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COURT OF APPEALS

STATE OF NEW YORK

BLACK,

Appellant,

-against-

No. 86

NYS TAX APPEALS TRIBUNAL,

Respondent.

20 Eagle Street
Albany, New York
October 17, 2023

Before:

CHIEF JUDGE ROWAN D. WILSON
ASSOCIATE JUDGE JENNY RIVERA
ASSOCIATE JUDGE MICHAEL J. GARCIA
ASSOCIATE JUDGE MADELINE SINGAS
ASSOCIATE JUDGE ANTHONY CANNATARO
ASSOCIATE JUDGE SHIRLEY TROUTMAN
ASSOCIATE JUDGE CAITLIN J. HALLIGAN

Appearances:

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1 CHIEF JUDGE WILSON: Good afternoon. The first
2 matter on today's calendar is Number 86, a matter of Black
3 v. New York State Tax Appeals Tribunal.

4 Counsel?

5 MR. GREENBERG: Chief Judge Wilson, members of
6 Court. May it please the court.

7 Chief Judge Wilson, may I reserve five minutes in
8 rebuttal?

9 CHIEF JUDGE WILSON: Five? Yes.

10 MR. GREENBERG: This afternoon I represent the
11 petitioner, Christopher Black, who has brought this Article
12 78 proceeding, challenging a determination of the Tax
13 Tribunal which found him a hundred percent personally
14 liable to pay the withholding taxes of New England
15 Construction Company.

16 Question before this court, the profoundly
17 important question which tax lawyers across the state are
18 eager to hear what the court has to say, is whether or not
19 the doctrine of federal conformity still exists at the
20 Department of Tax and Finance.

21 That doctrine simply holds - - -

22 JUDGE RIVERA: Yeah. But it may exist, but the
23 question is, if - - - if the federal - - - if on the
24 federal side, you have a different record before you.
25 Right? The State has a more robust one; does that make a

1 difference?

2 MR. GREENBERG: Well, Judge Rivera, that goes to
3 the question of what deference should have been given to
4 the IRS determination, which addressed the exact same issue
5 construing the federal analog to - - -

6 JUDGE TROUTMAN: If you apply the appropriate
7 factors, are you required to have the same result?

8 MR. GREENBERG: No. And our argument is not that
9 the Department of Tax and Finance owed slavish deference to
10 the IRS. That is not our argument.

11 JUDGE HALLIGAN: Can you go back to the IRS point
12 for a minute? Does the record reveal whether or not the
13 holding out that Mr. Black did, with respect to his status,
14 was before the IRS when it made its determination?

15 MR. GREENBERG: Well, there was holding out
16 relative to the IRS, separate from the Department of Tax
17 and Finance, which caused the IRS to conduct a parallel
18 audit with the Department of Tax and Finance.

19 But let me be clear, we're not arguing that the
20 Tax Tribunal needed to simply rubber stamp the IRS'
21 determination. We do argue, although it's not our primary
22 argument, that at a minimum, the IRS determination was not,
23 as the Tax Tribunal said, irrelevant. The doctrine of
24 federal - - -

25 JUDGE HALLIGAN: Sorry. Just if I could,



1 Counsel?

2 MR. GREENBERG: Please.

3 JUDGE HALLIGAN: So there are a couple of forms
4 in the record involving, it looks to me, a deferred payment
5 agreement with the tax division. Were those specifically
6 before the IRS when it made its determination? I just
7 couldn't tell.

8 MR. GREENBERG: The record is silent on that.
9 What we presented, and is part of your record, are those
10 materials that we submitted to the IRS. What else the IRS
11 had that caused them to trigger the audit, which
12 incidentally, initially sought 10 million dollars in
13 penalties against my client. Whereas the Department of Tax
14 and Finance commenced their audit months after my client
15 was fired by Anthony Nastasi at NECC. But my point about
16 the doctrine of federal conformity, what makes this case
17 important, is that when, as here, you have a state tax law,
18 685(g), that is identical to a federal tax law, was drafted
19 to conform word-for-word with the federal tax law on an
20 important issue that amounts to an exception to the general
21 rule that corporate officers are not personally liable - -
22 - corporate employees are not personally liable. This is
23 an exception to that rule that when the law is identical,
24 this court taught as far back as the 1970s, in Matter of
25 Levin, that the state law and the federal law need not only



1 to be conformed and interpreted the same way, but that the
2 Tax Tribunal and New York courts should be looking to
3 federal law.

4 JUDGE CANNATARO: So where's the - - - where's
5 the error, Counsel?

6 JUDGE SINGAS: How didn't that happen here?
7 Sorry, Judge Cannataro.

8 JUDGE CANNATARO: No, go ahead.

9 JUDGE SINGAS: How - - - how didn't that happen
10 here? It appears to me that looking at sort of the
11 totality of the circumstances, they were conforming to the
12 federal statute.

13 MR. GREENBERG: Well, we know exactly what the
14 Tribunal did in this case and in other cases construing
15 685(g). Because their opinions are all online and you can
16 look at them, and you can look at their twenty-one-page
17 opinion in this case. Unlike the more than twenty-five
18 federal cases that we've cited, they do not cite federal
19 law. More, they don't cite the federal test.

20 What is the federal test? Which they have never
21 cited. And because this court has not addressed the
22 meaning of 685(g), with respect to the personal
23 responsibility issue, the Tax Tribunal has had a vacuum.

24 JUDGE RIVERA: If I'm understanding my
25 colleague's question, the real issue is even if they don't

1 cite those cases, even if they do not parrot the exact
2 language in - - - in those cases, are they nevertheless
3 indeed applying the same test?

