

Petitioner Philip J. Spincola, 88 Luquer Koad, Plandome Manor, New York 11030, 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 1980 and 1981 (File No. 56436). He also filed a petition for revision of a determination or for refund of sales and use taxes under Articles 28 and 29 of the Tax Law for the period September 1, 1981 through May 31, 1982 (File No. 49327).

Petitioner George J. Bunstead, 152 West End Avenue, Pompton Plains, New Jersey 07444, 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 1980 and 1981 (File No. 56437). He also filed a petition for revision **of** a determination or for refund of sales and use taxes under Articles 28 and 29 **of** the Tax Law for the period September 1, 1981 through May 31, 1982 (File No. 49326).

A consolidated hearing was held before James Hoefer, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York on May 1, 1986 at 1:30 P.M., and continued to conclusion on May 28, 1986 at 9:45 A.M., with all briefs to be submitted by June 28, 1986. Petitioners appeared by Edwin Bernstein, Esq. The Audit Division appeared by John P. Dugan, Esq. (Irwin Levy, Esq., of counsel).

ISSUES

I. Whether petitioner Philip J. Spincola **is** subject to a penalty pursuant to section 685(g) of the Tax Law as a person who willfully failed to collect, truthfully account for and pay over the New York State withholding taxes **due** from Rockville Tire & Service, Inc. for **the** years 1980 and 1981.

11. Whether petitioner Philip J. Spicola **is** personally liable for sales taxes due from Rockville Tire & Service, Inc. for the period September 1, 1981 through May 31, 1982.

III. Whether petitioner George J. Bunstead **is** subject **to** a penalty pursuant to section 685(g) **of** the Tax Law as a person who willfully failed to collect, truthfully account for and pay over the New York State withholding taxes due from Rockville Tire & Service, Inc. for the years 1980 and 1981.

IV. Whether petitioner George J. Bunstead **is** personally liable for sales taxes due from Rockville Tire & Service, Inc. for the period September 1, 1981 through May 31, **1982**.

FINDINGS OF FACT

1. **Rockville Tire & Service, Inc. (hereinafter "Rockville")**, 76 South Long Beach Road, Rockville, New York 11570, failed to pay over the New York State personal income taxes withheld from the wages of its employees for the following periods:

<u>Withholding Tax Period</u>	<u>Amount</u>
January 1, 1980 through December 31, 1980	\$4,080.90
January 1, 1981 through December 31, 1981	<u>\$3,158.50</u>
TOTAL	<u><u>\$7,239.40</u></u>

2. On July 30, 1984, the Audit Division issued a Notice **of** Deficiency¹ against each petitioner wherein a penalty was asserted pursuant: to section 685(g) **of** the Tax Law **for** an amount equal to the New York State withholding

1 Although the Notice of Deficiency with respect to petitioner Philip J. Spicola was not placed in evidence, a Statement of Deficiency issued under such date was placed in evidence. Since lack of such document was neither argued nor admitted, the finding is based on the evidence.

taxes due from Rockville for the aforestated periods. Such penalties were asserted on the grounds that each petitioner was a person required to collect, truthfully account for and pay over said taxes and that they willfully failed to do so.

3. On October 20, 1983, the Audit Division issued a Notice of Determination and Demand for Payment of Sales and Use Taxes Due against each of said petitioners as officers of Rockville, for sales taxes due of \$16,532.79 for the period September 1, 1981 through May 31, 1982. Penalty of \$1,212.39 and interest of \$507.29 were also asserted, for a total due of \$18,252.47. Said notices were issued based on an audit conducted for the aforestated period. Since insufficient records were presented at the audit, the sales tax assessment was determined from information available.

4. For several years prior to the years at issue herein petitioners were employed full time as management consultants for Control Associates Incorporated ("Control"), a New Jersey based management consulting firm which specialized in providing services to brokerage firms and banks.

5. In the mid 1970's Control experienced a lull in its business affairs. Accordingly, petitioners sought to involve themselves in a separate business activity while still performing limited services for Control.

6. In 1977 petitioners, together with one Philip T. Burke, whom they met through Goodyear Tire & Rubber Co., incorporated Rockville to engage in business as a vendor of Goodyear tires and accessories. Rockville was also to provide automobile repair services.

7. Petitioner George J. Bunstead was president of Rockville. Petitioner Philip J. Spicola was vice president and secretary and Mr. Burke was vice president and treasurer.

8. Both Mr. Bunstead and Mr. Spicola made capital contributions of \$15,000.00 to Rockville. Mr. Burke contributed \$5,000.00.

9. Since neither Mr. Bunstead nor Mr. Spicola had prior experience in the tire business, it was agreed that Mr. Burke would run the day-to-day operations of Rockville.

