

STATE OF NEW YORK

DIVISION OF TAX APPEALS

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In the Matter of the Petition :  
of :  
**CHRISTOPHER BLACK** : DETERMINATION  
for Redetermination of Deficiencies or for Refund : DTA NO. 828015  
of Personal Income Tax under Article 22 of the :  
Tax Law for the Periods Ended December 31, :  
2014, March 31, 2015, and June 30, 2015. :  
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Petitioner, Christopher Black, filed a petition for redetermination of deficiencies or for refund of personal income tax under article 22 of the Tax Law for the periods ended December 31, 2014, March 31, 2015, and June 30, 2015.

A hearing was held before James P. Connolly, Administrative Law Judge, in Albany, New York, on August 20, 2018, at 9:00 a.m., with all briefs to be submitted by January 25, 2019, which date commenced the six-month period for issuance of this determination. Petitioner appeared by Ross Law Offices (David M. Cherubin, Esq., of counsel). The Division of Taxation appeared by Amanda Hiller, Esq. (Stephanie M. Lane, Esq., of counsel). After due consideration of the documents and arguments submitted, James P. Connolly, Administrative Law Judge, renders the following determination.

***ISSUE***

Whether petitioner, Christopher Black, was a person responsible for the collection and payment of employee withholding taxes on behalf of New England Construction Company, Inc., for the periods ended December 31, 2014, March 31, 2015, and June 30, 2015.

***FINDINGS OF FACT***

1. Petitioner, Christopher Black, was president and 51% shareholder of New England Construction Company, Inc. (NECC), for the periods ended December 31, 2014, March 31, 2015, and for part of the period ended June 30, 2015 (periods at issue). NECC was an S-corporation, incorporated in New York by petitioner in 1994, which, during the periods at issue, was engaged in interior finish construction, including dry wall construction, acoustical ceilings, and millwork.

2. For the quarter ending December 31, 2014, NECC filed a form NYS-45 (quarterly combined withholding, wage reporting and unemployment insurance return), signed by petitioner, reporting \$220,665.41 in withholding tax due, with a check attached, signed by petitioner, for only the unemployment insurance amounts reported by the return. For the quarter ending March 31, 2015, NECC electronically filed an unsigned form NYS-45 showing \$131,941.38 in withholding tax due, with no remittance. For the quarter ending June 30, 2015, NECC filed a form NYS-45, signed by “Anthony Nastasi,” as “President,” reporting withholding tax due in the amount of \$26,151.28, and reporting that NECC had employees only in the month of April. No remittance accompanied the return. NECC filed a form NYS-45 for the quarter ending September 30, 2015, signed by Mr. Nastasi, reporting no withholding tax liability, and stating that NECC permanently ceased paying wages as of May 7, 2015.

3. The Division of Taxation (Division) issued to petitioner three notices of deficiency (Notices), all dated December 15, 2015, asserting withholding tax penalty against him, as a responsible person of NECC, under Tax Law § 685 (g), for the periods at issue as follows:

<u>Assessment Identification Number</u>	<u>Period Ending</u>	<u>Penalty Amount</u>
L-044110478	December 31, 2014	\$220,665.71
L-044110477	March 31, 2015	\$131,941.38
L-044110476	June 30, 2015	\$26,151.28

4. After graduating from high school, petitioner entered a four-year apprenticeship training program with a firm called Nastasi White, which was a drywall company owned by two brothers, Frank and Tom Nastasi. A drywall company hangs drywall and acoustical ceilings. After completing that program, petitioner became a journeyman union carpenter, working for Nastasi White. When Nastasi White splintered into two companies, petitioner went with the company started by Frank Nastasi and Jerry Marchelletta, Nastasi and Associates, Inc. (Nastasi and Associates). In 1994, petitioner incorporated NECC. The corporation was authorized to issue 200 shares, all of which would be common shares. Petitioner and his brother, Walter, were the two original shareholders. Petitioner's purpose in forming NECC was to have the corporation certified as a minority business enterprise (MBE), which, according to petitioner, allows a company, "to get access to minority contracts that have minority goals attached to them."

5. It is not clear whether Nastasi White or its principals had a role immediately with NECC. Petitioner testified that he worked eight years for Nastasi White, starting right after he ended his four-year apprenticeship program, which he testified began in 1986, so it appears that he was working for Nastasi White when he created NECC. Moreover, he testified that Frank Nastasi and Jerry Marchelletta handled the corporation's finances at its "inception," but he also

testified that his brother, Walter Black, “was designated to handle the financial aspects of the company.”

6. At some point not specified in the record, petitioner asked Nastasi and Associates whether he could do that company’s “minority participation work” in relation to contracts with governmental entities. More specifically, Nastasi and Associates had drywall contracts with governmental entities that sometimes required it, as a primary contractor, to use MBE subcontractors to do, for example, 30% of the work. Performing the company’s minority participation work was “a good fit” according to petitioner, because Nastasi and Associates was familiar with petitioner’s workmanship, as he had worked with the Nastasis during his apprenticeship years, and the company needed someone to do its minority participation work.

7. In the 1995 to 1996 time range, Frank Nastasi and Jerry Marchelletta invested money in NECC, with the two sons of each becoming shareholders of the corporation. As a result of that investment and acquiring his brother’s interest in the company, petitioner became a 51% shareholder, with the four sons owning the remaining 49% interest, one of whom was Anthony Nastasi.