4 MR. GREENBERG: Respectfully, Judge Rivera, they
5 are clearly not.

6 JUDGE RIVERA: Okay. What's the test they're
7 applying? And how is it different from the federal test?

8 MR. GREENBERG: Well, first of all, the State Tax
9 Tribunal does not apply a test. They recite factors
10 tethered to nothing. The federal case is the second
11 circuit, a mountain of case law, not hyperbole, says over
12 and over again, the test, when is someone personally
13 responsible? When they have effective power, actual
14 ability and authority to control the finances that they
15 write the check.

16 JUDGE GARCIA: But isn't that just basically a
17 shorthand summary that some circuit courts use for the
18 myriad of factors test? I mean, the myriad of factors test
19 really goes to that. So whether they sum up and say, okay,
20 it goes to the phrasing you're just saying, or whether they
21 apply the factors, I think to Judge Rivera's question,
22 isn't it really the same thing, even if they don't have
23 your tagline at the end? Some circuits don't use that
24 test.

25 MR. GREENBERG: Most definitely not. It's not



1 the tagline at the end. It's the test in the beginning.

2 JUDGE GARCIA: But all those factors are the
3 test. It's a - - - it seems hard to say you're misapplying
4 a myriad of factors test, because they are looking at
5 pretty much the same factors. They're just not summing up
6 the way you're doing or the way the circuit does.

7 MR. GREENBERG: Well here, and again, if you look
8 at your decisions, and most of the Levin v. Gallman, and
9 decisions which cite the federal case law and the federal
10 test, which is robust. If you just recite a series of
11 factors, you have I-know-it-when-I-see-it, ad hoc decision-
12 making, and that is what you had in this case.

13 JUDGE GARCIA: Basic question, Counsel, who has
14 the burden here once they assess?

15 MR. GREENBERG: We had the burden of establishing
16 that we would not be at the administrative hearing - - -

17 JUDGE GARCIA: Right.

18 MR. GREENBERG: - - - before the Tribunal. It
19 was our burden. But our burden was entirely different than
20 the one-paragraph analysis. That's what you got. Twenty-
21 one-page decision with find it - - - well, let me say this.
22 Their whole argument to you, their whole argument is
23 premised on two fictions. Let me start with this fiction.
24 They would have you think that there was a credibility
25 finding made by the Tax Tribunal. They say it over and

1 over and over again in their brief. This isn't a
2 metaphysical question. You have the decision of the Tax
3 Tribunal, twenty-one pages long, thirty-five enumerated
4 findings of fact. They did make factual findings, findings
5 of fact. Then they get to their analysis, and the Tax
6 Tribunal sits like an appellate court, three commissioners
7 with the record; they don't look at witnesses, they don't
8 hear testimony.

9 One paragraph, page 58, first paragraph. That is
10 the sum total of their analysis. That one paragraph, if
11 you look at it, has three errors in it. Error number one,
12 they frame the issue. And as Justice Lynch and as Justice
13 Aarons pointed out in their dissent, they frame the issue
14 as whether petitioner presented facts showing petitioner
15 lacked control and authority over the affairs of NECC. Not
16 the standard. It's not over the general business affairs.
17 If that were the rule, then every corporate officer or
18 employee, every director could potentially be liable.
19 That's not the issue. It's whether they have control over
20 the finances.

21 Error number one, you go to the final sentence,
22 this is it. They come before the Court of Appeals, and
23 they represent to you there was a credibility finding. The
24 final sentence, they say that is an implicit finding that
25 the petitioner and the three witnesses - - -

1 JUDGE RIVERA: So - - - so Mr. Black, in various
2 documents that are in that record presented to the ALJ,
3 represents that he has control over the finances, not just
4 the company itself. But then he says otherwise. Isn't
5 that, of course, a credibility determination? You've got
6 to decide either the prior statements were true or the
7 current statement is true. How - - - how would you
8 otherwise reconcile it?

9 MR. GREENBERG: The Tax Tribunal, first of all,
10 didn't make a factual finding. They drew a conclusion of
11 law. They applied the - - -

12 JUDGE RIVERA: But again, isn't it - - - isn't
13 that the exercise that one would have to go through?
14 You've made statements before conceding, right?

15 MR. GREENBERG: Yes.

16 JUDGE RIVERA: That you have control. And now
17 you want us to believe that you didn't have control. So
18 you've got to make a decision. You either believe in the
19 initial statements or this later statement that benefits,
20 right in the moment, the individual, because they're trying
21 to avoid paying the tax.

22 MR. GREENBERG: Well, let's presuppose that that
23 is what the Tribunal should have done. They didn't do it.
24 The final sentence that they say represents a credibility
25 finding is an application of the substantial evidence.

1 CHIEF JUDGE WILSON: Let me - - - let me ask you
2 this, Counsel. What - - - what is the public policy
3 consequence, if any, of allowing people to file
4 representations with the Department of Taxation and then
5 several years later disprove them? And let's suppose they
6 could prove that what they had done was false. What's the
7 public policy consequence there?

8 MR. GREENBERG: There is a whole regulatory
9 regime administered by the Department of Economic
10 Development that addresses circumstances where a minority
11 owned business - - -

12 CHIEF JUDGE WILSON: No, forget a minority owned
13 business. I'm not asking that at all. And suppose this
14 hadn't involved a minority owned business at all. It's
15 just there are forms that you can make representations to
16 the tax department that you are the responsible person for
17 the purpose of collecting taxes. And those forms, I
18 assume, are meant to induce governmental reliance.

