

To be Argued by:
Henry M. Greenberg
(Time Requested: 20 Minutes)

APL No. APL-2022-00109
Appellate Division, Third Department Docket No. 532477
DTA No. 828015

Court of Appeals
of the
State of New York

In the Matter of the Petition of

CHRISTOPHER BLACK,

Petitioner-Appellant,

– against –

TAX APPEALS TRIBUNAL OF THE STATE OF NEW YORK,
NEW YORK STATE DEPARTMENT OF TAXATION AND FINANCE and
MICHAEL R. SCHMIDT, as New York State Commissioner of Taxation and
Finance, in his official capacity,

Respondents-Respondents.

BRIEF FOR PETITIONER-APPELLANT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES	iii
PRELIMINARY STATEMENT	1
QUESTIONS PRESENTED.....	4
STATEMENT OF JURISDICTION.....	4
STATEMENT OF FACTS	5
I. Petitioner Begins Career Working for Nastasi-Owned Companies.....	5
II. NECC is Incorporated.	5
III. The Nastasis Controlled NECC.....	6
A. Anthony Nastasi Controlled NECC’s Financial Affairs.....	7
B. Petitioner Had No Control Over NECC’s Finances.....	8
C. Nastasi Made All Personnel Decision for NECC.	9
D. Nastasi Could Fire Petitioner At Will.	9
IV. Port Authority Finds that Nastasi Controls NECC.....	10
V. Nastasi Fires Petitioner.....	11
VI. NECC’s Mounting Tax Problems.....	12
A. The IRS Proceeding.....	12
B. The State Division of Taxation’s Proceeding.	14
1. The Administrative Law Judge’s Determination.....	15
2. The Tax Appeals Tribunal’s Decision.....	17
C. The Appellate Division’s Ruling.	18
ARGUMENT	22

I.	THE TRIBUNAL’S DECISION THAT PETITIONER IS PERSONALLY LIABLE TO PAY NECC’S WITHHOLDING TAXES IS CONTRARY TO LAW AND CONTRADICTED BY THE UNDISPUTED EVIDENCE IN THE RECORD.....	22
A.	The Requirements of Tax Law § 685(g).....	23
B.	The State Responsible Person Test Must Be Construed in Conformity with the Federal Standard.....	24
C.	The Responsible Person Test Requires Effective Power and Actual Authority or Ability to Pay the Taxes Owed.....	26
D.	Petitioner Was Not a “Responsible Person” for Payment of Withholding Taxes Under Tax Law § 685(g).	30
1.	The Tribunal Applied an Incorrect Test.	31
2.	The Tribunal’s Interpretation of Tax Law § 685(g) is Not Entitled to Deference.	37
E.	Even if Petitioner Was Under A Duty to Pay NECC’S Withholding Taxes, His Failure to Pay Was not Willful.	39
	CONCLUSION.....	42

TABLE OF AUTHORITIES

Page(s)

State Cases

<i>Matter of Amengual v. State Tax Commn.</i> , 95 A.D.2d 949 (3d Dep’t 1983).....	<i>passim</i>
<i>Matter of Astoria Fin. Corp. v. Tax Appeals Trib. of State of N.Y.</i> , 63 A.D.3d 1316 (3d Dep’t 2019).....	25
<i>Matter of Basch v. State Tax Commn.</i> , 134 A.D.2d 786 (3d Dep’t 1987).....	24, 28
<i>Matter of Benjamin K. Chin</i> , DTA No. 802832, 802500 (Tax App. Trib., Dec. 20, 1990) https://www.dta.ny.gov/pdf/archive/decisions/802832.dec.pdf	36
<i>Matter of Blodnick v. State Tax Commn.</i> , 124 A.D.2d 437 (2d Dep’t 1986).....	32
<i>Cooperstein v. Director, Div. of Taxation</i> , 13 N.J. Tax 68, 1993 N.J. Tax LEXIS 8 (Tax Ct. of N.J. 1993).....	28
<i>Matter of Fisher v. State Tax Commn.</i> , 90 A.D.2d 910 (3d Dep’t 1982).....	33, 40
<i>Matter of Frank A. Moscheto</i> , DTA No. 821443 (Tax App. Trib., Mar. 17, 1994), https://www.dta.ny.gov/pdf/archive/decisions/821443.dec.pdf ;.....	36
<i>Matter of Frank S. Constantino</i> , DTA 802335 (Tax App. Trib., Sept. 27, 1990), https://www.dta.ny.gov/pdf/archive/Decisions/802335.dec.pdf ;.....	36
<i>Matter of Friedman v. State Tax Commn.</i> , 64 N.Y.2d 76 (1984).....	25
<i>Matter of Gaied v. State Tax Appeals Trib.</i> , 22 N.Y.3d 592 (2014).....	38
<i>Matter of Harshad Shah</i> , DTA 814588, 8145889 (Tax App. Trib., Feb. 25, 1999), https://www.dta.ny.gov/pdf/archive/Decisions/814588.dec.pdf ;.....	36
<i>Matter of Hopper v. Commissioner of Taxation & Fin.</i> , 224 A.D.2d 733, <i>lv. denied</i> , 88 N.Y.2d 808 (1996).....	27

<i>Hunt v. State Tax Commn.</i> , 65 N.Y.2d 13 (1985)	25
<i>Matter of Jessie Luongo</i> , DTA 822823, 822517 (Tax App. Trib., July 10, 2012), https://www.dta.ny.gov/pdf/archive/decisions/822823.dec.pdf ;	36
<i>Lande v. McGoldrick</i> , 132 N.Y.S.2d 661 (Sup. Ct. Kings Cnty. 1954)	37
<i>Matter of Levin v. Gallman</i> , 42 N.Y.2d 32 (1977)	23, 25, 39
<i>Matter of Malkin v. Tully</i> , 65 A.D.2d 228 (3d Dep’t 1978)	19, 28
<i>Matter of McHugh v. State Tax Commn.</i> , 70 A.D.2d 987 (3d Dep’t 1979)	28, 35, 36
<i>Matter of Menik v. Roth</i> , 280 A.D.2d 702 (3d Dep’t 2001)	26, 27, 28
<i>Matter of Michaelsen v. State Tax Commn.</i> , 67 N.Y.2d 579 (1986)	25
<i>New York Times Co. v. City of N.Y. Commn. on Human Rights</i> , 41 N.Y.2d 345 (1977)	37
<i>Matter of Risoli v. Commr.</i> , 237 A.D.2d 675 (3d Dep’t 1997)	24, 28
<i>Matter of Webster v. Tully</i> , 82 A.D.2d 976 (3d Dep’t 1981), <i>aff’d</i> , 56 N.Y.2d 532 (1982)	31

Federal Cases

<i>Adams v. Coveney</i> , 162 F.3d 23 (1st Cir. 1998)	33
<i>Alsheskie v. United States</i> , 31 F.3d 837 (9th Cir. 1994)	34
<i>Anderson v. United States</i> , 561 F.2d 162 (8th Cir. 1977)	29
<i>Barnett v. IRS</i> , 988 F.2d 1449 (5th Cir. 1993)	27

<i>Barrett v. United States</i> , 580 F.2d 449 (1978).....	34
<i>Bauer v. United States</i> , 543 F.2d 142 (Cl. Ct. 1976).....	33
<i>Caterino v. United States</i> , 794 F.2d 1 (1st Cir. 1986).....	33
<i>Erwin v. United States</i> , 591 F.3d 313 (4th Cir. 2010)	26, 31, 33
<i>Fiataruolo v United States</i> , 8 F.3d 930 (2d Cir. 1993)	<i>passim</i>
<i>Gephart v. United States</i> , 818 F.2d 469 (6th Cir. 1987)	26, 29
<i>Godfrey v. United States</i> , 748 F.2d 1568 (Fed. Cir. 1984)	26, 29, 33
<i>Hochstein v. United States</i> , 900 F.2d 543 (2d Cir. 1990)	20, 34
<i>Jean v. United States</i> , 396 F.3d 449 (1st Cir. 2005).....	29
<i>Mazzeo v. United States</i> , 131 F.3d 295 (2d Cir. 1997)	23
<i>McGlaughlin v. United States</i> , Civil No. S. 98-3819, 2000 U.S. Dist. LEXIS 1944 (D. Md. Jan. 6, 2000)	26, 34, 41
<i>Morgan v. United States</i> , 937 F.2d 281 (5th Cir. 1991)	26
<i>O'Connor v. United States</i> , 956 F.2d 48 (4th Cir. 1992)	33
<i>Plett v. United States</i> , 185 F.3d 216 (4th Cir. 1999)	27, 29, 31
<i>Raba v. United States</i> , 977 F.2d 941 (5th Cir. 1992)	26, 31
<i>Slodov v. United States</i> , 436 U.S. 238 (1978).....	13, 39

