

No. APL-2022-00109

To be argued by:
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State of New York
Court of Appeals

In the Matter of the Application of
CHRISTOPHER BLACK,

Petitioner-Appellant,

v.

TAX APPEALS TRIBUNAL OF 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,

For a Judgment Pursuant to Article 78
of the Civil Practice Law & Rules.

BRIEF FOR RESPONDENT COMMISSIONER

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PRELIMINARY STATEMENT

For over 60 years, Tax Law § 685(g) has provided that employees who are required to collect and remit withholding taxes on behalf of their business may be held personally liable for their willful failure to collect and pay such taxes.¹ And during this time, the Tax Appeals Tribunal and state courts have consistently employed a familiar set of factors to determine whether a business's employee may be held responsible under this provision for that business's uncollected and unpaid withholding taxes, including the nature and degree of the taxpayer's status, involvement and control over his or her company's business affairs. This analysis is often referred to as the "responsible person test."

Petitioner was the president and majority shareholder of New England Construction Company, Inc. ("NECC"). Following an audit, respondent Commissioner of Taxation and Finance determined that petitioner was a responsible person and thus was

¹ Withholding taxes are personal income taxes on employees' wages, salaries, bonuses, commissions, and other similar income that employers are required to withhold from these wages and pay to the Department. Tax Law §§ 671, 674.

personally liable for withholding tax deficiencies owed by his business between October 1, 2014 and February 18, 2015. In particular, based on multiple representations by petitioner in the company's official records, the Tribunal found that he 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), but willfully failed to do so. In so holding, the Tribunal rejected as not credible petitioner's explanation that he was merely an employee with no real authority over NECC's affairs, falsely representing that he had authority in order to qualify the company for benefits as a minority-owned enterprise.

Petitioner challenged the Tribunal's decision by commencing an article 78 proceeding in the Appellate Division, Third Department. A three-Justice majority upheld the Tribunal's determination on the ground that it was supported by substantial evidence, given the numerous documents before the Tribunal establishing petitioner's control over NECC. Two justices dissented and would have

annulled the Tribunal's decision. The dissent accepted petitioner's disavowal of his prior representations of authority and assertion that he was little more than an employee of a company controlled by someone else, and further agreed that the Tribunal's § 685 analysis was irrational because it departed from the way federal courts construe the parallel federal "responsible person" statute. *See* 26 U.S.C. § 6672. Petitioner appealed as of right based on the two-justice dissent.

This Court should confirm the Third Department's decision. The Tribunal's determination is amply supported by substantial evidence, comprising numerous contemporaneous documents in which petitioner evidenced his power over NECC, especially its tax obligations. And the Tribunal's rejection of petitioner's defense that he falsified those documents solely to retain benefits for NECC as a minority-owned business was an "unassailable" credibility determination that was not subject to judicial review. *Matter of Berenhaus v. Ward*, 70 N.Y.2d 436, 443 (1987).

Finally, this Court should reject petitioner's untenable claim that the Tribunal's analysis conflicts with federal "responsible

person” jurisprudence and thus violates the doctrine of federal conformity. Likewise, although a 2012-2014 audit performed by the Internal Revenue Service (IRS) had previously found that petitioner was not a responsible person of NECC, that determination was based on a different factual record from the one considered by the Tribunal. The IRS’s conclusion was not binding on the Tribunal and is of no relevance here. For all these reasons, as more fully explained below, this Court should not disturb the Tribunal’s decision.

QUESTIONS PRESENTED

1. Was 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 rational and supported by substantial evidence, where the contemporaneous documentary record demonstrated that petitioner possessed and exercised significant actual authority over the financial affairs of the corporation?

2. Was the Tribunal's determination that petitioner acted willfully in failing to pay NECC's withholding taxes rational and supported by substantial evidence?

3. Did the Tribunal and the Third Department properly reject petitioner's argument that the Tribunal's analysis violated the doctrine of federal conformity, where (1) the Tribunal's legal analysis was consistent with federal cases construing the parallel federal statute, 26 U.S.C. § 6672; and (2) the difference between the determinations of the state Tribunal and the IRS audit is factual in nature and can be explained by the fact that the two decisions were made on different records?

STATEMENT OF THE CASE

A. Statutory Provision

This case involves the application of Tax Law § 685(g), which provides that “[a]ny person required to collect, truthfully account for, and pay over the tax imposed by [article 22, Personal Income Tax]” and who “willfully fails” to do so shall be liable for the amount of the tax not collected and interest in the form of a responsible person penalty.

B. The Notices of Deficiency

During the tax periods at issue, petitioner was president and 51% shareholder of NECC (R.351-352), a New York “S” corporation that petitioner formed in 1994. (R.345-348, 820-829.) NECC was engaged in the business of interior finish construction, including drywall construction, acoustical ceilings and millwork.

The Department’s audit and resulting notices of deficiency were prompted by NECC’s filing of NYS-45 forms (“quarterly combined withholding, wage reporting and unemployment insurance returns” [hereinafter “withholding tax returns”]) for the quarters ending December 31, 2014, March 31, 2015 and June 30, 2015. (R.595-605.) On all three returns, NECC reported that it owed withholding taxes, but it did not pay those taxes. Only one return, for the quarter ending December 31, 2014, was accompanied by a check (signed by petitioner), and that check was intended for only the unemployment insurance amount due and not the withholding taxes. (R.598.) The withholding tax deficiencies for the three quarters totaled \$378,658.37. (R.41.)

In December 2015, the Department concluded that petitioner was an officer responsible for collecting and remitting NECC's withholding tax under § 685(g) and accordingly issued three notices of deficiency against petitioner, asserting responsible person penalties resulting from outstanding withholding tax liabilities for the tax periods ending December 31, 2014, March 31, 2015, and June 30, 2015. (R.506-518.)

Petitioner opposed the notices, arguing that only a business partner named Anthony Nastasi ("Nastasi") had actual authority and control over NECC's affairs. After petitioner's initial objections were denied at a conciliation conference (R.504-505), petitioner filed a petition in the Division of Tax Appeals contesting the notices of deficiency. (R.62-90; *see* R.499-503 [the Division's answer].)