19 MR. GREENBERG: Justice Lynch and Justice Aarons
20 addressed that point and made it clear that there are laws
21 - - - first of all, the Department of Tax and Finance could
22 have made a referral if they thought there was fraud to a
23 law enforcement agency. They also could have, if they
24 wanted to, made a referral to the Department of Economic
25 Development to try to get NECC decertified. What they

1 can't do is to distort and twist and contort 685(g). Every
2 commentator that has looked at this case, everyone knows
3 what happened here. Everyone knows; it's not up for grabs.
4 We know what happened here. The petitioner in this case,
5 desperate to be able to maintain certification as an MBE
6 made - - -

7 JUDGE RIVERA: Well, that - - - that is his
8 sympathetic story. That's what I'm saying. You - - -
9 you've got whatever narratives are going. But let me ask
10 you a different question.

11 MR. GREENBERG: Please.

12 JUDGE RIVERA: I know your red light is on, with
13 Chief Judge's permission. Do you agree that there could be
14 more than one person responsible for the taxes?

15 MR. GREENBERG: Yes.

16 JUDGE RIVERA: Does that matter here, then?

17 MR. GREENBERG: No. Because if you apply
18 effective power, actual authority, and control. Here is
19 the undisputed evidence, if I might. The undisputed
20 evidence. We called four witnesses, not a one of whom - -
21 - and you could see the transcript, had their integrity
22 questioned, was there any claims that they were testifying
23 perjuriously. The undisputed evidence showed as follows:
24 the petitioner in this case did not have control over the
25 checkbook; that was in a safe in Hauppauge, forty miles

1 away from him. Did not have the - - -

2 JUDGE RIVERA: But yet, he did sign checks.

3 MR. GREENBERG: What's that?

4 JUDGE RIVERA: He did sign checks.

5 MR. GREENBERG: Yeah.

6 JUDGE RIVERA: So again, we're back to either you
7 believe his narrative or you don't.

8 MR. GREENBERG: He did.

9 JUDGE SINGAS: Can I ask one question, Chief?

10 CHIEF JUDGE WILSON: Of course.

11 JUDGE SINGAS: So suppose we agree with you, and
12 we think the Tribunal applied the wrong standard, what's
13 the remedy? It goes back to the Tribunal to apply the
14 right standard?

15 MR. GREENBERG: That would be an option that the
16 court would have. I think it's critically important in
17 this case, given the forty-year vacuum that has been filled
18 by the Tax Tribunal, to say what they think the standard
19 is, never citing any federal law. First of all, to set
20 forth like Justice Lynch and Aarons did - - - and by the
21 way, they weren't stretching to say what the law is. They
22 were merely reciting the federal cases.

23 The Tribunal needs to know what the standard is
24 and actually articulate it in its decisions. If you wanted
25 to, you could remit it and say, take a look under that

1 standard. But I would suggest to you on this record, when
2 you know the Tribunal did not question the veracity - - -
3 did not; you have the record before you. They didn't
4 question the veracity of petitioner or any of the
5 witnesses. They relied entirely on the documents, and they
6 said, here's what they said, that's sufficient. But that
7 is not the law. There is a factual determination that
8 needs to be made. Did the petitioner have effective actual
9 power? Do you think he could have told Anthony Nastasi you
10 need to write checks to the Department of Tax and Finance?
11 The undisputed record of evidence is that he, the
12 Comptroller, the general counsel of NECC, multiple times
13 went to Anthony Nastasi and said, pay the taxes. Nastasi
14 said no.

15 So any event, if I might, I've reserved some time
16 for rebuttal.

17 CHIEF JUDGE WILSON: Thank you.

18 MR. GREENBERG: Thank you.

19 MR. DEMUTH: May it please the Court. Hello,
20 Your Honors. Owen Demuth on behalf of the respondent
21 Commissioner.

22 I made a little list here while I heard Counsel
23 argue.

24 Judge Halligan, I'd like to answer your question.
25 You had asked what was in the record? What was actually

1 submitted to the IRS? We actually do know what was in the
2 record. And - - - and we know this from petitioner's
3 accountant who had testified, who represented him during
4 the appeal of the IRS. On page 340, he indicated that the
5 total package was - - - it was basically three affidavits:
6 an affidavit from petitioner, an affidavit from Mr.
7 Nastasi, and an affidavit from the accountant, and - - -
8 and apparently some banks signature cards. And those are
9 on pages 802 to 818 of the record. That was, as Mr. Blanch
10 indicated, the complete package of documents. Meanwhile,
11 the Tribunal has far more than that. It has an array of
12 documents, the responsible person questionnaire. Again,
13 indicating - - -

14 JUDGE TROUTMAN: With respect to the 2005
15 agreement between the parties, what role, if any, does that
16 play with respect to actual or apparent authority?

17 MR. DEMUTH: It - - - it doesn't speak to it.
18 And I'd like to thank you for asking that. I'd like to
19 make a few points about that. First of all, I would agree
20 that because it provides for a future contingent transfer
21 of - - - between Mr. Nastasi's company and petitioner. It
22 does indicate, of course, that Mr. Nastasi had some
23 influence over - - - over NECC. But to the extent it shows
24 his control, it doesn't overcome substantial evidence,
25 because ultimately, that is the standard that applies here,

1 indicating that petitioner also had and exercised his own
2 control.

3 And Judge Rivera, it is critical, it is critical
4 that both the federal and the state standards recognize
5 that more than one person may be responsible. It - - -
6 it's not the most responsible person, it's any - - -

7 JUDGE TROUTMAN: So is it actual authority or is
8 it apparent authority?

9 MR. DEMUTH: It's - - - it's actual authority.
10 And just - - - and again, I think this was another question
11 you asked, Judge Rivera. You said, does it matter? One of
12 petitioner's argument is - - - arguments is that because
13 the Tribunal, and I guess some of the state cases don't use
14 the exact phrasing that we see in some, not all of the
15 federal cases: effective power, significant control, actual
16 authority, then that - - - that means they applied the
17 wrong standard.