<i>Thosteson v. United States</i> , 331 F.3d 1294 (11th Cir. 2003)	33
<i>United States v. Carrigan</i> , 31 F.3d 130 (3d Cir. 1994)	34
<i>United States v. Jones</i> , 33 F.3d 1137 (9th Cir. 1994)	33
<i>United States v. Rem</i> , 38 F.3d 634 (2d Cir. 1994)	24, 29, 34
<i>Vinick v. United States</i> , 205 F3d 1 (1st Cir 2000).....	<i>passim</i>

State Statutes

N.Y. Exec. Law § 310(7)	6
N.Y. Tax Law § 607.....	25
N.Y. Tax Law § 671(a).....	12
N.Y. Tax Law § 685(g).....	<i>passim</i>
N.Y. Tax Law § 685(n).....	23
N.Y. Tax Law § 2016.....	1

Federal Statutes

26 U.S.C. § 6672	<i>passim</i>
26 U.S.C. § 3102(a)	12
26 U.S.C. § 6671	16, 19
26 U.S.C. § 7501(a)	13

Rules

CPLR 5601(a)	4
CPLR 7803(3).....	37

Other Authorities

84 A.L.R. Fed. 170.....	26
L. 1962, ch. 1011, Bill Jacket, Mem. of Dep’t of Taxation & Finance at 1 (Mar. 19, 1962)	23

Taxes in New York Report for August 13, 2020 (August 18, 2020),
[https://www.hodgsonruss.com/blogs-State-and-Local-Tax-
Blog,tiny-report-for-august-13-2020-reporting](https://www.hodgsonruss.com/blogs-State-and-Local-Tax-Blog/tiny-report-for-august-13-2020-reporting)37

PRELIMINARY STATEMENT

This is a case of first impression. This Court has never addressed Tax Law § 685(g)'s "responsible person" test for determining when state tax authorities may hold an officer or employee of a corporation personally liable for 100% of the corporation's unpaid employee withholding taxes.

The question arises in the context of this CPLR article 78 proceeding (initiated in the Appellate Division, Third Department, pursuant to Tax Law § 2016), in which Petitioner-Appellant Christopher Black ("Petitioner") seeks an order annulling Respondent-Respondent Tax Appeals Tribunal of the State of New York's ("Tribunal") August 6, 2020 decision, holding him personally liable as a responsible person under Tax Law § 685(g) for delinquent employee withholding taxes of New England Construction Company, Inc. ("NECC").

The Tribunal determined that Petitioner was a person responsible for collecting and paying NECC's taxes, but willfully failed to do so. However, Petitioner does not meet the standards under Tax Law § 685(g) for assessment of civil penalties. Although this Court has not opined on the responsible person test, scores of federal courts have, construing Internal Revenue Code (26 U.S.C.) § 6672(a), which served as the model for Tax Law § 685(g). Under the doctrine of federal conformity, because Tax Law § 685(g) and 26 U.S.C. § 6672(a) are parallel statutes, they should be construed in conformity with one another.

As revealed by the federal case law, a person cannot be held personally liable as a responsible person for unpaid taxes, unless he or she has the effective power, actual authority or ability to pay the taxes owed. The personal liability concept is not intended to penalize officers and owners of corporations solely because of their titular authority and shareholder status, but to reach the party or parties actually responsible for the corporation's failure to pay the tax. The core question, therefore, is whether the individual has significant control over the enterprise's finances. The test is functional and pragmatic, based on considerations of substance, not form.

Here, Petitioner clearly was not a responsible person for purposes of Tax Law § 685(g), nor was any failure on his part to collect or remit withholding taxes willful. The undisputed evidence before the Tribunal established that Petitioner functioned as little more than an employee of NECC, notwithstanding that he was the company's nominal president and held 51% of its stock. Petitioner did not participate in the financial management of NECC; did not hire and fire; did not control or make decisions regarding payroll; did not have access to corporate books and records; and did not determine which creditors and liabilities, including taxes, would be paid and which would not.

Thus, Petitioner did not have the effective power, actual authority or ability to collect and pay NECC's withholding taxes. Notably, during the same audit period

at issue here, the IRS determined that Petitioner was not a responsible person for NECC's unpaid federal employment trust fund taxes under 26 U.S.C. § 6672(a).

However, the Tribunal misconstrued and misapplied the legal standard for what is required to be a responsible person. Ignoring all federal jurisprudence and giving no weight to the IRS's determination, the Tribunal neither in this case nor any other has ever articulated or applied a responsible person test in which the central inquiry is effective power, actual authority or ability to pay. Instead, the Tribunal mechanistically applied a checklist of factors, drawn from its own internal jurisprudence and decades old Third Department case law, to avoid the reality that Petitioner had no control over NECC's finances.

On Petitioner's appeal, the Third Department, with two justices dissenting, confirmed the Tribunal's decision. In doing so, the majority repeated the Tribunal's error, by ignoring federal court case law applying the responsible person test under 26 U.S.C. § 6672(a). Instead, quoting from a forty-year Third Department decision, the majority set forth, in a single sentence, a purported version of the responsible person test that is, in fact, no test at all, but rather, a mere handful of factors untethered to an objective standard. The majority's purported responsible person test is materially different than the federal standard. Thus, like the Tribunal, the majority violated the doctrine of federal conformity. In addition, by ruling that Petitioner acted "willfully," notwithstanding that he was powerless to pay the

withholding taxes at issue, the Third Department transformed Tax Law § 685(g) into a strict liability statute, which it was never intended to be.

Accordingly, this Court should reverse the decision of the court below and annul the Tribunal's determination.

QUESTIONS PRESENTED

1. Whether Petitioner was a person responsible for withholding, accounting for, and paying over withholding taxes on behalf of NECC under Tax Law § 685(g), when he did not actually exercise control over the corporation's financial affairs?

2. Whether the Tribunal engaged in the correct inquiry and applied the correct legal standard for the non-payment of withholding taxes under Tax Law § 685(g), by failing to consider or provide any weight to factors that assess whether Petitioner had significant control over NECC's financial management and affairs?

3. Whether Petitioner willfully failed to collect, account for, or pay over withholding taxes for the periods in question under Tax Law § 685(g)?

STATEMENT OF JURISDICTION

This appeal is taken from a Memorandum and Judgment of the Appellate Division, Third Department, which finally determined this proceeding. There was a dissent by two justices on a question of law in favor of the Petitioner-Appellant. Therefore, the Court has jurisdiction over this appeal pursuant to CPLR 5601(a).

STATEMENT OF FACTS

I. Petitioner Begins Career Working for Nastasi-Owned Companies.

In 1986, Petitioner, a high school graduate, entered a four-year apprenticeship training program with a drywall company called Nastasi White (“NW”). (R. 100, 343.)¹ Owned by brothers Frank and Tom Nastasi, NW hung drywall and acoustical ceilings. (R. 100, 345.) Following his apprenticeship, Petitioner worked for NW as a journeyman carpenter. (R. 343-44.) When Frank Nastasi formed a new company with Jerry Marchelletta, called Nastasi and Associates, Inc. (“N&A”), Petitioner joined it and worked there until 1994. (R. 100, 345.) N&A was one of the most powerful drywall companies in New York. (R. 102, 396.)

II. NECC is Incorporated.

On April 8, 1994, Petitioner and his brother, Walter Black, incorporated NECC, an interior finish contractor, specializing in drywall construction, acoustical and specialty ceilings, and millwork. (R. 99-100, 200, 345-46, 348, 392, 820.) The two men, who are African-Americans, conceived of NECC as a certified minority business enterprise (“MBE”) that could gain access to government construction contracts with minority participation goals. (R. 99, 348.) MBE certification is limited to businesses that are at least 51% owned, operated and controlled by one or

¹ References to the Record on Appeal have been designated “R. ___.”

more minorities. *See* N.Y. Exec. Law § 310(7) (defining “minority-owned business enterprise”).

NECC was certified as an MBE in its first year of operations. Petitioner reached out to his former employers, Frank Nastasi and Jerry Marchetta, and offered to handle N&A’s drywall contracts with New York governmental entities that required N&A, as a primary contractor, to use MBE subcontractors. (R. 101, 349-50.) Nastasi and Marchetta knew well the quality of Petitioner’s work and used NECC on N&A’s minority participation work. (R. 349-51.)

III. The Nastasis Controlled NECC.

Shortly after NECC was formed, Frank Nastasi took control over its financial management. (R. 100, 116-17, 352, 393.) Two of his sons (Anthony and Tom) and Jerry Marchetta’s two sons collectively acquired a 49% shareholder interest in NECC. (R. 101, 351-52.) Walter Black stayed involved with NECC for only two years, after which Petitioner became a 51% owner of the company’s stock and its president. (R. 99, 101, 115-16, 203, 349, 352, 393-95.) By 2008, NECC had three shareholders with the following ownership interests: Petitioner (51%), Anthony Nastasi (44%) and Richard Lee (5%).² (R. 102.)

² Lee worked for NECC but did not participate in its management or make decisions regarding its finances. He died in 2013. (R. 14.)