8. Upon the failing health of his father, Frank Nastasi, Anthony Nastasi became involved in the financial management of NECC. Petitioner testified that once Anthony Nastasi became involved in NECC, the arrangement between the parties was as follows:

“My responsibility was in the field because that was my background. Everything inside the office as far as payments and all the liabilities and distributions as far as checks and taxes, I had nothing to do with that. They [the Nastasis] had handled all of that . . . .

I was purely day to day operations with managing projects, making sure the job was billed correctly, making sure it was on schedule. Those were my responsibilities.”

9. After Frank Nastasi died around 2005, Anthony Nastasi eventually bought out Tom Nastasi and took over ownership of Nastasi and Associates. According to petitioner, by 2010, the Nastasis had invested substantial sums in NECC, perhaps \$6 million. During the entire time he owned NECC, petitioner invested, at most, \$200,000.00 in it. Anthony Nastasi eventually bought out the interests of Jeffrey and Jerry Marchelletta in NECC, acquiring a 44% interest in NECC, with 5% being owned by a Mr. Richard Lee, who was not involved in the management of the corporation.

10. Petitioner entered into an agreement dated December 28, 2005, with Nastasi and Associates, which recited that “[w]hereas [NECC] was indebted to [Nastasi and Associates] for more than [\$4,000,000.00], and the parties desire to order their relationship in the event of certain contingencies,” the parties agreed that “upon the written demand of Anthony Nastasi,” petitioner would resign his position as president of NECC, and would be deemed to have sold to Anthony Nastasi 26 shares of NECC common stock for \$26.00. According to the agreement, after NECC paid in full all outstanding obligations it owed Nastasi and Associates and those of any secured creditors, the corporation would distribute 70% of the remaining assets to Anthony Nastasi and Tom Nastasi, 25% to petitioner, and 5% to Mr. Lee, after which petitioner would be immediately reinstated as president, and Anthony Nastasi and Tom Nastasi would be deemed to have transferred 70 shares of NECC common stock to petitioner for \$70, and Mr. Lee would be deemed to have transferred to petitioner his five shares for \$5.00.

11. When asked why he would enter into such a contract, petitioner testified:

“My background – I came into this agreement with nothing really, and working for the Nastasi’s, just to give you a little backdrop, this was one of the most powerful drywall companies in the New York area. At that time an inner city kid, it was like being . . . inducted into the Hall of Fame, being like Derek Jeter on the Yankees.

I didn't know much about the business aspect of the business, and at this point it sounded like a good fit for me because just trying to feed my family.”

12. Until February 2015, NECC's offices were located in New York City, while Nastasi and Associates' offices were located in Hauppauge, New York. Because Anthony Nastasi handled the financial affairs of both corporations, NECC's checkbook was kept in Nastasi and Associates' Hauppauge office, where it was locked in Anthony Nastasi's safe at night. Petitioner testified that he would travel to that office about once a week to sign checks prepared by the controller of Nastasi and Associates, Mary Probst, at Anthony Nastasi's behest. With petitioner's approval, Anthony Nastasi maintained a facsimile stamp of petitioner's signature at the Hauppauge office, which was also kept in Anthony Nastasi's safe. Mr. Nastasi would authorize its use without consulting petitioner. Petitioner testified that he had no authority to issue checks without Anthony Nastasi's permission, including checks for federal and State taxes.

13. The Division introduced various bank signature cards for NECC's account with First Republic Bank. A signature card dated April 11, 2011, lists Anthony Nastasi as “Signer Number 1” and petitioner as “Signer Number 2.” A replacement signature card, dated November 5, 2012, lists petitioner as “Signer Number 1” and Anthony Nastasi as “Signer Number 2” and includes the handwritten note that “Chris Black may withdraw funds independently. Withdrawals by Anthony Nastasi must receive Chris Black's dual approval.” Petitioner testified that the handwritten note was put on the replacement signature card in order to maintain NECC's MBE certification at a time when he was trying to get NECC re-certified. A Removal of Authorized Signer card, dated May 21, 2015, and signed by Anthony Nastasi as “President” removed petitioner's authorization as a signer on the account.

14. As part of his role with NECC, petitioner represented the corporation in regard to matters related to its MBE status. He also represented the corporation with regard to tax matters involving the Division. Thus, petitioner's signature appears on NECC's application to register for a sales tax certificate of authority (DTF-17), dated June 17, 2011. Section G of that form requires the applicant to list its responsible persons. Petitioner is listed first, with his title as president. His primary duties are described as "Oversees all business activities." That form also lists Anthony Nastasi as a responsible person of petitioner, with his business title listed as vice president, and his primary duties being described as "director of all business activities." In connection with a sales tax audit of NECC for the period March 1, 2009 through November 30, 2011, petitioner signed consent forms extending the statute of limitations for assessment dated January 28, 2013, and August 7, 2013. He also signed a form AU-377.12, test period audit method election form, dated January 26, 2014, and a form AU-346, statement of proposed audit change for sales and use tax, dated January 26, 2014. The record also contains a form POA-1, power of attorney, bearing petitioner's signature and dated November 21, 2013, appointing an attorney to represent NECC before the Division in withholding tax matters for the 2010 through 2013 period.