18 JUDGE TROUTMAN: With respect to financial
19 control or authority - - -

20 MR. DEMUTH: Yes.

21 JUDGE TROUTMAN: - - - what role does that play?

22 MR. DEMUTH: Oh, it's still very important. That
23 - - - but that's - - - that's not in dispute. But the - -
24 - the fact that they didn't use, you know, phrases like
25 "effective power" doesn't mean the Tribunal did not

1 consider that. And counsel - - -

2 JUDGE HALLIGAN: But do you - - -

3 MR. DEMUTH: - - - counsel indicates - - -

4 JUDGE HALLIGAN: - - - do you - - -

5 MR. DEMUTH: I'm sorry.

6 JUDGE HALLIGAN: I was just going to ask. Do you
7 agree that the touchstone is financial control specifically
8 and not broader operational control over a business?

9 MR. DEMUTH: Well, if - - - under this right,
10 totality of circumstances analysis, which - - - which does
11 make operational control relevant. Emphasis, though,
12 should be given to financial control.

13 JUDGE HALLIGAN: So you think the - - -

14 MR. DEMUTH: And who is - - -

15 JUDGE HALLIGAN: - - - the - - - sorry. You
16 think that the Federal Circuit Court case, which describes
17 the core question as financial control, is a fair
18 characterization of the test? I understand you - - -
19 you're also saying - - -

20 MR. DEMUTH: But they don't have to say it
21 exactly that way.

22 JUDGE HALLIGAN: Yeah.

23 MR. DEMUTH: Yeah. No. I would agree with that.
24 And I think the Tribunal adhered to that and - - - and
25 counsel here indicates that the decision was a cursory one

1 paragraph. It really isn't because you have to look at the
2 findings of fact. Pages 45 to 49 in the Tribunal's
3 decision lay out all the different facts.

4 JUDGE GARCIA: Counsel, on - - - on that point,
5 and I think one thing some of these questions have been
6 going to, which seems to me to make this case different,
7 are the representations that this person made - - -

8 MR. DEMUTH: Yes.

9 JUDGE GARCIA: - - - in terms of control. How
10 would you characterize the Tribunal's findings with respect
11 to those representations?

12 MR. DEMUTH: The Tribunal found, and - - - and
13 this - - - and in this regard, it - - - it was a little
14 different from what the LJ found. If you read the LJ's
15 decision - - -

16 JUDGE GARCIA: Let's stick with the Tribunal.

17 MR. DEMUTH: Okay.

18 JUDGE GARCIA: Let's - - -

19 MR. DEMUTH: The - - - okay. The Tribunal found
20 that - - - that and I think you mean representations. He
21 wasn't just holding himself out without actual authority.
22 The Tribunal actually went further and said no. And the
23 reason why we know this is because on page 58 this was - -
24 - and this is all caught up in the credibility - - -

25 JUDGE GARCIA: I guess, my bottom line is - - -

1 MR. DEMUTH: Yeah.

2 JUDGE GARCIA: - - - are they saying, in your
3 view, the Tribunal, that you did this, and we take you at
4 your word. You're the responsible person here because
5 that's how you represented it to - - - yourself, to us, and
6 that's how we dealt with you in the past. Or are they
7 saying, you're basically estopped, and we understand you
8 weren't, but you said you were. So now, you know, you're
9 the responsible person anyway.

10 MR. DEMUTH: I don't - - -

11 JUDGE GARCIA: Which of those - - -

12 MR. DEMUTH: I don't think it's saying - - -

13 JUDGE GARCIA: - - - or something else?

14 MR. DEMUTH: I think it's saying something else.
15 I - - - I think it's saying, you know - - - and - - - and
16 we know this. He - - - what the - - - what they did on
17 page 58. Petitioner's whole argument, contrary to what
18 counsel said is, I had no control, Nastasi had complete,
19 and if you want to quote - - -

20 JUDGE GARCIA: So did they believe that, or did
21 they not believe it?

22 MR. DEMUTH: They - - - what they - - - they kind
23 of split the difference. What the Tribunal found was we -
24 - - whatever - - - we agree, Mr. Nastasi seems to have some
25 influence. But of course, more than one responsible person

1 doesn't - - - doesn't prevent you from going after another
2 one. What the Tribunal found was, whatever control Mr.
3 Nastasi might have had, you, yourself, petitioner, had and
4 exercised enough actual authority of your own, and then
5 cited all of these different things, including - - - I'd
6 like to pull - - - call the court's attention to the - - -
7 there's a contact log between the department and petitioner
8 on pages 784 to 793, in which there are numerous
9 communications during the period at issue, between
10 petitioner and the department. And not one reference to
11 Mr. Nastasi, not one reference to him saying, I have to go
12 back to Mr. Nastasi to get approval, I'm acting as an agent
13 for him. It's petitioner who is carrying the ball and
14 promising to make payments and promising to do - - - to get
15 financing for NECC. That and about eleven other sets of
16 documents are - - - are - - -

17 JUDGE GARCIA: So would you say, though, it might
18 have been - - - they took it as it might have been an
19 exaggeration in order to get certain advantages under this
20 program, but it wasn't without basis?

