

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition
of

EUGENE INGELFINGER

DECISION

for Redetermination of a Deficiency or for
Refund of Personal Income Tax under Article 22
of the Tax Law for the Years 1976, 1977 and
1982.

Petitioner, Eugene Ingelfinger, 640 East Quaker Road, East Aurora, New York 14052, filed a petition for redetermination of a deficiency or for refund of personal income tax under Article 22 of the Tax Law for the years 1976, 1977 and 1982 (File No. 49151).

A hearing was held before James J. Morris, Jr., Hearing Officer, at the offices of the State Tax Commission, 65 Court Street, Buffalo, New York, on January 13, 1986 at 1:15 P.M., with additional documents to be submitted by March 7, 1986. Petitioner appeared pro se. The Audit Division appeared by John P. Dugan, **Esq.** (Deborah J. Dwyer, Esq., of counsel).

ISSUE

Whether petitioner, Eugene Ingelfinger, is a person required to collect and pay over certain withholding taxes pursuant to section 685(g) of the Tax Law, notwithstanding a claim of personal bankruptcy.

FINDINGS OF FACT

1. On November 28, 1983, the Audit Division issued a Notice of Deficiency to petitioner, Eugene Ingelfinger, together with a Statement of Deficiency, asserting liability for penalties under section 685(g) of the Tax Law for the withholding tax periods December 1, 1976 to December 31, 1976, April 1, 1977 to

amounts of \$534.49, \$2,626.07 and \$5,700.00. The penalty was asserted against petitioner as a person required to collect, truthfully account for and pay over withholding taxes of Siding Master, Inc., and K & B Supply Company, Inc.

2. It was conceded by the attorney for the Audit Division that the amount of the deficiency had been reduced from \$8,860.56 to \$3,160.54.¹ The reduction resulted from a determination at conference that petitioner was not a responsible officer of K & B Supply Company, Inc. during the period March 1, 1982 to December 17, 1982 and, as such, was not liable for the penalty asserted against petitioner in that capacity. The remaining portions of the assessment in the amounts of \$534.49 and \$2,626.07 for the periods December 1, 1976 to December 31, 1976 and April 1, 1977 to September 30, 1977, respectively, related to petitioner's liability for withholding taxes as an officer of Siding Master, Inc.

3. Petitioner was the president and owner of Siding Master, Inc. during the periods covered by the Notice of Deficiency. Petitioner worked at Siding Master, Inc. as a salesman during approximately 40 percent of his work week. He had the authority to issue checks and had the authority to hire and fire employees.

4. During the withholding tax periods covered by the Notice of Deficiency with reference to Siding Master, Inc. (i.e., December 1, 1976 to December 31, 1976, and April 1, 1977 to September 30, 1977), petitioner employed a bookkeeper who signed and issued checks in payment of New York State withholding taxes.

5. Petitioner presented photocopies of checks, signed by his bookkeeper and made payable to the New York State Income Tax Bureau, which petitioner believed represented payment of withholding taxes. The Audit Division's position was that the checks were for payment of withholding taxes for periods not covered

by the Notice of Deficiency and one check was in payment of New York State unemployment insurance. Petitioner failed to produce any evidence to refute the Audit Division's assertion.

6. On December 17, 1982, the petitioner filed a voluntary petition in bankruptcy in the Western District of New York, under Case No. 82-13576.

7. Petitioner submitted a letter from Trecor Title Guarantee Company, 110 Franklin Street, Buffalo, New York 14202, which indicated that a warrant issued by the State Tax Commission of the State of New York against Eugene Ingelfinger, responsible officer of Siding Master, Inc. in the amount of \$3,966.50, dated October 15, 1981, was declared null and void by order *of* the Bankruptcy Court filed January 9, 1984. Petitioner failed to present the order of the Bankruptcy Court or any other information which indicated that the aforementioned warrant was related to the tax at issue herein. The Audit Division presented an order of the Bankruptcy Court, dated October 27, 1983, which held that a Tax Commission warrant in the amount of \$3,966.50 was null and void against the debtor's (petitioner's) interest in real estate located at 24 North Lane, Orchard Park, New York, because petitioner had no equity in the property and the Tax Commission was treated as an unsecured creditor.