15. At the hearing, the Division introduced copies of transactions NECC made in its electronic account with the Division, in relation to its "Business Contact Information." Specifically, by transaction dated August 4, 2014, petitioner was named as the person to contact for a series of taxes, including corporation tax, sales tax, and withholding tax. The blank for who authorized that transaction on behalf of NECC was left empty. By a second transaction dated February 26, 2015, NECC continued to list petitioner as the contact person for all the taxes

shown, including withholding tax, but now listed Nastasi and Associates' address in Hauppauge as the address. Mary Probst, NECC's controller, is listed in the "Submitted by" blank.

16. Petitioner testified that he first became aware that NECC was becoming "seriously delinquent" with regard to New York State taxes in late 2012. In October 2012, petitioner negotiated the terms of an installment agreement to pay off an unspecified New York State tax debt in the amount of \$75,000.00. As part of that negotiation, petitioner filled out and signed a form AU-431, responsible person questionnaire, dated October 23, 2012. On page 1 of that form, petitioner checked the "yes" box indicating that he "participate[d] in making significant business decisions" and that he was "responsible for maintaining and managing the business." With regard to the question whether he had authority to perform specified functions, he checked the "yes" box for the following functions:

- manage the business with knowledge and control over financial affairs;
- pay or direct payment of bills or other business liabilities;
- act, on behalf of the business, with the Tax Department;
- hire and fire employees; and
- negotiate loans, borrow money for the business, or guarantee business loans.

On the second page of the form, with regard to a question asking about petitioner's "involvement in the financial affairs of the corporation," petitioner responded "[a]ll financial affairs dealing with [NECC's] day to day business."

17. At the hearing, petitioner testified that the answers on the responsible person questionnaire were inaccurate. He answered the questions inaccurately because those questions as to his responsibilities with NECC were the same questions that MBE agencies used to audit



his control over NECC's operations, and he needed to be able to show that he maintained control over the corporation in order for NECC to retain its MBE status.

18. Petitioner signed forms NYS-45 for periods ending September 30, 2013, December 31, 2013, March 31, 2014, June 30, 2014, and September 30, 2014, along with the accompanying checks. The return for the period ending June 30, 2014 showed no withholding tax due and included a check remitting full payment for the unemployment insurance amount due. The returns for the remaining periods paid the amount of the unemployment insurance due, but did not include any payment for the withholding amount shown as due, as follows:

<u>Period Ended</u>	<u>Amount of Withholding Tax Shown Due, but Not Paid</u>
September 30, 2013	\$154,937.96
December 31, 2013	\$143,258.46
March 31, 2014	\$132,226.02
September 30, 2014	\$200,756.34

The record shows that the Division issued notices of deficiency to petitioner for the last three of these periods, but those notices are not at issue in this matter.<sup>1</sup>

19. The Internal Revenue Service (IRS) issued to petitioner an undated proposed assessment of trust fund recovery penalty, for unpaid employment tax trust funds (form 2751), related to NECC under Internal Revenue Code (IRC) § 6672 for quarters ending December 31, 2012 through September 30, 2014, in the aggregate amount of \$6,150,839.47 in tax and \$4,361,715.73 in penalty. According to the form 2751, \$124,522.41 of that amount was assessed

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<sup>1</sup> These notices are listed on the petition for this proceeding, but were severed and made part of a separate proceeding, DTA No. 828017.

for the quarter ending December 31, 2012, while \$959,211.33 was assessed for the quarter ending March 31, 2013.

20. When asked what he did once he became aware of NECC's tax problems, petitioner testified that "I approached Anthony and asked what he was going to do about it, and Anthony Nastasi responded that "this is my [i.e., Anthony's] responsibility. It is my money, I'll take care of it." When asked what he did to ensure that taxes were being paid, petitioner testified that "I couldn't do anything about making sure that the taxes were being paid because it was his [Anthony Nastasi's] money and his responsibility."

21. When asked by his counsel to describe his discussions with Anthony Nastasi when he became aware that the corporation was incurring tax delinquencies with New York State, petitioner testified that "I approached Anthony Nastasi on many occasions on those tax liabilities and Anthony Nastasi would tell me 'don't worry about it, I'm taking care of it, that's my responsibility.'" On such occasions, Anthony Nastasi would remind him that it was "his [Anthony Nastasi's] company, his money." According to petitioner, he (petitioner) had no ability to pay the tax debts without Anthony Nastasi's approval and Anthony Nastasi would not approve such repayments.

22. When asked why he remained in his position with NECC as president even though he had no real control, petitioner replied: "Just trying to maintain my MBE certification." When asked to elaborate further, he testified that the MBE certification provided opportunity for more contracts.

23. The Division's contact log shows that petitioner spoke with the Division's tax compliance unit from October 2013 to December 2014 a total of eight times regarding NECC's overdue taxes. The tax compliance agent's summary of the substance of those conversations

shows that on four occasions petitioner asserted that the corporation would soon be making a payment towards the existing liabilities. On two of those occasions, petitioner advised the Division that the corporation was close to obtaining new financing that would allow the corporation to make sizable payments towards the amount owed. Thus, on the second of those occasions, the contact sheet summarizes the conversation on May 12, 2014, as follows:

“I called and spoke with [Chris Black] who said he couldn’t make a payment last week because he had to make payroll. TP said he still working on some deal and will be able to make at least the \$450,000 by May 25. TP said he doesn’t need IPA, what he needs is a release of lien, so he can get his business going. I told TP he either makes the payment or provide [sic] financial documentations [sic], if no payment by May 25. I warned TP that collection actions, including seizure will be taken, if no compliance. TP understood.”