C. The Hearing in the Division of Tax Appeals

1. Petitioner forms NECC

The following facts are based on the hearing evidence before the Division of Tax Appeals. Reviewing the history of NECC, petitioner testified that in 1986, he had entered a four-year apprenticeship training program with a firm called Nastasi White,

a drywall company owned by brothers Frank (father of Anthony Nastasi) and Tom Nastasi. After Nastasi White splintered into two companies, petitioner joined the one that became Nastasi and Associates, Inc., which had been started by Frank Nastasi and Jerry Marchelletta. (R.344-345.) In 1994, petitioner incorporated NECC with his brother Walter, as the two original shareholders. (R.346, 820-829). Petitioner testified that his purpose in forming NECC was to have it certified as a minority-owned business enterprise (“MBE”), which according to petitioner allowed it “to get access to minority contracts that have minority goals attached to them.” (R.348-353.)

At some unspecified point, petitioner asked Nastasi and Associates whether he could do that company’s “minority participation work” in relation to contracts with governmental entities that required a certain amount of the work force on any contract to be supplied by an MBE (R.349). In 1995 or 1996, Frank Nastasi and Jerry Marchelletta invested money in NECC, with two sons of each becoming shareholders in the corporation. That investment resulted in petitioner becoming a 51% shareholder of NECC, with

the remaining 49% owned by four others: the two sons of Jerry Marchelletta and the two sons of Frank Nastasi, including Anthony Nastasi. (R.348-352.)

Anthony Nastasi became more involved in the financial management of Nastasi and Associates as his father Frank developed serious health issues and eventually died in 2005. (R.353-354.) Anthony Nastasi then bought out his brother's interest and took over ownership of Nastasi and Associates. Anthony Nastasi eventually also bought out the interests of Marchelletta's two sons in NECC and acquired a 44% interest in that company (R.344-345).² Petitioner testified that Anthony Nastasi had invested as much as \$6 million in NECC, while petitioner's own investment was only around \$200,000. (R.354.) However, this investment by Anthony Nastasi was not reflected on NECC's balance sheets for the 2014 and 2015 tax years. (R.385-392, 544, 582.)

² The remaining 5% was owned by a Richard Lee, who was not involved in NECC's management. (R.831.)

In December 2005, petitioner entered into an agreement with Nastasi and Associates concerning the potential sale of his shares in NECC, the satisfaction of a \$4 million debt NECC owed to Nastasi and Associates, and the distribution of any remaining assets after satisfaction of the debt. (R.830-831.) Contrary to petitioner's claim (Br. at 10), this agreement did not "effectively cede[]" control over the business to Anthony Nastasi. The agreement said nothing about the on-going management of the business or responsibility to pay its taxes. Rather, it provided for the future disposition of shares and assets, as well as petitioner's resignation from his position as NECC's president, upon demand by Nastasi.

Specifically, the agreement recited that "[w]hereas [NECC] was indebted to [Nastasi and Associates] for more than [\$4,000,000.00], and the parties desire to order their relationship in the event of certain contingencies," the parties agreed that "[u]pon the written demand of Anthony Nastasi," petitioner would resign his position as NECC's president and would be deemed to have sold to Anthony Nastasi his 26 shares of NECC common stock for \$26, with all NECC assets remaining after the satisfaction of its debt to

Nastasi and Associates being distributed among Anthony and Tom Nastasi (70%), petitioner (25%), and another shareholder named Richard Lee (5%). (R.355-357, 830-831.) Petitioner explained that he signed this agreement because Nastasi and Associates was “one of the most powerful drywall companies in the New York area,” so “it sounded like a good fit for me.” (R.396.)

Petitioner testified that in February 2015, as NECC’s tax woes worsened, he was approached by Anthony Nastasi with a request to complete a questionnaire provided by an attorney representing a carpenter’s union that was disputing NECC’s failures to provide benefits to NECC’s unionized employees (R.196-198). Petitioner refused to do so, stating that he was being advised by his counsel, whom he did not identify, “Not to fill this out due to not having any Control of the \$.” (R.837.) Anthony Nastasi then sent an email firing petitioner and invoking the December 2005 agreement in which petitioner had agreed to relinquish his interest in NECC. (R.836-842.)

2. The ALJ considers multiple documents establishing that petitioner exercised significant control over NECC's financial affairs

The Department presented multiple contemporaneous documents demonstrating that petitioner exercised significant control over NECC's financial matters, especially its tax obligations. Lori Bishop, the Department's tax compliance agent who had reviewed NECC's tax documentation for 2014 and 2015, testified that she reviewed the following 11 sets of documents, including one in which petitioner had expressly represented himself to the Department as a responsible person for NECC with authority to manage its financial and tax affairs (R.645-46):

- K-1 schedules ("Shareholder's Share of Income, Deductions, Credits, etc.") on which petitioner indicated NECC losses that were reflected on his personal income tax returns (R.203-204, 547-548);
- NECC's withholding tax return for the quarter ending December 31, 2014, which petitioner had signed as NECC's president (R.206-207, 595);

- An attachment to the withholding tax returns signed by petitioner, with a notation in petitioner’s handwriting indicating that he was providing “final payment” toward NECC’s unemployment insurance tax delinquencies for the fourth quarter of 2014 (R.207, 597);
- Additional forms signed by petitioner as NECC’s president, with attached checks that petitioner also signed for the payment of NECC’s tax delinquencies (R.208-211, 606-627);
- A “business contact information” form provided to the Department that petitioner signed as NECC’s sole contact (R.219-220, 628-629);
- A Power of Attorney provided to the Department giving petitioner authority to act as NECC’s attorney-in-fact (R.221-223, 630-634);
- An “Application to Register for a Sales Tax Certificate of Authority” (Form DTF-17), indicating that petitioner was the “responsible person” authorized to handle