21 MR. DEMUTH: Exactly. Petitioner's argument - -
22 - it's an unusual argument that petitioner has to make is,
23 everything I did was a sham. It was a fraud. I was being,
24 you know, I - - - I was really - - - this guy was pulling
25 my strings. And Tribunal said, no, we're looking at these

1 documents here, we're looking how you used these documents,
2 and we think you had some authority of your - - - on your
3 own. So - - - so - - -

4 JUDGE CANNATARO: So was that the credibility
5 determination that the Tribunal is talking about?

6 MR. DEMUTH: Absolutely.

7 JUDGE CANNATARO: Because your adversary says
8 it's not that; that's not the credibility determination.

9 MR. DEMUTH: It - - - it is a credibility
10 determination. And - - - and - - -

11 JUDGE HALLIGAN: And you're at page 58?

12 MR. DEMUTH: Yes.

13 JUDGE HALLIGAN: That's the operative? That
14 middle paragraph there?

15 MR. DEMUTH: That's the most important part of
16 the opinion. And I'm going to slightly paraphrase what
17 they said, which - - - which shows that this is manifestly
18 a credibility determination. "We do not find in
19 petitioner's testimony that he never had authority or
20 control over NECC overcomes, the record evidence
21 demonstrating just the opposite." This is credibility.
22 And because it is - - -

23 JUDGE CANNATARO: And if I can - - - if I could
24 just confirm? You're saying that that credibility
25 determination or at least the - - - the fullness of that

1 was not before the IRS when - - - when they considered the
2 claims made in this case?

3 MR. DEMUTH: Apparently not. All we have is
4 their own affidavits and some bank signature cards.

5 JUDGE CANNATARO: I'm trying to figure out if
6 maybe it's possible the IRS might have come to the same
7 conclusion, had they had the benefit of the same record?

8 MR. DEMUTH: You know, I - - - I don't - - - I
9 don't know, but it's clear that they didn't. It's clear
10 that these were decided on very, very different records.
11 And because of that, you know, I think petitioner realizes
12 that estoppel would not apply. But comity shouldn't apply
13 either.

14 JUDGE CANNATARO: Well, it's just, I think - - -
15 I think what your adversary is arguing is the - - - the
16 reason why you might have different results here is that
17 there's an inappropriate deviation from the focus on
18 financial control on your side that - - - that the IRS is
19 correctly applying, and that's the explanation for the
20 divergence.

21 MR. DEMUTH: Well - - -

22 JUDGE CANNATARO: And I'm wondering if there are
23 alternative explanations other than that.

24 MR. DEMUTH: Well, the bottom line is we'll never
25 know. We don't know what the IRS determined. Not only was

1 it a different record, but their letter - - -

2 JUDGE TROUTMAN: But what here - - - what in the
3 record here establishes that the appropriate standard was
4 applied below?

5 MR. DEMUTH: By the Tribunal?

6 JUDGE TROUTMAN: Yes.

7 MR. DEMUTH: Well, as I - - - I was saying
8 earlier, they - - - they first of all, they indicated - - -
9 they said it in a different way. But of course, that
10 doesn't - - - doesn't render what they did wrong. They
11 said it's a - - - it's a key factor and responsible person
12 inquiry is consider the involvement in fiscal matters.
13 That's on page 57. And then again, the findings of fact
14 are part of the decision.

15 JUDGE TROUTMAN: But not all persons involved in
16 fiscal matters. There is - - - one could have some fiscal
17 control, but not necessarily actual authority to make
18 decisions as to who gets paid, when they get paid, what
19 bills get paid.

20 MR. DEMUTH: Well, the Tribunal found that there
21 was actual - - - so whatever Nastasi himself also
22 exercised, the Tribunal found that there was.

23 JUDGE TROUTMAN: So what, in the record, supports
24 that he had actual authority to make those financial
25 decisions as to who gets paid, when they get paid, et

1 cetera?

2 MR. DEMUTH: Well, first, you know, I'll - - -
3 I'll go through it all. He had the authority to, and he
4 submitted NECC's tax return as NECC's president. He had
5 the authority to and did resolve disputes as the sole
6 negotiator with - - - with the department in negotiating
7 NECC's various tax liabilities.

8 JUDGE TROUTMAN: But I said the overall financial
9 responsibilities. Where is it that - - -

10 MR. DEMUTH: Well, I would say the best place to
11 look is probably the responsible person questionnaire where
12 petitioner himself said, "I have control over all financial
13 affairs dealing with NECC."

14 JUDGE TROUTMAN: And how does that avoid a - - -
15 a titular head kind of situation? Right? If you just look
16 at that, can't you just default to the person being a
17 titular head?

18 MR. DEMUTH: Oh, I don't think so at all, Your
19 Honor. This is not just him saying, I'm the president;
20 therefore, I'm the guy. This is him saying, I'm the
21 president, but I'm also - - - and - - - and it's more than
22 just that. There's all these different boxes he's
23 checking, saying I'm also responsible for this. No, that
24 is - - - that is - - - that's another error petitioner
25 makes.

1 JUDGE SINGAS: So the core question I thought you
2 were arguing, and I thought they were arguing, that the
3 core question is whether or not the individual who is being
4 charged as the person responsible for paying the taxes is
5 someone who in fact could have done that but chose not to
6 do that. But that's really the question that's on - - -

7 MR. DEMUTH: Well, that's the willfulness part.
8 That the - - - the responsible person says, well, what
9 actual authority did you have? And - - - and that goes to
10 the twelve sets of documents.

11 JUDGE SINGAS: But the authority has to be to
12 actually pay the taxes.

13 MR. DEMUTH: Right. And he did. I mean, again,
14 look at that contact log on pages 784 to 793, he's on - - -
15 he and he alone, no reference to Mr. Nastasi at all, he's
16 saying, I'm going to try to get payment next time. Oh, I
17 couldn't make payment this week; I had to make payroll. So
18 he's also in charge of payroll apparently.

