

STATE OF NEW YORK

TAX APPEALS TRIBUNAL

In the Matter of the Petitions	:	
of	:	
C. E. FLEMING CORPORATION	:	DECISION
AND CHARLES E. FLEMING	:	DTA NOS. 817008
	:	AND 817009
for Redetermination of Deficiencies or for Refund	:	
of New York State and New York City Personal Income	:	
Tax under Article 22 of the Tax Law and the	:	
Administrative Code of the City of New York for the	:	
Period January 1, 1987 through December 30, 1996.	:	

Petitioners C. E. Fleming Corporation and Charles E. Fleming, 400 Olive Street, St. Louis, Missouri 63102-2718, filed an exception to the determination of the Administrative Law Judge issued on May 4, 2000. Petitioners appeared by Fred B. Wander, Esq. The Division of Taxation appeared by Barbara G. Billet, Esq. (Kevin R. Law, Esq., of counsel).

Petitioners filed a brief in support of their exception. The Division of Taxation filed a letter stating it would rely on its post-hearing brief filed below. Oral argument, at petitioners' request, was scheduled for January 11, 2001 in Troy, New York, but neither petitioners nor their representative appeared.

After reviewing the entire record in this matter, the Tax Appeals Tribunal renders the following decision.

ISSUES

I. Whether the Division of Taxation should be estopped from asserting New York State and City withholding tax deficiencies against petitioner C. E. Fleming Corporation.

II. Whether penalties asserted against C. E. Fleming Corporation for failing to file withholding tax returns and wage and tax statements and for failing to remit withholding tax should be abated.

III. Whether the Division of Taxation properly determined that petitioner Charles E. Fleming was liable for penalties equal to 100 percent of C. E. Fleming Corporation's unremitted withholding taxes pursuant to Tax Law § 685(g) and (n).

FINDINGS OF FACT

We find the facts as determined by the Administrative Law Judge. These facts are set forth below.

On February 9, 1998, following an audit, the Division of Taxation ("Division") issued to petitioner C. E. Fleming Corporation ten notices of deficiency which asserted New York State withholding tax due for the period January 1, 1987 through December 30, 1996 as follows:

<i>Year</i>	<i>Assessment No.</i>	<i>Tax Amount Assessed</i>
1987	L014658339	\$ 4,087.24
1988	L014658340	7,496.96
1989	L014658344	7,802.48
1990	L014658342	29,100.50
1991	L014658346	49,176.14
1992	L014658348	35,566.05
1993	L014658350	41,629.04

1994	L014658352	39,571.64
1995	L014658354	34,268.24
1996	L014658356	36,653.00

Also on February 9, 1998, the Division issued to petitioner C. E. Fleming Corporation nine notices of deficiency which asserted New York City withholding tax due for the period January 1, 1988 through December 30, 1996 as follows:

<i>Year</i>	<i>Assessment No.</i>	<i>Tax Amount Assessed</i>
1988	L014658341	\$ 2,145.63
1989	L014658345	2,006.70
1990	L014658343	6,862.18
1991	L014658347	11,550.24
1992	L014658349	11,177.97
1993	L014658351	13,932.71
1994	L014658353	14,855.05
1995	L014658355	12,593.68
1996	L014658357	12,494.73

The notices of deficiency issued to petitioner C. E. Fleming Corporation also asserted penalties pursuant to Tax Law § 685(a)(1); (b) and (h), plus interest.

On March 30, 1998, the Division issued to petitioner Charles E. Fleming 19 notices of deficiency (Notice numbers L014748885 through L014748903) which asserted penalty under Tax Law § 685(g) equal to the amount of New York State and City withholding tax asserted against C. E. Fleming Corporation pursuant to the notices of deficiency referenced above.

Petitioner C. E. Fleming Corporation (“the corporation”) is an architectural and engineering firm. Its principal office is in St. Louis, Missouri. During the period at issue petitioner had an office in New York City. The corporation withheld New York State and City personal income tax from its New York employees during that time and issued W-2 forms to these employees documenting the amounts so withheld. The corporation did not file any New York State or City withholding tax returns during that period and did not remit any of the tax withheld from its employees to New York State.

C. E. Fleming Corporation was selected for a withholding tax audit as a result of a screening program in the Division’s withholding tax database matching amounts reported as withheld by employees and their employers. In this case, the program revealed that the corporation’s New York employees had reported New York State and City tax withheld, but that petitioner had not remitted any such tax or filed any withholding tax returns.

The Division sent the corporation a letter dated January 21, 1997 advising that petitioner’s withholding tax returns for the period January 1, 1993 through December 31, 1995 had been selected for audit. The letter further advised petitioner that the Division’s records indicated that employees had been claiming withholding under petitioner’s employer identification number, but that the Division had no record of the corporation’s filing of any withholding tax returns during the period. The letter requested that petitioner provide the Division with copies of all records pertinent to the preparation of its withholding tax returns, including New York forms WT-1 and WT-4A and Federal forms 940, 941, W-2 and W-3.

