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.

REPLY BRIEF FOR PETITIONER-APPELLANT

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PRELIMINARY STATEMENT[1]

What legal test should the Tribunal apply to determine whether an officer or employee of a company is a "responsible person" under New York Tax Law § 685(g), making him or her personally liable for 100% of the company's unpaid taxes? Is it the same test applied by the IRS and federal courts under a parallel statute, 26 U.S.C. § 6672(a), where the crucial inquiry is whether the person, by virtue of his or her position in the company, had the effective power to pay the taxes owed based on actual authority or ability to make the payment? This case of first impression turns on these very questions. And Respondents' Brief serves only to demonstrate that the Tribunal violated the doctrine of federal conformity by applying a different test under Tax Law § 685(g) than the federal test.

Indeed, Respondents concede the Tribunal applied a "sufficient authority and control" standard when it found Petitioner qualified as a responsible person under Tax Law § 685(g). However, "sufficient authority and control" is an amorphous phrase that has never been invoked by a federal court as a legal test or standard under 26 U.S.C. § 6672(a). Like the Appellate Division majority, the Tribunal failed to set forth and apply the federal test (or cite any federal case law) and therefore reached an erroneous determination — one contradicted by the uncontested evidence

[1] In this Reply Brief, Petitioner uses the same defined terms used in his opening brief, which is referred to herein as the "Opening Brief" and cited as ("Pet's Brief"). The "Brief for Respondent Commissioner" is referred to herein as "Respondents' Brief" and is cited as "Resp's Brief."

produced at Petitioner's hearing and at variance with the IRS' ruling that Petitioner was not a responsible person under 26 U.S.C. § 6672(a).

Wholly with merit is Respondents' attempt to have this Court rubber stamp the Tribunal's Determination by hiding behind the deferential substantial evidence standard. It is well settled that when, as here, the dispositive issue on appeal is one of statutory interpretation, this Court will engage in de novo review of the statutory interpretation and need not accord any deference to the agency's determination. Whether the Tribunal correctly interpreted Tax Law § 685(g) is a pure question of statutory construction, and no deference should be accorded the Tribunal's interpretation.

Finally, Respondents' argument that Petitioner's inability to collect and remit withholding taxes was willful is meritless. It was undisputed at Petitioner's hearing that he was powerless to direct NECC's trust fund monies be paid to the Tax Department.

ARGUMENT

I. THE TRIBUNAL'S DETERMINATION WAS AFFECTED BY AN ERROR OF LAW AND SHOULD BE ANNULLED.

A. The Substantial Evidence Standard is Inapplicable.

Desperate to create obstacles to prevent reaching the merits of this case, Respondents urge the Court to apply the deferential substantial evidence standard of review for article 78 proceedings that turn on contested questions of fact. (Resp's

Brief at 24-33.) Such standard, however, is inappropriate to resolve the question presented here: whether the Tribunal erred, as a matter of law, by applying an incorrect responsible person test under Tax Law § 685(g). Respondents cannot transmute this question of statutory interpretation into one of fact.

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 "simply whether the [agency] properly analyzed the law." *New York Times Co. v. City of N.Y. Comm'n on Hum. Rts.,* 41 N.Y.2d 345, 349 (1977); *see also Solnick v. Whalen,* 49 N.Y.2d 224, 231 (1980) (article 78 proceeding challenging procedures used to revise Medicaid reimbursement rates is "available as a question for review in such a proceeding under the third question authorized by CPLR 7803 — whether the 'determination was . . . affected by an error of law'").

This Court has recognized "errors of law" exist where an administrative agency misapplies a governing statute, applies an incorrect standard, or relies on inapplicable case law. *See, e.g., White v. Cnty. of Cortland,* 97 N.Y.2d 336, 339-40 (2002) (hearing officer applied an incorrect and heightened standard of proof in determining if petitioner was eligible for disability benefits under General Municipal Law § 207-c); *Tobin v. Steisel,* 64 N.Y.2d 254 (1985) (vacating agency determination because it applied an incorrect legal standard). Of particular relevance here, the Court has struck down erroneous interpretations of the Tax Law by the

Tribunal, including when it misapplies the law in an adjudicatory proceeding. *See, e.g., Matter of Gaied v. New York State Tax Appeals Trib.,* 22 N.Y.3d 592, 597 (2014) (overturning Tribunal determination based on an erroneous interpretation of the Tax Law and, in so doing, reversed a decision of the Third Department that upheld the Tribunal's determination based on the substantial evidence standard); *see also Matter of Walsh v. New York State Comptroller,* 34 N.Y.3d 520, 523-524 (2019) (where dispositive issue is one of statutory interpretation, court will "engage in de novo review of the statutory interpretation" and "need not accord any deference to the agency's determination") (internal quotation marks and citation omitted).

