

STATE OF NEW YORK  
DIVISION OF TAX APPEALS

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| In the Matter of the Petition  | : |
| of   | : |
| JEROME FARKAS  | : |
|  | : |
| for Redetermination of a Deficiency or for<br>Refund of Personal Income Tax under Article 22<br>of the Tax Law and Chapter 46, Title T of the<br>Administrative Code of the City of New York for<br>the Years 1977 through 1981. | : |

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DETERMINATION

Petitioner, Jerome Farkas, 9 Behnke Court, Rockville Centre, New York 11570, filed a petition for redetermination of a deficiency or for refund of personal income tax under Article 22 of the Tax Law and Chapter 46, Title T of the Administrative Code of the City of New York for the years 1977 through 1981 (File Nos. 801546 and 802968).

A hearing was held before Robert F. Mulligan, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on July 23, 1987 at 3:00 P.M. Petitioner appeared pro se. The Audit Division appeared by John P. Dugan, Esq. (Gary Palmer, Esq., of counsel).

ISSUE

Whether petitioner is liable to a penalty equal to the unpaid withholding taxes of J. L. Electronics Co., Inc.

FINDINGS OF FACT

1. Petitioner, Jerome Farkas, was president of J.L. Electronics Co., Inc. ("the corporation") during the years at issue.
2. (a) On July 30, 1984, the Audit Division issued a Notice of Deficiency to petitioner in the amount of \$662.55 for unpaid withholding taxes due from the corporation for the period June 1, 1981 through June 30, 1981.  
  
(b) On November 25, 1985, the Audit Division issued a Notice of Deficiency to

petitioner in the amount of \$6,501.95 for unpaid withholding taxes due from the corporation.

Said deficiency represented a total for various withholding tax periods, i.e.:

| <u>Withholding Tax Period</u> | <u>Amount</u> |
|-------------------------------|---------------|
| 1/1/77-12/31/77               | \$2,044.31    |
| 3/1/79-3/31/79                | 460.15        |
| 6/1/79-6/30/79                | 466.85        |
| 12/1/79-12/31/79              | 814.70        |
| 3/16/80-3/31/80               | 653.95        |
| 6/16/80-6/30/80               | 565.60        |
| 9/16/80-9/30/80               | 567.20        |
| 12/16/80-12/31/80             | <u>929.19</u> |
| Total                         | \$6,501.95    |

3. There is some confusion in the record as to whether deficiencies were asserted against petitioner for periods for which the corporation did not file withholding tax returns. This confusion is due at least in part to the fact that the corporation had filed withholding tax returns on a quarterly basis, rather than monthly or semi-monthly, but used monthly or semi-monthly forms. It is noted that the returns on which the corporate deficiencies were based were all "no remittance" returns, i.e., they showed tax due but were not accompanied by payment. Moreover, the return for the period January 1, 1977 through December 31, 1977 was a "dummy return", apparently prepared by the Income Tax Bureau.

4. Petitioner concedes responsibility as a person required to collect, account for and remit tax on behalf of the corporation. He also concedes that taxes are owed, but disputes the balance claimed as due by the Audit Division.

5. After the corporation ceased doing business, its records were removed from its former place of business by the new tenant of the premises. When petitioner learned that the records were being discarded, he salvaged a portion, but not all of the records. Accordingly, not all of the records were available at the time of the hearing.

6. Petitioner essentially claims that not all payments have been applied against the taxes due and, in particular, alludes to the following items:

(a) Suffolk County Federal Savings and Loan Association money order in the amount of \$1,500.00 dated February 28, 1983. Petitioner made this payment because he "was being

pressed by the State to pay certain bills". There is nothing in the record to indicate which bill or bills were to be paid by said check.

(b) State Tax Commission levy of \$3,293.51 against the corporation's account at Chemical Bank, as per Chemical Bank debit advice dated January 25, 1984.

(c) Payment of \$569.05 by the corporation's check No. 4036 dated April 30, 1977.

(d) Payment of \$540.30 by the corporation's check No. 4179 dated July 31, 1977.

(e) Payment of \$500.45 by the corporation's check No. 4353 dated October 1, 1977.

(f) Payment of \$85.87 by the corporation's check No. 4516 dated January 30, 1978.

7. Petitioner claimed that the corporation paid \$1,609.80 of the \$2,044.31 in tax withheld for 1977 (Finding of Fact "6[c], [d] and [e]). The corporation's records show that the following checks were written for New York State and New York City withholding tax:

| <u>Date</u> | <u>Amount</u> |
|-------------|---------------|
| 4/30/77     | \$ 569.05     |
| 7/31/77     | 540.30        |
| 10/31/77    | <u>500.45</u> |
| Total       | \$1,609.80    |

Petitioner produced a cancelled check and bank statement showing that the \$500.45 check was paid on November 10, 1977 and Department records confirm such payment. Petitioner did not produce either cancelled checks or bank statements showing that the other two checks were paid. Moreover, Department records indicate that no such payments were received.