NECC's sales tax issues and providing petitioner's signature (R.225-228, 635-639);

- Various "Consent to extension of time," forms that petitioner signed "as responsible person for [NECC]," extending the time for the Department to investigate the company's potential liability for unpaid sales and use tax (R.228-230, 640-644);
- Various other documents indicating petitioner's authority to negotiate with the Department during a 2014 sales and use audit of NECC; these documents indicated that petitioner was NECC's "primary contact" (R.665; *see* 234-235, 241-244, 647-680);
- Bank signature cards indicating petitioner's authority to withdraw funds from NECC's bank account as "signer number one," or "signer number two," including one that stated "[petitioner] may withdraw funds independently. Withdrawals by Anthony Nastasi must . . . receive [petitioner's] dual approval" (R.270-276, 794-799); and

- A Responsible Person Questionnaire that petitioner completed for NECC in which he affirmed that he had the authority to manage the business with knowledge and control over financial affairs, handle NECC's tax affairs, participate in making significant business decisions, and handle "all financial affairs with NEC[C's] day to day business," including signing checks and negotiating NECC's tax issues with the Department. (R.230-233, 645-646.)

Based on her review of these documents, Bishop concluded that petitioner had both the authority and the ability to address NECC's withholding tax liabilities, and thus he should be held personally liable as a responsible person for NECC's outstanding withholding tax liabilities. (R.215, 276.)

3. Petitioner disavows his prior representations and testifies that he falsely claimed to control NECC's business affairs solely to retain its MBE status

Petitioner did not dispute that he signed the abovementioned documents as NECC's president, including the Responsible Person

Questionnaire (R.645-646), as well as checks to settle NECC's withholding tax delinquencies (R.398). And he acknowledged that he had held himself out as NECC's decision-maker with regard to its MBE status and tax matters. (R.363-364, 400-406.)

Despite the abundant documentary evidence establishing the contrary, petitioner testified at the hearing that he had "nothing to do with" managing NECC's taxes or other financial responsibilities. (R.353.) Rather, he argued, this power lay solely with Anthony Nastasi. Petitioner asserted that he had falsely held himself out as someone with such authority on multiple records in order to retain NECC's MBE status. (R.361-364, 404.) As petitioner states in his brief (at 9), some of his submissions to the Department "inaccurately represented that Petitioner controlled NECC's financial affairs because MBE regulators used such information to audit Petitioner's control over NECC." Although petitioner generally asserted that Anthony Nastasi actually exerted control over NECC, he presented no specific evidence or testimony that tended to show that Nastasi was behind any of the payments or negotiations that petitioner himself had conducted on NECC's behalf.

To support his recantation, petitioner introduced evidence of two government reviews. First, on July 21, 2014, The Port Authority of New York and New Jersey had decertified NECC as an MBE based on evidence that it was “heavily dependent” on non-MBE firms, including Nastasi and Associates. (R.368-372, 832-83.) Petitioner acknowledged that he had opposed decertification by arguing that Anthony Nastasi was merely a “silent partner” of NECC. (R.414).

Second, petitioner submitted papers from an audit by the IRS, which initially determined that he was liable as a responsible person for unpaid withholding taxes assessed against NECC under 26 U.S.C. § 6672. (R.305-320, 802-816.) Petitioner filed a protest with the IRS supported by two affidavits from Anthony Nastasi asserting that petitioner “handled the operating activities of NECC[],” but did not handle its “financial responsibilities and decisions.” (R.810, 812.) Petitioner’s federal protest was successful, and he was relieved of personal liability for NECC’s federal withholding tax obligations. (R.815-816, 819.) The IRS decision did not provide its reasons or identify the facts on which it relied

(R.815), and the record does not indicate what, if any, documents the IRS considered besides Anthony Nastasi's two affidavits.

Finally, two witnesses testified on petitioner's behalf. Mary Probst, NECC's former controller, stated that she agreed with the assertions in Nastasi's IRS affidavits that he—and not petitioner—had absolute authority and control over NECC's finances. (R.428-430.) And Thomas Pillari, the general counsel for Nastasi and Associates, similarly testified that NECC was “not [petitioner's] business.” (R.441-442.)

D. The ALJ's Determination

The Administrative Law Judge (“ALJ”) upheld the notices of deficiency on the ground that petitioner qualified as a responsible person until his departure from the company on February 18, 2015. (R.92-123.) The ALJ noted the numerous indicia of responsibility, which established that “petitioner did not lack for authority to act on behalf of NECC.” (R.115-116.) The ALJ further held that petitioner's failure to collect and pay the withholding taxes owed by NECC was willful under Tax Law § 685(g), given the evidence that petitioner “continued to hold himself out as NECC's responsible

person,” even “when he knew the corporation was regularly not paying over the federal and State withholding taxes it collected from its employees’ checks.” (R.119.)

Accordingly, the ALJ upheld the Department’s assignment of liability to petitioner as NECC’s responsible person but modified it to reflect that this liability ended after February 18, 2015, when petitioner was terminated as NECC’s president. (R.122-123.) The ALJ thus directed the Department to modify the second notice of deficiency, cancel the third notice, and recalculate petitioner’s liability in accordance with this ruling. (R.123.)

E. The Tax Appeals Tribunal’s Decision

The Tribunal noted that, on the uncontroverted evidence in the record, petitioner “was an officer of NECC and its majority shareholder, managed its field operations, had check signing authority, filed tax returns on behalf of the company and had considerable economic interest in NECC.” (R.58.) The Tribunal continued, “[t]hese facts considered in conjunction with petitioner’s holding himself out to third parties, as well as to the Division itself in responding to its [Responsible Person Questionnaire] are uncon-

tested and require the conclusion that petitioner qualifies as a responsible person for NECC.” (R.58.) The Tribunal considered but specifically rejected petitioner’s explanation that he could not be considered a responsible person for NECC because the evidence of his authority over NECC’s corporate affairs consisted of false statements that he intentionally made in an effort to keep NECC’s MBE status. (R.58.) In the Tribunal’s view, the evidence “demonstrate[d] just the opposite.” (R.58.)