19 JUDGE SINGAS: And he does sign some checks?

20 MR. DEMUTH: And he's signing checks. And - - -
21 and yes, petitioner tried - - - made a lot about this was -
22 - - he had to go down to Nastasi's office. But one thing
23 that petitioner doesn't note is - - - is that the bank
24 signature card on file at the time indicated that
25 petitioner is signer number one and the only one of the two

1 who had power to independently withdraw money.

2 JUDGE GARCIA: On review - - -

3 JUDGE TROUTMAN: Wouldn't it have been easier for
4 us to figure out that the appropriate standard was applied
5 if federal law was cited? Is - - - is there a reason why
6 they wouldn't cite federal law?

7 MR. DEMUTH: I suppose it would be easier, but I
8 - - - I don't - - - I don't know of any requirement and - -
9 - and - - - or any state case where if you're - - - if the
10 issue before you is to parse a state tax law, you're all of
11 a sudden required to then go out and - - - and do a
12 parallel - - -

13 JUDGE TROUTMAN: As it applies to conformity. So
14 does conformity apply here or not?

15 MR. DEMUTH: Well, the issue was raised. We - -
16 - we think it's meritless and a red herring. But yes,
17 there were - - - there was complete conformity here. And
18 it doesn't matter that the language that's being used was
19 slightly different. The standards are the same - - -

20 JUDGE GARCIA: Counsel, put it - - -

21 MR. DEMUTH: - - - and they were applied the
22 same.

23 JUDGE GARCIA: Put aside the test for a second
24 and the conformity issue, I understand the dispute. But
25 assuming the right test, what's our standard of review of

1 this record for the conclusion here?

2 MR. DEMUTH: Your - - - your - - - your standard
3 is substantial evidence. That - - - that - - - that is - -
4 - that has been our - - - our argument all along, is that
5 this was a fact-intensive, credibility driven inquiry.
6 They could not - - - when petitioner is putting his
7 credibility at issue and making the argument that I had no
8 control and Nastasi had exclusive control, it's clear the
9 Tribunal did not accept that. That's a credibility
10 determination because - - -

11 JUDGE RIVERA: That is substantial evidence based
12 on the proper interpretation application of the law,
13 correct? So you have to have the correct standard in
14 place.

15 MR. DEMUTH: Right. So the - - - the - - - the
16 court would first say, just like the Third Department
17 majority said, that there was no conflict. There were - -
18 - the - - - the - - - there was no inconsistency with how
19 the - - - the Tribunal applied 685 versus how the federal
20 courts apply 6672. Then I mean, that's kind of what this
21 court did in Levin v. Gallman. It had - - - you know, it's
22 kind of a hybrid. There's a - - - there's an error of law.
23 And - - - and the question that Levin had to address was,
24 well, what does willfulness mean? Because this is back in
25 - - - you know, many years ago. They adopted the federal

1 standard, then they applied it to the substantial evidence
2 review. So - - -

3 JUDGE HALLIGAN: That - - -

4 MR. DEMUTH: - - - that's what this court could
5 do here.

6 JUDGE HALLIGAN: - - - that also assumes, I take
7 it that we read that paragraph on page 58 as reflecting a
8 credibility finding?

9 MR. DEMUTH: Yes, but even if you found that
10 credibility, - - - it's still substantial evidence. I
11 mean, they - - - even if credibility didn't enter into it,
12 I think it - - - that was - - - that was nothing, if not a
13 credibility finding. It's still, you know, as this court
14 has said many times, most probably most recently in Haug,
15 you can have substantial evidence on either side. And so
16 if you - - -

17 JUDGE HALLIGAN: I guess - - - I guess - - -

18 MR. DEMUTH: - - - just do a weighing - - -

19 JUDGE HALLIGAN: Just to make sure I understand.
20 What I took you to be arguing and - - - and maybe I
21 misunderstood, was that to the extent there is evidence
22 that he lacked any actual authority over the financial
23 operations, that given that he had some operational
24 control, was involved in the finances and held himself out,
25 that that was enough to show that the Tribunal must have

1 found that - - - that the evidence cutting the other way
2 was - - -

3 MR. DEMUTH: Right.

4 JUDGE HALLIGAN: - - - was not sufficient?

5 MR. DEMUTH: Right. And that's exactly what they
6 said - - -

7 JUDGE HALLIGAN: Which I took to be - - -

8 MR. DEMUTH: - - - on page 58. You know, we're -
9 - - we've considered your evidence - - - you know, he had
10 witnesses. But - - - but then - - - and - - - and - - -
11 but that's how it goes. That's how it happens with
12 substantial evidence review. You know, because there's
13 contrary evidence, you don't - - - it doesn't change - - -
14 it doesn't require annulment. And that's exactly what they
15 did in 58. They said, oh, we've considered your evidence,
16 petitioner, but we also have all this other evidence, your
17 own testimony, all these documents that you were paying
18 taxes, that you were - - - you were spearheading
19 negotiations with the department, and it demonstrates just
20 the opposite of what you're arguing. So yeah, that's - - -
21 that is a classic - - - even though the facts may be kind
22 of odd, this is a classic substantial evidence case.

23 JUDGE CANNATARO: But that can't be what we're
24 here to do. We're not here to determine whether or not
25 there was substantial evidence. That's a fairly easy



1 determination. The underlying issue is, did they apply - -
2 - did they test under the appropriate standard? That has
3 to be the core of the argument, don't you think?

