

STATE OF NEW YORK

TAX APPEALS TRIBUNAL

In the Matter of the Petition :
of :
KWANG YOUNG CHO : DECISION
 : DTA NO. 826088
for Redetermination of Deficiencies or for Refund :
of Personal Income Tax under Article 22 of the :
Tax Law and the New York City Administrative :
Code for the Period January 1, 2006 through :
December 31, 2008. :

Petitioner, Kwang Young Cho, filed an exception to the determination of the Administrative Law Judge issued on January 28, 2016. Petitioner appeared by Edmund J. Mendrala, Esq. 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. Oral argument was held on August 18, 2016, which date started the six-month period for the issuance of this decision.

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

ISSUES

I. Whether petitioner, Kwang Young Cho, was a person responsible for the collection and payment of employee withholding taxes on behalf of Fine Carpenters Group, Inc., for the period January 1, 2006 through December 31, 2008.

II. If petitioner was a person responsible for the collection and payment of employee withholding taxes on behalf of Fine Carpenters Group, Inc., whether the failure to remit such taxes was willful for purposes of imposition of the penalty under Tax Law § 685 (g).

FINDINGS OF FACT

We find the facts as determined by the Administrative Law Judge, except for findings of fact 8 and 12, which we have modified to more accurately reflect the record. The Administrative Law Judge's finding of facts and the modified findings of fact are forth below:

1. During the period January 1, 2006 through December 31, 2008 (audit period), Fine Carpenters Group, Inc. (FCG) was a company engaged in interior design, construction and renovation located at 15 East 32nd Street, in New York City.

2. Petitioner was the company's president and 90% shareholder. He was a highly skilled carpenter whose day-to-day responsibilities included managing job sites and over 20 employees.

3. Petitioner was authorized to sign checks on behalf of FCG. He and FCG secretary, Joongoo Kang, signed the application for the business checking account with Shinhan Bank America in April 2006. Only petitioner signed the corporate authorization resolution, which represented that FCG's board of directors authorized him and Mr. Kang to open corporate accounts, endorse checks, withdraw funds, borrow money, execute promissory notes, and pledge security on behalf of FCG.

4. Petitioner was the sole incorporator for FCG and his signature appears on the certificate of incorporation, which was filed in the office of the New York State Department of State on May 3, 2005. Petitioner signed the certificate of assumed name on behalf of FCG, which also was filed with the New York State Department of State, on April 25, 2006.

5. Petitioner was listed as the principal officer of FCG on its application for a federal employer identification number. He signed the tax form NYS-100, New York State employer registration for unemployment insurance, withholding, and wage reporting, dated September 1, 2006, indicating his official position with FCG as president. Petitioner signed New York corporation franchise tax returns for 2006 and 2007. No New York franchise tax return was filed for 2008. In addition, he signed forms NYS-45-MN, quarterly combined withholding, wage reporting and unemployment insurance returns, and forms NYS-1, returns of tax withheld.

6. Petitioner received compensation from FCG during the audit period.

7. The Internal Revenue Service (IRS) conducted an examination of the payroll tax returns of FCG and determined that additional tax was due. The IRS discovered that FCG cashed the checks it received from clients and, in turn, paid its employees in cash, failing to withhold any taxes or issue any W-2s or 1099s. The federal changes were reported to New York State and withholding tax adjustments were made for the years 2006, 2007 and 2008. The IRS assessed FCG and Hyo Sung Kim, the 10% owner, for the taxes determined to be due to the IRS.

8. Mr. Kim, on behalf of FCG, and the IRS executed an agreement on or about October 27, 2010, accepting liability for the assessment and collection of the additional tax due. The agreement bound FCG to pay additional withholding taxes to the IRS in the sum of \$1,140,551.79. There was no explanation why only Mr. Kim and FCG were bound by the agreement or why Mr. Kim represented himself as "V. President" of FCG.

9. Acting on a referral of this information from the IRS, the Division issued a withholding tax field audit adjustment for the audit period, which asserted additional tax of \$353,440.00 plus penalty of \$186,555.00 and interest of \$161,256.00 for a total due of

\$701,251.00. Mr. Kim, acting as an authorized person for the corporation, executed a consent to the assessment and collection of the amounts stated, dated February 5, 2012.

In addition, the Division made a request for records from both the company and petitioner, but was told by their accountant, Bryan Ban, that the company had gone out of business and destroyed its records. The Division continued its efforts to get information about the persons responsible for the payment of the withholding taxes, subpoenaing records from Shinhan Bank America and examining returns and applications filed by FCG. Based on all the information it received, it determined that petitioner was a person responsible for the tax on behalf of FCG.