The Tribunal further agreed with the ALJ that petitioner’s failure to collect and remit NECC’s withholding taxes was willful under Tax Law § 685(g), given his reliance on another person (Anthony Nastasi) to fulfill these obligations despite his “actual knowledge that withholding tax was not being paid.” (R.58-59.) Accordingly, the Tribunal sustained the notices of deficiency, as modified by the ALJ.

F. The Third Department’s Decision

A three-Justice majority of the Third Department confirmed the Tribunal’s decision and dismissed petitioner’s petition. (R.911-923.) Noting that the relevant standard of review was whether the

Tribunal’s decision “has a rational basis and is supported by substantial evidence” (R.915), the court examined the wealth of evidence demonstrating the substantial control petitioner exerted over NECC:

“[n]otwithstanding evidence that could support a contrary determination, it is undisputed that petitioner was president, the majority shareholder, had check signing authority, was involved in daily field operations and derived a substantial part of his income from NECC. Additionally, petitioner intentionally held himself out to third parties, as well as to the Division of Taxation itself, as the contact person and responsible person for New York taxes by signing state tax returns and checks accompanying the returns, executing a sales tax certificate of authority listing himself as the corporation's responsible person, filling out the Division's “Responsible Person Questionnaire,” and maintaining communication with the Department.”

(R.916-917.) Based on this “myriad of factors,” each indicating petitioner’s exercise of control over NECC’s affairs, the court held that substantial evidence supported the Tribunal’s decision on this issue.

The majority further held that petitioner’s failure to remit NECC’s withholding taxes was willful: “[a]lthough petitioner might not have initially known that the taxes were not paid due to Nastasi

writing and directing the checks that petitioner should sign, it is undisputed that petitioner became aware of the tax liabilities from employees of the corporation and the Department, yet failed to take affirmative steps to ensure payment.” (R.917-918.) The court noted petitioner’s contrary evidence that sole power over NECC lay with Nastasi, but concluded that under settled principles of substantial evidence jurisprudence, this provided no basis for disturbing the rational basis provided by the Tribunal. (R.917.)

Finally, the Third Department rejected petitioner’s argument that the Tribunal’s analysis was inconsistent with the federal standard applied under the federal “responsible person” statute, *see* 26 U.S.C. § 6672, and thus violated the doctrine of federal conformity. To the contrary, the court held that “the Tribunal neither incorrectly interpreted Tax Law § 685(g), nor applied an improper test in determining who is a responsible person.” (R.916.) The court observed that “there is no dispute that 26 USC §§ 6671(b) and 6672(a) are parallel statutes with Tax Law § 685(g) and (n),” and further noted “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.” (R.915.) But the majority held that petitioner’s argument was misplaced because “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.” (R.915.)

Two justices dissented and would have annulled the Tribunal’s determination. Examining only federal case law under the parallel federal statute, the dissent stated that “the ‘*core question*’ is whether the individual has significant control over the enterprise’s finances,” quoting *Fiataruolo v. United States*, 8 F.3d 930, 939 (2d Cir. 1993) (emphasis in original, internal citations and quotation marks omitted) (R.920.) Wholly accepting petitioner’s hearing testimony that only Nastasi had this control, the dissent concluded that the Tribunal’s analysis was inconsistent with the federal standard because it focused on NECC’s “affairs” rather than its “finances.” (R.921.) Instead of the documents evidencing petitioner’s control over financial matters, the dissent gave more

credence to Nastasi's affidavits generally stating that he handled NECC's financial matters, including its tax obligations. (R.921.)

The dissent also accepted petitioner's explanation—implicitly rejected by the Tribunal as lacking in credibility—that his contrary statements on the numerous documents before the Tribunal were knowingly false, made with the sole intention of retaining NECC's MBE status. The dissent described this pattern of fraudulent deception as “highly inappropriate,” but stated that “the appropriateness of petitioner's conduct” was not before the court. (R.918.)

ARGUMENT

THE TAX APPEALS TRIBUNAL'S DETERMINATION THAT PETITIONER WAS LIABLE AS A RESPONSIBLE PERSON FOR WILLFULLY FAILING TO PAY WITHHOLDING TAXES OWED BY NECC WAS RATIONAL, LAWFUL, AND SUPPORTED BY SUBSTANTIAL EVIDENCE

This Court should affirm the Third Department's decision. There is ample record evidence that petitioner had the authority to manage NECC's most important financial affairs, including its withholding tax delinquencies, and that he regularly exercised this authority on his company's behalf. Under familiar principles of substantial evidence review, petitioner's reliance on conflicting

evidence that he was merely a pawn of Anthony Nastasi and exercised no real control over NECC at most presented a question of credibility for the Tribunal to resolve as the administrative fact finder. And the Tribunal resolved that question against petitioner, crediting the contemporaneous documentary evidence over his later self-serving explanations. Accordingly, substantial evidence supports the Tribunal's decision that petitioner was liable under Tax Law § 685(g) as a person responsible to collect and remit NECC's withholding taxes.

Finally, petitioner's argument that the Tribunal's responsible-person analysis conflicts with federal case law applying the parallel federal statute is meritless. For these reasons, as more fully set forth below, the Tribunal's decision should not be disturbed.

A. Petitioner Qualified As a Responsible Person Under Tax Law § 685(g)

1. The Tribunal reasonably concluded, based on the hearing evidence, that petitioner exerted significant authority and control over NECC

Petitioner strains to characterize the issue in this case as one of “first impression” based on his claim that the Tribunal’s analysis deviated from federal cases construing a similar statute governing responsible person liability. (Br. at 1.) *See* 26 U.S.C. § 6672.³ Petitioner is mistaken: this case turns not on the question of which legal standard to apply; as we discuss below (Point C, *infra*), the Third Department majority properly held that there was no divergence between the Tribunal’s application of the state standard for responsible person liability and federal courts’ application of the parallel federal standard—both ask whether a person exercises significant, actual authority over the company’s financial affairs,

³ The federal statute provides that “[a]ny person required to collect, truthfully account for, and pay over any tax imposed by this title who willfully fails to collect such tax . . . shall, in addition to other penalties provided by law, be liable to a penalty equal to the total amount of the tax evaded[.]” 26 U.S.C. § 6672(a).

and both assess this question under a multi-factor, totality-of-the-circumstances test.