Not to the contrary is *Matter of Levin v. Galman,* 42 N.Y.2d 32 (1977), upon which Respondents rely. (Resp's Brief at 28.) In *Matter of Levin,* this Court (1) interpreted Tax Law § 685(g)'s willfulness' requirement and then (2) applied its interpretation to the facts of the case. Contrary to Respondents' assertion, the Court did not apply the substantial evidence standard in the process of interpreting § 685(g). Rather, the Court treated its interpretation of § 685(g) as a question of law to resolve de novo, noting that "[n]o prior New York authorities have defined 'willful' as used in this statute." *Id.* at 33-34. Moreover, in sharp contrast to the Tribunal and Appellate Division majority, the Court based its statutory interpretation entirely on federal court decisions construing 26 U.S.C. § 6672. *See id.* at 34 ("we adopt the Federal definition of 'willful' as so defined" by federal case law) (citing

Tax Law § 607(a)). Only in its application of the law to the facts of the case did the Court defer to the agency's factual determinations. *Id.*

B. The Tribunal Applied an Incorrect Responsible Person Test.

Turning to the case at hand, the Tribunal and ALJ clearly applied a version of the responsible person test for Tax Law § 685(g) that is different from the one applied by federal courts under 26 U.S.C. § 6672(a). Federal law is settled and crystal clear: the "crucial inquiry" under the responsible person test "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." *Barnett v. IRS,* 988 F.2d 1449, 1454 (5th Cir. 1993) (citations omitted). (*See also* cases cited in Pet's Br. at 26-29.) The Tribunal's Determination made no mention of this "crucial inquiry" or that it plays any role under Tax Law § 685(g).

Instead of setting forth the federal test, the Tribunal simply declared 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 (citations omitted).) The Tribunal then enumerated a handful of factors, applied some of them to the facts of the case, and concluded that Petitioner "was actively involved in NECC's operations and possessed *sufficient authority and control* over its financial affairs to qualify as a person responsible for collecting and remitting NECC's withholding taxes pursuant to Tax Law §§ 685(g) and (n)."

(Resp's Brief at 2 (emphasis added); *see also id.* at 4 ("the Tribunal's determination that petitioner exercised *sufficient control* over NECC to be personally liable as a responsible person for withholding taxes owed by NECC in 2014 and 2015") (emphasis added).) Similarly, the ALJ stated that the question whether someone is a responsible person turns on whether the individual had or could have had "'*sufficient authority and control over the affairs of the business* to be considered a responsible officer or employee,'" based on a consideration of certain factors. (R. 114 (emphasis added).)

There is a seismic difference between, on the one hand, the Tribunal's "sufficient authority and control" analysis under Tax Law § 685(g) and, on the other hand, the federal test under 26 U.S.C. § 6672 that a person have "effective power" to pay the tax at issue — that is the actual authority or ability to do so. "Sufficient authority and control" is not a legal test. It is an amorphous phrase that merely begs the question: How much authority and control is sufficient to qualify as a responsible person? So, too, the factors cited by the Tribunal are not an applicable standard, but rather, merely relevant considerations or guideposts to be considered in determining whether a person has the effective power, actual authority or ability to pay the tax. *See Rogers v. United States,* No. 13-cv-3544, 2015 U.S. Dist. LEXIS 45057, at *10 (S.D. Tex. Feb. 11, 2015) ("the presence of one or more . . . factors often indicates that an individual has actual authority to pay the taxes, it is that authority — and not

any particular combination of . . . factors — that makes an individual liable for penalties under § 6672.") (citing *Barnett v. I.R.S.,* 988 F.2d 1449, 1454 (5th Cir. 1993)). The Tribunal's purported test amounts to nothing more than a *post hoc* justification for a preferred result.

Moreover, the Tribunal's standardless analysis allows personal liability to be imposed on an individual (such as Petitioner) who (as the Record makes clear) was not actually responsible for the corporation's failure to pay the tax. This is not possible under 26 U.S.C. § 6672(a)'s responsible person test. *See Cooperstein v. Div. of Taxation,* 13 N.J. Tax 68, 82-89, 1993 N.J. Tax LEXIS 8, **21-**33 (Tax Ct. of N.J. 1993) (comparing and contrasting New York and federal caselaw, noting that "[t]he personal liability concept, as revealed by the federal decisions. . . reach[es] the party or parties actually responsible for the corporation's failure to pay the tax").

