

STATE OF NEW YORK
STATE TAX COMMISSION

In the Matter of the Petition	:	
of	:	
DAVID BEAUMONT	:	DECISION
for Redetermination of a Deficiency or for	:	
Refund of Personal Income Tax under Article 22	:	
of the Tax Law for the Year 1978.	:	

Petitioner, David Beaumont, 114 Clinton Street, Brooklyn, New York 11201, filed a petition for redetermination of a deficiency or for refund of personal income tax under Article 22 of the Tax Law for the year 1978 (File No. 49951).

A hearing was held before Brian L. Friedman, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on January 15, 1986 at 9:15 A.M. Petitioner appeared by Jack M. Portney, CPA. The Audit Division appeared by John P. Dugan, Esq. (Angelo Scopellito, Esq., of counsel).

ISSUE

Whether petitioner was a person required to collect, truthfully account for and pay over withholding taxes under section 685(g) of the Tax Law.

FINDINGS OF FACT

1. On October 24, 1983, the Audit Division issued a Notice of Deficiency along with a Statement of Deficiency asserting a penalty pursuant to section 685(g) of the Tax Law against David Beaumont (hereinafter "petitioner") as a person required to collect, truthfully account for and pay over withholding taxes of Frames Unlimited in the amount of \$19,494.92 for the year 1978.
2. Frames Unlimited was in the business of manufacturing picture frames

of the stock of Frames Unlimited. For the year at issue, Mr. Schatz was the president, petitioner was the secretary and Salvatore Pepe was the vice-president of Frames Unlimited. Each of the officers was a signatory on the bank resolution of Frames Unlimited.

3. The accounting firm of Jack M. Portney, CPA, petitioner's representative became the accountants for Frames Unlimited in 1976. This accounting firm, retained by Frames Unlimited to check bank reconciliations, prepare corporation tax returns, review sales tax returns and furnish other financial advice, hired Salvatore Pepe in 1977 as chief financial officer and comptroller of Frames Unlimited, which positions he held until his death in 1982. Mr. Pepe, in his role as chief financial officer and comptroller, was charged with the duties of signing checks, paying bills, preparing payroll records and payroll tax returns, keeping corporate books and hiring and firing employees. Neither petitioner nor Mr. Schatz signed checks or tax returns unless Mr. Pepe, after he had prepared the same, was unavailable to sign the checks or returns.

4. Petitioner was the outside sales representative for Frames Unlimited. He spent approximately 75 percent of his time procuring gallery framing jobs and bidding on commercial framing jobs. The remaining 25 percent of petitioner's time was spent setting up orders for production in the factory. Petitioner had no office duties or dealings with office affairs except on a cursory basis. Mr. Pepe supervised office personnel, while Mr. Schatz was in charge of factory personnel. Petitioner had no employees who worked directly under his control or supervision.

5. Petitioner had no knowledge of the withholding and sales tax liabilities of Frames Unlimited until 1983 when he was so advised by the then comptroller, **Melvin Schumer**. During the year at issue and for years both prior and subsequent

thereto, Jack M. Portney, CPA, in his position as accountant for Frames Unlimited frequently met with petitioner concerning such matters as production, credit with suppliers and increasing working capital, but Mr. Portney did not discuss those functions which were within the purview of Mr. Pepe, with whom Mr. Portney met separately to discuss the same.

CONCLUSIONS OF LAW

A. That where a person is required to collect, truthfully account for and pay over withholding tax and willfully fails to collect and pay over such tax, section 685(g) of the Tax Law imposes on such person "...a 'penalty equal to the total amount of tax evaded, not collected, or not accounted for and paid over."

B. That section 685(n) of the Tax Law defines a 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 the question of who is a "person" required to collect and pay over withholding taxes is to be determined on the basis of the facts presented. Some of the factors to be considered include whether petitioner owned stock, signed tax returns, or exercised authority over the employees and the assets of the corporation. McHugh v. State Tax Comm., (70 A.D.2d 987). Other factors to be considered are whether the person derived a substantial part of his income from the corporation or had the right to hire and fire employees. MacLean v. State Tax Comm., (69 A.D.2d 951, aff'd 49 N.Y.2d 920). See also Malkin v. Tully, (65 A.D.2d 228).

D. That petitioner was not a person under a duty to collect, truthfully account for and pay over withholding taxes on behalf of Frames Unlimited. He


he prepare payroll checks, tax returns or corporate books and records. Although he was authorized to sign corporate checks, he rarely did so since such authority was granted for the purpose of convenience only. Petitioner had no authority nor was he ever involved in the internal accounting procedures of the corporation. His duties were primarily limited to those normally associated with an outside sales representative and, although he set up production orders with factory personnel, such personnel were supervised by the president, Mr. Schatz.

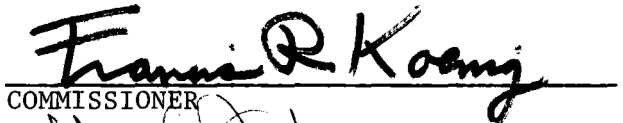
E. That the petition of David Beaumont is granted and the Notice of Deficiency issued October 24, 1983 is cancelled.

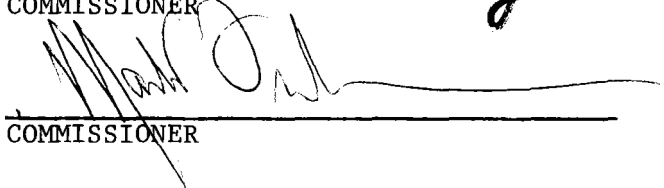
DATED: Albany, New York

STATE TAX COMMISSION

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PRESIDENT


COMMISSIONER


COMMISSIONER