Rather, the lynchpin in this case is whether the numerous facts produced at the hearing and the reasonably plausible inferences they support provide substantial evidence for the Tribunal's conclusion that petitioner *did* exercise significant, actual authority over NECC's financial affairs, and thus is liable for the company's delinquent withholding taxes as a responsible person. As explained below, they do. Thus, this case is not nearly so remarkable or novel as petitioner insists, but turns on the familiar and longstanding principles that guide this common form of deferential judicial review.

Here, petitioner had the burden of proving before the Tax Appeals Tribunal that the Department's notices of deficiency holding him liable as a responsible person for NECC's unpaid withholding taxes were erroneous. Once the agency resolved that question, "the role of a court reviewing an administrative determination is limited to ensuring that the determination arrived at following an adversarial hearing is supported by substantial

evidence.” *Jason B. v. Novello*, 12 N.Y.3d 107, 114 (2009). “The substantial evidence standard is a minimal standard” that is “less than a preponderance of the evidence.” *Matter of Haug v. State Univ. of New York at Potsdam*, 32 N.Y.3d 1044, 1045 (2018) (citations and quotation marks omitted). “The substantial evidence test ‘demands only that a given inference is reasonable and plausible, not necessarily the most probable.’” *Marine Holdings, LLC v. New York City Comm'n on Human Rights*, 31 N.Y.3d 1045, 1047 (2018), quoting *Matter of Ridge Rd. Fire Dist. v. Schiano*, 16 N.Y.3d 494, 499 (2011).

Indeed, this was precisely the standard that this Court applied on the only other occasion when it construed Tax Law § 685(g). In confirming a determination of the State Tax Commission (the predecessor to the Tribunal), the Court held that “if there are any facts or reasonable inferences from the facts to support the [C]ommission’s determination, the assessment should be confirmed.” *Matter of Levin v. Gallman*, 42 N.Y.2d 32, 34 (1977). Moreover—and critically relevant to this case—“[c]ourts may not weigh the evidence or reject [a] determination where the evidence

is conflicting and room for choice exists.” *Matter of State Div. of Human Rights (Granelle)*, 70 N.Y.2d 100, 106 (1987); accord *Marine Holdings, LLC*, 31 N.Y.3d at 1047.

Far from consisting of “undisputed” or “uncontradicted” evidence that petitioner was merely an employee without authority over NECC (Br. at 2, 22, 30, 32), the record submitted to the ALJ contained multiple contemporaneous documents which tend to show the opposite. These documents, in conjunction with the reasonable inferences therefrom, provide more than substantial evidence for the Tribunal’s decision. This evidence established that petitioner (1) was NECC’s majority shareholder; (2) derived substantial income from NECC as its president; (3) had broad oversight authority over NECC’s daily field operations; (4) was authorized throughout the period at issue (October 2014-February 2015) to resolve NECC’s ongoing financial problems and was directly involved in attempting to resolve those problems by signing tax returns, discussing NECC’s tax liabilities with the Department as NECC’s main contact and attorney-in-fact, and issuing payments to satisfy those liabilities; and (5) held himself out to be

the owner and principal officer of the corporation with control over its financial affairs.

Concerning petitioner's assertions of authority, petitioner mistakenly argues (Br. at 35) that "[h]olding oneself out as a responsible person does not fit within the typical litany of factors under Tax Law § 685(g)." Not so. Both the state and federal case law consider this to be a relevant factor under the responsible person test. *See Hochstein v. United States*, 900 F.2d 543, 548 n.1 (2d Cir. 1990); *Matter of Martin v. Commissioner of Tax. & Fin.*, 162 A.D.2d 890, 891 (3d Dep't 1990) (holding that the taxpayer was a person responsible for collecting sales taxes under the same analysis applied to withholding tax "responsible person" cases).

Indeed, it was only because of these very same documents indicating that petitioner exercised ownership, direction, and control over NECC that the corporation was certified as an MBE and awarded lucrative construction contracts as a result of this status.

Petitioner (Br. at 30) and the dissent below (R.921) rely heavily on the Nastasi affidavits, as well as testimony from

Nastasi's former employees, for the proposition that "Nastasi alone determined which of NECC's financial obligations (including tax liabilities) would be paid and which would not" (Br. at 7). But ample documentary evidence undermines petitioner's claim and establishes that he, too, had such authority. In light of this contrary evidence, petitioner's reliance on the affidavits is misplaced. As this Court has explained, "often there is substantial evidence on both sides of an issue disputed before an administrative agency," but if "substantial evidence exists to support a decision being reviewed by the courts, the determination must be sustained, irrespective of whether a similar quantum of evidence is available to support other varying conclusions." *Matter of Haug*, 32 N.Y.3d at 1046 (citations and quotation marks omitted).

Moreover, the fact that Nastasi might have wielded control over NECC to the same or an even greater extent than petitioner is beside the point, since responsible-person liability is joint and several and may extend to more than one person. *See Matter of Blodnick v. New York State Tax Commn.*, 124 A.D.2d 437 (3d Dep't 1986) (holding that several officers of a corporation were personally

liable for the corporation's sales and use tax liabilities); *Fiataruolo v. United States*, 8 F.3d 930, 939 (2d Cir. 1993); *USLIFE Title Ins. Co. of Dallas on Behalf of Mathews v. Harbison*, 784 F.2d 1238, 1243 (5th Cir. 1986) (“responsible persons under Section 6672 are held jointly and severally liable for the underlying withholding tax delinquency”). And it matters not that Nastasi may have wielded more power than petitioner and had the power to fire him under the 2005 agreement. *Cf. Mahler v. United States*, 121 F. Supp. 2d 179, 184 (D. Conn. 2000) (“[o]ne need not be the “most responsible” person to be liable under Section 6672”), *aff'd*, 29 F. App'x 777 (2d Cir. 2002); *see also United States v. Rem*, 38 F.3d 634, 642 (2d Cir. 1994) (“it is not necessary that the individual in question have the final word as to which creditors should be paid in order to be subject to liability” under 26 U.S.C. § 6672) (citations and quotation marks omitted).