24. By letter dated February 3, 2014, the Office of Business Diversity and Civil Rights of the Port Authority of New York and New Jersey (Port Authority) notified petitioner of its intent to decertify NECC as an MBE based on a report by the Port Authority’s Inspector General (OIG report). The letter describes the OIG report’s findings in pertinent part as follows:

“According to the OIG report, [NECC] is heavily dependent on another construction company, Nastasi & Associates, for financing, staffing, management and daily operations. Anthony Nastasi, who also owns 44% of [NECC], owns Nastasi & Associates. Although you referred to Mr. Nastasi as a ‘silent partner’, Nastasi exerts a substantial amount of control over the operations of [NECC].

The OIG investigation has determined that [NECC] shares numerous management, office, and field employees, as well as equipment and warehouse space with Nastasi & Associates. . . . You did not disclose this information in either the MBE/WBE Recertification Application or the [Background Qualification Questionnaires] submitted on behalf of [NECC] to work on WTC projects.”

By letter dated July 21, 2014, a hearing officer upheld the proposed decertification of NECC as a MBE, citing, among other things, the existence of “several substantial non-documented interest-free loans between [NECC] and parties related to [Nastasi and Associates].”<sup>2</sup>

25. According to petitioner, NECC had been doing a substantial business with the Port Authority, as it had a contract with the Port Authority with an original value of \$12.5 million that had grown to have a value of \$22.5 million.

26. Petitioner testified that Anthony Nastasi began to lose financial control of NECC in 2014 as a result of its accumulating tax liabilities, and a growing liability vis a vis the carpenters’ union. Petitioner introduced a chain of emails showing Anthony Nastasi’s attempt to enter into a deferred payment agreement with the district counsel of the carpenters’ benefit fund in February 2015 on behalf of both Nastasi and Associates and NECC. As part of that negotiation, by email dated February 13, 2015, Charles Virginia, counsel for the carpenters’ benefit fund, asked that a “questionnaire” be filled out in connection with the application for a “payment plan.” Anthony Nastasi forwarded the questionnaire to petitioner, stating “You need to fill out for [NECC].”

Petitioner emailed Anthony Nastasi back on February 15, 2015, stating:

“I am being advised by my council  
Not to fill this out due to not having any  
Control of the \$.  
You can fill this out.”

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<sup>2</sup> As president of NECC, petitioner signed a “Security Agreement” between NECC and Nastasi and Associates, dated February 12, 2014, which gave the latter a security interest in certain assets of NECC, “[t]o secure and provide for payment of . . . \$8,502,996.00 provided in note or notes of [NECC].” Petitioner testified that NECC had entered into similar agreements over the years in recognition of the monies that Anthony Nastasi was putting into NECC’s business. Petitioner testified that loans pertaining to that security agreement were what was being referred to in the Port Authority’s July 21, 2014 letter.

Anthony Nastasi responded two hours later with another email to petitioner, on which others were copied, stating:

“Then we are done !

I am exercising my right to your shares of our pre agreement of 2006 so you are relieved of your duties and your relieved of your position.

Please do not touch any company property as of this moment[.] And leave tbt premises as you are terminated as well as Christina [petitioner’s daughter who also worked for NECC].”

Consistent with the above, petitioner signed an “Agreement of Sale” dated May 20, 2015, transferring 51 shares of stock in NECC to petitioner for \$26.00. Attached to that agreement was a letter of the same date from petitioner, resigning his position with NECC “effective immediately.”

At the hearing, petitioner testified that he did not want to execute the document Anthony Nastasi sent him via his February 13, 2015 email because doing so would have created personal liability for him for “hundreds of thousands of dollars of union benefits, fringe benefits.”

27. The Division’s contact log contains an entry for April 9, 2015, in which Anthony Nastasi informed the Division that petitioner had been “released from his duties.”

28. Petitioner retained A. Earl Blanche, CPA, to represent him with regard to the proposed trust fund recovery penalties described in finding of fact 19. Mr. Blanche wrote the IRS, arguing that petitioner should not be considered a “responsible person” for purposes of IRC § 6672 because petitioner lacked financial control of NECC, which, instead, was controlled by Anthony Nastasi. In connection with that protest, Mr. Blanche sent the IRS an affidavit sworn to by Anthony Nastasi on September 9, 2015, in which Mr. Nastasi made the following statements:

“1. In addition to being a shareholder and director of [NECC,] I held the corporate offices of secretary and treasurer, also. I have held these offices from

the time I invested in [NECC] until the present. Neither [petitioner] (President/CEO for [NECC]) nor any other employee of [NECC] exercised control over the corporate disbursements (e.g., payments for vendors, creditors, union benefits and obligations, all payroll taxes, employer compensation and benefits, etc.).

