significant underbidding of the project, caused Richards to be unable to pay the withholding and sales taxes at issue. He further maintained that Sciamè had control of the funds needed for payment of Richards' tax obligations.

13. Richards brought adversary proceedings in the course of its bankruptcy against both Sciame and Sims, seeking redress for fraud, breach of contract, and other similar causes of action. These actions appear to be pending.

14. Attached as an exhibit to Richards' adversary proceeding complaint against Sciame is an agreement between the two companies dated March 16, 2009. This agreement calls for a payment by Sciame of \$1,200,000.00 to Richards in order to settle all claims by the latter up to March 16, 2009. Petitioner maintained that these funds either went to Sims as discussed in finding of fact 5 or were retained by Sciame.

15. During the period at issue, Richards obtained financing through a factor. Richards paid this factor 10% of all of its revenues in order to continue its financing arrangement. Eventually, petitioner, his brother, and his father loaned Richards \$245,000.00 in order to make full payment to the factor and end the obligation. Ultimately, there was a \$120,000.00 credit given back to Richards from the factor that was deposited into escrow in the bankruptcy.

16. Richards also settled a lawsuit against petitioner's brother, Larry, during the relevant period. This settlement resulted in a payment to Richards in the amount of \$150,000.00, which also was placed into the bankruptcy escrow account.

17. Petitioner claimed to have personally spent more than \$1.8 million on Richards since March 2008 to allow the company to remain in operation.

18. As part of his case, petitioner placed in the record several examiner's reports, dated April 7, May 6 and June 16, 2010, and prepared by M. Jacob Renick, CPA/CFF, CIRA, CDBV, CFE, pursuant to an order of the Richards' bankruptcy court. One of these reports addressed potential avoidance actions against insiders and reported that disbursements from Richards were made through April 9, 2009 to or for the benefit of petitioner, his father, and brothers.

Additionally, the examiner reported that during the period November 1, 2007 through April 7, 2009, petitioner deposited funds into Richards' account and withdrew funds from Richards that he deposited into his personal account. The net effect of these withdrawals and deposits was a deposit of \$1,524,806.49 into Richards' account, which was treated by Richards as a loan from petitioner. Another of the examiner's reports stated that during the period between April 9, 2009 and March 31, 2010, two of Richards' stockholders received compensation from the company. Mr. Resnick also reported that Richards paid rent to an entity owned by petitioner's father.

19. After review of Richards' filings and nonpayment, on August 3, 2012, the Division of Taxation (Division) issued numerous withholding tax notices of deficiency and sales and use tax notices of determination to petitioner as a responsible person for Richards. After discussions between the parties, the following notices remain at issue:

Withholding Tax Notices of Deficiency

Notice #	Period Ending	Tax	Penalty	Interest
L- 038393998	03/31/09	0	\$60,255.74 ¹	0
L- 038393997	06/30/09	0	\$33,451.10	0
L- 038393996	09/30/09	0	\$20,365.20	0
L- 038393995	12/31/09	0	\$10,933.22	0
L- 038393994	03/31/10	0	\$6,584.02	0
L- 038393993	06/30/10	0	\$7,138.25	0
L- 038393990	09/30/10	0	\$8,153.40	0
L- 038393986	12/31/10	0	\$6,795.14	0
L- 038393984	03/31/11	0	\$8,110.63	0

¹ Full penalty amount assessed was \$60,255.74; however, a credit of \$11,751.61 was applied thus reducing the balance due for this notice to \$48,504.14.

Sales and Use Tax Notices of Determination

Notice #	Period Ending	Tax	Penalty	Interest
L- 038394008	08/31/09	\$8,019.86	\$2,405.78	\$4,130.67
L- 038394007	11/30/09	\$4,079.18	\$1,223.71	\$1,881.62
L- 038394006	02/28/10	\$4,171.06	\$1,251.30	\$1,707.64
L- 038394005 ²	05/31/10	\$8,019.86	\$2,405.78	\$2,882.09
L- 038394004	08/31/10	\$6,648.10	\$1,994.41	\$2,068.32
L- 038394003	11/30/10	\$4,559.65	\$1,322.17	\$1,206.36
L- 038394002	02/28/11	\$4,877.50	\$1,268.07	\$1,071.50
L- 038394001	05/31/11	\$5,976.12	\$1,374.49	\$1,054.10
L- 038394000	08/31/11	\$5,615.54	\$1,123.05	\$753.47
L- 038393999	11/30/11	\$3,266.22	\$555.24	\$306.75