10. During the Division's audit of FCG, it discovered that petitioner had been one of two signatories on FCG's bank account, held the office of president, and performed other duties consistent with a person who was responsible for the collection and payment of taxes on behalf of the company, discussed in detail above. As a result, it issued to petitioner six notices of deficiency, dated March 13, 2013, for the following:

Period Ended	Jurisdiction	Notice Number	Penalty	Total
12/31/2006	State	L-039131145	\$99,496.00	
12/31/2006	City	L-039131142	\$54,157.00	
12/31/2007	State	L-039131144	\$58,222.00	
12/31/2007	City	L-039131146	\$31,695.00	
12/31/2008	State	L-039131143	\$71,143.00	
12/31/2008	City	L-039131147	\$38,727.00	
				<u>\$353,440.00</u>

11. Mr. Kim had operated in real estate prior to his involvement with FCG and had experience in developing properties. He was presented with an opportunity to build storefronts

and showrooms for the design industry. He was keenly aware of the value of skilled craftsmen, and, based on his observation of petitioner's work, he believed that he would need to make certain promises to petitioner to ensure a lasting relationship for this new business endeavor. This was partly due to a cultural custom that would bolster petitioner's self-worth and value to the company.

12. Mr. Kim proposed that a new corporation be formed in which petitioner would be the majority shareholder and hold the office of president. The agreement between the two was not memorialized in writing, but based on good faith. In fact, petitioner held a 90% ownership interest in the company and Mr. Kim 10%. As mentioned, petitioner incorporated the company in May 2005 and became one of two signatories on FCG's bank account. Mr. Kim was not a signatory on that account. It was Mr. Kang, the office administrator and secretary of the corporation, who was the second signatory on that account.

13. Mr. Kang operated FCG's office at 15 East 32nd Street, performing accounting and bookkeeping functions, procuring merchandise and supervising other employees. He saw petitioner at the office on occasion, when petitioner would stop in to pick up architectural drawings. Although Mr. Kang was a signatory on FCG's bank account, he would only issue checks with Mr. Kim's authorization. Mr. Kim would tell Mr. Kang what to pay and whose name he wanted as the signatory, sometimes telling him to write Mr. Kang's name, sometimes petitioner's name. Mr. Kim directed Mr. Kang whose name he wanted on tax returns as well, particularly the form NYS-45-MN, quarterly combined withholding, wage reporting and unemployment insurance returns, where he directed Mr. Kang to sign his name, petitioner's name and even Mr. Kim's own name. Mr. Kang also observed petitioner signing checks and tax returns as well.

14. Mr. Kim and petitioner had a professional relationship that spanned over 20 years. Petitioner's skilled craftsmanship made him a very desirable employee to a company that was well known in the design and fashion industry. Both Mr. Kim and petitioner were known for their ability to deliver a high-end, quality product.

15. Petitioner made no cash contribution to capitalize FCG, while Mr. Kim estimated he contributed approximately \$100,000.00.

THE DETERMINATION OF THE ADMINISTRATIVE LAW JUDGE

The Administrative Law Judge first reviewed the withholding tax penalty and persons subject to the penalty under Tax Law § 685. The Administrative Law Judge then set forth the factual approach that cases regarding responsible persons employed in determining personal liability for withholding tax penalties, considering such factors as whether the person in question had the authority to sign tax returns, derived income from the business, or had the ability to hire and fire employees. According to the Administrative Law Judge, the issue to be determined was whether petitioner had or could have had sufficient authority and control over the affairs of the business to be considered a person responsible for the collection and remittance of withholding taxes.

The Administrative Law Judge noted that if that question is answered in the affirmative, the next step is determining whether the person under such a duty willfully failed to collect and remit withholding taxes. The Administrative Law Judge demarcated willful failure to remit the taxes described and mere accidental nonpayment. However, the Administrative Law Judge also noted that willful failure to pay over withholding taxes does not require a responsible person's actual knowledge of nonpayment if that person recklessly disregarded his responsibilities.

The Administrative Law Judge reasoned that petitioner was properly held responsible for the withholding tax obligations of FCG because he was unable to establish by clear and convincing evidence that he was not under a fiduciary duty to FCG for collection and remittance of the taxes at issue. The Administrative Law Judge found that petitioner did not lack the necessary authority to act or that he was otherwise thwarted in his carrying out of his fiduciary duty, noting that petitioner was a corporate officer of FCG, held a 90% ownership interest in FCG, was FCG's incorporator, was listed on FCG's filings with the New York State Department of State, applied for a federal employer identification number on behalf of FCG, and was the signatory to a number of FCG's required New York tax filings. The Administrative Law Judge also found it noteworthy that petitioner actively managed more than 20 employees of FCG and received compensation from the corporation.

