

STATE OF NEW YORK

STATE TAX COMMISSION

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In the Matter of the Petition

of

GUY V. BERRETTA

DECISION

for Redetermination of a Deficiency or for  
Refund of Personal Income Tax under Article 22 :  
of the Tax Law for the Period April 1, 1978  
through December 31, 1978.

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Petitioner, Guy V. Berretta, 916 Little Bardfield Road, Webster, New York 14580, 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 April 1, 1978 through December 31, 1978 (File No. 49619).

A hearing was held before Timothy J. Alston, Hearing Officer, at the offices of the State Tax Commission, 259 Monroe Avenue, Rochester, New York, on January 28, 1986 at 2:45 P.M. Petitioner appeared pro se. The Audit Division appeared by John P. Dugan, Esq. (James Della Porta, Esq., of counsel).

#### ISSUE

Whether petitioner is liable for the penalty asserted against him pursuant to section 685(g) of the Tax Law with respect to withholding taxes due from 33 Meyerhill Circle West, Inc. d/b/a Candlelight Restaurant and Partyhouse.

#### FINDINGS OF FACT

1. On October 24, 1983, the Audit Division issued a Notice of Deficiency along with a Statement of Deficiency to petitioner Guy V. Berretta, asserting a penalty equal to the amount of unpaid withholding tax which the Audit Division had determined was due from 33 Meyerhill Circle West, Inc. d/b/a Candlelight

Restaurant and Partyhouse ("the corporation"). Said notice asserted that \$7,477.82 was due for the period April 1, 1978 through December 31, 1981.

2. After the Notice of Deficiency was issued, the Audit Division withdrew its assertion of penalty against petitioner for the period January 1, 1979 through December 31, 1981. Accordingly, the period at issue herein was limited to April 1, 1978 through December 31, 1978 and the amount asserted due by the Audit Division was reduced to \$1,257.39.

3. During the period at issue, petitioner was treasurer of the corporation. As treasurer, petitioner, a certified public accountant, maintained the corporation's books and records and filed the necessary federal, state and local tax returns and reports. Petitioner signed such returns and reports on behalf of the corporation. Petitioner worked approximately 15 hours per week for the corporation, but did not receive a salary.

4. Petitioner was involved with the corporation from its inception in 1977. He was asked by one Charles Perry to become involved with the corporation because of his experience in financial and tax matters. Petitioner contributed no capital to the corporation, but was issued 25 percent of the common stock of the corporation based upon his anticipated involvement *as* set forth above in Finding of Fact "3". Fifty percent of the corporation's stock was owned by Mr. Perry, the corporation's president, who ran the business of the corporation on a daily basis. The remaining 25 percent of the corporation's stock was owned by Thomas Mastro, the corporation's vice president, who was also involved with the business on a daily basis working under the direction of Mr. Perry.

5. Like each of his fellow stockholders, petitioner had the authority to sign checks on behalf of the corporation. Petitioner did not have authority to

determine which among the corporation's many creditors would be paid, nor did he have any authority with respect to the hiring or firing of employees.

Although he was aware of the corporation's daily activities, he was not actively involved in the day-to-day running of the corporation.

6. The corporation experienced financial difficulties soon after its inception in 1977. At that time, petitioner expressed to Mr. Perry his disagreement with the manner in which Mr. Perry was running the business with respect to payment of the corporation's tax liabilities. Petitioner suggested the establishment of a special bank account to better enable the corporation to set aside funds to satisfy its tax liabilities. The corporation disregarded petitioner's advice. In view of the corporation's failure to take adequate measures to address its tax problems and its poor financial condition, petitioner resigned as treasurer of the corporation effective November 26, 1978. On the same date, he also sold his stock interest in the corporation for one dollar.

#### 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, section 685(g) of the Tax Law 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 section 685(n) of the Tax Law defines "person," for purposes of section 685(g) of the Tax Law, 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 Comm., 70 A.D.2d 987; Matter of MacLean v. State Tax Comm., 69 A.D.2d 951, aff'd 49 N.Y.2d 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 Amengua v. State Tax Comm., 95 A.D.2d 949, 950; Matter of Malkin v. Tully, 65 A.D.2d 228). Other factors considered are the amount of stock owned, the authority to pay corporate obligations and the individual's official duties (Matter of Amengua v. State Tax Comm., supra).

D. That petitioner was not a person required to collect, truthfully account for and pay over the withholding taxes of 33 Meyerhill Circle West, Inc. d/b/a Candlelight Restaurant and Partyhouse within the meaning of section 685(g) of the Tax Law. Although petitioner was treasurer of the corporation and completed and signed tax returns on its behalf, he had no authority to determine which among the corporation's liabilities, including its tax liabilities, would be satisfied. In addition, he was a minority stockholder of the corporation, received no salary from the corporation and had no authority to hire or fire employees. Moreover, it should be noted that petitioner disassociated himself from the corporation when it failed to take adequate measures to satisfy its tax liabilities. Accordingly, petitioner is not liable for the penalty imposed pursuant to section 685(g) of the Tax Law.


E. That the petition of Guy V. Berretta is granted and the Notice of Deficiency dated October 24, 1983 is hereby cancelled.


DATED: Albany, New York

STATE TAX COMMISSION

JUN 19 1986

  
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PRESIDENT

  
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COMMISSIONER

  
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COMMISSIONER