THE DETERMINATION OF THE ADMINISTRATIVE LAW JUDGE

The Administrative Law Judge noted that petitioner had conceded that he was a responsible person for Richards pursuant to Tax Law §§ 685 (g) and 1133 during the periods at issue and that it was petitioner's contention that his failure to pay the taxes at issue was not willful.³

Next, the Administrative Law Judge discussed the meaning of willful as used in Tax Law § 685 (g) and determined that petitioner's conduct was willful within the meaning of that provision. The Administrative Law Judge rejected petitioner's claim that he was essentially precluded from making the subject withholding tax payments. Rather, the Administrative Law

² L-038394005 is a notice of estimated determination resulting from Richards' failure to file a return for the period ending May 31, 2010. The tax was estimated by the Division based on information available at the time.

³ The Administrative Law Judge also noted that petitioner had conceded that the tax, penalty, and interest calculations in the statutory notices are correct.

Judge found that, although Richards experienced economic problems during the periods at issue as a consequence of its dispute with Sciame, such problems were not an excuse for failure to pay withholding taxes. The Administrative Law Judge also noted that Richards remained in operation during the period at issue and he concluded that Richards had funds to satisfy its withholding tax obligations, notwithstanding its dispute with Sciame. The Administrative Law Judge found, however, that such funds were paid to others with the knowledge, or at least the reckless disregard, that withholding taxes would not be paid as a result.

The Administrative Law Judge also determined that petitioner was personally liable as a responsible officer for Richards' sales tax deficiency. The Administrative Law Judge rejected petitioner's claim that he was precluded from fulfilling his obligation to act for Richards in complying with the sales tax law. The Administrative Law Judge again observed that petitioner chose to continue to operate Richards and found that petitioner caused Richards to pay other creditors and even himself. He also noted a lack of evidence showing that petitioner was prevented from carrying out Richards' sales tax responsibilities.

The Administrative Law Judge found no evidence in the record demonstrating reasonable cause for the failure of Richards to pay sales tax. He thus sustained penalties asserted in the notices of determination pursuant to Tax Law § 1145 (a) (1) (i).

ARGUMENTS ON EXCEPTION

Petitioner contends that he did not concede that he was a responsible officer of Richards and asserts that he was not such an officer. He further contends that his father was in charge of Richards until his death in June 2011 and that he directed petitioner to do whatever was possible to save the business.

If petitioner were to be considered a responsible officer, he contends that any failure on his part to pay Richards' withholding and sales tax liabilities was not willful. Petitioner asserts that he kept Richards in business, aided in part by his own cash contributions, in order to collect the revenues that would be used to pay the taxes. Petitioner contends that such action was necessary given the realities of the construction business, where the failure to finish even a bad project results in collecting substantially less than the amount owed for a partially completed project. Petitioner also contends that Richards filed for bankruptcy in an effort to ensure that the payments due from Sciame would be made available to New York State. Petitioner further asserts that he did not take any compensation from Richards for at least two years prior to the bankruptcy filing. Additionally, petitioner complains that the Division failed to take action in the bankruptcy proceeding to collect taxes due from Richards.

Petitioner also contends that his conduct was not willful because Sciame had control of the funds needed to pay the taxes and Sciame did not pay such funds to Richards.

Petitioner asserts, for the first time on exception, that the significant underbid made by Larry Hopwood on Richards' behalf for the Sciame contract was intentional, and thus was, in essence, a conversion or theft of funds that was not discovered until June 2009. Petitioner claims that he would have canceled the contract if he had been aware of the error, but that Richards continued to work on the Cooper Union project without full knowledge of Larry Hopwood's bidding mistake.

Petitioner does not contest the assertion of penalties in the subject notices of determination on exception.

The Division contends that petitioner did concede that he was a responsible officer of Richards during the period at issue. Even if petitioner did not so concede, the Division argues

that there is sufficient evidence in the record to support the Administrative Law Judge's conclusion that petitioner was such a responsible officer and therefore personally liable for the withholding tax penalties and sales and use taxes at issue. The Division further contends that petitioner's conduct was willful as that term has been defined in case law for purposes of establishing whether a responsible officer may be held personally liable for withholding taxes. With respect to petitioner's assertion that his deceased father was a responsible officer of Richards, the Division asserts that the Tax Law provides that more than one person may be considered to be a responsible officer of a business enterprise.