2. As Director/Secretary-Treasurer of [NECC], I had ultimate authority and absolute control over the financial disbursements of the company. I opened the bank account at First Republic Bank (FRB) and added Mr. Black to the Master Signature Card and Agreement to Open Account(s) (the first signature card document for the FRB bank accounts (sic). . . .

3. I controlled the payment of [NECC] bills and creditors at my office, which is separate and apart from [NECC's] place of business. All correspondence, including bank statements came to my office. I handled all checking activity for [NECC] from my office. I kept the checks and check register at my office and only authorized personnel at my office had access to the checkbook. Mr. Black did not have access to the checkbook to make disbursements. I would direct my staff to write checks and Mr. Black would come to my office to sign the checks I authorized.

4. . . . Mr. Black, as President/CEO of [NECC], handled the operating activities of [NECC], but did not control any of the financial responsibilities and decisions of [NECC]. Mr. Black had signature authority on the bank account only to enable him to handle items related to running the operations of [NECC]; his authority did not include payment of [NECC] accrued liabilities, tax obligations, or anything beyond the company's general operations.”

29. By letters dated December 14, 2015, and September 20, 2017, the IRS Appeals Office determined that petitioner should not be held liable for trust fund recovery penalties assessed for the quarters in the period December 31, 2012 through June 30, 2015.

30. Petitioner filed joint New York State resident income tax returns (forms IT-201) with his wife for 2014 and 2015, with W-2 forms issued by NECC attached. On those returns petitioner reported receiving \$196,923.00 and \$76,923.00 in wages from NECC for, respectively, 2014 and 2015.

31. For the calendar year 2014, NECC electronically filed a form CT-3-A, New York S corporation franchise tax return, which showed an ordinary business loss of \$3,561,752.00. The

signature page of the return was undated and did not list any authorized person. Attached was a schedule K-1 issued to petitioner, which allocated to him a business loss of \$1,816,494.00. For 2015, NECC electronically filed a CT-3-S, showing an ordinary business loss of \$5,451,882.00. The signature page of the return was undated and did not list any authorized person. Attached to the return was a schedule K-1 issued to petitioner, showing an ordinary business loss of \$1,058,860.00.

32. Petitioner's daughter also worked for NECC for all or some portion of the periods at issue, but there is nothing in the record as to her earnings.

33. At the hearing, Laurie Bishop, the tax compliance agent who recommended the issuance of the Notices to petitioner, testified on behalf of the Division. She explained that she based her determination that petitioner qualified as a responsible person for NECC during the audit period on the documents in the Division's records, showing his title and responsibilities with the company. She did not interview anyone with NECC before determining that petitioner qualified as a responsible person of NECC.

34. Mary Probst, NECC's controller during the years at issue, and employed at the time of the hearing by a company owned by petitioner, testified that all of the receipts for the two companies came to Nastasi and Associates's Hauppauge office, where they were transferred between NECC's and Nastasi and Associates's bank accounts, as needed. According to Ms. Probst, it was Anthony Nastasi who determined which of NECC's liabilities would be paid, including tax liabilities, and that if petitioner had directed her to pay those tax liabilities without the approval of Anthony Nastasi, she would not have done so. Ms. Probst testified that petitioner had no access to NECC's checkbook.

35. Tom Pillari, an attorney admitted to practice in New York State, testified that he was hired by Anthony Nastasi and did legal work for both Nastasi and Associates and NECC under Anthony Nastasi's direction. He testified that Anthony Nastasi was in complete financial control of NECC, kept NECC's checkbook and the facsimile stamp of petitioner's signature in his safe, and did not give petitioner access to either. He agreed with the statements Anthony Nastasi made in his September 9, 2015 affidavit (*see* finding of fact 28). Asked to describe how Anthony Nastasi treated petitioner, Mr. Pillari testified:

“In my opinion, if you want to know how I honestly feel, Chris Black was more of an employee. He allowed the Nastasi family to operate a minority enterprise, and it was Anthony's business, period. I don't know how else to describe it. It was Anthony Nastasi's business. It was his money. He put all the money into this business and it was his business. And he made that clear to everybody including myself, including Chris. It was not Chris Black's business to run. Chris Black got a salary and some nice perks and I think he had a pretty decent life, but it was not his business.”

36. The Division submitted unnumbered proposed findings of fact in narrative form as part of its post-hearing brief. Given that they are unnumbered, this determination will not make rulings on them (*see* State Administrative Procedure Act § 307 [1]). Moreover, some of the proposed findings of fact constitute legal conclusions. To the extent that the Division's proposed findings of fact are supported by the record and do not constitute conclusions of law, they are included in the foregoing findings of fact.

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

A. With regard to the withholding tax penalty asserted against petitioner, 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 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 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.”

C. The question of whether someone is a “person” under a duty to collect and pay over withholding taxes (responsible person) is a factual one. In *Matter of Moschetto* (Tax Appeals Tribunal, March 17, 1994), the Tax Appeals Tribunal (Tribunal) reaffirmed the standard articulated in *Matter of Constantino* (Tax Appeals Tribunal, September 27, 1990):

“The question to be resolved in any particular case is whether the individual had or could have had sufficient authority and control over the affairs of the corporation to be considered a responsible officer or employee. The case law and the decisions of this Tribunal have identified a variety of factors as indicia of responsibility: the individual’s status as an officer, director, or shareholder; authorization to write checks on behalf of the corporation; the individual’s knowledge of and control over the financial affairs of the corporation; authorization to hire and fire employees; whether the individual signed tax returns for the corporation; the individual’s economic interest in the corporation (citations omitted).”

