

STATE OF NEW YORK
DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
DAVID B. LYON	:	DETERMINATION
for Redetermination of a Deficiency or for	:	
Refund of Personal Income Tax under Article 22	:	
of the Tax Law for the Period August 16, 1982	:	
through August 31, 1982.	:	

Petitioner, David B. Lyon, 7080 East Eden Road, Hamburg, New York 14075, filed a petition for redetermination of a deficiency or for refund of personal income tax under Article 22 of the Tax Law for the period August 16, 1982 through August 31, 1982 (File No. 52750).

A hearing was held before Timothy J. Alston, Hearing Officer, at the offices of the State Tax Commission, 65 Court Street, Buffalo, New York, on May 20, 1987 at 9:15 A.M. Petitioner appeared by Phillips, Lytle, Hitchcock, Blaine & Huber (James A. Locke, Esq., of counsel). The Audit Division appeared by John P. Dugan, Esq. (Deborah J. Dwyer, Esq., of counsel).

ISSUE

Whether petitioner is liable for the penalty asserted against him pursuant to Tax Law § 685(g) with respect to withholding taxes due from Fabmet Corporation.

FINDINGS OF FACT

1. On February 27, 1984, the Audit Division issued a Notice of Deficiency along with a Statement of Deficiency to petitioner, David B. Lyon, asserting a penalty equal to the amount of unpaid withholding tax which the Audit Division determined to be due from Fabmet Corporation ("the corporation"). Said notice asserted that \$2,614.86 was due for the period August 16, 1982 through August 31, 1982.

2. Fabmet Corporation was incorporated and began doing business in 1978. At the time of incorporation, petitioner, Mr. Malcolm J. French, and Mr. James Walsh each owned one-third of

the stock of the corporation. Mr. French was president of the corporation and petitioner was vice-president from the time of incorporation through and subsequent to the period at issue. Mr. Walsh disassociated himself from the corporation in 1982. As a result, both petitioner and Mr. French owned 50 percent of the corporation's outstanding stock during the period at issue herein.

3. Petitioner had a considerable investment in the corporation. He initially invested \$20,000.00 and subsequently invested an additional \$60,000.00. These investments consisted of both capital contributions and loans. Petitioner also caused the Cryogenic Supply Corporation, of which he was president, to loan the corporation \$60,000.00.

4. Petitioner was a member of the board of directors of the corporation from its incorporation through the period at issue.

5. Petitioner was not involved in the day-to-day management of the corporation and, except for a six-month period in 1981, at no time did petitioner receive a salary from the corporation. During this six-month period, petitioner generally oversaw the individual who was managing the corporation at that time. At no time was petitioner directly involved in day-to-day operations. In late 1979, Mr. French took over the day-to-day operations of the corporation. Mr. French, a certified public accountant, was paid an annual salary of \$100,000.00 to run the corporation.

6. Petitioner's involvement with the corporation subsequent to the aforementioned six-month period in 1981 consisted of meetings with Mr. French during which Mr. French advised him of the corporation's general condition. Petitioner met with Mr. French about once a month, sometimes more frequently. Their discussions, however, usually centered upon the affairs of Cryogenic Supply Corporation, of which Mr. French was the accountant. The affairs of Cryogenic Supply Corporation were petitioner's main business concern during the period at issue.

7. At all times, petitioner had the authority to sign checks on behalf of the corporation. Petitioner exercised this authority on only a few occasions in Mr. French's absence.

8. Petitioner was not involved in determining which of the corporation's creditors were to

be paid, and at no time was petitioner involved in the preparation of any corporate tax returns.

9. The corporation's tax returns were prepared and filed by an outside accountant at all times during 1981 and 1982.

10. On September 17, 1982, the corporation filed a petition under Chapter XI of the Bankruptcy Code. Petitioner subsequently took control of the operations of the corporation with respect to the payment of the corporation's debts. At this time, petitioner became aware of the corporation's unpaid withholding taxes. The filing of the bankruptcy petition precluded petitioner from causing the corporation to make payment of the unpaid withholding taxes.

11. Petitioner became aware of the serious financial problems of the corporation in August 1982.

CONCLUSIONS OF LAW

A. That where a person is required to collect, truthfully account for and pay over withholding taxes and willfully fails to collect and pay over such taxes, Tax Law § 685(g) imposes on such person "a penalty equal to the total amount of tax evaded, or not collected, or not accounted for and paid over."

B. That Tax Law § 685(n) defines "person", for purposes of Tax Law § 685(g), to include:

"an individual, corporation or partnership or an officer or employee of any corporation...who as such officer, employee, or member is under a duty to perform the act in respect of which the violation occurs."

C. That whether petitioner was a person required to collect, truthfully account for and pay over withholding taxes during the period in issue is a question of fact (Matter of McHugh v. State Tax Commission, 70 AD2d 987, 988; Matter of MacLean v. State Tax Commission, 69 AD2d 951, affd 49 NY2d 920). Factors which are relevant to this determination include whether the individual signed the corporation's tax returns, derived a substantial part of his income from the corporation and possessed the right to hire and fire employees (Matter of Amengual v. State Tax Commission, 95 AD2d 949, 950; Matter of Malkin v. Tully, 65 AD2d 228, 229). Other factors considered are the amount of stock owned, the authority to pay corporate obligations and the individual's official duties (Matter of Amengual v. State Tax Commission, supra).

D. That petitioner was a person required to collect, truthfully account for and pay over the withholding taxes of Fabmet Corporation during the period at issue. Petitioner was vice-president of the corporation, owned 50 percent of its stock, and had authority to sign checks on its behalf. He also had a substantial investment in the corporation. He was, therefore, under "a duty to act" on the corporation's behalf within the meaning of Tax Law § 685(n) and was thus a "person" under Tax Law § 685(g).

E. That, inasmuch as petitioner was a "person" for purposes of Tax Law § 685(g), his liability for the penalty at issue herein rests upon a determination as to whether he willfully failed to collect and pay over the withholding taxes of Fabmet Corporation. The test of willfulness is as follows:

"[W]hether 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.... No showing of intent to deprive the Government of its money is necessary but only something more than accidental nonpayment is required." (Matter of Levin v. Gallman, 42 NY2d 32, 34.)

F. That petitioner's failure to collect and pay over withholding taxes was not willful under Tax Law § 685(g). Petitioner, during the period at issue herein, received no salary or other compensation from the corporation, was not involved in determining which creditors were to be paid, was devoting all his time and effort to his main business concern, Cryogenic Supply Corporation, and had no knowledge that any taxes were owed prior to the filing of the bankruptcy petition. Furthermore, the corporation was being run on a day-to-day basis by a certified public accountant and its tax matters were being handled by an outside accountant. It is clear that petitioner relied upon these two individuals to pay the corporation's tax obligations. These circumstances negate a finding of willfulness under Tax Law § 685(g), for petitioner's conduct was not consciously or voluntarily done with the knowledge that, as a result, withholding taxes would not be paid over to the State (see Matter of Levin v. Gallman, *supra*; Matter of Reyers v. State Tax Commission, 116 AD2d 880). Accordingly, petitioner was not liable for the penalty asserted against him herein.

G. That the petition of David B. Lyon is granted and the Notice of Deficiency, dated February 27, 1984, is cancelled.

DATED: Albany, New York
June 3, 1988

ADMINISTRATIVE LAW JUDGE