4 MR. DEMUTH: Well, that's the core of
5 petitioner's argument, because he trying to get around
6 substantial evidence review. He knows he loses if
7 substantial evidence review is the only issue before the
8 court. But yes, that there is that error of law that he's
9 raised; we've addressed it. And - - - and there is - - -
10 we've gone into the federal cases, that they've - - -
11 they've not pointed out any major departure. Even though
12 the wording, the phrasing the Tribunal used might have been
13 different, it doesn't indicate that they weren't also
14 giving strong credence and emphasis on his financial
15 control over NECC. I mean, the standards are - - - are the
16 same and they were applied the same.

17 CHIEF JUDGE WILSON: Thank you, Counsel.

18 MR. DEMUTH: Thank you very much.

19 JUDGE CANNATARO: Mr. Greenberg, can I ask you a
20 question?

21 MR. GREENBERG: Please.

22 JUDGE CANNATARO: It can't be the case that the
23 Tribunal or - - - or the Appellate Division has to cite the
24 appropriate federal case that applies the correct standard
25 just to prove that they're doing it right. I mean, they

1 could cite their own precedent that shows that they're in
2 conformity with the federal standard, can't they?

3 MR. GREENBERG: Yes. I don't disagree.

4 JUDGE CANNATARO: And I feel like that's what the
5 appellate division did here. They - - - they cited their
6 own precedent. But that precedent actually refers to what,
7 I think, is the correct federal analysis.

8 MR. GREENBERG: Appellate Division majority, when
9 you read their opinion, they cite a forty-year-old case,
10 and they articulate what they think the standard is in one
11 sentence. That is not the federal standard. The trap door
12 fell out from under their argument when Justice - - - Judge
13 Halligan and Judge Troutman asked the question.

14 JUDGE CANNATARO: Is old law - - - is old law,
15 bad law? Is that the problem?

16 MR. GREENBERG: I'm sorry?

17 JUDGE CANNATARO: Is old law a bad law?

18 MR. GREENBERG: No.

19 JUDGE CANNATARO: You're talking about Tully,
20 right?

21 MR. GREENBERG: No.

22 JUDGE CANNATARO: Is that - - - is that the
23 forty-year-old case?

24 MR. GREENBERG: The one sentence in the appellate
25 division majority is the same error of the Tribunal; it's

1 one sentence. It says the tests are factors.

2 Judge Halligan, you asked the question, at long
3 last, they finally conceded what they resisted, even in the
4 Appellate Division. That the test is effective actual
5 apart. The core inquiry is, does the person have the
6 ability to decide the money can be paid? Your question,
7 Judge Troutman.

8 JUDGE SINGAS: Okay. That's the question. So
9 you look at multiple factors, that's the way you answer
10 that question. That's your test. So I'm - - - I'm not
11 understanding your distinction.

12 MR. GREENBERG: Well, then let - - - I want to be
13 clear. Crystal clear as the federal cases are, the core
14 inquiry is whether or not the person at issue has effective
15 power, actual authority, or ability over the finances of
16 the company to cut the check, not sign the check. That is
17 the core inquiry. And Judge Troutman, you put your finger
18 on it. What does that 2005 agreement mean? Again, we
19 don't have to speculate about what it means any more than
20 the wild speculations about what they think the Tribunal
21 thought and did. The 2005 agreement says that Mr. Black
22 was an at-will employee who could be fired in the
23 unilateral determination of Anthony Nastasi, and he gets
24 the whopping twenty-six dollars.

25 CHIEF JUDGE WILSON: But Counsel, it doesn't

1 actually say that, I think, at least not as I read it. I
2 read it more as a security agreement. That is, Nastasi had
3 loaned four million plus to the company, and what he put in
4 place was a trigger where he could then acquire control of
5 the company. And at that point, if the company was worth
6 more than whatever amount of money he had loaned, plus
7 whatever the secured creditors were owed, then the company
8 would revert back to Mr. Black. If it was worth less than
9 the sum of those two amounts, then it wouldn't revert back
10 to Mr. Black.

11 So it's a little - - - it's - - - it's unclear, I
12 think at the time they sign it, whether the company is
13 going to have more than the amount loaned plus the secured
14 creditors, what was owed to them. So it's - - - I think
15 you're oversimplifying the way it worked.

16 MR. GREENBERG: Respectfully, I don't think I am.
17 February 18, 2015, when Mr. Black would not assent to
18 Anthony Nastasi's demand that he accept personal liability
19 for the debts, right? February 18, 2015, he says, then
20 you're done. That's the email. You're fired. Invoking
21 the agreement, you're fired. And Mr. Black gets twenty-six
22 dollars. That was the value of his stock, twenty-six
23 dollars.

24 CHIEF JUDGE WILSON: Right. But if - - - if the
25 company actually had had assets that were more than the sum

1 of those two amounts, then Nastasi would be forced to sell
2 back seventy shares for seventy dollars, right?

3 MR. GREENBERG: Yes. Theoretically.

4 CHIEF JUDGE WILSON: That's that - - - that's the
5 way the agreement read? Well, it just depended on a future
6 contingent event that nobody knew, at least I didn't know
7 what the outcome would be. Maybe Nastasi did.

8 MR. GREENBERG: Well, I think a fair reading of
9 the agreement, Your Honor, makes absolutely clear he's an
10 at-will employee. He can be fired whenever Mr. Nastasi - -
11 -

12 JUDGE GARCIA: And does that go just to the
13 myriad of factors that he - - - you - - - you say we
14 shouldn't consider him an owner, because an at-will
15 employee can still be a responsible person, right?