8. Petitioner presented a warrant issued by the State Tax Commission to "Joyce Ingelfinger, individually and as officer of Siding Master, Inc.", in the amount of \$8,860.56 for the periods at issue herein. Joyce Ingelfinger and petitioner were divorced by order of the New York Supreme Court, County of Erie, dated June 29, 1981. Petitioner claims that the amount of the warrant should have been satisfied through the sale of his former wife's property in June of 1985, but petitioner failed to present any evidence to substantiate his claim.

CONCLUSIONS OF LAW

A. That section 685(g) of the Tax Law provides, in pertinent part, that:

"Any person required to collect, truthfully account for, and pay over the tax imposed by this article who willfully fails to collect such tax or truthfully account for and pay over such tax or willfully attempts in any manner to evade or defeat the tax or the payment thereof, shall, in addition to other penalties provided by law, be liable to a penalty equal to the total amount of the tax evaded, or not collected, or not accounted for and paid over."

B. That section 685(n) of the Tax Law provides that:

"For purposes of subsections (g), (l), (o), (q) and (r), the term person includes an individual, corporation or partnership or an officer or employee of any corporation (including a dissolved corporation), or a member or employee of any partnership, who as 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 factual question (Matter of McHugh v. State Tax Commission., 70 A.D.2d 987 119791; Matter of MacLean v. State Tax Commission., 69 A.D.2d 951 119791, aff'd 49 N.Y.2d 920 [1980]). Factors which are relevant to this determination include whether the individual signed the company's tax returns and possessed the right to hire and fire employees (Matter of Amengual v. State Tax Commission., 95 A.D.2d 949 [1983]; Matter of Malkin v. Tully, 65 A.D.2d 228 [1978]). 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 judged by the criteria set forth in Conclusion of Law "C", petitioner was a person responsible for the collection and payment of withholding taxes due from Siding Master, Inc. for the periods December 1, 1976 through December 31, 1976 and April 1, 1977 and September 30, 1977. In particular,

40 percent of his time to the business, he had the authority to issue checks and to hire and fire employees.

E. That petitioner cannot absolve himself **of** his responsibility to collect and pay withholding tax merely by failing to concern himself with whether the taxes were paid and delegating the duty to his bookkeeper (see Ragonesi v. New York State Tax Commission, 88 A.D.2d 707 [1982]; Malkin v. Tully, 65 A.D.2d 228 [1978])).


F. That petitioner's prior discharge in personal bankruptcy **is** not an effective legal bar to collection of the withholding tax penalty (Matter of Milton Weinstein, State Tax Commission, April 6, 1979; ~~see also~~, In Re Sotelo, Bankrupts, 436 U.S. 268 [1978])).

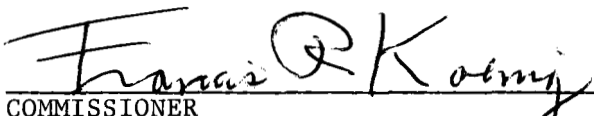
G. That the petition **of** Eugene Ingelfinger **is** granted to the extent indicated in Finding of Fact "2"; the Audit Division **is** hereby directed to modify the Notice of Deficiency issued November 28, 1983, and that, except as **so** granted, the petition is in all other respects denied.

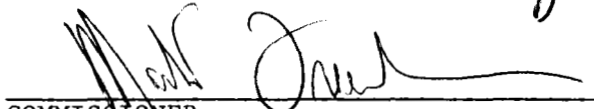
DATED: Albany, New York

STATE TAX COMMISSION

JUN 30 1986


PRESIDENT


COMMISSIONER


COMMISSIONER