

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petitions	:	
of	:	
MARTIN M. HOPWOOD, JR.	:	DETERMINATION
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 petitions for redetermination of deficiencies or for refund of New York State personal income tax under Article 22 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.

A consolidated hearing was held before Herbert M. Friedman, Jr., Administrative Law Judge, in Albany, New York, on November 14, 2014 at 10:30 A.M., with all briefs to be submitted by April 13, 2015, which date began the six-month period for the issuance of this determination. Petitioner appeared pro se. The Division of Taxation appeared by Amanda Hiller, Esq. (David Gannon, Esq., of counsel).

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.

III. Whether petitioner has established any facts or circumstances warranting the reduction or abatement of penalties imposed pursuant to Tax Law § 1145(a)(1)(i).

FINDINGS OF FACT

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 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 Sciamè and Sims, seeking redress for fraud, breach of contract, and other similar causes of action. The actions still 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 commercial financing.¹ Petitioner testified that Richards paid this lender 10 percent of all of its revenues in order to continue its financing arrangement. Eventually, petitioner, his brother, and his father lent Richards \$245,000.00 in order to make full payment to the lender and end the obligation. As it turned out, there was a \$120,000.00 credit given back to Richards from the financing entity 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 expended 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.

¹The name of the lender was omitted from the record.

Additionally, the examiner reported that during the same period, petitioner withdrew funds from Richards and deposited them into his personal account. Some of these appear to have been loans from Richards to petitioner. Furthermore, another report stated that during the period between April 9, 2009 and March 31, 2010, two of Richards' stockholders received compensation from the company. Moreover, it was reported by Mr. Resnick 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 ²	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

² 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 ³	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

20. Petitioner concedes that he was a responsible person for Richards pursuant to Tax Law §§ 685(g) and 1133. He also concedes that the tax, penalty, and interest calculations in the statutory notices are correct. Petitioner solely disputes that his failure to pay the taxes at issue was willful.

CONCLUSIONS OF LAW

A. The first issue to be addressed is the viability of the withholding tax penalties asserted against petitioner for the period March 1, 2009 through March 31, 2011. Tax Law § 685(g) provides:

“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

³L-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.

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....”

B. Tax Law § 685(n), in turn, furnishes the following definition of “person” subject to the section 685(g) penalty:

“the term person includes an individual, corporation, 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.”

C. As noted, petitioner does not challenge that he was a “person required to collect, truthfully account for, and pay over the tax” imposed by Article 22, nor does he challenge the amount of the penalty asserted in the Division’s notices of deficiency, which equals the tax evaded. Instead, petitioner solely maintains that he did not willfully fail to pay the tax. As the Court of Appeals indicated in *Matter of Levin v. Gallman* (42 NY2d 32 [1977]), the test for willfulness is:

“whether 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” (*id.* at 34).

Moreover, “corporate officials responsible as fiduciaries for tax revenues cannot absolve themselves merely by disregarding their duty and leaving it to someone else to discharge” (*Matter of Ragonesi v. State Tax Commn.* 88 AD2d 707, 708 [1982]; *see Matter of Goodman*, Tax Appeals Tribunal, November 15, 2007).

Here, the record dictates that petitioner willfully failed to make the required withholding tax payments for the period at issue. Starting in March 2008, petitioner took control of the

operation of Richards, and admittedly was its responsible person. During the relevant time, Richards continued in operation at petitioner's insistence, both with the Cooper Union project and other contracts, paying employees, other creditors, fellow officers, and even himself. Ironically, some of the funds used to keep the projects in operation came from petitioner himself. Additionally, Richards filed withholding tax returns, signed by petitioner, that reported taxes withheld in each quarter. Unquestionably, petitioner knew the extent of Richards' tax liability. Meanwhile, the record lacks evidence that petitioner made efforts to end the Cooper Union project or cease incurring further tax liabilities on it, and there is scant evidence that petitioner made efforts to insure payment to New York State. On the contrary, Richards continued to operate as a debtor in possession in bankruptcy and failed to remit the reported withholding taxes. Such actions have been determined to equate to willfulness (*see Matter of Lardner*, Tax Appeals Tribunal, April 17, 2008; *Matter of Muffoletto*, Tax Appeals Tribunal, June 19, 1997).