Based on the foregoing, the Tribunal's fact-intensive, credibility-driven inquiry easily satisfies substantial evidence review. Accordingly, there is no basis to disturb it. *See Matter of State Div. of Human Rights (Granelle)*, 70 N.Y.2d at 106 (“when a

rational basis for the conclusion adopted by the [agency] is found, the judicial function is exhausted”); *accord Marine Holdings, LLC*, 31 N.Y.3d at 1047.

2. The Tribunal’s decision turned on its credibility assessment of petitioner’s attempt to disavow his prior representations of having control over NECC

Petitioner asserts that notwithstanding the documentary evidence placing him squarely at NECC’s helm, his control over the company was in reality a sham designed to obtain MBE status. (Br. at 8-9, 30-31.) But this is of no moment because petitioner’s contrary evidence at most presented an issue of credibility for the Tribunal to resolve. The Tribunal’s assessment of the credibility of petitioner’s disavowal of his prior statements is not subject to judicial review because “the credibility of witnesses is solely a question of fact for the administrative fact-finder.” *Matter of Halloran v. Kirwan*, 28 N.Y.2d 689, 692 (1971) (Breitel, J., dissenting) (collecting cases).

Here, petitioner expressly placed his credibility at issue by insisting that all of his representations of authority and control

were in fact bogus, intended only “to create the illusion that Petitioner controlled NECC.” (Br. at 8-9.) As petitioner asserts in his brief (at 9), some of his submissions to the Department “inaccurately represented that Petitioner controlled NECC’s financial affairs because MBE regulators used such information to audit Petitioner’s control over NECC.” To credit petitioner’s current claim would have required the Tribunal to disregard each of the numerous documents establishing petitioner’s authority and control over NECC, and instead accept the contrary testimony of petitioner, Nastasi’s affidavits to the IRS, and petitioner’s two witnesses.

The Tribunal acted well within its discretion in declining to credit petitioner’s disavowal of his prior representations, especially at a time when he no longer risked the loss of NECC’s MBE status because the company had already been decertified in 2014. Under those circumstances, the Tribunal reasonably found that petitioner could not overcome “the substantial evidence demonstrating just the opposite.” (R.58.) This was in sum and substance a credibility determination by the Tribunal. As the dissent below recognized,

petitioner could prevail only if the Tribunal credited his claim that he possessed *none* of the indicia of control that he had previously asserted on each of the documents considered by the Tribunal. The dissent erred by substituting its credibility judgment for that of the Tribunal, although the dissent duly noted that accepting petitioner’s current version of the scope of his authority meant that he had engaged in “highly inappropriate” conduct by misrepresenting his authority to various government agencies in order to secure and retain MBE status for NECC. (R.918.)

Petitioner (Br. at 31) and the dissent (R.921) also err in claiming that the Tribunal’s decision rested on a finding that petitioner had control over only the “affairs” of NECC, as distinct from the “finances” of the company. It is clear from the Tribunal’s decision that it found that petitioner wielded a substantial amount of power over NECC’s finances, as evidenced by, among other things, the fact that petitioner spearheaded negotiations with the Department to reduce NECC’s withholding tax liability. The Tribunal’s conclusion—supported by numerous documents that petitioner authenticated and did not disavow until it suited him to

do so at the hearing—was “not impossible or incredible”; thus, the dissent’s refusal “to give any effect to it” amounted to an improper substitution of its own view of the facts. *Matter of Burke v. Bromberger*, 300 N.Y. 248, 249-50 (1949). But “[n]othing is better settled than that the court had no such power in an article 78 proceeding.” *Id.* at 250. Accordingly, petitioner and the dissent are foreclosed by 75 years of case law preventing courts from substituting their own credibility determinations for those reached by the administrative fact-finder, here, the Tribunal.

B. Petitioner’s Failure to Pay NECC’s Withholding Tax Obligations Was Willful

The Tribunal also rationally determined that petitioner’s failure to pay the withholding tax obligations he had once readily assumed on NECC’s behalf was willful and thus justified the imposition of responsible person penalties. Adopting the federal rule based on the federal “responsible person” statute, this Court has held that willfulness turns on “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 v. Gallman*, 42 N.Y.2d 32, 34 (1977).

Here, the evidence established that petitioner was aware that NECC was falling behind on its withholding tax obligations. Petitioner’s own witnesses admitted as much: Probst acknowledged that petitioner knew about and had discussed these delinquencies with her and Nastasi (R.430-431), and Pillari testified that “there were times when we all had tried to get the company to pay taxes” (R.447). Given these concessions and the proof that petitioner was actively involved in negotiating repayment plans concerning its tax liabilities, but then abandoned those responsibilities by leaving them to Nastasi, there is no basis to disturb the Tribunal’s finding of willfulness.

Nor is *Matter of Fisher v. State Tax Commn.*, 90 A.D.2d 910 (3d Dep’t 1982) (Br. at 33, 40) on point; unlike the petitioner there, petitioner here was never advised that the tax payments had been made. And the dissent’s statement that petitioner “ceded control to Nastasi” when he signed the 2005 agreement (R.922) is belied by the record, which establishes that petitioner, not Nastasi, assumed

control over NECC’s tax obligations during the periods at issue. In any event, the 2005 agreement is silent on petitioner’s duties and responsibilities for NECC. (R.830-831.)

In sum, substantial evidence supports the Tribunal’s conclusion that petitioner’s failure to collect and remit NECC’s withholding taxes was not “accidental nonpayment” but, rather, “consciously and voluntarily done with knowledge” that his refusal to act would result in the taxes not being paid. *Matter of Levin*, 42 N.Y.2d at 34.