A. Anthony Nastasi Controlled NECC's Financial Affairs.

Following Frank Nastasi's death in 2005, his son, Anthony Nastasi ("Nastasi"), assumed complete and exclusive control over NECC's financial management and affairs. (R. 101-02, 112-13, 116-17, 122, 353-54.) Nastasi alone determined which of NECC's financial obligations (including tax liabilities) would be paid and which would not. (R. 101, 112-13, 353, 358, 428, 442, 445-46, 452.) NECC's financial affairs were conducted out of the office of Nastasi's business, N&A, in Hauppauge, New York. (R. 103, 216, 357-59, 449.) All NECC-related correspondence, including bank statements, came to N&A's Hauppauge office and were handled by N&A staff, under Nastasi's sole direction and control. (R. 112, 428-30.)

Nastasi managed NECC's bank accounts and checkbooks, including the preparation of expense and payroll checks. Petitioner could not even sign a check or cause one to be issued, for any purpose, including to pay taxes, without Nastasi's permission. (R. 103, 112, 353, 360, 367, 410, 419-20, 429, 441, 447.) Nastasi kept NECC's checkbook in N&A's Hauppauge office, where it was locked in his safe at night. (R. 103, 359-60, 446.) Nastasi maintained a facsimile stamp of Petitioner's signature (which he also kept in the safe), and often used it, without consulting Petitioner. (R. 103, 359-60, 396-97, 434, 446.) Petitioner did not have access to NECC's checkbook or the facsimile stamp with his signature. (R. 112, 359-60, 367-

68, 410, 446.) Instead, once a week Petitioner would travel 40 miles from NECC's office in Manhattan to N&A's office in Hauppauge to sign checks prepared pursuant to Nastasi's direction. (R. 103, 398, 419-20, 441, 449.)

In 2011, Nastasi opened a bank account for NECC at First Republic Bank. Initially, Nastasi listed himself on NECC's bank account signature card as "Signer Number 1" and Petitioner as "Signer Number 2." (R. 103, 271-72.) The following year Nastasi changed the signature card to list Petitioner first and added language regarding Petitioner's withdrawal privileges. (R. 272-73.) Nastasi did this to create the illusion that Petitioner controlled NECC so that NECC would be recertified as an MBE. (R. 400, 416-18.)

B. Petitioner Had No Control Over NECC's Finances.

Although nominally NECC's president, and notwithstanding that he owned 51% of the company's stock, Petitioner played no role in NECC's financial affairs and was denied access to NECC's financial books and records. (R. 353, 358, 399-02, 414, 429-30, 434, 441.) Petitioner functioned as a mere employee of NECC. (R. 113, 441-42.) His focus was day-to-day operating activities in the field. He managed projects, making sure work was done safely and securely, and on schedule. (R. 101, 116 353, 358, 401-02.)

Also, under Nastasi's direction, Petitioner represented NECC about matters related to NECC's MBE status and occasionally appeared before government

agencies to create the illusion that Petitioner controlled NECC so that the company could remain certified as an MBE. (R. 104-08, 203-11, 214-15, 219-22, 225-26, 229, 231-35, 241-44, 256, 261-65, 361-65, 401-06, 409, 414-16.) For example, Petitioner appeared before the New York State Department of Taxation and Finance (“Tax Department”) and signed and submitted checks, forms, questionnaires and other documents. (*Id.*; R. 104-08, 119.) Some of these submissions inaccurately represented that Petitioner controlled NECC’s financial affairs because MBE regulators used such information to audit Petitioner’s control over NECC. (*Id.*; R. 104-06, 119-20.)

C. Nastasi Made All Personnel Decision for NECC.

Nastasi’s domination of NECC extended to personnel decisions. He hired and fired all of NECC’s employees, including those who worked in the field under Petitioner’s supervision. (R. 409-10.) Without seeking Petitioner’s approval, Nastasi hired N&A’s comptroller, Mary Probst, and general counsel, Tom Pillari (who was Nastasi’s brother-in-law), to perform the same functions for NECC. (R. 112, 359, 427, 432, 435-36, 438-40.) Probst and Pillari worked out of N&A’s office in Hauppauge and reported solely to Nastasi. (R. 428-29, 439-40.)

D. Nastasi Could Fire Petitioner At Will.

By the end of 2005, Nastasi could fire Petitioner from NECC at any time, for any reason, and buy-out all of his NECC stock for a pittance. (R. 102, 356-57, 378,

411, 431-32.) To that end, in December 2005, Petitioner entered into a written agreement with N&A that effectively ceded control of the business to Nastasi, by providing that, upon Nastasi's written demand, Petitioner would resign as president of NECC and sell 95% of his stock shares to Nastasi for the nominal sum of \$26. (R. 102, 116-17, 356-57, 378, 411.)

By 2010, Nastasi controlled all of NECC's assets. He then had invested in NECC \$6 million — a figure that grew to nearly \$9 million by 2015. (R. 354, 387, 418-19, 451-52.) As a result, NECC gave N&A a secured interest in all of NECC's assets. (R. 388-91.)

IV. Port Authority Finds that Nastasi Controls NECC.

In early 2014, the Port Authority of New York and New Jersey ("Port Authority"), with whom NECC had a \$22.5 million contract, decertified NECC as an MBE, owing to Nastasi's control of NECC's financial affairs. (R. 108-09, 119-20, 368-73, 423, 832-34.) The Port Authority's Office of Inspector General found that NECC was "heavily dependent" on N&A for "financing, staffing, management and daily operations," and that Nastasi, who then owned 44% of NECC, and also owned N&A, "exert[ed] a substantial amount of control over the operations of [NECC]." (R. 108-09, 369-70, 832-33.) By letter dated July 21, 2014, the Port Authority's Office of Business Diversity and Civil Rights upheld decertification of

NECC as an MBE, because NECC lacked “financial and operational independence” and had a “reliant relationship” with N&A. (R. 108-09, 371-73, 834-35.)

V. Nastasi Fires Petitioner.

In 2014 and 2015, NECC was embroiled in a dispute with the carpenters’ union over the company’s failure to pay union benefits. (R. 109, 373-76.) The Union threatened to not let its members work on NECC jobs. (R. 109, 373.)

Nastasi attempted to enter into a deferred payment agreement with the union to pay the delinquent benefits. (R. 109, 375-76.) The union’s lawyer asked Nastasi to complete a “questionnaire” regarding NECC’s “payment plan.” (R. 836-42.) Nastasi forwarded the questionnaire to Petitioner and ordered him to fill it out. (R. 376, 837-38.)

On February 18, 2015, Petitioner told Nastasi he would not complete the questionnaire, because doing so would subject him to personal liability for hundreds of thousands of dollars owed by NECC to the union. (R. 109-10, 376-77, 837.) Nastasi immediately fired Petitioner and ordered him to vacate NECC’s offices. (R. 109-10, 377-78, 432, 836.) As required by Petitioner and Nastasi’s 2005 agreement, Petitioner transferred his NECC stock to Nastasi for \$26. (R. 379-80, 411.) Nastasi became president of NECC, revoked Petitioner’s name as a signer on NECC’s bank account and, on April 9, 2015, advised the Tax Department that Petitioner had been terminated. (R. 103, 110.)

VI. NECC's Mounting Tax Problems.

By 2013 and 2014, NECC had mounting federal and New York State tax liabilities for delinquent employee withholding taxes. (R. 109.) Under both federal and state law, employers are required to withhold income taxes from their employees' wages.³ (R. 430, 442.) Internal Revenue Code (26 U.S.C.) § 6672(a) and Tax Law § 685(g) impose individual liability on persons responsible for a company's willful failure to pay tax withholding taxes. (R. 147-48.)

Because Nastasi had sole power to pay the withholding taxes owed by NECC, Petitioner, as well as Mary Probst and Tom Pillari, all of whom were concerned about the delinquent taxes, often asked Nastasi when he would pay them. (R. 105, 107, 360-61, 366, 373-74, 399, 412-13, 429-31, 442-43, 447, 449-51.) Nastasi would respond that he was responsible for the taxes and would promptly pay them, but never did so. (R. 107, 366, 399, 412-13, 431, 443-44, 451.)

A. The IRS Proceeding.

In early 2015, the IRS issued Petitioner a proposed assessment of trust fund tax penalties for NECC's unpaid federal withholding taxes, pursuant to 26 U.S.C. § 6672. (R. 305-06, 800.) Trust fund taxes are payroll withholding taxes that an employer has withheld from employee wages. The employer holds these taxes as

³ See 26 U.S.C. § 3102(a) (requiring withholding for federal income taxes); N.Y. Tax Law § 671(a) (requiring withholding for State income taxes).

“special fund[s] in trust for the United States,”⁴ and the withheld amounts are commonly referred to as “trust fund taxes.”⁵ With respect to NECC’s tax trust fund taxes, the IRS advised Petitioner he was personally liable for unpaid employment tax trust funds under 26 U.S.C. § 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. (R. 106-07, 306-08, 325-26, 800-801.)

