

STATE OF NEW YORK

DIVISION OF TAX APPEALS

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

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Petitioner, Shi Ying Tan, filed a petition 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 for the period January 1, 2003 through December 31, 2004.

On January 2 and 3, 2013, respectively, petitioner, appearing by Miu & Co. (Louis Miu, CPA), and the Division of Taxation, appearing by Amanda Hiller, Esq. (Peter B. Ostwald, Esq., of counsel), waived a hearing and agreed to submit the matter for determination based on documents and briefs submitted by April 29, 2013, which date commenced the six-month period for the issuance of this determination. After review of the documents and arguments submitted, Herbert M. Friedman, Jr., Administrative Law Judge, renders the following determination.

***ISSUES***

I. Whether petitioner was a person required to collect, truthfully account for and pay over withholding tax with respect to an entity known as Kingston Fashion, Inc., and who willfully failed to do so, thus becoming liable for a penalty equal to such unpaid tax under section 685(g) of the Tax Law.

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

***FINDINGS OF FACT***

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:

	<i>Audited</i>	<i>Reported</i>	<i>Difference</i>
1 <sup>st</sup> Qtr 2003	-	-	-
2 <sup>nd</sup> Qtr 2003	-	-	-
3 <sup>rd</sup> Qtr 2003	\$462,417.00	\$101,905.00	\$360,512.00
4 <sup>th</sup> Qtr 2003	\$462,417.00	\$141,541.00	\$320,876.00

1 <sup>st</sup> Qtr 2004	\$253,916.00	\$124,959.00	\$128,957.00
2 <sup>nd</sup> Qtr 2004	\$253,916.00	\$146,584.00	\$107,332.00
3 <sup>rd</sup> Qtr 2004	\$253,916.00	-	\$253,916.00
4 <sup>th</sup> 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 described 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 77<sup>th</sup> 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 80<sup>TH</sup> 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 80<sup>TH</sup> 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 77<sup>th</sup> ST FL 2, BROOKLYN, NY 11214-1112.”

#### ***SUMMARY OF THE PARTIES’ POSITIONS***

11. Petitioner maintains that he did not receive the subject notices of deficiency in a timely manner as they were not sent to his last known address as required by Tax Law § 681(a). As a result, petitioner asserts that the statute of limitations in Tax Law § 683 compels cancellation of the notices. Additionally, petitioner argues that there are no statutory withholding requirements for employers or their officers. Finally, petitioner states that the Division has not presented any proof as to how it arrived at the amount at issue.

12. The Division, meanwhile, emphasizes that the subject notices are presumed correct and that the burden is on petitioner to demonstrate, by clear and convincing evidence, that the deficiency is erroneous. It adds that the statute of limitations remained open as petitioner, and his company, failed to notify the Division of federal audit changes relating to the years at issue. Further, the Division asserts that the statute of limitations in Tax Law § 683 does not apply to liabilities imposed under Tax Law § 685(g). Last, the Division points to the long line of cases that support a withholding tax responsible person assessment.

### ***CONCLUSIONS OF LAW***

A. As the Division emphatically notes, determinations made in a notice of deficiency are presumed correct, and the burden of proof is upon petitioner to establish that those determinations are erroneous (*Matter of Leogrande v. Tax Appeals Tribunal*, 187 AD2d 768, 589 NYS2d 383 [1992], *lv denied* 81 NY2d 704, 595 NYS2d 398 [1993]). The burden does not rest with the Division to demonstrate the propriety of the deficiency (*Matter of Scarpulla v. State Tax Commission*, 120 AD2d 842, 502 NYS2d 113 [1986]).

B. Section 671(a)(1) of the Tax Law requires every employer maintaining an office or transacting business in the state and making payment of any taxable wages to 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 New York adjusted gross income or New York source income received during the calendar year. Pursuant to section 674 of the Tax Law, every employer required to deduct and withhold tax shall file a withholding return and pay over to the Division the taxes required to be deducted and withheld. Section 675 of the Tax Law provides that 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.

C. Tax Law § 685(g) provides that a person responsible for the collection and payment of employee withholding taxes who willfully fails to do so is subject to personal liability in the form of a penalty for the amount of the unpaid taxes. Section 685(n) of the Tax Law defines a person required to collect such tax 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.”

