

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition :
of :
ROBERT B. OEHLER : DETERMINATION
for Redetermination of a Deficiency or for Refund of : DTA NO. 818059
Personal Income Tax under Article 22 of the Tax Law :
for the Period July 1, 1996 through December 31, 1996. :

Petitioner, Robert B. Oehler, 255 South Grand Avenue, # 2605, Los Angeles, California 90012, 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 July 1, 1996 through December 31, 1996.

A hearing was held before Gary R. Palmer, Administrative Law Judge, at the offices of the Division of Tax Appeals, 500 Federal Street, Troy, New York, on August 13, 2001 at 2:00 P.M., with all briefs to be submitted by December 7, 2001, which date began the six-month period for the issuance of this determination. Petitioner appeared by James H. Tully, Jr., Esq. The Division of Taxation appeared by Barbara G. Billet, Esq. (Jennifer L. Hink, Esq., of counsel).

ISSUE

Whether petitioner is liable for penalties imposed under Tax Law § 685(g) for the unpaid withholding taxes of Lenco Mining & Development International, Inc. for the period July 1, 1996 through December 31, 1996.

FINDINGS OF FACT

1. Lenco Mining & Development International, Inc., (“the corporation”) was formed by James W. Lenigan as a “C” corporation in 1995 for the purpose of developing a gold mining operation in the jungles of Colombia, South America. The project initially entailed the raising of early stage money to finance an appraisal of the extent of gold reserves at the site to determine whether the quantity of gold present justified the financing of a full-scale mining operation.

2. Petitioner was invited to join the project, initially as a consultant to assist in the formulation of a business plan, and then to raise the early stage money. He accomplished these objectives in return for three percent of the issued stock of the corporation. Thereafter the corporation became an S corporation and all shareholders, including petitioner, consented to have the corporation treated as a New York S corporation.

3. Upon filing as a New York S corporation, Mr. Lenigan retained his titles as president and treasurer, while other titles were conferred on three of the other seven shareholders, including petitioner, who became chief financial officer and executive vice-president of finance administration. Petitioner became an employee of Lenco at this stage. The corporate office was located in Mr. Lenigan’s residence in Brant Lake, New York. At the time, petitioner resided in Lake Placid, New York.

4. Petitioner’s role in the corporate structure was limited to fund-raising and establishing a professional relationship between the corporation and a New York City law firm, as well as with the accounting firm Arthur Andersen.

5. Petitioner’s background included long-term employment in the banking industry. On behalf of Lenco, he raised money from sources in Vancouver and Nassau, the Bahamas. The amount raised was barely sufficient to meet corporate expenses. In 1997, an engineer employed

by the corporation at the site in Colombia was kidnaped by guerillas and held for ransom. His release was secured by payment of the ransom by Ross Perot and the parents of the engineer. The kidnapping brought the project to an abrupt end because the site, located some five miles upriver in the jungle, could no longer be safely accessed.

6. Mr. Lenigan owned 840 shares of stock in the corporation. Petitioner owned 30 shares. Petitioner was not involved in hiring or firing corporate employees and had no role in determining which corporate tax debts would be paid.

7. On September 15, 1996, when Mr. Lenigan was in Columbia, petitioner signed a New York general business corporation franchise tax return as an officer of the corporation. Also, on March 15, 1996, petitioner signed a series of six New York forms CT-6, election by a Federal S corporation to be treated as a New York S corporation. Petitioner signed these documents as an officer in Mr. Lenigan's absence for the purpose of certifying the accuracy of their contents.

8. A list of accounts payable as of November 22, 1996 contains the names of 85 creditors of the corporation including New York State, petitioner and James W. Lenigan. Some of the creditor's names appear on the list more than once. In the far right column of the list is a space for comments. In that space for a creditor named "Action Mining" is an entry reading "Do Not Pay Per JWL." Further down in that same space next to the name of a different creditor is an entry reading "[h]old per Jim 11/15." Both entries refer to Mr. Lenigan. There are no entries in this document whereby petitioner or anyone other than Mr. Lenigan directs that a particular corporate debt be paid or not paid.

9. Denise Cavoli was employed by the corporation as its staff accountant. Ms. Cavoli worked at the corporate office located in the basement of Mr. Lenigan's residence. Petitioner had access to the corporate books and records through Ms. Cavoli. Petitioner never asked to see

any of the books and records. Nor did he ever attempt to confirm that withholding taxes were being paid. Petitioner and Mr. Lenigan each had check signing authority. There is no indication in the record as to whether petitioner ever signed any corporate checks.

10. On the date of the hearing, petitioner obtained the list of accounts payable referenced in Finding of Fact “8” above from Ms. Cavoli, who retrieved it from a floppy disk she had in her possession.

11. Petitioner was unaware that withholding taxes were not being paid until he received two notices of deficiency issued to him by the Division on February 16, 1999. The two notices were in the amounts of \$4,684.05 and \$2,202.52.