Petitioner protested the IRS’s determination, arguing that he should not be considered a responsible person under 26 U.S.C. § 6672, because he lacked financial control over NECC and had not act willfully. (R. 110, 308.) Petitioner submitted to the IRS affidavits sworn by Anthony Nastasi, which averred that Nastasi “had ultimate authority and absolute control over the financial disbursements of [NECC]”; “maintained uninterrupted control” of NECC’s available funds; and “exercised control over the financial policies of [NECC],” including “authorizing payments for tax obligations . . . and accrued liabilities.” Nastasi also averred that Petitioner did not handle NECC’s financial responsibilities and decisions, including those dealing with tax liabilities. (R. 110-11, 311-21, 429, 444-45, 447, 802-16.) Petitioner, Nastasi explained, had “signature authority on the [NECC] bank account only to enable him to handle items related to running the operations of [the business;

⁴ 26 U.S.C. § 7501(a).

⁵ *Slodov v. United States*, 436 U.S. 238, 243 (1978).

h]is authority did not include payment of . . . accrued liabilities, tax obligations, or anything beyond the company’s general operations.” (R. 24, 52, 313, 320, 810, 812, 882.)

Based on this information, the IRS sustained Petitioner’s protest. By letters dated December 14, 2015 and September 20, 2017, the IRS advised Petitioner that he was not a responsible person of NECC under 26 U.S.C. § 6672(a) and, thus, not liable for any trust fund recovery penalties for the period December 31, 2012 through June 30, 2015. (R. 111, 309, 340-41, 819.)

B. The State Division of Taxation’s Proceeding.

On December 15, 2015, ten months after Nastasi fired Petitioner from NECC, the Tax Department’s Division of Taxation (“Tax Division”) issued Petitioner three Notices of Deficiency (“NOD”), for NECC’s unpaid withholding taxes, pursuant to Tax Law § 685(g). (R. 99, 106, 193, 506-18.) Just like the IRS’ initial position, the Tax Division asserted \$378,758.37 in withholding tax penalties against Petitioner, as a responsible person of NECC, covering the tax periods ending December 31, 2014, March 31, 2015 and June 30, 2015, under Tax Law § 685(g). (R. 99-100, 506-18.)

Petitioner protested the NODs and requested reconsideration. He also requested and received a conciliation conference, but the Tax Division adhered to its position. (R. 504-505.) On December 19, 2016, Petitioner challenged that

determination, by filing a Petition with the Division of Tax Appeals, arguing that, under Tax Law § 685(g), he was not a responsible person for payment of NECC's taxes. (R. 62-90.)

1. The Administrative Law Judge's Determination.

On August 20, 2018, a hearing on Petitioner's claim was held before an Administrative Law Judge ("ALJ"). (R. 108-495.) The Tax Division's lone witness, a compliance agent, testified that the determination Petitioner was a responsible person for NECC was based solely on documents in the files of the Tax Division. (R. 102, 111-12; *see also id.* 115-19.) The compliance agent did not interview anyone with NECC nor was she aware the IRS found that Petitioner was not responsible for NECC's delinquent federal withholding taxes. (R. 112, 280-83, 296.)

Petitioner testified at the hearing, and called as witnesses his certified public accountant, Andrew Earl Branche, Jr. (R. 303-41), Mary Probst and Thomas Pillari (R. 424-52). Petitioner introduced into evidence his submissions to the IRS in its parallel proceeding involving NECC's unpaid withholding taxes, including two sworn affidavits from Anthony Nastasi. (R. 304-26, 331-32, 340, 800-894.) Additionally, Probst and Pillari corroborated Petitioner's testimony and the Nastasi affidavits, testifying that Nastasi bore sole responsibility for NECC's financial

affairs and that Petitioner played no role in them whatsoever. (R. 112-13, 428-31, 441, 810-14.) As Pillari put it:

[Petitioner] 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's business. It was his money. He put all the money into this 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.

(R. 441-42.) The Tax Division did not challenge the veracity of Petitioner's testimony or any of three witnesses who testified on his behalf. (R. 434, 448.)

On July 25, 2019, the ALJ issued a determination that sustained the NOD for the period ending December 31, 2014 and partially sustained the NOD for the period ending March 2015, finding that, during that time, Petitioner was a responsible person for NECC under Tax Law § 685(g). (R. 116-17, 119.) The ALJ based this ruling on Petitioner's status as incorporator, president, CEO, director, and 51% shareholder of NECC. (R. 121.) The ALJ also concluded that Petitioner willfully failed to collect and pay over withholding taxes. (R. 121-22.) However, based upon Nastasi's termination of Petitioner on February 18, 2015, and the sale of Petitioner's shares of stock to Nastasi in May 2015, the ALJ cancelled the third NOD for the period ending June 30, 2015. (R. 122-23.)

Finally, the ALJ held that it was not obligated to defer to the IRS' finding that Petitioner was not a responsible person under 26 U.S.C. § 6671. (R. 122.)

2. The Tax Appeals Tribunal's Decision.

Petitioner filed an exception and appealed to the Tax Appeals Tribunal. (R. 124-30.) On August 6, 2020, the Tribunal issued a decision (1) denying Petitioner's exception; (2) affirming the ALJ's determination; (3) denying the Petition, except as modified by the ALJ; and (4) sustaining (a) the NOD for the tax period ending March 31, 2015, as modified by the ALJ's Determination, and (b) the NOD for the tax period ending December 31, 2014. (R. 39-61.)

The Tribunal framed the issue at hand as "whether petitioner presented facts showing that [he] lacked control and authority over the affairs of NECC." (R. 58.) The Tribunal then determined that Petitioner was a responsible person for NECC under Tax Law § 685(g) and, therefore, personally liable for its unpaid taxes, based on the following factors: (1) Petitioner was an officer and majority shareholder of NECC, (2) managed its field operations, (3) had check signing authority, (4) filed tax returns on behalf of the company, (5) had a considerable economic interest in the company, and (6) had held himself out as a responsible person. (R. 58.) Also, the Tribunal determined that Petitioner acted willfully in failing to pay the taxes owed by NECC, reasoning that his "continued reliance on another [, i.e., Nastasi,] to pay withholding tax constituted a reckless disregard of his duty to act." (R. 58-59.) Finally, like the ALJ, the Tribunal gave no weight to the IRS' determination that Petitioner was not a responsible person under 26 U.S.C. § 6672. (R. 60.)

C. The Appellate Division's Ruling.

Petitioner commenced this article 78 proceeding in the Appellate Division, Third Department, seeking an order annulling the Tribunal's decision. (R 1-130.) On June 30, 2022, by a 3-2 vote, the Third Department confirmed the Tribunal's decision and dismissed the Petition. (R. 913-923.) As an initial matter, the majority held that the Tribunal's determination was not irrational, in light of the IRS having reached a different conclusion on the same issue. (R. 915.) The majority acknowledged that both federal and state tax laws "require a showing that the taxpayer has actual authority in order to be a person responsible for collecting and remitting the corporation's withholding taxes." (*Id.*) But, according to the majority, "the Tribunal's determination was not based upon an erroneous legal standard contrary to that found under federal law, but upon the Tribunal's numerous factual findings based on the extensive record before it." (*Id.*)

Turning to the merits, the majority, applying the rational basis and substantial evidence standards of review, first held that the Tribunal had not "incorrectly interpreted Tax Law § 685(g) or applied an improper test in determining who is a responsible person." (R. 915-916.) Quoting from a 1977 Third Department decision, the majority described the responsible person test, as follows:

In determining whether petitioner was a responsible person for the time periods in question, the test is a factual one to be determined after consideration of a myriad of factors, including "whether the petitioner signed the tax return, derived a substantial part of his [or her] income

from the corporation, or had the right to hire and fire employees. While no one factor is controlling, all must be considered.”

(R. 916 (quoting *Matter of Malkin v. Tully*, 65 A.D.2d 228, 231 (3d Dep’t 1978).)

Next, the majority upheld as rational and supported by substantial evidence the Tribunal’s determination that Petitioner was a responsible person under Tax Law § 685(g). (R. 917.) Additionally, the majority rejected Petitioner’s argument that he had not willfully failed to collect and remit NECC’s taxes, reasoning that Petitioner was aware of the unpaid taxes but failed to take affirmative steps to ensure their payment and continued to rely on Nastasi to pay despite his mismanagement. (R. 917-918.)