The Administrative Law Judge found further that neither petitioner nor Mr. Kim respected the legal existence of FCG and operated the business without regard for titles or representations to the public on FCG's filings. The Administrative Law Judge observed that petitioner was imbued with authority to perform all financial functions of the corporation, but left such responsibilities to others without confirming that such functions were carried out. He also noted that whether or not petitioner chose to exercise his authority to act on behalf of FCG is immaterial to the question of whether petitioner actually had such authority and was under a duty to act.

The Administrative Law Judge concluded that petitioner acted willfully in delegating the duty to pay withholding taxes to someone else because petitioner was a 90% owner of the corporation, held title of president and had authority over the corporate checking account, which the record indicated he actually exercised. The Administrative Law Judge found that in light of

the circumstances, petitioner's actions rose to the level of reckless disregard for his responsibility of ensuring collection and remittance of withholding tax and therefore resulted in more than accidental nonpayment. Because petitioner did not bear his burden of showing that he was not a responsible person pursuant to Tax Law § 685 (n), and that his actions were not willful within the meaning of Tax Law § 685 (g), the Administrative Law Judge denied petitioner's petition and sustained the six notices of deficiency dated March 13, 2013.

SUMMARY OF ARGUMENTS ON EXCEPTION

Petitioner contends that he did not have authority and control over the financial affairs of FCG and therefore cannot be deemed a person responsible for collecting and remitting withholding tax. Petitioner further states that he was neither a shareholder nor a corporate officer in FCG. He maintains that the record below illustrated that he lacked authority and control over FCG and that all financial decisions were ultimately made by Mr. Kim, who he claims exercised complete control over and was the true owner of FCG. As such, petitioner argues that he could not have ignored his responsibilities to FCG as he had no responsibilities or authority he could exercise without Mr. Kim's direction. On exception, petitioner also argues that his job duties carried out in the course of his employment for FCG were clearly not within the range of typical job duties of a corporate president and presented new evidence with his exception to illustrate that point.

As an alternative argument, petitioner argues that even if he is deemed a person responsible for the collection and payment of withholding tax on behalf of FCG, he did not willfully fail to collect and remit such amounts because he was not under a duty and any failure to do so was not willful on his part.

The Division contends that petitioner has not met his burden of proving that he was not a person responsible for the payment of the withholding taxes for FCG. It argues that petitioner's 90% ownership interest in FCG and corporate title of president were clearly established in the record. Furthermore, petitioner's actions while president of FCG, including forming the corporation, listing himself as a signatory on the corporate bank account and signing filings with New York State and federal tax authorities, indicate that he had the authority to act on FCG's behalf. The Division urges this Tribunal to adopt the conclusion of the Administrative Law Judge that petitioner accepted his 90% ownership interest and corporate title while ignoring the legal existence of the corporation and his responsibilities to it. Thus, the Division posits that the Administrative Law Judge correctly determined that petitioner recklessly disregarded his responsibility to pay withholding taxes and correctly sustained the withholding tax penalty against petitioner for the periods at issue.

OPINION

We affirm the determination of the Administrative Law Judge.

As recited by the Administrative Law Judge in his determination, Tax Law § 685 (g) imposes a penalty upon persons responsible for the collection and remittance of withholding taxes. In relevant part:

“Willful failure to collect and pay over tax.--Any person required to collect, truthfully account for, and pay over the tax imposed by this article 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 sum of [i] the total amount of the tax evaded, or not collected, or not accounted for and paid over”

Tax Law § 685 (n), defines the persons subject to the section 685 (g) penalty:

“For purposes of subsections (g), (i), (o), (q) and (r), the term person includes an individual, corporation or partnership or limited liability company or an officer or

employee of any corporation (including a dissolved corporation), or a member or employee of any partnership, or a member, manager or employee of a limited liability company, who as such officer, employee, manager or member is under a duty to perform the act in respect of which the violation occurs.”