8. After the hearing, the Audit Division submitted copies of the Department's computer records pertaining to the deficiencies and payments at issue. The records reveal the following:

(a) The Suffolk County Federal check in the amount of \$1,500.00 (Finding of Fact "6[a]") was received and paid and was applied as follows:

| <u>Tax</u>  | <u>Period</u>    | <u>Amount</u> |
|-------------|------------------|---------------|
| Corporation | 7/31/78          | \$ 647.59     |
| Withholding | 12/1/77-12/31/77 | 736.78        |
| Corporation | 7/31/77          | <u>115.63</u> |
| Total       |                  | \$1,500.00    |

(b) The levy of \$3,293.51 (Finding of Fact "6[b]") was received and was applied as follows:

| <u>Tax</u>  | <u>Period</u>    | <u>Amount</u>     |
|-------------|------------------|-------------------|
| Withholding | 12/1/78-12/31/78 | \$1,599.73        |
| Withholding | 9/1/78-9/30/78   | 1,009.26          |
| Withholding | 12/1/77-12/31/77 | <u>684.52</u>     |
| Total       |                  | <u>\$3,293.51</u> |

(c) The check for \$500.45 (Finding of Fact "6[e]") was received and paid and was applied for the period September 1, 1977 through September 30, 1977 and no tax is now due for said period.

(d) The check for \$85.87 (Finding of Fact "6[f]") was received and paid and was applied for the period December 1, 1977 through December 31, 1977.

(e) The above payments were applied by the Department of Taxation and Finance against penalty and interest assessed against the corporation prior to payment, as well as to additional penalty and interest for which no notice and demand was issued. The allocation between assessed and unassessed penalty and interest was as follows:

| <u>Period</u>    | <u>Penalty and Interest Assessed Prior to Payment</u> | <u>Unassessed Penalty and Interest</u> |
|------------------|---|--|
| 12/1/77-12/31/77 | \$17.87   | \$ 635.95                              |
| 9/1/78-9/30/78   | 34.64   | 460.12                                 |
| 12/1/78-12/31/78 | <u>18.00</u>  | <u>722.68</u>                          |
| Total            | <u>\$70.51</u>  | <u>\$1,818.75</u>                      |

#### CONCLUSIONS OF LAW

A. That petitioner, Jerome Farkas, was concededly a person required to collect, truthfully account for and pay over withholding tax on behalf of J. L. Electronics Co., Inc. and willfully failed to do so. Accordingly, he is liable to a penalty equal to the amount of unpaid withholding taxes due from said corporation (Tax Law § 685[g]; Administrative Code § U46-35.0[g]).

B. That the notices of deficiency were correct and the amounts of tax shown due thereon were properly computed.

C. That petitioner did not sustain his burden of proof imposed under Tax Law § 689(e)

and Administrative Code former § T46-189.0(e) to show that the checks for \$569.05 and \$540.30 were ever paid to the State of New York (Finding of Fact "7"). As noted in Finding of Fact "8(c)", the check for \$500.45 was paid and was credited for the period September 1, 1977 through September 30, 1977.

D. That where a taxpayer makes a payment without specific instructions as to allocation among taxes or periods, the taxing authority may allocate the payments as it sees fit (see \_\_\_ Anderson v. United States, 497 F Supp 563; Gray v. United States, 586 F Supp 1127). Accordingly, it was proper for the Department of Taxation and Finance to allocate the \$1,500.00 payment under the Suffolk County Federal money order in part for corporation tax and in part for withholding tax.

E. That the debt of a corporation for penalties and interest is payable only upon "notice and demand" (Tax Law § 685[1]; Administrative Code former § T46-185.0[1]). Payments made on a corporation's account for withholding taxes are to be applied to penalties and interest to the extent assessed at the time of payment. Payments in excess of such penalties and interest assessed should be credited to withholding tax (see \_\_\_ First National Bank in Palm Beach v. United States, 591 F2d 1143 [5th Cir 1979]). Accordingly, petitioner is to be given credit for \$1,818.75 in payments made against unassessed penalties and interest (Finding of Fact "8[e]").

F. That the petition of Jerome Farkas is granted to the extent that the notices of deficiency are to be reduced by the sum of \$1,818.75 (Conclusion of Law "E") and the notices of deficiency issued on July 30, 1984 and November 25, 1985 are otherwise sustained.

DATED: Albany, New York  
December 17, 1987

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ADMINISTRATIVE LAW JUDGE