Another pertinent area of inquiry is whether the person held himself out to third-parties as a responsible person (see *Matter of Amengual v State Tax Commn.*, 95 AD2d 949 [3d Dept 1983]; *Matter of McHugh v State Tax Commn.*, 70 AD2d 987 [3d Dept 1979]; *Matter of Shah*, Tax Appeals Tribunal, February 25, 1999; *Matter of Luongo*, Tax Appeals Tribunal, July 10, 2012). The issue to be resolved 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 (*Matter of Constantino; Matter of Chin*, Tax Appeals Tribunal, December 20, 1990).

D. Even if petitioner is found to qualify as a person under a duty as described, he will only incur liability under Tax Law § 685 (g) if his failure to withhold and pay over the proper amount of taxes is found to be willful. The question of willfulness is related directly to the question of whether petitioner was a person under a duty, since only a person who is under a duty to collect and pay over the taxes can consciously and voluntarily decide not to do so. However, merely because one is determined to be a person under a duty, it does not automatically follow that a failure to withhold and pay over income taxes is “willful” within the meaning of that term as used in Tax Law § 685 (g). As the Court of Appeals indicated in *Matter of Levin v Gallman* (42 NY2d 32 [1977]), the test 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 non-payment is required” (*id.* at 34; *see Matter of Lyon*, Tax Appeals Tribunal, June 3, 1988).

The failure to pay over taxes can be willful notwithstanding the lack of actual knowledge, if the person recklessly disregarded his responsibilities, including the responsibility to see that employment taxes are paid (*Matter of Capoccia v State Tax Commn.*, 105 AD2d 528 [3d Dept 1984]). Finally, while responsible persons can make reasonable delegations of responsibility to others (*Matter of Lyon*), “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 Risoli v Commr.*, 237 AD2d 675 [3d Dept 1997]).

E. Here, petitioner was NECC’s incorporator, its president, chief executive officer, and director for almost the entire audit period, and a 51% shareholder of the corporation. Such

indicia of responsibility mean that petitioner did not lack for authority to act on behalf of NECC. Indeed, “absent compelling circumstances which establish that apparent authority is not actual authority,” such indicia of responsibility are sufficient to make petitioner a responsible person for purposes of the § 685 (g) withholding tax penalty (*Matter of Napoli*, Tax Appeals Tribunal, July 13, 1995; *see Matter of Cho*, Tax Appeals Tribunal, February 9, 2017; *Matter of Kropf*, Tax Appeals Tribunal, May 21, 1991).

Against this conclusion, petitioner cites a line of Tribunal decisions holding that if a corporation’s officer is “thwarted” or “precluded” from exercising his fiduciary responsibility by another person, then the officer does not qualify as a responsible person (*see Matter of Constantino; Matter of Moschetto; Matter of Stamas*, Tax Appeals Tribunal, May 19, 1994; *Matter of Taylor*, Tax Appeals Tribunal, October 24, 1991). Petitioner points to Anthony Nastasi’s control over the financial affairs of the corporation, as a result of which, only Mr. Nastasi could determine which liabilities were paid, while petitioner lacked access to the corporation’s checkbook and could not order anyone to issue a check for him. Petitioner argues that, under such circumstances, he was thwarted from ensuring proper payment of withholding tax and thus should not be held to be a responsible person.

Petitioner’s argument to the contrary, those cases are distinguishable, and petitioner is found to be a responsible person for NECC, except as set forth in conclusion of law I.

F. Anthony Nastasi’s control over the corporation stems from the agreement between petitioner and the Nastasis that existed from the very outset of NECC’s involvement with the Nastasis, under which petitioner would handle NECC’s field operations while the Nastasis would control “[e]verything inside the office as far as payments and all the liabilities and distributions as far as checks and taxes.” This original agreement was reinforced when Anthony Nastasi

loaned money to NECC, and the parties entered into a written agreement under which, upon Anthony Nastasi's demand, petitioner would resign his position as president of the corporation and would transfer control over the corporation to Anthony Nastasi. Indeed, petitioner concedes this when he states in his reply brief that Anthony Nastasi's control resulted "from a long-standing agreement between employees/officers/shareholders." In none of the preclusion cases cited by petitioner did the petitioner's lack of control over the corporation result from an agreement voluntarily entered into by the petitioner who otherwise had apparent authority to control the corporation. In the first three of the cases cited by petitioner (*Matter of Constantino*, *Matter of Moschetto*, and *Matter of Stamas*), the Tribunal held that the petitioners in questions were not responsible persons in view of the fact that the petitioners were minority shareholders of corporations, in which the majority shareholders refused to allow them any control over the corporation's finances.<sup>3</sup> The fourth case, *Taylor*, also did not involve a majority shareholder's voluntary relinquishment of control over the corporation's finances, as occurred here. In that case, the petitioner was the nominal president and owner of a corporation that was under the control of four individuals involved in a racketeering conspiracy, who performed all his acts out of fear for his life.