Tellingly, only after this CPLR article 78 proceeding was commenced did Respondents acknowledge that "actual authority" must be shown under Tax Law § 685(g). (R. 915 ("there is no dispute that . . . both the state and federal statutes 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"); Resp's Brief at 39-40 ("[b]oth the federal and the state statutory schemes require a showing that the taxpayer have actual authority").) In its Determination, however,

the Tribunal did not explain or support its determination by use of the phrase "actual authority" or any other synonymous words or phrases. Likewise, the Tribunal failed to cite a single federal case, notwithstanding this Court's decision in *Matter of Levin,* 42 N.Y.2d at 34, which relied exclusively on federal court decisions construing 26 U.S.C. § 6672 in interpreting Tax Law § 685(g)'s willfulness requirement. Thus, there is no substance to Respondents' assertion that the Tribunal has "interpreted the latter consistently with how federal courts have interpreted the former." (Resp's Brief at 39.)

Further, the Tribunal's failure to apply the correct standard has led to precisely the outcome the doctrine of federal conformity aims to prevent — namely, Respondents have reached a result in this instance that is diametrically different from the IRS' determination on the exact same issue. That outcome, in this very case, has caused tax experts to express concern. *See, e.g.,* Hollis L. Hyans, *Tribunal Affirms Decision Sourcing "Other Business Receipts" to Where the Work was Performed*, MOFO New York Tax Insights, Sept. 2019, at 6 ("The ALJ's determination is notable because it finds the responsible person test to be satisfied despite evidence in the record tending to demonstrate that Mr. Black did not exert actual control over the corporation's finances. Indeed, the IRS found that Mr. Black was not a responsible person under a similarly worded statute, and an affidavit from Mr. Nastasi supported Mr. Black's claims that he exercised no actual control over the

corporation's finances or tax responsibilities."), https://assets.contentstack.io/v3/assets/blt5775cc69c999c255/blt66d74fa0b537f086/190903-ny-tax-insights.pdf (last viewed on May 24, 2023).

Finally, Petitioner cannot let pass unnoticed Respondents' misleading assertion that there are "50 years of case law" handed down by "state courts" uniformly construing Tax Law § 685(g)'s responsible person test. (Resp's Brief at 1, 39.) Respondents fail to acknowledge that the most recent decision to which they refer was decided more than a quarter-century ago, and that such decision, along with all the other state responsible person cases cited in their brief, come from a single court: the Appellate Division, Third Department.[2] The vacuum created by the paucity of Third Department case law construing the responsible person test — coupled by the lack of a definitive interpretation by this Court — has been filled by the Tribunal, which has developed a body of internal jurisprudence unmoored from federal law.

C. The Tribunal Made No Finding As to Petitioner's Credibility.

Likewise unavailing is Respondents' attempt to cloud the legal questions presented here, by disingenuously asserting that the Tribunal's Determination "implicitly rejected . . . as lacking in credibility" Petitioner's claim that he lacked

[2] Pursuant to Tax Law § 2016, only the Third Department hears appeals taken from Tribunal determinations.

effective power and actual authority or ability to pay NECC's taxes, and that such "finding" is beyond judicial review. (Resp's Brief at 24-25; *see also id.* at 32-36.) This argument is based on a cryptic reference in the 23-page Determination to "substantial evidence demonstrating just the opposite" of a position taken by Petitioner. (R. 58.) But these few words do not bear the weight Respondents place on them. (R. 39-61.)[3] Not even the Appellate Division majority suggested that the Tribunal made any findings based on a credibility assessment of Petitioner.

In fact, the Determination does not discuss, let alone question, the veracity of any witness called by Petitioner during his hearing before the ALJ. This is because the Tax Division never argued below that the sworn testimony and affidavits adduced by Petitioner were untruthful or perjurious. Notably, the ALJ, who heard the live testimony, credited the testimony of Petitioner and his witnesses, finding that Petitioner gave "exclusive authority to another corporate officer to control [NECC's] financial affairs, including the proper payment of taxes" (R. 117), but nevertheless found Petitioner personally liable because he had "sufficient authority" (R. 120-21).

[3] In a similar vein, Respondents imagine that the Tribunal made a finding that "petitioner wielded a substantial amount of power over NECC's finances[.]" (Resp's Brief at 35.) Respondents cite to nothing in the Determination to support this assertion because the Tribunal made no such finding.

D. Federal-State Comity Required the Tribunal to Give Proper Regard to the IRS' Parallel Determinations.

Also meritless is Respondents' contention that it is of "no relevance" that the IRS found Petitioner not personally liable to pay NECC's taxes under 26 U.S.C. § 6672(a), during the same tax-periods at issue here. (Resp's Brief at 4; *see also* R. 60 (Tribunal rules that it is not required "to give deference to a factual determination of the IRS regarding the status of a responsible person").)