In a lengthy dissent authored by Justice Michael C. Lynch, he and Justice Sharon A.M. Aarons voted to annul the Tribunal’s determination. (R. 918-923.) Given that Tax Law § 685(g) and 26 U.S.C. § 6672(a) are parallel statutes, the dissent, like the majority, maintained that their terms needed to be construed in conformity. (R. 919.) However, the dissent cited and quoted from federal court decisions that enunciated a different responsible person test than that articulated by the majority, stating:

Several factors are relevant in determining whether an individual is a person responsible for paying the tax under 26 USC § 6671(b), including, among other things, whether the individuals “(1) is an officer or member of the board of directors, (2) owns shares or possess an entrepreneurial stake in the company, (3) is active in the management of day-to-day affairs of the company, (4) has the ability to hire and fire employees, (5) makes decisions regarding which, when and in what

order outstanding debts or taxes will be paid, (6) exercises control over daily bank accounts and disbursement records, and (7) has check-signing authority” (*Vinick v United States*, 205 F3d 1, 7 (1st Cir 2000)); see *Fiataruolo v United States*, 8 F3d 930, 939 [2d Cir 1993]. Although no single factor is determinative and the “totality of the circumstances” must be considered (*Vinick v United States*, 205 F3d at 8 [internal quotation marks and citation omitted]), the “core question ‘is whether the individual has significant control over the enterprise’s finances’” (*Fiataruolo v United States*, 8 F3d at 939 [emphasis added and emphasis omitted], quoting *Hochstein v United States*, 900 F2d 543, 547 [2d Cir 1990]). This test “is meant to encompass all those connected closely enough with the business to prevent the tax default from occurring” (*Fiataruolo v United States*, 8 F3d at 939 [internal quotation marks, brackets and citation omitted]), but it “is not meant to ensnare those who have merely technical authority or titular designation” (*id.*).

(R. 919-920.)

Applying this standard, the dissent concluded that the Tribunal’s ruling that Petitioner was a responsible person under Tax Law § 685(g) “cannot be sustained.”

(R. 922.) Based on their review of testimony and documents introduced at Petitioner’s hearing, the dissent found that “Anthony Nastasi [], rather than petitioner, was the person who had significant control over NECC’s finances during the tax years in question.” (R. 920-921.)

Additionally, the dissent noted that it was uncertain if the Tribunal applied the correct responsible person test, given that the Tribunal did not analyze Petitioner’s control and authority over the finances of NECC’s, but rather, erroneously “framed the issue as ‘whether petitioner presented facts showing that [he] lacked control and authority over the *affairs of [NECC]*.’” (R. 921 (emphasis added)). The dissent

added that the factors cited by the Tribunal, while relevant, established only that Petitioner had titular authority, which was insufficient to satisfy the responsible person test. “Indeed,” the dissent stated, “the Tribunal did not make any specific findings that petitioner had ‘significant control over the enterprise’s finances’ — the ‘core’ component of the [responsible person] inquiry.” (R. 921-922 (quoting *Fiataruolo*, 8 F.3d at 939 (internal quotation marks, emphasis and citation omitted).))

Finally, the dissent rejected as “not rational” the Tribunal’s determination that Petitioner willfully failed to remit the required taxes. (R. 922-923.) The dissent observed that Petitioner ceded control over NECC’s finance to Nastasi in 2005, long before the subject tax liability came to fruition. There was then no indication NECC failed to pay its taxes. (*Id.*) It was nine years later, the dissent continued, when Petitioner learned that NECC was in default, at a time when he “had no actual authority to compel Nastasi to make the required payments,” and “no authority to intervene.” (R. 923.) Thus, it was irrational for the Tribunal’s to find willfulness based on “‘petitioner’s continued reliance’ on Nastasi.” (*Id.*)

Petitioner now appeals from the Third Department’s Memorandum and Judgment. (R. 907-08.)

ARGUMENT

I. THE TRIBUNAL’S DECISION THAT PETITIONER IS PERSONALLY LIABLE TO PAY NECC’S WITHHOLDING TAXES IS CONTRARY TO LAW AND CONTRADICTED BY THE UNDISPUTED EVIDENCE IN THE RECORD.

The Tribunal erred as a matter of law in ruling that Petitioner was personally liable for 100% of NECC’s unpaid employee withholding taxes. The uncontradicted evidence before the Tribunal established that Petitioner lacked the requisite control over NECC’s finances to satisfy the responsible person test under Tax Law § 685(g). Likewise, any failure by Petitioner to collect or remit NECC’s taxes was not “willful” within the meaning of that statute.

The Tribunal misconstrued the applicable legal standards for personal assessment of a civil penalty, and then misapplied them to its findings. The Third Department repeated this error, setting forth, in a single sentence, a purported version of the responsible person test that is, in fact, no test at all, but rather, a mere handful of factors untethered to an objective standard. Moreover, the Third Department’s purported test is notably different than that applied by federal courts construing 26 U.S.C. § 6672(a) — the model for Tax Law § 685(g). The Tribunal and Appellate Division violated the doctrine of federal conformity by failing to look to the federal standard when deciding the present case under Tax Law § 685(g). In addition, by ruling that Petitioner acted “willfully,” notwithstanding that he was powerless to pay the withholding taxes, the Tribunal and Appellate Division

erroneously transformed Tax Law § 685(g) into a strict liability statute. Accordingly, the Tribunal’s decision should be annulled.

A. The Requirements of Tax Law § 685(g).

Under Tax Law § 685(g), a person may be held personally liable for the withholding taxes of a corporation if he or she is “required to collect, truthfully account for, and pay over the tax imposed” and “willfully attempts in any manner to evade or defeat the tax or the payment thereof[.]” Tax Law § 685(g). A person responsible for “collect[ing], truthfully account[ing] for, and pay[ing] the tax includes “an officer or employee of a corporation . . . who . . . is under a duty to perform the act in respect of which the violation occurs.” Tax Law § 685(n).

Tax Law § 685(g) was modelled after 26 U.S.C. § 6672(a).⁶ *See Matter of Levin v. Gallman*, 42 N.Y.2d 32, 33-34 (1977) (noting similarity between Tax Law § 685(g) and 26 U.S.C. § 6672); *Mazzeo v. United States*, 131 F.3d 295, 299 (2d Cir. 1997) (same); L. 1962, ch. 1011, Bill Jacket, Mem. of Dep’t of Taxation & Finance at 1 (Mar. 19, 1962) (“The new provisions added to Article 22 under this bill conform

⁶ 26 U.S.C. § 6672(a) states as follows:

Any person required to collect, truthfully account for, and pay over any tax imposed by this title 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 any such tax or the payment thereof, shall, in addition to other penalties provided by law, be liable to a penalty equal to the total amount of the tax evaded, or not collected, or not accounted for and paid over. No penalty shall be imposed under section 6653 or part II of subchapter A of chapter 68 for any offense to which this section is applicable.

its administrative and procedural provisions, so far as possible, to the provisions of the Internal Revenue Code with reference to notices of deficiency, assessment, interest, [and] penalties”); Mem. of N.Y.S. Bar Assn. at 3 (“the new bill achieves conformity in such fields as . . . civil penalties”). Under both statutes, a party may be held liable for a corporation’s unpaid withholding taxes if he or she (1) is responsible to collect and pay such taxes and (2) willfully failed to discharge this responsibility. See *Matter of Basch v. State Tax Commn.*, 134 A.D.2d 786, 787 (3d Dep’t 1987) (“A person responsible for the collection and payment of employee withholding taxes who willfully fails to perform those duties is subject to personal liability for the unpaid taxes (Tax Law § 685[g]).”); *Fiataruolo*, 8 F.3d at 938 (“Under [26 U.S.C. 6672(a)], a party may be held liable for unpaid withholding taxes if: first, he is the ‘responsible person’ for collection and payment of the employer’s taxes, and second, he ‘willfully’ failed to comply with the statute.”) (internal citations omitted). Case law generally refers to the first element as the “responsible person” test, although the words “responsible person” do not appear either in Tax Law § 685(g) or 26 U.S.C. § 6672(a). E.g., *Matter of Risoli v. Commr.*, 237 A.D.2d 675, 656 (3d Dep’t 1997); *United States v. Rem*, 38 F.3d 634, 642 (2d Cir. 1994).

B. The State Responsible Person Test Must Be Construed in Conformity with the Federal Standard.

It is well settled that terms used in New York’s Tax Law shall be interpreted in conformity with federal tax law unless a different meaning is clearly required.

See Matter of Michaelsen v. State Tax Commn., 67 N.Y.2d 579, 583 (1986) (“New York income tax law evinces a strong intent to conform to Federal authority wherever possible”); *Hunt v. State Tax Commn.*, 65 N.Y.2d 13, 16 (1985) (recognizing that the Legislature enacted Tax Law § 607 “to achieve close conformity with the Federal system of income taxation”); *Matter of Friedman v. State Tax Commn.*, 64 N.Y.2d 76, 80 (1984) (Tax Law § 607(a) provides “a statutory mandate to assure conformity between federal and state law”). This requires New York State tax authorities to apply the same standard as the IRS where state and federal provisions are similar. *See Matter of Astoria Fin. Corp. v. Tax Appeals Trib. of State of N.Y.*, 63 A.D.3d 1316, 1319 (3d Dep’t 2019) (“Pursuant to the doctrine of federal conformity, courts [should] adopt, whenever reasonable and practical, the [f]ederal construction of substantially similar tax provisions, particularly where the state statute is modeled on [the] federal law) (internal quotation marks and citations omitted).