SUMMARY OF THE PARTIES’ POSITIONS

12. Petitioner argues that he did not have the authority to determine which corporate debts were to be paid and which debts were to be deferred, because his responsibilities within the corporate hierarchy were limited to fund-raising, while Mr. Lenigan, the majority shareholder and corporate president, was the dominant force within the corporation who made all important corporate decisions. As a further basis in support of his denial of liability for the withholding tax penalty, petitioner argues that his failure to pay over the tax due was not willful because he did not know that the withholding taxes were unpaid until he received the statutory notices.

13. The Division asserts that petitioner, by virtue of his status as a corporate officer with check signing authority and access to corporate books and records, had actual or constructive knowledge that withholding taxes were in arrears, which made him a person as defined in Tax Law § 685(n) who willfully failed to collect, truthfully account for and pay over withholding tax due.

CONCLUSIONS OF LAW

A. The Division of Taxation determined that petitioner was a person as defined in Tax Law § 685(n) who willfully failed to collect or truthfully account for and pay over withholding tax due from the corporation for the period from July 1, 1996 through December 31, 1996, and who was, therefore, liable for a penalty equal to the total amount of the tax evaded, not collected or not accounted for and paid over in accordance with Tax Law § 685(g). The test for willfulness, as stated in *Matter of Levin v Gallman* (42 NY2d 32, 396 NYS2d 623) is:

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 No showing of intent to deprive the Government of its money is necessary but only something more than accidental non-payment is required.

In reaching a determination as to whether or not petitioner meets the Tax Law § 685(n) definition of “person” the Tax Appeals Tribunal has acknowledged that the fact-based inquiry is similar to that used to determine responsible officer status for sales tax purposes (*Matter of Frenette*, Tax Appeals Tribunal, August 23, 2001). Of the variety of factors that generally support responsible officer status, it is those factors that demonstrate that the taxpayer had knowledge that the sales tax or withholding tax, as the case may be, was not being paid to the State, coupled with the authority to act on that knowledge that is critical to a finding that the officer or employee was under a duty to collect, truthfully account for and pay over the tax imposed and that such person willfully failed to fulfill that duty. Such knowledge and authority must both be present in order to support a finding of willful failure to pay over the tax. In fact, absent a finding that the officer recklessly disregarded his corporate responsibilities in an effort to shield himself from the knowledge that taxes were not being paid (*see, Matter of Capoccia v State Tax Commission*, 105 AD2d 528, 481 NYS2d 476), the lack of actual knowledge serves to

negate a finding that the act was voluntarily or consciously done. In *Matter of Stamas* (Tax Appeals Tribunal, May 19, 1994), petitioner had knowledge that withholding taxes were not being paid, but lacked authority to make payments absent authority and direction from one of two specified corporate investors. The Tribunal found that Mr. Stamas's failure to pay was not willful. Conversely, in *Matter of Wendel* (Tax Appeals Tribunal, February 3, 2000), the Tribunal found that the taxpayer's failure to pay was willful because he was aware that taxes were not being paid and he had the authority see to it that they were paid. Similar results were reached for similar reasons in *Matter of Rosenblatt v State Tax Commission* (68 NY2d 775, 506 NYS2d 675) and *Matter of Menik v Roth* (280 AD2d 702, 720 NYS2d 265).

In the matter here under review, the authority to make the important decisions relating to the day-to-day operations of Lenco was centralized in its president and majority shareholder, Mr. Lenigan. The corporate books and records were maintained at the corporate office located in Mr. Lenigan's residence. Petitioner testified credibly that he was unaware withholding taxes were not being paid until he received the notices from the Division. Because the notices indicated that penalty only, not tax, was due, petitioner even then assumed that the tax had been paid late and the penalty imposed was for late payment. Working in his area of responsibility, corporate fund-raising, would not, of necessity, have exposed him to knowledge of the status of the corporate withholding tax liabilities. Petitioner did attend one shareholders meeting in August or September of 1996, which may have also been a directors meeting. There is no other proof in the record that petitioner ever served as a director of the corporation. Nor is there any proof of what transpired at the meeting. The Lenco accounts payable document received in evidence contains an entry that shows Mr. Lenigan giving instructions that a particular corporate debt was not to be paid. A second entry reads "[h]old per Jim 11/15." This Jim is James W.

Lenigan. There are no other entries in this document that show any other Lenco officer or employee giving payment instructions respecting any of the other listed accounts.

B. Because petitioner lacked the authority within the corporate structure to direct that withholding taxes be paid, he was not a person under a duty to pay over the taxes due in accordance with Tax Law § 685(n), and because he was not aware that the taxes had not been paid, his failure to pay over the taxes could not have been willful as required by Tax Law § 685(g).

C. The petition of Robert B. Oehler is granted and the notices of deficiency dated February 16, 1999 are canceled.

DATED: Troy, New York
May 9, 2002

/s/ Gary R. Palmer
ADMINISTRATIVE LAW JUDGE