OPINION

The Administrative Law Judge correctly determined that petitioner conceded that he was a responsible officer of Richards during the period at issue and that petitioner's case for cancellation of the statutory notices at issue rested upon his contention that his conduct in failing to pay the taxes at issue was not willful. As petitioner has contested this concession on exception, we quote his opening statement at the hearing before the Administrative Law Judge:

"I just have a brief opening statement that I'm not disputing the determination of either the dollar amounts *or the fact that I was the responsible officer*. What I am disputing is that the failure to pay was willfully [sic]. And when I give my testimony, I will explain that in more detail (emphasis added) (tr at 15, lines 2-9)."

Even if petitioner did not so concede, we agree with the Division that the record makes clear that he was a responsible person for purposes of the penalties and taxes at issue.

Tax Law § 685 (g) imposes upon any person required to collect, truthfully account for, and pay over withholding taxes who willfully fails to collect and pay over such taxes, "a penalty equal to the sum of the total amount of the tax evaded, or not collected, or not accounted for and paid over." Tax Law § 685 (n) defines "person," for purposes of Tax Law § 685 (g), to include,

among others, corporate officers and employees who are under a duty “to perform the act in respect of which the violation occurs.”

Tax Law § 1133 (a) imposes personal liability upon any person required to collect the tax imposed by Article 28 of the Tax Law for the tax imposed, collected or required to be collected. A person required to collect tax is defined to include, among others, corporate officers and employees who are under a duty to act for such corporation in complying with any requirement of Article 28 (Tax Law § 1131 [1]).

As may be inferred from the similar statutory definitions, a determination of whether an individual is a person under a duty to collect and pay over withholding taxes is similar in scope and analysis to the question of whether one is a responsible individual for sales and use tax purposes. That is, both inquiries require an examination of the facts to determine whether the individual in question had the authority and responsibility to exercise control over the corporation (*see e.g., Matter of Ragonesi v New York State Tax Commn.*, 88 AD2d 707,708 [1982] [withholding tax]; *Matter of Coppola v Tax Appeals Trib. of State of N.Y.*, 37 AD3d 901, 903 [2007] [sales tax]). Factors to be considered include whether the individual owned stock, was an officer, signed tax returns, and exercised authority over employees and corporate assets (*see e.g., Matter of Hopper v Commissioner of Taxation & Fin.*, 224 AD2d 733, 737 [1996], *lv denied* 88 NY2d 808 [1996], *regarg denied* 88 NY2d 1065 [1996] [withholding tax]; *Matter of Coppola v Tax Appeals Trib. of State of N.Y.*).

The facts in the present matter, viewed in light of these factors, clearly establish that petitioner was a person responsible to collect and pay over both withholding and sales and use taxes on behalf of Richards pursuant to Tax Law §§ 685 (n) and 1131 (1). Specifically, beginning in March 2008, and continuing though the entire period at issue, petitioner was in

control of Richards (*see* finding of fact 4). He was responsible for all phases of its work on the Cooper Union project, which constituted 80 to 90 percent of Richards' revenue during the period at issue (*see id.* and finding of fact 8). He was an officer and shareholder of Richards (*see* finding of fact 2). He signed all sales and use tax and withholding tax returns during the period at issue (*see* finding of fact 11).

While not disputing the indicia of responsibility noted above, petitioner asserts that he did not willfully fail to discharge his responsibility to ensure that withholding taxes of Richards were paid. More specifically, petitioner contends that Sciamé took advantage of the underbid contract by withholding payments from Richards. According to petitioner, Sciamé thus controlled the funds that should have been used to pay the withholding taxes.

As noted, liability for the penalty under Tax Law § 685 (g) hinges on a finding that the responsible person *willfully* failed to collect and pay over a business entity's withholding taxes. The test for determining whether a responsible person's failure was willful for purposes of the penalty sets a low bar:

“[W]hether 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 nonpayment is required” (*Matter of Levin v Gallman* (42 NY2d 32, 34 [1977])).