16 MR. GREENBERG: Yes. Theoretically, they could
17 be. But here's the - - - the reality. And incidentally,
18 Judge Garcia, you asked the question. Like, what's really
19 going on with the Tribunal? Not wild speculations about
20 credibility findings, which they clearly did not make. The
21 sentence - - - the one sentence says what it says. The
22 Tribunal struggled the same way I was in the Appellate
23 Division, right? Which is your point. They wanted to
24 estop Mr. Black because of the forms he submitted. That's
25 what's going on. It was a result in search of a rationale.

1 JUDGE GARCIA: Can they do that?

2 MR. GREENBERG: It was a result - - -

3 JUDGE GARCIA: Can they do that? Can they estop
4 him? Why - - - why couldn't they say we weighed this
5 factor very heavily, you represented it to us, you got very
6 lucrative contracts under this. We paid you all this
7 money. You didn't withhold it. You told us that you
8 would. You told us you were a responsible officer, and now
9 you are. And we're holding you responsible. You can tell
10 us the thing was in the drawer or you know, you can make
11 all those arguments. But you told us that, and now we're
12 holding you to it. Can they do that?

13 MR. GREENBERG: I don't think they can do that
14 under the federal standard. Perhaps - - -

15 JUDGE GARCIA: I haven't seen a federal case
16 where this has happened. And also, can New York weigh more
17 heavily because the misrepresentations were made in a state
18 program?

19 MR. GREENBERG: We could speculate what the
20 Tribunal might have done, could have done, should have
21 done, would have thought, but you know what they did. And
22 what they did - - - and by the way, before we got to the
23 Appellate Division, the tax department fought bitterly the
24 idea of an actual authority was the test. Bitterly. It
25 was only in the Appellate Division when finally, at long

1 last, appeals and opinions had to concede what the federal
2 standard was and then said, yes, it's actual authority.
3 But that's really what they were doing.

4 You not only need to look at this opinion, but
5 you have years and years of Tax Tribunal decisions where
6 over and over again, never, not once, never, not once have
7 they applied anything like the federal standard.

8 JUDGE HALLIGAN: Chief, may I ask one last
9 question?

10 CHIEF JUDGE WILSON: Of course.

11 JUDGE HALLIGAN: To go back to the point you just
12 made in response to Judge Garcia's question about whether
13 they can do it. The only federal case I saw that shed any
14 light on the question is one that both you and your
15 adversary cite, which is Hochstein. And as the AG's office
16 points out, I think there's a footnote in Hochstein which
17 suggests that holding out is something that could be given
18 significant weight. Are there any other federal cases
19 you're aware of that address that point?

20 MR. GREENBERG: This particular fact pattern, the
21 answer, Judge Halligan, is no. I wasn't able to find - - -

22 JUDGE HALLIGAN: Were you able to hold out - - -

23 MR. GREENBERG: - - - I wasn't - - -

24 JUDGE HALLIGAN: - - - as being responsible?

25 MR. GREENBERG: This fact pattern in its own

1 right, I would suggest, is different. It's unique. And
2 that's why I think Judge Lynch and Judge Aarons got it
3 exactly right. Are we going to warp and distort the Tax
4 Tribunal's application of a provision which, by the way, if
5 I might make this one point?

6 JUDGE RIVERA: May I ask you this - - - again,
7 with the Chief Justice's permission?

8 CHIEF JUDGE WILSON: Of course.

9 JUDGE RIVERA: Assume for one moment we disagree
10 with you that there wasn't a credibility decision. If
11 there is a credibility decision, does that then resolve the
12 case in favor of the Tribunal?

13 MR. GREENBERG: It does not.

14 JUDGE RIVERA: Why not?

15 MR. GREENBERG: Because of this court's decision
16 in 2014, in matter of Gaied and also the New York Times
17 case; there was a threshold issue. Did the agency or did
18 it not apply the correct standard? If you find that they
19 applied the incorrect standard, which I think clearly they
20 didn't apply the federal standard, then you don't even get
21 to that.

22 JUDGE RIVERA: We disagree with you on that.
23 Those are the two things we need to do?

24 MR. GREENBERG: I believe the threshold issue,
25 yes. First and foremost, did they apply the correct

1 standard? And the final point I'd like to make is how
2 vitally important to corporations all throughout the State
3 of New York this case is and what the standard is. Why?
4 Because every corporation in New York State takes
5 withholding taxes from employees. Every corporation in New
6 York State has officers and directors who do not want to be
7 personally liable. And if they're going to be personally
8 liable, they want to know when and under what circumstance.

9 JUDGE RIVERA: Hopefully they're not
10 misrepresenting, right? I mean, that's what makes the case
11 different, right? It's the - - -

12 MR. GREENBERG: Whether - - -

13 JUDGE SINGAS: - - - it's the concession, the
14 admission that I have misrepresented my - - - my status, my
15 ability to, as you say, cut, not sign the checks. That's
16 what makes this different. I would hope that that's - - -
17 that people are not on pins and needles over that.

18 MR. GREENBERG: Whatever the facts of this case
19 are, the reason why it is in the New York Court of Appeals,
20 - - - there's a reason why this case is in the New York
21 Court of Appeals. Because Justice Lynch and Justice Aarons
22 thought after forty years of a vacuum in the Tribunal,
23 without any guidance from this court about the meaning of
24 this test, that the Tribunal, once and for all, should be
25 told what the law is and to apply it. And for all of the

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reasons in our brief, we would respectfully request that
you reverse.

CHIEF JUDGE WILSON: Thank you.

MR. GREENBERG: Thank you for your time and
attention.

(Court is adjourned)



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C E R T I F I C A T I O N

I, Chrishanda Sassman-Reynolds, certify that the foregoing transcript of proceedings in the Court of Appeals of Black v. NYS Tax Appeals Tribunal, No. 86 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.



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