Thus, because Tax Law § 685(g) and 26 U.S.C. § 6672(a) are parallel statutes, they should be construed in conformity with one another. *See Levin*, 42 N.Y.2d at 33-34 (federal definition of “willfully,” as used in 26 U.S.C. § 6672, adopted with respect to Tax Law 685(g)).

C. The Responsible Person Test Requires Effective Power and Actual Authority or Ability to Pay the Taxes Owed.

Prior to the instant case, no state court appears to have defined or applied Tax Law § 685(g)'s responsible person test in two decades,⁷ and this Court has never had occasion to do so. However, a mountain of federal court decisions has fleshed out the contours of 26 U.S.C. § 6672. *See generally*, Edward A. Nolfi, Annot., *When are persons other than owners, directors, officers, and employees potentially liable for penalties under IRC § 6672 (26 U.S.C.A. § 6672), concerning failure to collect and pay over tax*, 84 A.L.R. Fed. 170 (collecting cases).

As defined by federal courts, the responsible person test is “pragmatic”⁸ and “functional”⁹ — “a test of substance, not form.”¹⁰ The critical inquiry in determining whether someone is a “responsible person” is if he or she had the “effective power,”¹¹ “actual authority or ability” to pay the taxes owed by the corporation. *Plett*

⁷ Before the instant case, it appears that the most recent decision addressing the responsible person test under Tax Law § 685(g), albeit in cursory fashion, was *Matter of Menik v. Roth*, 280 A.D.2d 702 (3d Dep’t 2001).

⁸ *McGlaughlin v. United States*, Civil No. S. 98-3819, 2000 U.S. Dist. LEXIS 1944, at *4 (D. Md. Jan. 6, 2000).

⁹ *Gephart v. United States*, 818 F.2d 469, 473 (6th Cir. 1987).

¹⁰ *Godfrey v. United States*, 748 F.2d 1568, 1576 (Fed. Cir. 1984).

¹¹ *Erwin v. United States*, 591 F.3d 313, 321 (4th Cir. 2010); *Raba v. United States*, 977 F.2d 941, 943 (5th Cir. 1992); *Morgan v. United States*, 937 F.2d 281, 284 (5th Cir. 1991).

v. United States, 185 F.3d 216, 219 (4th Cir. 1999) (quoting *Barnett v. IRS*, 988 F.2d 1449, 1454 (5th Cir. 1993)).

In analyzing whether a party is a responsible person, both federal courts and decades-old Third Department case law look to a “myriad of factors,” *Menik*, 280 A.D.2d at 702 (applying Tax Law § 685(g), including whether the person under consideration: (1) is an officer or member of the board of directors; (2) owns or shares or possesses an entrepreneurial stake in the company; (3) is active in the management of the day-to-day affairs of the company; (4) has the ability to hire and fire employees; (5) makes decisions regarding which, when and in what order outstanding debts or taxes will be paid; (6) exercises control over daily bank accounts and disbursement records; and, (7) has check signing authority. *Vinick*, 205 F.3d at 7 (quoting *Fiataruolo*, 8 F.3d at 939); *Matter of Hopper v. Commissioner of Taxation & Fin.*, 224 A.D.2d 733, 737 (3d Dep’t 1996) (“Relevant factors to be considered in arriving at such a determination include ‘whether the taxpayer owned stock, signed the tax returns, exercised authority over employees and assets of the corporation, derived substantial income from the corporation, or served as an officer or employee thereof’) (internal quotation marks & citation omitted), *lv. denied*, 88 N.Y.2d 808 (1996). Federal and Third Department case law are also at one that “[n]o single factor is determinative of responsibility” and the “totality of the circumstances” must be considered.” *Vinick*, 205 F.3d at 8 (internal quotation marks

& citation omitted); *Menik*, 280 A.D.2d at 702 (stating that “no one factor is controlling, all must be considered”).

However, federal courts and the Third Department differ over the role of the responsible person test’s factors. The case law cited by the Third Department and Tribunal¹² construing Tax Law § 685(g) does not explain how each of the laundry list of factors weigh in the balance and why. Moreover, the factors cited in these cases themselves provide no objective standard for assessing personal liability for a corporation’s tax obligations. The failure to explain the reasonableness and weight of each factor results in an “I know it when I see it test,” which is no test at all.

By contrast, federal courts construing 26 U.S.C. § 6672(a) have made clear that factors are intended to serve only as a guide — not a mechanistic checklist — for answering the “core question” of whether an “individual has significant control over the enterprise’s finances.” *Fiataruolo*, 8 F.3d at 939 (internal citation omitted); *see also* Michael I. Saltzman, *IRS Practice and Procedure* ¶ 17.07 (2005) (the concept of responsibility connotes more than “corporate title” or a “theoretical authority” to pay over taxes, but rather, “arises out of control actually exercised over the financial operations of the business”); *Cooperstein v. Director, Div. of Taxation*,

¹² *See Matter of Menik*, 280 A.D.2d at 702-703; *Matter of Risoli*, 237 A.D.2d at 677; *Matter of McHugh v. State Tax Commn.*, 70 A.D.2d 987 (3d Dep’t 1979); *Matter of Malkin*, 65 A.D.2d at 231; *Matter of Basch*, 134 A.D.2d at 787; *Matter of Amengual v. State Tax Commn.*, 95 A.D.2d 949, 950 (3d Dep’t 1983).

13 N.J. Tax 68, 82-89, 1993 N.J. Tax LEXIS 8, **21-**33 (Tax Ct. of N.J. 1993) (contrasting New York and federal caselaw).¹³ “This inquiry is the heart of the matter because it identifies most readily the person who could have paid the taxes, but chose not to do so.” *Vinick*, 205 F.3d at 9 (citations omitted). The test “is meant to encompass all those connected closely enough with the business to prevent the tax default from occurring” but it “is not meant to ensnare those who have merely technical authority or titular designation.” *Fiataruolo*, 8 F.3d at 939 (internal quotation marks, brackets and citation omitted). Thus, the most important factors are those which pertain to who had actual control over a corporation’s finances. *See Jean v. United States*, 396 F.3d 449, 454 (1st Cir. 2005) (noting that most important factors are those which “identify most readily the person who could have paid the taxes, but chose not to do so”).

¹³ *See also, e.g., Plett*, 185 F.3d at 219 (the “crucial inquiry is whether the person had the effective power to pay the taxes — that is, whether he had the actual authority or ability, in view of his status within the corporation, to pay the taxes owed”); *Rem*, 38 F.3d at 642 (“the determinative question is whether the individual has *significant control* over the enterprises finances”) (inner quotes and citations omitted, emphasis in original); *Gephart*, 818 F.2d at 473 (test for determining responsibility of a person “focus[es] upon the degree of influence and control which the person exercised over the financial affairs of the corporation and, specifically, disbursements of funds and the priority of payments to creditors”); *Godfrey*, 748 F.2d at 1575 (chairman of the board not liable because there was no evidence he exercised control over collection, accounting for, or payment of taxes; notwithstanding that he took lead in attempting to avoid insolvency, negotiated for loans, sold corporate assets, and otherwise participated in business’s daily operations); *Anderson v. United States*, 561 F.2d 162, 165 (8th Cir. 1977) (for an individual to be considered a “responsible person” under § 6672 “the test is whether the person had the control of the disbursements of the taxpayer, that is, whether ‘he had he final word as to what bills should or should not be paid, and when’”).

D. Petitioner Was Not a “Responsible Person” for Payment of Withholding Taxes Under Tax Law § 685(g).

Given the doctrinal mandate to assure conformity between Tax Law § 685(g) and 26 U.S.C. § 6672(a) — which requires that a person have effective power, actual authority or ability to pay a corporation’s taxes to be held personally liable for them — the conclusion is inescapable that Petitioner was not a responsible person under Tax Law § 685(g).

It was undisputed at Petitioner’s administrative hearing that he had no control over NECC’s finances. The unchallenged testimony of Petitioners’ four witnesses (including himself), along with the sworn affidavits of Anthony Nastasi, established that Nastasi had total, exclusive and complete control over NECC’s financial affairs, including the payment of state and federal taxes, whereas Petitioner:

- Did not control or have any role in NECC’s financial operations;
- Did not have access to NECC’s corporate books and records;
- Did not hire or fire employees;
- Did not have authority over payroll;
- Did not determine which creditors and liabilities would be paid and which would not;
- Did not have access to NECC’s checkbooks; and,
- Did not have the ability to sign a check or cause one to be issued, without Nastasi’s permission.

Based on these facts, the IRS concluded under 26 U.S.C. § 6672 that Petitioner was not a responsible person to pay NECC's federal withholding taxes during the audit period at issue here. This Court should reach the same conclusion under Tax Law § 685(g), not as a matter of deference to the IRS, but rather, because that result is compelled by undisputed facts and federal case law interpreting and applying the responsible person test under 26 U.S.C. § 6672. "Any other conclusion would depart from the statutorily mandated conformity of New York tax law to Federal tax law in the absence of a statutory provision wherein a different meaning is clearly required." *Matter of Webster v. Tully*, 82 A.D.2d 976, 977 (3d Dep't 1981), *aff'd*, 56 N.Y.2d 532 (1982).