The corporation provided documents in response to the Division’s request. Upon review of such documents, the Division concluded that petitioner did not file withholding tax returns for

the 1993 through 1995 period and that it withheld, but did not remit, New York State and City income tax during the same period. The Division expanded the audit period to include 1987 through 1992 and 1996. Upon review of documentation provided by the corporation for these years the Division determined that petitioner did not file withholding tax returns and that it withheld, but did not remit, withholding tax during this expanded portion of the audit period.

For the years 1987 through 1991, and 1996, the Division determined the amount of State and City withholding tax that petitioner withheld but did not remit by totaling the amounts reported as withheld on W-2 wage and tax statements provided to the Division during the audit. For the years 1993 through 1995, because of discrepancies between C. E. Fleming Corporation's W-2's and general ledger, the Division determined the amount of withholding tax due using the general ledger. For the year 1992, the general ledger did not indicate New York State or City withholding. The Division determined the amount withheld for this year by subtracting the New York taxes withheld for the years 1987 through 1991 from the amount that was accrued as payable on the general ledger as of January 1, 1993.

The corporation did not take issue with the Division's method of calculating the subject withholding tax deficiencies.

During the audit, petitioner C. E. Fleming Corporation produced a letter addressed to the Division's "Withholding Tax Unit" dated March 16, 1993, which stated, in relevant part, "[a]t this time we would like to again request State of New York Withholding tax forms & instruction materials for the C. E. Fleming Corporation." The letter was signed by Mark Vleisides of the corporation's accounting department. Petitioner offered no evidence regarding the mailing of this letter and the Division produced no evidence of receipt.

The corporation also produced a letter addressed to the Division's Revenue Opportunity Division dated November 6, 1995, which advised of the return of certain questionnaires. This letter makes no reference to withholding tax.

During the audit, the corporation, by its controller, Timothy J. Rickard, sent a letter dated March 14, 1997 to the Division which stated that the "letters [dated March 16, 1993 and November 6, 1995] were sent after numerous prior attempts were made to obtain the proper information from the State." Mr. Rickard also sent a letter to the Division dated December 29, 1997 following the Division's issuance of its audit report in this matter. This letter states, in part: "We further attempted to contact the State numerous times by mail and telephone to request the proper [withholding tax] filing information yet never once received a response to any of our inquiries."

Petitioner Charles E. Fleming was president of C. E. Fleming Corporation and owned 100 percent of its stock. He was an employee of the corporation and the sole signatory on the corporate checking account. Mr. Fleming was aware that the corporation was withholding New York State and City taxes from employee wages but not remitting such taxes to the Division. Mr. Fleming did not personally attempt to obtain information from the Division regarding the corporation's withholding tax obligations because he had charged others in the organization with this responsibility, notably the corporation's controller, who had greater knowledge of such matters.

THE DETERMINATION OF THE ADMINISTRATIVE LAW JUDGE

Initially, the Administrative Law Judge found that there was insufficient support for an estoppel claim against the Division for failure to supply forms and instructions concerning the

filing of New York State and City withholding tax returns. The Administrative Law Judge held that, as a general proposition, the doctrine of estoppel is not applicable to governmental acts absent a showing of exceptional facts which require its application to avoid a manifest injustice (*Matter of Sheppard-Pollack v. Tully*, 64 AD2d 296, 409 NYS2d 847). Those facts did not present themselves in this matter, where petitioner corporation withheld tax from employees and then failed to remit the tax for a ten-year period. Such circumstances do not rise to the level of the unusual circumstance which would warrant the invocation of estoppel against the Division (*Matter of Harry's Exxon Service Sta.*, Tax Appeals Tribunal, December 6, 1988).

In addition, a concealment or false representation is a necessary element of any estoppel claim (*see, Griesemer v. Bourst*, 141 AD2d 919, 529 NYS2d 232). Since the Administrative Law Judge found no evidence of any misrepresentations by the Division in this matter, petitioners' estoppel claim failed on this ground as well. The Administrative Law Judge noted that the Division's failure to respond to petitioners' requests for forms and instructions could have been easily remedied by consulting with a tax professional familiar with New York State and City withholding tax. The Administrative Law Judge determined that it was not prudent to knowingly withhold and fail to remit the taxes over a ten-year period. Further, even if the Division's failure to provide the forms and instructions rose to the level of a misrepresentation, petitioners did not suffer "profound and unconscionable" injury (*see, Schuster v. Commissioner*, 312 F2d 311, 62-2 USTC ¶ 12,121).