C. There is No Conflict Between the Tribunal’s Decision and Federal Law

To avoid substantial evidence review—which is all that is required in this case—petitioner argues that the analysis in which the Tribunal and Third Department engaged is “materially different than the federal standard” and thus “violated the doctrine of federal conformity.” (Br. at 3.) Specifically, petitioner, echoing the dissent below, claims that the Tribunal failed to follow federal law “by failing to consider or provide any weight to factors that assess whether petitioner had significant control over NECC’s financial

management and affairs.” (Br. at 2, 4, 20-21, 28-34; *see* R.919-921.) Petitioner and the dissent are mistaken. The Tribunal correctly applied Tax Law § 685(g) in accordance with 50 years of case law interpreting that provision and consistent with the parallel federal statute.

Contrary to petitioner’s arguments (Br. at 36), there was no violation of the doctrine of federal conformity, let alone of “basic notions of comity between federal and state agencies.” The doctrine of federal conformity provides that state laws will be construed and enforced in a manner consistent with parallel federal tax laws except where the state laws “specifically and expressly diverge from the Federal tax laws.” *Matter of CoData Corp. v. Commissioner of Tax. & Fin.*, 163 A.D.2d 755, 756 (3d Dep’t 1990). Here, there is no dispute that the applicable federal statute, 26 U.S.C. § 6672, and New York Tax Law § 685(g) are parallel statutes, but the Tribunal has interpreted the latter consistently with how federal courts have interpreted the former. Both the federal and the state statutory schemes require a showing that the taxpayer have actual authority in order to be a person responsible for collecting and remitting the

corporation's withholding taxes, and both assess this question under a totality-of-the-circumstances test using a variety of factors. See *Matter of Malkin v. Tully*, 65 A.D.2d 228, 231 (3d Dep't 1978); *Vinick v. United States*, 205 F.3d 1, 8 (1st Cir. 2000).

Petitioner complains that the Tribunal's decision and the State cases upon which it relied set forth merely a "laundry list of factors" that "provide no objective standard for assessing personal liability for a corporation's tax obligations." (Br. at 28.) Petitioner is wrong. The factors that the Tribunal and the Appellate Division relied on to find petitioner liable as a responsible person under Tax Law § 685(g) are the same as those cited by the federal cases construing 26 U.S.C. § 6672. And contrary to petitioner's argument (Br. at 28), the state cases do not diverge from the federal cases by failing to explain how each factor "weigh[s] in the balance and why;" no federal case claims such artificial precision. Indeed, in the very next paragraph petitioner appears to concede as much, noting that the federal courts treat the § 6672 factors "only as a guide—not a mechanistic checklist" to ascertain actual control over a company's finances. (Br. at 28.) True enough, but that undermines petitioner's

criticism that the Tribunal and the state cases uniquely lack an objective standard.

Both state and federal courts analyze a taxpayer's potential responsibility for his or her company's unpaid withholding taxes under a similar set of factors. These include general factors, such as the taxpayer's status as an officer of the company, his or her involvement in its day-to-day affairs, and whether he or she derived substantial income from the company. *Compare Matter of Hopper v. Commissioner of Tax. & Fin.*, 224 A.D.2d 733, 737 (3d Dep't 1996) *with Fiataruolo v. United States*, 8 F.3d 930, 939 (2d Cir. 1993). And they also include an analysis of the taxpayer's specific control over the company's finances. *Compare Matter of Hopper*, 224 A.D.2d at 737 (considering whether the taxpayer signed tax returns and "exercised authority over employees and assets of the corporation"); *Matter of Risoli v. Commissioner of Tax & Fin.*, 237 A.D.2d 675, 676 (3d Dep't 1997) (considering as particularly relevant to taxpayer's responsibility for his business's unpaid withholding taxes his "broad oversight authority with respect to the management of the corporation" and the fact that he exercised check-signing authority

and was “directly involved in attempting to resolve” his business’s financial problems) *with Fiataruolo*, 8 F.3d at 939 (“[t]he core question is whether the individual has significant control over the enterprise’s finances,” although such control may be shared with others) (citation and quotation marks omitted).

Like their federal counterparts, state courts recognize that no one factor is dispositive or controlling; rather, “all must be considered” in determining the taxpayer’s liability as a responsible person under Tax Law § 685(g). *Matter of Malkin*, 65 A.D.2d at 231; *Vinick*, 205 F.3d at 8 (“[n]o single factor is determinative of responsibility [under section 6672]. . . . The deciding court must look at the ‘totality of the circumstances’ when making the determination of responsibility”).

Moreover, both state and federal case law recognize that more than one person may be a responsible person under § 685(g) (state) and § 6672 (federal). *See Matter of McHugh v. State Tax Comm’n*, 70 A.D.2d 987 (3d Dep’t 1979); *Brounstein v. United States*, 979 F.2d 952, 954 (3d Cir. 1992) (“[w]hile a responsible person must have significant control over the corporation’s finances, exclusive

control is not necessary”). And the federal cases have emphasized that for liability to attach, the taxpayer’s exercise of authority over the business’s tax obligations need not be “ultimate” or “the final word.” *See Winter v. United States*, 196 F.3d 339, 347 (2d Cir. 1999).

Finally, both state and federal case law recognize that a taxpayer’s mere titular designation coupled with minimal actual involvement with the company’s financial matters, without more, is insufficient to find that taxpayer personally responsible for the delinquent company’s unpaid withholding taxes. *See Matter of Amengual v. State Tax Comm’n*, 95 A.D.2d 949, 950 (3d Dep’t 1983); *Fiataruolo*, 8 F.3d at 939-941 (2d Cir. 1993).

Petitioner strains to manufacture a divergence between the federal and state case law, arguing that the Tribunal failed to examine whether petitioner exercised “significant control” over NECC’s finances, contrary to the Second Circuit’s analysis in *Fiataruolo* and other federal cases. Petitioner is again mistaken, because the Tribunal considered precisely that issue.