1. The Tribunal Applied an Incorrect Test.

Manifestly, the Tribunal did not apply a reasonable person test that conforms to the federal standard. Nowhere in the Tribunal's decision does it state (as federal courts routinely do) that the object of the responsible person test is to determine whether an individual has effective power, actual authority or ability to pay the corporation's unpaid taxes. *See, e.g., Erwin*, 591 F.3d at 321; *Raba*, 977 F.2d at 943; *Plett*, 185 F.3d at 219. Nor does the Tribunal ever state, in words or substance, that the "core" component of the inquiry is whether Petitioner has "significant control" over NECC's finances (as opposed to its "affairs"). *Fiataruolo*, 8 F.3d at 939.

Instead of articulating the correct reasonable person test — or any test at all — the Tribunal simply asserted that “[t]he question of whether someone qualifies as a person under a duty to collect and pay over withholding taxes is a factual one and its resolution turns on a variety of factors.” (R. 57-58 (internal citations omitted).) The Tribunal then listed those factors that purportedly supported its result-oriented decision and ignored the most important factors pertaining to who had significant control over NECC’s finances. (*Id.*)

Moreover, the factors upon which the Tribunal relied are irrelevant given the uncontradicted evidence produced by Petitioner during the hearing. For example, the Tribunal misplaced its reliance on the fact that Petitioner was an officer and majority shareholder of NECC. It is well settled under both state and federal case law that titular authority and stock ownership is legally insufficient to assess personal liability for unpaid taxes, when, as here, the person at issue did not actually exercise control over the corporation’s financial affairs. *See, e.g., Matter of Blodnick v. State Tax Commn.*, 124 A.D.2d 437, 438 (2d Dep’t 1986) (“the holding of corporate office does not, per se, impose [tax] liability upon the officeholder”) (citations omitted); *Matter of Amengual*, 95 A.D.2d at 950 (finding corporate officer

was not responsible for the collection and payment of withholding taxes from the corporation).¹⁴

So, too, the Tribunal ignored a vast body of precedent when it cited Plaintiff's check signing authority and the fact that he filed tax returns on behalf of the NECC. See *Matter of Amengual*, 95 A.D.2d at 950 (finding corporate officer with check-signing authority not a responsible person under Tax Law § 685(g)); *Matter of Fisher v. State Tax Commn.*, 90 A.D.2d 910, 911-12 (3d Dep't 1982) (corporate officer and shareholder, with authority to sign checks, not personally liable under Tax Law § 685(g) to pay delinquent withholding taxes); *Godfrey*, 748 F.2d at 1575 (“[t]he mechanical “duties of signing checks and preparing tax returns are not determinative of liability”). “[C]ase law discloses that authority to sign checks, without more, is a weak pillar on which to rest a liability determination that a person

¹⁴ See also, e.g., *Erwin*, 591 F.3d at 320 (“Titular authority alone does not establish responsible person status.”); *Thosteson v. United States*, 331 F.3d 1294, 1299 (11th Cir. 2003) (“[R]esponsibility is a matter of the power and authority to make payment of withholding taxes, which is not dispositively determined by corporate title or position.”); *Vinick*, 205 F.3d at 14-15 (appellant not a responsible person because he was a passive investor in the corporation and did not possess actual, exercised authority over the company's financial matters); *Adams v. Coveney*, 162 F.3d 23, 28 (1st Cir. 1998) (because president lacked sufficient responsibility over corporation's financial obligations, he was not responsible person); *United States v. Jones*, 33 F.3d 1137, 1139 (9th Cir. 1994) (“Courts must look beyond official titles to the actual decision-making process.”); *O'Connor v. United States*, 956 F.2d 48, 51 (4th Cir. 1992) (reasoning that because a 50% shareholder and vice president of a corporation did not perform duties an officer might perform and did not exercise his authority as an owner and officer, he was little more than a passive investor who neither exercised authority nor had a duty to exercise authority); *Caterino v. United States*, 794 F.2d 1, 5 (1st Cir. 1986) (courts consider a person's actual office function rather than his title); *Bauer v. United States*, 543 F.2d 142, 149 (Ct. Cl. 1976) (“Mere office holding of and by itself does not render one responsible for the collection and paying over of employee withholding taxes.”).

is properly subject to a . . . penalty.” *Vinick*, 205 F.3d at 10 (internal quotation marks and citation omitted).¹⁵ And, in weighing these factors, the Tribunal did not take into account “the context of financial control” within NECC, *id.*, ignoring the fact that Petitioner did not have access to the corporate checkbook and “had absolutely no decision-making authority with regard to paying creditors, or deciding whether funds would go to pay a particular creditor, including the IRS” and state Tax Department, *McGlaughlin*, 2000 U.S. Dist. LEXIS 1944, at *5.

Likewise, the Tribunal erred by affording weight to Petitioner’s management of NECC’s field operations and economic interest in the company, without regard to whether such factors were indicative of Petitioner’s control over the finances of NECC. *See Hochstein v. United States*, 900 F.2d 543, 547 (2d Cir. 1990) (“The district court incorrectly focused on [taxpayer’s] control over [the company’s] operations generally, rather than his control over the finances of the corporation.”).

¹⁵ *See also, e.g., Matter of Amengual*, 95 A.D.2d at 950 (finding corporate officer with check signing authority not responsible for collection and payment of withholding taxes); *Fiataruolo*, 8 F.3d at 939-40 (determining joint project partners, with only the power to write checks on one account, not responsible persons); *Rem*, 38 F.3d at 647 (power to sign checks and hold corporate office “can exist in circumstances where the individual in reality does not possess significant control over corporate finances”); *United States v. Carrigan*, 31 F.3d 130, 134 (3d Cir. 1994) (employee with check-signing authority may not have been a “responsible person” insofar as his control over the affairs of the company was “significantly circumscribed” by others); *Alsheskie v. United States*, 31 F.3d 837, 839 (9th Cir. 1994) (corporate president not personally liable for taxes, although he had sole authority to sign checks, manage day-to-day operations, and hire and fire employees); *Barrett v. United States*, 580 F.2d 449, 453 (1978) (finding corporate director with check-signing authority not a responsible person,” where corporate president controlled which creditors would be paid, including IRS).

While such factors show Petitioner’s involvement in NECC, they do “not indicate financial control, and determining whether [Petitioner] has financial control is the aim of the [responsible person] . . . inquiry.” *Vinick*, 205 F.3d at 37.

Contrary to the Tribunal’s assertion, the fact that Petitioner held himself out as a responsible person, in order to maintain NECC’s MBE status, does not alter the fact that he had no control over NECC’s finances and could not pay its withholding taxes. Holding oneself out as a responsible person does not fit within the typical litany of factors under Tax Law § 685(g) and the two Third Department cases cited by the Tribunal in support of its position — *Matter of McHugh* (70 A.D.2d 987) and *Matter of Amengual* (95 A.D.2d 949) — make no mention of any such factor.

In addition, the Tribunal exalted form over substance by cryptically asserting that it did “not find petitioner’s testimony that his representations to third parties and the Division were ‘inaccurate’ and that he never in fact had authority or control over NECC[.]” (R. 58.) The ALJ, who heard the live testimony of five witnesses, found just the opposite, expressly ruling that Petitioner “deceive[d] the State offices supervising the corporation’s MBE status about his control of the corporation[.]” (R. 119-20.) Not a scrap of evidence before the Tribunal established that Petitioner controlled NECC’s finances. And the Tribunal’s decision is devoid of any analysis of Petitioner’s actual involvement in NECC’s financial affairs.

The Tribunal also misplaced its reliance on factually dissimilar prior rulings of its own,¹⁶ and two Third Department’s decisions, the most recent of which was decided nearly 40 years ago.¹⁷ None of these ruling and decisions referenced federal case law construing the responsible person standard under 26 U.S.C. § 6672.

The Tribunal also violated basic notions of comity between federal and state agencies, by failing to accord any weight to the IRS’ determination that Petitioner was not a responsible person to pay NECC’s taxes, beyond a conclusory assertion that the Tax Division was free to conduct its own examination and reach its own conclusion. (R. 60.) “Comity between state and federal authorities, and the sanctity of decisions of federal and state agencies founded for like objectives, should deter [the Tribunal] from acting as an appellate court over the decisions of [the IRS], unless competent proof of a strong nature is adduced to overcome the finality and presumption of regularity of the previous adjudication of the agency of first

¹⁶ *Matter of Jessie Luongo*, DTA 822823, 822517 (N.Y.S. Tax App. Trib., July 10, 2012), <https://www.dta.ny.gov/pdf/archive/decisions/822823.dec.pdf>; *Matter of Harshad Shah*, DTA 814588, 8145889 (Tax App. Trib., Feb. 25, 1999), <https://www.dta.ny.gov/pdf/archive/Decisions/814588.dec.pdf>; *Matter of Frank S. Constantino*, DTA 802335 (Tax App. Trib., Sept. 27, 1990), <https://www.dta.ny.gov/pdf/archive/Decisions/802335.dec.pdf>; *Matter of Frank A. Moscheto*, DTA No. 821443 (Tax App. Trib., Mar. 17, 1994), <https://www.dta.ny.gov/pdf/archive/decisions/821443.dec.pdf>; *Matter of Benjamin K. Chin*, DTA No. 802832, 802500 (Tax App. Trib., Dec. 20, 1990), <https://www.dta.ny.gov/pdf/archive/decisions/802832.dec.pdf>.