Thus, the fact here that, by agreement, petitioner gave exclusive authority to another corporate officer to control the company's financial affairs, including the proper payment of taxes, makes this case different from the preclusion cases cited by petitioner. As the Division

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<sup>3</sup> In *Matter of Stamas*, for example, petitioner was president, chief financial officer, and a director of a corporation, albeit a minority shareholder. His employment contract made his authority subject to an individual who was both the chief executive officer (CEO) and chairman of the board of directors. In finding the petitioner not to be a responsible person, the Tribunal found that he lacked authority to make any payments without the authority of the CEO, who was one of the founders of the corporation, and who, with the three other founders, owned a majority of the corporation's stock.

argues, that fact makes this case more similar to *Matter of Button* (Tax Appeals Tribunal, January 28, 2002). In *Button*, the petitioners were two brothers who owned and were officers in a corporation, Herkimer, that was a wholesaler of cigarettes and other items. The corporation entered into a loan and security agreement with a bank, which granted the bank a security interest in all the accounts of the corporation in the event of default. The bank eventually concluded that a default had occurred and seized the corporation's accounts that included prepaid sales tax on cigarettes, causing the corporation to fail to make timely ACH payments of such prepaid sales tax to the Division. The Tribunal rejected petitioners' argument that they should not be found to be persons under duty to act for the corporation because the loan and security agreement prevented them from exercising their authority to ensure the proper payment of pre-paid sales tax, reasoning as follows:

“Given Herkimer's *voluntary agreement* to the terms of these agreements, its officers, who executed the agreements and took the risks necessary to keep Herkimer in business, cannot now shield themselves from liability for the cigarette and sales and use taxes due by claiming to be surprised by the actions of Marine on the business's default. Petitioners did not seek the Division's approval in placing it at risk with the business fortunes of Herkimer [. . .]. . . . Any preclusion from action by these petitioners *was of their own creation*, with full appreciation of the possible tax ramifications if the business operations failed” (emphasis added).

Here, just as in *Button*, petitioner acted voluntarily when he entered into his agreement with Anthony Nastasi, under which, in the words of Mr. Pillari, he allowed “the Nastasis to operate a minority enterprise” and he thus cannot expect to be shielded from responsibility when Mr. Nastasi proved unreliable in making proper withholding tax payments to the Division. This outcome is consistent with the well-established principle that “corporate officials responsible as fiduciaries for tax revenue cannot absolve themselves merely by disregarding their duty and leaving it to someone else to discharge” (*Matter of Ragonesi v New York State Tax Commn.*, 88

AD2d 707, 708 [3d Dept 1982]). Petitioner attempts to distinguish *Button* by pointing to the fact that, there, the agreement was with a third-party who had no officer role in the corporation, whereas petitioner's agreement was with Anthony Nastasi, an officer and shareholder in the corporation. Given that the Tribunal's emphasis in *Button* was on the voluntary nature of the agreement that precluded petitioners there from ensuring payment of the taxes due from the corporation, and not on the identity of the party with whom they had the agreement, the distinction petitioner draws is not persuasive.

G. Moreover, there is another reason why the preclusion cases petitioner relies on here are distinguishable. Here, petitioner continued to hold himself out as NECC's responsible person to the Division, as well as to other New York State agencies, well after "late 2012" when he knew that the corporation was regularly not paying over the federal and State withholding taxes it collected from its employees' checks (*see* findings of fact 14, and 16 through 18), all the while experiencing economic gain through a salary, a job for his daughter, and the allocation to him of business losses (*see* findings of fact 22, and 30 through 32). In October 2012, in the course of negotiating a deferred payment agreement with the Division, petitioner filled out a responsible person questionnaire, in which he checked the "yes" box indicating that he managed the business with knowledge and control over its financial affairs. Additionally, when asked on the questionnaire to describe his involvement in the corporation's financial affairs, petitioner wrote "[a]ll financial affairs dealing with [NECC's] day to day business." In 2013 and 2014, when he was in negotiations with the Division's tax compliance unit over NECC's tax debts, he continued to make representations about the corporation's finances, new sources of financing, and the date by which the Division could expect partial payments (*see* finding of fact 23). Furthermore, he continued to deceive the State offices supervising the corporation's MBE status about his control

of the corporation, telling the Port Authority at one point that Anthony Nastasi was merely a “silent partner.” This allowed NECC to remain certified as a MBE with the Port Authority until July 2014. This is important because the Port Authority contract was a large one and petitioner dated the process by which Anthony Nastasi eventually lost control over NECC’s finances to 2014.