Respondents' position, if accepted, would eviscerate the doctrine of federal conformity. Tax Law § 607(a) expresses a policy of comity that, when exercising any legislatively-authorized-powers that parallel a provision of federal tax law, Respondents must comply with the judicial and administrative interpretations of that federal statute. *See Hunt v. State Tax Comm'n,* 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"); *Friedsam v. State Tax Comm'n,* 64 N.Y.2d 76, 80 (1984) (Tax Law § 607(a) provides "a statutory mandate to assure conformity" between federal and state law). This avoids the anomalous result of a taxpayer achieving a different result regarding payment of a New York tax where the New York tax provision is modeled after a federal tax provision. *See. e.g., Michaelsen v. New York State Tax Comm'n,* 67 N.Y.2d 579, 583 (1986) (noting that "New York income tax law evinces a strong intent to conform to Federal authority wherever possible" and considering federal regulations in determining

proper New York tax treatment); *Delese v. Tax Appeals Tribunal of N.Y.,* 3 A.D.3d 612, 613 (3d Dep't 2004) (holding that Tribunal properly "utilized federal regulations" in interpreting a "federal statute which was expressly incorporated into [state] Tax Law," and noting state's long-held policy to "adopt, whenever reasonable and practical, the Federal construction of substantially similar tax provisions"); *Webster v. Tully,* 82 A.D.2d 976, 976-77 (3d Dep't 1981) ("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."), *aff'd,* 56 N.Y.2d 532 (1982) (internal quotations and citations omitted).

Applying this principle here compels the conclusion that the Tribunal erred by failing to give proper regard to the IRS's ruling involving Petitioner. Respondents concede, as they must, that Tax Law § 685(g) is inextricably keyed to 26 U.S.C. § 6672(a) of the Internal Revenue Code. (Resp's Brief at 39 ("there is no dispute that the applicable federal statute, 26 U.S.C. § 6672, and New York Tax Law §685(g) are parallel statutes").) Nor do Respondents dispute that the IRS's finding that Petitioner was not a responsible person for NECC's federal unemployment trust fund taxes covers the same audit period at issue in this proceeding.

Thus, Respondents' dismissal of the IRS' rulings as of "no relevance" violates basic norms of federal-state comity.[4]

II. PETITIONER'S INABILITY TO PAY NECC'S WITHHOLDING TAXES WAS NOT WILLFUL.

Unable to persuasively answer Petitioner's uncontradicted evidence and case law regarding Tax Law § 685(g)'s willfulness requirement, Respondents' construct a strawman argument based on a fictitious legal standard. Specifically, Respondents argue that a person who fails to pay withholding taxes will be deemed to have acted willfully unless they can establish "accidental nonpayment." (Resp's Brief at 38 (quoting *Matter of Levin,* 42 N.Y.2d at 34).) But that is not and has never been the standard for determining willfulness. "Willfulness under Tax Law § 685(g) may be found when '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,'" and that standard requires a showing of "'something more than accidental nonpayment.'" *Hopper v. Comm'r of Taxation &*

[4] The two cases cited by Respondents are inapposite. (Resp's Brief at 48.) *Matter of Fisher v. Levine,* 36 N.Y.2d 146 (1975) is not a tax case and therefore is not subject to Tax Law § 607(a)'s express mandate. Also inapposite is *Ross-Viking Mdse. Corp. v. Tax Appeals Trib. of State of N.Y.,* 188 A.D.2d 698 (3d Dep't 1992). There, in contrast to the present case, the petitioner did "not cite any law which suggests that respondents are bound by the Federal determination" at issue. *Id.* at 699. Furthermore, the court ruled that the federal determination, while not binding, "may have persuasive value"; whereas here Respondents reject as "not relevant" an IRS ruling involving Petitioner during the same tax periods at issue here. *Id.* at 700.

Fin., 224 A.D.2d 733, 738 (3d Dep't 1996) (quoting *Matter of Levin,* 42 N.Y.2d at 34), *lv. denied,* 88 N.Y.2d 808 (1996).

Here, Petitioner did not and could not direct NECC's trust fund monies to the Tax Department (or anyone else), because he was powerless to do so. As such, the willfulness requirement was not satisfied.

CONCLUSION

For the reasons set forth above and in Petitioner's Opening Brief, 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: May 30, 2023
Albany, New York

Respectfully submitted,

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NEW YORK STATE COURT OF APPEALS
CERTIFICATE OF COMPLIANCE

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Date: May 30, 2023
Albany, New York

Respectfully submitted,

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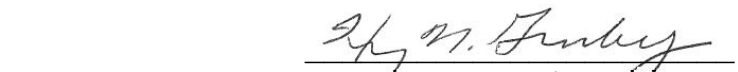

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