¹⁷ *Matter of Amengual*, 95 A.D.2d 949 (3d Dep’t 1983); *Matter of McHugh v. State Tax Commn.*, 70 A.D.2d 987 (3d Dep’t 1979).

decision.” *Lande v. McGoldrick*, 132 N.Y.S.2d 661, 662-63 (Sup. Ct. Kings Cnty. 1954).

In sum, it was irrational for the Tribunal to impose on Petitioner a 100% penalty for the non-payment of NECC’s taxes. NECC was a “one man show” and Petitioner was not that man. Anthony Nastasi had total control over NECC’s disbursements and only he had effective power to pay the taxes. Petitioner was “obviously a straw man used to get minority business enterprise contract work for the Nastasi interests.” Emma M. Savino & Christopher L. Doyle, *Taxes in New York Report for August 13, 2020* (August 18, 2020), <https://www.hodgsonruss.com/blogs-State-and-Local-Tax-Blog.tiny-report-for-august-13-2020-reporting>. That

Petitioner “ended up holding the bag for the withholding taxes is tragic.” *Id.*

2. The Tribunal’s Interpretation of Tax Law § 685(g) is Not Entitled to Deference.

The Third Department erred by giving lip service to the doctrine of federal conformity, but then failed to cite any federal case law construing 26 U.S.C. § 6672, holding instead that the Tribunal’s interpretation of Tax Law § 685(g) was entitled to deference and not “contrary to that found under federal law.” (R. 915.)

No deference is owed to the Tribunal’s interpretation of Tax Law § 685(g). CPLR article 78 permits a petitioner to challenge an agency “determination . . . affected by an error of law.” CPLR 7803(3). The “error of law” standard queries whether the agency “properly analyzed the law.” *New York Times Co. v. City of N.Y.*

Commn. on Human Rights, 41 N.Y.2d 345, 349 (1977). Under that standard, this Court has not hesitated to strike down the Tribunal’s erroneous interpretations of the Tax Law, including when, as here, it misapplies statutes in an adjudicatory proceeding. *See, e.g., Matter of Gaied v. State Tax Appeals Trib.*, 22 N.Y.3d 592, 597 (2014) (overturning Tribunal determination based on a standard that erroneously interpreted the Tax Law). This is especially true, in the present case, where the Tribunal was required to conform its interpretation of Tax Law § 685(g) with 26 U.S.C. § 6672. Whether the Tribunal complied with this mandate raises a pure question of law for which no deference is owed.

Also, the Third Department repeated the Tribunal’s error and decided this case without applying any legal standard. Instead, the majority asserted that the applicable test is factual, cited a few factors, and declared that it could not disturb the Tribunal’s determination because “evidence in the record” existed to support a conclusion other than that “Nastasi exerted control over NECC’s financial responsibilities.” (R. 917.) As revealed by even a cursory comparison of the majority and dissent’s respective articulations of the responsible person test, the majority’s single sentence standard (based on a case decided more than 40-years ago) does not conform to the comprehensive test applied by federal courts under 26 U.S.C. § 6672.

E. Even if Petitioner Was Under A Duty to Pay NECC'S Withholding Taxes, His Failure to Pay Was not Willful.

The same unrefuted evidence establishing that Petitioner was not a person under a duty to ensure that NECC's employee withholding taxes were paid, also compels the conclusion that he did not willfully fail to pay such taxes, as required by Tax Law § 685(g). The Tribunal erred as a matter of law concluding otherwise.

The test of 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." *Matter of Levin*, 42 N.Y.2d at 34. This test does not assign strict liability to a responsible party who, for whatever reason, fail to pay over taxes through no fault of their own. *See Slodov*, 436 U.S. at 254 ("Section 6672 cannot be read as imposing upon the responsible person an absolute duty to 'pay over' amounts which should have been collected and withheld. The fact that provision imposes a 'penalty' and is violated only by a 'willful failure' is itself strong evidence that it was not intended to impose liability without personal fault. Congress, moreover, has not made corporate officers generally, and § 6672 therefore should be construed in a way which respects that policy choice."). To the contrary, liability is limited only to those who are personally at fault. *See id.*

Here, Petitioner had no authority or ability to pay NECC's employee withholding taxes when they became due and owing in 2014 and 2015. And, prior

to that time, Petitioner had no reason to believe that Anthony Nastasi failed to discharge his obligation to pay NECC's taxes. It is undisputed — and undisputable — that when NECC's tax liability at issue came to fruition, Petitioner could not pay the taxes himself and was powerless to force Anthony Nastasi to pay them. Nastasi kept NECC's checkbook in a safe in his office and had sole physical control over it. Nastasi's office was located at N&A's offices, many miles from Petitioner's office. (R. 103, 112, 359-60, 367-68, 410, 446.) Petitioner had no access to NECC's checkbook nor the effective power to direct NECC's comptroller to issue a check to any creditor, let alone the IRS and Tax Department. (*Id.*) Anthony Nastasi, and only Anthony Nastasi, could make that decision. Despite repeated requests of Petitioner and NECC's general counsel and comptroller, beseeching Nastasi to make those payments, Nastasi refused to do so. (R. 105, 107, 360-61, 366, 373-74, 399, 412-13, 429-31, 442-44, 447, 449-51.)

By any measure, Petitioner's conduct does not satisfy the willfulness requirement. *See Matter of Fisher v. State Tax Commn.*, 90 A.D.2d 910, 912 (3d Dep't 1982) (finding that officer and stockholder of a corporation, with check signing authority, had not willfully failed to pay the taxes, because he "continually emphasized" to the corporation's president that the taxes had to be paid; "specifically inquired" as to the status of payment; and, in response, was advised payment was made).

As the Third Department dissent points out, it was irrational for the Tribunal to fault Petitioner for continuing to rely on Nastasi to pay NECC's taxes, after Petitioner learned Nastasi had not done so. (R. 923.) From NECC's inception in the 1990s, the Nastasi family controlled the corporation's financial operations. (R. 100, 116-17, 352, 393.) This relationship was ultimately memorialized in 2005 when Petitioner signed an agreement that gave Nastasi effective control of 95% of NECC's stock along with the right to fire Petitioner at any time, for any reason. (R. 102, 116-17, 356-57, 378, 411.) During the audit period nine years later, Petitioner was powerless to pay NECC's withholding taxes and could not compel Nastasi or anyone else to do so. (R. 110-11, 311-21, 429, 444-45, 447, 802-16.) In such circumstances, where Petitioner was not at fault for NECC's nonpayment, no decision of this Court or any other has found the willfulness requirement satisfied. *See McGlaughlin*, 2000 U.S. Dist. LEXIS 1944, at *4 to *6 (corporate director not responsible person, even though he had knowledge of delinquent trust fund taxes and possessed certain operational authority, because his authority was subject to corporation's president). As pointed out by the Third Department dissent, the Tribunal misread existing precedent, and, by so doing, erroneously transformed Tax Law § 685(g) into a strict liability statute. (R. 922.)

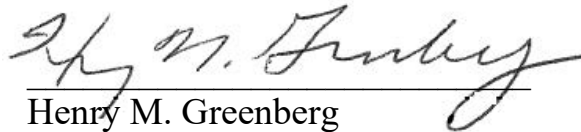
CONCLUSION

For the reasons set forth above, this Court should (1) reverse the Memorandum and Judgment of the court below, (2) grant the Petition; (3) annul the August 6, 2020 Determination of the Tax Appeals Tribunal in *Matter of the Petition of Christopher Black for Redetermination or for Refund of Personal Income Tax Under Article(s) 22 of the Tax Law for the Period December 31, 2014, February 27, 2015, March 31, 2015 and June 30, 2015*; and (4) cancel the Notices of Deficiency in their entirety.

Date: January 9, 2023
Albany, New York

Respectfully submitted,

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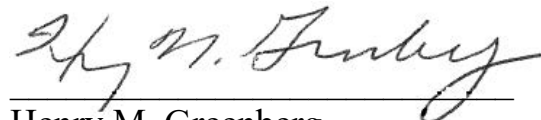
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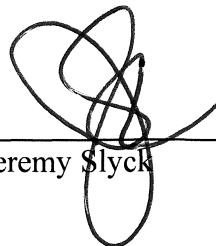
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Jeremy Slyck