With respect to the penalties asserted pursuant to Tax Law § 685(a)(1) and (h), the Administrative Law Judge held that petitioners failed to establish an entitlement to an abatement. The fact that petitioners did not report or pay over any of the withholding taxes it collected from

employees for a ten-year period and did not seek the advice of a tax professional was conduct which constituted “willful neglect” for purposes of Tax Law § 685(a)(1) and (h) and “intentional disregard of the Tax Law” for purposes of Tax Law § 685(b).

The Administrative Law Judge also determined that Charles E. Fleming was a “person” within the meaning of Tax Law § 685(n). Mr. Fleming was a 100 percent shareholder of C.E. Fleming Corporation; an employee of the corporation; and the sole signatory on the corporate checking account. The Administrative Law Judge held that he was a person who had or could have had sufficient authority and control over the affairs of the corporation to be considered a person under a duty to remit the withholding taxes in question (*Matter of Constantino*, Tax Appeals Tribunal, September 27, 1990).

The Administrative Law Judge held that Mr. Fleming acted “willfully” in his failure to remit the withholding taxes to New York State in that his conduct was consciously and voluntarily done with knowledge that the trust funds belonging to the State would not be paid over but used for other purposes (*citing Matter of Levin v. Gallman*, 42 NY2d 32, 396 NYS2d 623). Under the standard enunciated in *Levin*, it is not necessary to show an intent to deprive the government of its money, only something more than accidental nonpayment. The Administrative Law Judge determined that this willfulness standard had been met in this matter. Mr. Fleming was fully aware that taxes were being withheld from employees but not reported or paid over to the State. He made no effort to correct the situation and permitted his subordinates to continue the failure for a ten-year period. The Administrative Law Judge determined that these actions constituted “willfulness” under Tax Law § 685(g). Petitioner Charles E. Fleming’s delegation of

his responsibilities did not shield him from responsibility since his actions were not reasonable and he had full knowledge of the corporation's failure to report and pay over the taxes.

ARGUMENTS ON EXCEPTION

On exception, petitioners contend that the corporation never agreed to the Division's methodology in calculating the taxes assessed. This is the first time this factual issue was raised by petitioners in this matter. Further, petitioners argue that the Division did not produce any findings of fact at the hearing to determine that petitioners agreed to the methodology.

Petitioners also argue that the circumstances in this matter do constitute exceptional facts which require the application of the estoppel doctrine and that the damages suffered by petitioners were both profound and unconscionable. Petitioners maintain that the Division did not prove that there was an intentional disregard of the Tax Law because there was ample proof that petitioners made inquiries of the Division concerning its responsibilities but received no response and, therefore, its actions could not have been intentional. Petitioners contend that their failure to use certified or registered mail when sending correspondence to the Division was not fatal to their case. Finally, petitioners maintain that their acts were not voluntary because they were unaware of the requirements due to the Division's failure to provide forms and instructions.

OPINION

We affirm the determination of the Administrative Law Judge. However, we first address petitioners' argument that challenges the methodology used by the Division to calculate the taxes assessed herein. This factual issue was not raised before the Administrative Law Judge in the petition, at hearing or in post hearing briefs. As we stated in *Matter of Chuckrow* (Tax Appeals Tribunal, July 1, 1993):

We have consistently held that new legal issues can be raised on exception (*see, Matter of Standard Mfg. Co.*, Tax Appeals Tribunal, July 11, 1991; *Matter of Small*, Tax Appeals Tribunal, August 11, 1988). We have not, however, allowed new factual issues to be raised after the hearing which would disadvantage the party who had the burden of establishing the disputed fact

This is especially true where, as here, a party has failed to introduce any evidence in support of its position at hearing (*Matter of Small, supra*), a position heretofore undisclosed. For this reason, we cannot permit petitioners to challenge the audit methodology.

With respect to the remaining issues of estoppel, liability for penalties assessed pursuant to Tax Law § 685(a)(1), (b) and (h), and the personal liability of Mr. Fleming for penalties under Tax Law § 685(g), we believe the Administrative Law Judge fully and accurately addressed each of them. Since petitioners have raised no new legal arguments on exception, we affirm the determination based upon the reasoning set forth therein.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of C. E. Fleming Corporation and Charles E. Fleming is denied;
2. The determination of the Administrative Law Judge is affirmed;
3. The petitions of C. E. Fleming Corporation and Charles E. Fleming are denied; and

4. The notices of deficiency, dated February 9, 1998 and March 30, 1998, are sustained.

DATED: Troy, New York
July 5, 2001

/s/Donald C. DeWitt

Donald C. DeWitt
President

/s/Carroll R. Jenkins

Carroll R. Jenkins
Commissioner

/s/Joseph W. Pinto, Jr.

Joseph W. Pinto, Jr.
Commissioner