The record clearly supports the conclusion that petitioner was an employee and corporate officer of FCG (*see* finding of fact 2). The question remaining is whether petitioner had, or could have had, sufficient authority and control over the affairs of the business to be considered a person under a duty to collect and remit the unpaid taxes in question (*see Matter of Cohen v State Tax Commn.*, 128 AD2d 1022 [1987]; *Matter of Constantino*, Tax Appeals Tribunal, September 27, 1990; *Matter of Chin*, Tax Appeals Tribunal, December 20, 1990). Substantial evidence exists in the record demonstrating that petitioner had the requisite authority to carry out the responsibilities and duties of a corporate president (*see* findings of fact 2 and 3) and even exercised that authority on occasion (*see* findings of fact 3 - 5). It is clear to us, as it was to the Administrative Law Judge, that petitioner did not respect the legal existence of the corporation and chose instead to focus on particular aspects of the business while disregarding other aspects that he was under a duty to preform for FCG.

The Administrative Law Judge also correctly determined that petitioner’s failure to withhold and pay over such taxes was willful within the meaning of Tax Law § 685 (g). As explained by the Administrative Law Judge, merely because someone is determined to be a person responsible for payment of withholding taxes, it does not necessarily follow that a failure to withhold and pay over those funds is “willful” as that term is used in Tax Law § 685 (g). As the Court of Appeals held in *Matter of Levin v Gallman*, the query involves not so much determining whether a responsible person had the specific intent to deny the government of funds, but rather whether “something more than accidental nonpayment” resulted in the failure to pay over the amounts due (42 NY2d 32, 34 [1977]). Claiming that such responsibilities were left

to others to perform does not absolve petitioner from his liability as a responsible person.

Corporate officers cannot avoid their duty as persons responsible as fiduciaries for faithful accounting and paying over of tax revenues by disregarding their duty and leaving it to someone else to discharge (*Matter of Risoli v Commissioner of Taxation & Fin.*, 237 AD2d 675 [1997]).

Petitioner did not bear his burden of showing by clear and convincing evidence that he was not under a duty to act on behalf of FCG in these circumstances or that his failure to perform his duty was not willful (*see* Tax Law § 689 [e]). Nor did he show that his efforts were frustrated by the actions of others in preventing his carrying out of his fiduciary duties to FCG, a factor to consider when determining whether petitioner's actions were willful (*see Matter of Goodfriend*, Tax Appeals Tribunal, January 15, 1998). We note that the holding of a corporate office alone is not dispositive on the issue of responsibility for the payment of tax and filing of returns (*see Matter of Chevlowe v Koerner*, 95 Misc 2d 388 [1978]), but recognize that the facts here indicate that petitioner had the requisite authority, but chose to sometimes exercise his responsibilities himself and other times left them to others. Petitioner's delegation of management of the business to others involved in FCG without confirming that all legal requirements imposed on the corporation were being met constitutes a reckless disregard of his fiduciary duty to FCG and was willful within the meaning of Tax Law § 685 (g) (*Matter of Capoccia v New York State Tax Commn.*, 105 AD2d 528, 529 [1984]; *Matter of Ragonesi v New York State Tax Commn.*, 88 AD2d 707, 708 [1982]; *Matter of Oehler*, Tax Appeals Tribunal, July 10, 2003, *Matter of Flax*, Tax Appeals Tribunal, September 9, 1988). Thus, petitioner failed to carry his burden of proof pursuant to Tax Law § 689 (e) in showing that he did not act willfully within the meaning of Tax Law § 685 (g).

In his brief in support of his exception, petitioner refers to a sample job description for “President/CEO” from the Society of Human Resource Management (SHRM), a national human resource professional trade association, containing a list of job duties of a hypothetical corporate president or chief executive officer. Petitioner argues that he cannot be considered a responsible person of FCG because he performed none of the job duties listed in SHRM’s sample job description. We need not consider petitioner’s argument where clear authority places personal liability for the payment of withholding tax on a person who had the requisite authority and could have collected and paid over the tax as required under the statute regardless of whether that person actually performed those duties. Here, the record is replete with facts demonstrating that petitioner had the requisite authority to carry out his job duties (*see* findings of fact 2 - 5). Petitioner was a signatory on bank accounts, signed checks on behalf of the corporation, managed employees, and was the incorporator of the business (*id.*). Thus, the Administrative Law Judge reasonably concluded that petitioner had sufficient authority to collect and pay over withholding taxes but failed to do so. For these reasons, we conclude that petitioner has not borne his burden of showing by clear and convincing evidence that he was not a person responsible for the collection and paying over of withholding tax for the period at issue.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of Kwang Young Cho is denied;
2. The determination of the Administrative Law Judge is affirmed;
3. The petition of Kwang Young Cho is denied; and

4. The six notices of deficiency, dated March 13, 2013 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