D. Petitioner argues that he was essentially precluded from making the necessary withholding tax payments by Sciame. He states that because of the horrific mistake in their contract, starting in December 2008, Sciame leveraged its advantage, systematically changed and withheld payments to Richards, and controlled which creditors (in particular, Sims) received payment on the Cooper Union project. Thus, according to petitioner, Sciame usurped all control from Richards and petitioner and left it without sufficient funds to pay its taxes.

Petitioner's argument on this point lacks merit and similar arguments have previously been rejected by the Tribunal. First, although there plainly was a financial dispute between Richards and Sciame, the Tribunal has held that economic difficulties are not an excuse for the failure to pay withholding taxes (*see Matter of Muffoletto; Matter of Pasquino*, Tax Appeals Tribunal, April 15, 1999). Moreover, not only did Richards remain in operation through the

relevant period, payments were made to petitioner and other officers either as salary or in lieu thereof, thereby evidencing control of some funds by petitioner. Further, Richards received revenues from other unrelated simultaneous projects. Clearly, there were funds available to petitioner to satisfy Richards' withholding tax obligations regardless of the actions of Sciamé. Instead, petitioner's actions to pay others were taken with knowledge, or at least reckless disregard, that as a result withholding taxes would not be remitted. In sum, petitioner did not meet his burden to show that Sciamé exercised such control of Richards during the period at issue that petitioner was precluded from collecting and paying over withholding tax trust funds (*see* Tax Law § 689[e]; 20 NYCRR 3000.15[d][5]). Therefore, it must be determined that he willfully failed to collect and to pay over such taxes (*see Matter of Levin v. Gallman; Matter of Muffoletto*).

E. As is the case with petitioner's responsibility for Richards' withholding taxes (*see* Conclusion of Law D), the record in the instant case compels the conclusion that he is also responsible for Richards' sales tax liability for the period at issue. Petitioner does not contest that, as an officer and major shareholder of Richards, he had a fiduciary duty to the corporation to comply with its tax obligations and that the amount of that obligation, as determined by the Division, is correct. Instead, petitioner points out that the Tribunal has found exceptions to such liability where the corporate officer proved that he was precluded from acting on behalf of the corporation by the acts of another (*see e.g. Matter of Moschetto*, Tax Appeals Tribunal, March 17, 1994; *Matter of Turiansky*, Tax Appeals Tribunal, January 20, 1994). As discussed above (*see* Conclusion of Law D), however, petitioner has failed to convincingly demonstrate that Sciamé, or anyone in his own company, precluded payment of Richards' sales tax obligations. On the contrary, the record reflects that petitioner chose to continue to fund operation of his

business, pay other creditors, and even himself with trust funds owed the state. There is no evidence, outside of petitioner's uncorroborated testimony, of any specific instance where Sciame or anyone else prevented petitioner from carrying out Richards' sales tax responsibilities. Hence, pursuant to Tax Law § 1133(a), petitioner is responsible for Richards' sales and use tax liabilities for the period at issue.

F. Petitioner also seeks relief from the penalties imposed under Tax Law § 1145(a)(1)(i). It is well-established that the taxpayer seeking the abatement of penalties faces an "onerous" task (*Matter of Philip Morris, Inc.*, Tax Appeals Tribunal, April 29, 1993). To do so, the taxpayer must establish that the failure to pay sales and use tax "was due to reasonable cause and not willful neglect" (Tax Law § 1145[a][1][iii]; 20 NYCRR 536.1[b]). Based on the record, Richards' failure to remit the proper sales taxes was as a result of petitioner's conscious choice to direct available funds elsewhere. There is no evidence establishing under the law a reasonable cause for this failure, or sufficient grounds for abatement (*see Matter of Coppola v. Tax Appeals Tribunal*, 37 AD3d 901 [2007]). Accordingly, the penalties imposed under Tax Law § 1145(a)(1)(i) are sustained.

G. The petitions of Martin M. Hopwood, Jr. are denied and the notices of determination and the notices of deficiency, all dated August 3, 2012, are sustained.

DATED: Albany, New York
September 3, 2015

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