Of all the preclusion cases petitioner cites, only one, *Taylor*, involved a situation where the officer in question held himself out to the public as a responsible person of the corporation. But *Taylor*, likewise, is distinguishable. There, the petitioner was required to act as a “front” for a ring of racketeers, out of fear for his life, and the Tribunal expressly found that the facts did not support the Division’s argument that the petitioner had “facilitat[ed] a fraud upon” the Division. In contrast, in a number of cases, the Tribunal has cited an officer’s holding himself out as a responsible person for the corporation, in concluding that the officer was a responsible person, especially where, as here, doing so provided an economic benefit to the petitioner (*see Matter of Tafeen*, Tax Appeals Tribunal, January 3, 2002 [although petitioner had nothing to do with the operation of the business, petitioner held to be under a duty to act for the corporation for sales tax purposes because she was paid a monthly sum by the corporation for the use of a liquor license issued to her]; *Matter of Martin*, Tax Appeals Tribunal, July 20, 1989 [petitioner participated in obtaining a liquor license for the corporation and “continually held himself out to be the owner of the business,” knowing that he would receive a benefit from the success of the corporation’s store because he owned the real property on which the store stood]; *Matter of Henrie*, Tax Appeals Tribunal, November 22, 2017 [petitioners signed the corporation’s liquor license application]; *Matter of Goodman*, Tax Appeals Tribunal, November 15, 2007 [doctor held liable as a responsible person of a professional corporation of which he was a president and 100%

shareholder, despite the fact that the corporation's operations and financial affairs were run by others, because his medical license was the key that allowed those persons to bill insurance companies for medical services and noting that petitioner earned \$25,000.00 a year as a result]; *compare Matter of Stamas* [where petitioner, a president and minority shareholder of the corporation and subject to the control of the corporation's CEO and chairman of the board of directors, and who ceased receiving his salary in the fall of 1985, found not to be a responsible person of the corporation for 1985 and 1986)].<sup>4</sup>

In sum, given petitioner's status of president and 51% shareholder of NECC, his decision to continue to hold himself out as in control of the corporation, and his acceptance of economic benefits from the corporation even while aware of Anthony Nastasi's practice of misappropriating withholding tax monies from late 2012 through February 2015, it is determined that petitioner is a responsible person of NECC for purposes of Tax Law § 685 (g) during the periods at issue, except as noted below.

H. Turning to the willfulness requirement, petitioner's agreement with Anthony Nastasi represented a delegation of the responsibility of ensuring the proper payment of taxes. While the Tribunal has said that an officer can make a reasonable delegation of such responsibility (*Matter of Lyon*), petitioner's delegation of that responsibility during the periods at issue was not reasonable. He took no steps to confirm that Anthony Nastasi was adequately carrying out that responsibility, even in the face of accumulating tax deficiency notices from the Division and the IRS (*see* findings of fact 18 and 19). That fact distinguishes this case from *Matter of Lyon*,

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<sup>4</sup> Implicit in petitioner's argument that he was "thwarted" from ensuring proper payment of NECC's withholding taxes is that, had he been free to act, he would have paid those taxes. The fact that petitioner used his apparent authority as president and majority shareholder of NECC to maintain the corporation's MBE status and to seek to stave off the Division's tax collection actions, while aware of Anthony Nastasi's practice of using tax monies to keep the corporation afloat, is fundamentally inconsistent with his preclusion claim.



where the Tribunal held that the officer's delegation was reasonable, given the lack of evidence in the record that the corporation had any history of being delinquent in paying taxes.

Petitioner's inactivity in the face of Mr. Nastasi's misuse of withholding tax monies aligns this case with *Matter of Boshes* (Tax Appeals Tribunal, November 29, 1990), where the Tribunal held that the petitioner's continued reliance on another, "[whom] petitioner knew had failed to pay the taxes in the past, was a reckless disregard of [the] duties" of a responsible person. By entering into an agreement with Anthony Nastasi giving him carte blanche over the finances of the corporation, and then not taking steps to ensure that Mr. Nastasi properly paid withholding tax to the Division even after Mr. Nastasi repeatedly misused withholding tax monies to pay other bills of the corporation, petitioner's actions amounted to "more than accidental nonpayment" (*Matter of Capoccia*). Thus, the willfulness requirement is met here (*see Matter of Boshes*).<sup>5</sup>

I. As petitioner points out in his reply brief, even if he is a responsible person before February 18, 2015, he should not be a responsible person after that date because his tenure as president of the corporation ended on that date when Anthony Nastasi exercised his authority under the parties' December 28, 2005 agreement to terminate him at will. While all the corporate formalities of transferring his stock to Mr. Nastasi were not completed until May 2015 (*see* finding of fact 26), petitioner presented evidence that he was terminated on that February date, and the Division did not contest that fact, which is consistent with what Mr. Nastasi told the Division in April 2015 (*see* finding of fact 27). Accordingly, petitioner's status as a responsible

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<sup>5</sup> It is noted that the Division is not bound by the IRS's determinations to not treat petitioner as a responsible person with regard to NECC's federal withholding tax liabilities (*see Matter of Dufton*, Tax Appeals Tribunal, April 5, 1995). Moreover, it is not clear whether the IRS was aware of the extent to which petitioner had continued to hold himself out as in control of the corporation even after Anthony Nastasi's failure to ensure proper payment of federal and State withholding taxes became apparent.

person is found to have terminated as of February 18, 2015, and the Division is directed to modify notice of deficiency number L-044110477 consistent with that date and to cancel notice of deficiency number L-044110476.

J. The petition of Christopher Black is granted to the extent indicated in conclusion of law I, and the Division is directed to recompute notice of deficiency number L-044110477 in conformity with that conclusion of law and to cancel notice number L-044110476; the petition is otherwise denied and the other notice of deficiency dated December 15, 2015 is sustained.

DATED: Albany, New York  
July 25, 2019

/s/ James P. Connolly  
ADMINISTRATIVE LAW JUDGE