10. ~~Mr.~~ Bunstead's activities for Rockville consisted primarily of performing physical labor. Mr. Spicola's activities consisted primarily of making deliveries of tires and accessories and picking up orders from suppliers.

11. During the periods at issue neither Mr. Bunstead nor Mr. Spicola drew a salary or any other type of compensation from Rockville. Mr. Burke, however, drew a salary of \$22,949.00 for fiscal year ended July 31, 1980 and \$27,031.00 for fiscal year ended July 31, 1981.

12. Petitioners claimed that they were not stockholders in Rockville.

13. Rockville's accountant, one Stanley Meyer, prepared all of Rockville's tax returns. He visited the premises of Rockville approximately twice per month and always received the books and records from Mr. Burke. On completion of the tax returns, he always delivered them to Mr. Burke.

14. Any **two** of the aforesaid three officers were authorized to sign Rockville checks.

15. It appears that no sales tax returns were filed by Rockville for the sales tax period at issue. Four returns submitted for periods prior to those at issue contain the forged signature of Mr. Bunstead. A payment agreement executed prior to the sales tax period at issue also contains a forged signature of Mr. Bunstead. Such signatures were deemed to be forged by one Russell D. Osborn, a handwriting expert who appeared **on** behalf of ~~Mr.~~ Bunstead.

16. Neither petitioner herein hired or fired employees.

17. Petitioner Philip J. Spicola returned to full time employment with Control in December 1978. At this time he discontinued performing services for Rockville.

18. Petitioner George J. Bunstead returned to full time employment with Control in December 1979. At this time he discontinued performing services for Rockville.

19. During the periods at issue it was Mr. Burke's responsibility, as manager of Rockville, to decide which bills to pay and to write the checks in payment of such bills.

20. Petitioners submitted copies of six (6) Rockville checks issued during October, November and December 1981. Although the corporate resolution required two (2) signatures, those checks submitted bore the single signature of Mr. Burke.

21. In late 1981 Rockville ceased doing business. Its assets were sold at that time and although petitioners received no money from such sale, they were parties to the sale.

CONCLUSIONS OF LAW

A. That section 685(g) of the Tax Law provides 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 subdivision (g), the term "person":

"[I]ncludes an individual, partnership, corporation, or trust."

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

C. That the question of whether petitioners were persons under a duty to collect and pay over withholding taxes must be determined on the basis of the facts presented. Some of the factors to be considered include whether petitioners signed the corporation's tax returns, possessed the right to hire and discharge employees or derived a substantial portion of their income from the corporation. Other relevant factors include the amount of stock petitioners held, the actual sphere of their duties and their authority to pay corporate obligations and/or exercise authority over the assets of the corporation. (Matter of Amengual v. State Tax Commn., 95 AD2d 949; McHugh v. State Tax Commn., 70 AD2d 987.)

D. That petitioners, George J. Bunstead and Philip J. Spinola, were not involved with the day-to-day operations of Rockville during the years at issue. This, coupled with the other relevant facts herein, leads to the conclusion that neither petitioner was a "person" as defined under section 685(n) of the Tax Law. Accordingly, the penalties asserted against them pursuant to section 685(g) of the Tax Law are hereby cancelled.

E. That section 1133(a) of the Tax Law places personal liability for taxes imposed, collected or required to be collected under Article 28 upon "every person required to collect any tax" imposed by said article. Section 1131 (1) of the Tax Law furnishes the following definition for the term "persons required to collect tax":

"'Persons required to collect tax' or 'person required to collect any tax imposed by this article' shall include: every vendor of tangible personal property or services; every recipient of amusement charges; and every operator of a hotel. Said terms shall also include any officer or employee of a corporation or of a dissolved corporation who as such officer or employee **is** under a duty to act

for such corporation in complying with any requirement of this article and any member of a partnership."

F. That for the reasons provided in Conclusion of Law "D", supra, neither petitioner herein was a person required to collect the sales taxes imposed under Article 28 of the Tax Law.

G. That the two petitions of Philip J. Spicola and the two petitions of George J. Bunstead are granted.


H. That the Notice of Deficiency issued against each petitioner herein on July 30, 1984, with respect to withholding taxes, is cancelled.

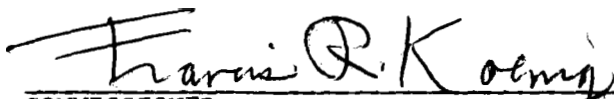
I. That the Notice of Determination and Demand for Payment of Sales and Use Taxes Due, issued against each petitioner herein on October 20, 1983, is cancelled.


DATED: Albany, New York

STATE TAX COMMISSION

FEB 03 1987


PRESIDENT


COMMISSIONER


COMMISSIONER