Consistent with this rule, we have held that “[m]ere economic difficulties are not an excuse for the failure to pay taxes (citations omitted). To allow the payment of taxes to be postponed on account of financial difficulties would seriously impede the ability of the State to raise revenue through taxes” (*see Matter of Dworkin Constr.*, Tax Appeals Tribunal, August 4, 1988). Accordingly, we have held that responsible persons may not continue to operate a

business at the cost of nonpayment of withholding taxes, even where the cause of the cash flow problem lies elsewhere (*see Matter of Anzilotti*, Tax Appeals Tribunal, February 22, 1996 [business failed to pay withholding taxes because its principal client was late with its payment]; *Matter of Byram*, Tax Appeals Tribunal, August 11, 1994 [not-for-profit hospital failed to pay withholding taxes because of inadequate Medicare and Medicaid reimbursement rates]).

Here, the record shows that petitioner made a conscious decision not to pay over Richards' withholding taxes on account of economic hardship as described herein. Such a conscious decision constitutes willful nonpayment pursuant to the foregoing discussion.

With respect to petitioner's contention that he was not aware of his brother's mistake in bidding on the Sciame contract, we note that that, from November 2007 through April 2009, petitioner loaned Richards \$1,524,806.49 (*see* finding of fact 18). Petitioner was thus plainly aware that Richards was experiencing financial problems, whether or not he was aware of the precise cause of those problems. Under such circumstances, petitioner chose to continue to operate Richards at the cost of the nonpayment of the company's withholding and sales and use taxes. While we recognize that petitioner was in a difficult position, his choice unfortunately results in his liability for penalties pursuant to Tax Law § 685 (g).

Similar principles apply to responsible person liability for sales and use taxes. Specifically, we have held that economic difficulties do not excuse an individual from his or her responsibility to collect and remit sales tax on behalf of a corporation (*see Matter of Stafford*, Tax Appeals Tribunal, May 11, 1995; *Matter of Kieran*, Tax Appeals Tribunal, November 13, 2014). That is, individuals may not continue to operate a business "at the expense of ensuring that sales tax was paid" (*see Matter of Napoli*, Tax Appeals Tribunal, July 13, 1995).

Accordingly, petitioner was personally liable for Richards' sales and use tax liability during the period at issue pursuant to Tax Law §§ 1131 (1) and 1133 (a).

With respect to petitioner's contention, made for the first time on exception, that his father was responsible for all decisions regarding Richards and that his father directed him to do what he could to save the business, we note that this contention is inconsistent with the record (*see* finding of fact 4). In any event, Tax Law §§ 685 (g) and 1133 create joint and several liability for unpaid sales and use and withholding taxes (*see Matter of Muffoletto*, Tax Appeals Tribunal, June 19, 1997; *Matter of Sacher*, Tax Appeals Tribunal, July 2, 2015). Accordingly, it is not a defense to petitioner's position that another individual also may have been a responsible officer of Richards during the period at issue.

In apparent support of his claim that his father was a responsible officer of Richards, petitioner submitted, for the first time on exception, copies of warrants issued by the Division to petitioner's father for many of the same unpaid withholding and sales and use taxes as are at issue herein. As this Tribunal has long and consistently held that we do not consider evidence offered with an exception if such evidence was not part of the record before the Administrative Law Judge (*see e.g. Matter of Katz*, Tax Appeals Tribunal, September 29, 2016), we do not accept such warrants into the record herein and we have not considered such documents in rendering this decision (*see e.g. Matter of Jacobi*, Tax Appeals Tribunal, May 12, 2016). In any event, given the joint and several nature of responsible officer liability, such documents, even if received in evidence, would have little probative value.

Finally, we note that the assertion of a penalty against a corporate officer under Tax Law § 685 (g) is separate and distinct from the corporation's liability for unpaid withholding taxes

(*Matter of Yellin v New York State Tax Commn.*, 81 AD2d 196, 198 [1981]). Consequently, petitioner's liability herein is unaffected by Richards' bankruptcy proceeding (*id.*).

Accordingly, it is ORDERED, ADJUDGED AND DECREED that:

1. The exception of Martin M. Hopwood, Jr. is denied;
2. The determination of the Administrative Law Judge is affirmed;
3. The petitions of Martin M. Hopwood, Jr. are denied; and
4. The notices of deficiency and the notices of determination dated August 3, 2012 are sustained.

DATED: Albany, New York
February 9, 2017

/s/ Roberta Moseley Nero
Roberta Moseley Nero
President

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

/s/ Dierdre K. Scozzafava
Dierdre K. Scozzafava
Commissioner