D. In the present case, petitioner does not contest that he was a responsible person for Kingston Fashion pursuant to Tax Law § 685(g) and (n) during the period at issue. He was the president of the company and signed tax returns and checks on its behalf. Moreover, there is no mention in the record of any other corporate officers or directors during the years at issue that could have handled the company’s tax responsibilities (*see Matter of Blodnick v. New York State Tax Commn.*, 124 AD2d 437, 507 NYS2d 536 [1986]). Hence, it is found that he was a responsible person in this matter.

E. Petitioner’s primary argument is that he received notice of the relevant deficiencies in June of 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 of Tax Law § 683. This argument fails for two reasons. First, 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 shall report the change or correction to the Division within 90 days after the final determination of such change or correction. If a taxpayer fails to comply with this provision, as is the case here, the Division is authorized to assess the additional tax due at any time (Tax Law § 683[c][1][C]). Moreover, the three-year statute of limitations found in

Tax Law § 683 does not bar the imposition of a penalty imposed on someone, like petitioner, who has failed to collect and pay withholding taxes (*Matter of Wolfstich v. New York State Tax Commn.*, 106 AD2d 745, 483 NYS2d 779 [1984]). Hence, the Division properly issued the notices of deficiency pursuant to Tax Law § 685(g) based upon the information it received from the IRS and petitioner's subsequent failure of notification (*see Matter of Migliore*, Tax Appeals Tribunal, January 17, 1991).

F. Petitioner also argues that the notices of deficiency issued March 1, 2011 should be canceled as they were sent to the wrong address. In support of this position, he placed into evidence a copy of what purports to be his 2010 New York State personal income tax return, dated February 18, 2011, and bearing an address of "1841 80<sup>TH</sup> ST FL 2, BROOKLYN, NY 11214." Meanwhile, according to petitioner, the notices of deficiency were incorrectly sent to petitioner's prior address at "1724 77<sup>th</sup> ST FL 2, BROOKLYN, NY 11214-1112."

Petitioner's contention on this point is unsupported by the record and case law. First, the copy of the 2010 return placed into evidence is problematic as it is unsigned by petitioner, and he offered no evidence whatsoever, such as an affidavit, to establish its authenticity (*see Matter of El-Tersli*, Tax Appeals Tribunal, January 23, 2003). Instead, petitioner's representative solely vouched for it through argument in his brief and it is well settled that such unsworn statements to that effect are insufficient for petitioner to meet his burden of proof (*see Matter of Greenwald*, Tax Appeals Tribunal, November 24, 1993). Absent the 2010 return, the last known address for petitioner in the record comes from his 2004 personal income tax return and is the same to which the notices of deficiency were sent.

Alternatively, when a mailing of a notice of deficiency provides the taxpayer with actual notice without prejudicial delay, a hearing on the merits of the case is appropriate,

notwithstanding the fact that the notice was not mailed to petitioner's "last known address" (*Matter of Riehm v. Tax Appeals Tribunal*, 179 AD2d 970, 579 NYS2d 228 [1992], *lv denied* 79 NY2d 759, 584 NYS2d 447 [1992], *rearg denied*, 80 NY2d 893, 587 NYS2d 910 [1992]). In the instant case, petitioner does not provide any evidence that supports a finding of prejudice; indeed, petitioner clearly was aware of the claimed deficiency and has availed himself of the same hearing process that a properly addressed notice would provide.

G. An adjustment to the subject notices is warranted, however, based on the audit record submitted into evidence by the Division. As part of the notices of deficiency, petitioner was assessed penalty under Tax Law § 685(g) for the first two quarters of 2003. The IRS Report that serves as a basis for the statutory notices did not indicate any adjustment for those quarters, though, and the Division's own Tax Field Audit Record notes that Kingston Fashion "commenced operation sometime during the summer of 2003." Based on this evidence, it does not appear that Kingston Fashion was in operation during the first two quarters of 2003 and assessment of withholding tax for that period was improper. Therefore, each of the notices must be adjusted by cancellation of all penalties assessed to petitioner for the period January 1, 2003 through June 30, 2003.

H. The petition of Shi Ying Tan is granted to the extent indicated in Conclusion of Law G, but in all other respects is denied. The Division of Taxation is directed to modify the notices of deficiency dated March 1, 2011 in accordance with Conclusion of Law G, and as modified, the notices are sustained.

DATED: Albany, New York  
October 17, 2013

/s/ Herbert M. Friedman, Jr.  
ADMINISTRATIVE LAW JUDGE