Among the numerous indicia of petitioner’s actual, significant control over NECC’s finances considered by the Tribunal was

evidence that petitioner regularly exercised his check-signing authority—and not just by signing any checks but specifically those submitted in payment of NECC’s tax deficiencies. (R.208-211, 398, 606-627.) Additionally, petitioner was responsible for handling NECC’s financial affairs and negotiating tax issues with the Department, and regularly communicated with its auditors on this matter. (R.230-233, 645-646.) Both federal cases construing § 6672 and state cases construing Tax Law § 685(g) rely on such authority. *See Turnbull v. United States*, 929 F.2d 173, 179 (5th Cir. 1991) (taxpayer was responsible person based largely on the fact that he had check-signing authority and the ability to negotiate a settlement with the IRS); *Erwin v. United States*, 591 F.3d 313, 322 (4th Cir. 2010) (same); *Smith v. United States*, 555 F.3d 1158, 1165 (10th Cir. 2009) (same); *Matter of Allen v. State Tax Comm’n*, 126 A.D.2d 51, 53 (3d Dep’t 1987) (petitioner was responsible for company’s unpaid state withholding taxes in part because he “authorized payment of \$400,000 to the Internal Revenue Service for unpaid Federal withholding taxes”).

Petitioner also specifically represented himself as the person authorized to negotiate with the Department concerning a 2014 Department sales and use tax audit of NECC (R.665, 234-235, 241-242, 647-680); and he signed NECC's withholding tax return, as its president (R. 206-207, 595). Those are also important factors that establish a taxpayer's significant control over a business's finances. *See Taylor v. I.R.S.*, 69 F.3d 411, 417 (10th Cir. 1995) (taxpayer was responsible person because, among other things, he had check-writing authority, managed the business's day-to-day operations and "signed at least one employment tax return"); *Plett v. United States*, 185 F.3d 216, 223 (4th Cir. 1999) (same); *King v. United States*, 914 F. Supp. 335, 339 (W.D. Mo. 1995) (same).

Thus, petitioner errs in asserting (Br. at 26-27, 32) that the Tribunal relied solely on petitioner's status as a corporate officer, majority shareholder, and signer of checks in finding him responsible for NECC's tax liabilities—although these factors certainly also support the Tribunal's conclusion. But the most compelling evidence of control considered by the Tribunal were petitioner's *own* representations on the Department's Responsible Person Ques-

tionnaire that he had authority to “manage the business with knowledge and control over financial affairs,” he was responsible for “all financial affairs with NEC[C’s] day to day business” (R.646), and he was authorized to resolve the company’s tax disputes during the tax periods at issue (R.225-228, 635-639). This evidence is sufficient under both the federal and state case law to demonstrate petitioner’s “significant control” over NECC’s financial affairs. Consequently, the Tribunal’s decision in no way departed or diverged from federal cases interpreting the parallel federal responsible-person statute.

Moreover, *Fiataruolo* and *Vinick*, the two federal cases upon which petitioner most heavily relies, were based on facts not present in this case. For example, the taxpayers in *Fiataruolo* were not responsible under § 6672 in part because they were not officers, directors or even employees of the business; held no shares or equity stake in it; had no involvement in the business’s daily functions; and at least one taxpayer was expressly forbidden from representing himself as a member of the business. *Fiataruolo*, 8 F.3d at 933-935, 939-941. In *Vinick*, the First Circuit held that the district

court had improperly focused on tax periods that were outside the scope of the litigation, and that the taxpayer's control over the business during the relevant tax periods was "minimal." *Vinick*, 205 F.3d at 5-6, 11-13. None of those facts is present in this case.

Ultimately, petitioner's federal conformity argument fails because the Tribunal's decision rested not on any misinterpretation of Tax Law § 685(g) or departure from parallel federal law, but rather on the specific facts before it. For this reason, petitioner's heavy reliance (Br. at 30-31, 36) on a prior determination of the IRS is misplaced. To be sure, the IRS found that petitioner was not a responsible person under § 6672. (R.815.) But the federal determination is not binding on the Tribunal. Nor may it even be considered persuasive; the IRS decision engaged in no legal or factual analysis, but simply found petitioner to "be relieved of liability for the tax periods indicated above." (R.815.) Moreover, it is not clear whether any of the myriad documents upon which the Tribunal relied to reach the opposite conclusion was before the IRS. The record indicates only that an attorney letter and affidavits from petitioner

and Nastasi were submitted in support of petitioner's protest of the IRS penalty assessment. (R.802-814.)

Regardless, the Tribunal is not bound by a federal agency's differing determination. *See Matter of Fisher v. Levine*, 36 N.Y.2d 146, 151-152 (1975); *cf. Ross-Viking Mdse. Corp. v. Tax Appeals Tribunal of State of N.Y.*, 188 A.D.2d 698, 699-700 (3d Dep't 1992) (holding that as to petitioner's state tax returns, Tax Appeals Tribunal and Commissioner were not bound by federal determination finding that reasonable cause existed for petitioner's delay in filing its federal return). Thus, the fact that the Tribunal did not reach the same conclusion as the IRS is not evidence of a violation of the doctrine of federal conformity; the conflict is not between state and federal law, but rather between the differing fact-driven conclusions of federal and state administrative tribunals.


CONCLUSION

The Third Department's memorandum and order should be affirmed.

Dated: Albany, New York
April 26, 2023

Respectfully submitted,

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AFFIRMATION OF COMPLIANCE

Pursuant to the Rules of Practice of the New York Court of Appeals (22 N.Y.C.R.R.) § 500.13(c)(1), Owen Demuth, an attorney in the Office of the Attorney General of the State of New York, hereby affirms that according to the word count feature of the word processing program used to prepare this brief, the brief contains 8,243 words, which complies with the limitations stated in § 500.13(c)(1).

A handwritten signature in blue ink, appearing to read "Owen Demuth", is written above a horizontal line.

OWEN DEMUTH