

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition

of

CARL DORFMAN

for Redetermination of a Deficiency or for
Refund of Personal Income Tax under Article 22 :
of the Tax Law for the Year 1981.

DECISION

In the Matter of the Petition

of

BERTRAND DORFMAN

for Redetermination of a Deficiency or for
Refund of Personal Income Tax under Article 22
of the Tax Law for the Year 1981.

Petitioner Carl Dorfman, 2525 Batchelder Street, Brooklyn, New York 11235, 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 1981 (File Nos. 53676 and 58595).

Petitioner Bertrand Dorfman, 444 East 82nd Street, New York, New York 10028, 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 1981 (File Nos. 45854 and 53677).

A consolidated hearing was held before Arthur Johnson, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on April 30, 1987 at 10:00 A.M., with all briefs to be submitted by August 31, 1987. Petitioners appeared by Lapatin, Lewis, Green and Kaplan,

P.C. (Joseph Lapatin, Esq., of counsel). The Audit Division appeared by John P. Dugan, Esq. (Gary Palmer, Esq., of counsel).

ISSUES

I. Whether petitioners were persons required to collect', truthfully account for and pay over withholding tax and willfully failed to do so, thus becoming liable for the penalty imposed under Tax Law § 685(g).

II. Whether Codata Corporation satisfied a portion of the tax liability asserted to be due and owing from it.

FINDINGS OF FACT

1. On April 28, 1983, the Audit Division issued identical notices of deficiency, asserting penalties pursuant to Tax Law § 685(g) against petitioners, Bertrand Dorfman and Carl Dorfman, as persons required to collect, truthfully account for and pay over withholding taxes of Codata Corporation ("Codata") in the amount of \$857.52 for the month of March 1981.

2. On March 26, 1984, the Audit Division issued identical notices of deficiency, asserting penalties pursuant to Tax Law § 685(g) against petitioners as persons required to collect, truthfully account for and pay over withholding taxes of Codata in the total amount of \$6,205.27 calculated as follows:

<u>Withholding Tax Period</u>	<u>Amount</u>
April 1, 1981 - May 31, 1981	\$1,226.00
August 1, 1981 - October 31, 1981	3,723.24
December 1, 1981 - December 31, 1981	<u>1,256.03</u>
Total	\$6,205.27

3. Codata was in the business of manufacturing and supplying fire alarm and communication systems and energy conservation control systems. In 1976, Codata entered into a joint venture with a Japanese company to sell similar services and equipment to the Southeast Asian market. Codata was to develop

the necessary technology and manufacture equipment, both of which would be purchased by its partners. The partners were to provide financing and marketing services. By 1978, Codata had transferred a significant amount of technological data to its partners and had manufactured over a million dollars worth of equipment. It was owed more than three million dollars by its partners, who were not executing their Part of the agreement. Codata eventually entered into arbitration proceedings before the Japanese Arbitration Board in the hope of recovering some of its losses. The arbitration procedure took three years, and in the end no monies were recovered.

4. In March 1978, Codata revealed to its employees that it could no longer meet its payroll. Employees were given the options of seeking employment elsewhere or remaining with Codata on a voluntary basis. They were told that Codata would attempt to pay them for their labor at a later time, but it would not obligate itself to do so. Approximately 20 employees continued to work for Codata without wages until April or May 1978. At that time, Codata became aware that it would receive no payments from its partners, and it subsequently dismissed all but five or six of its remaining employees.

5. Shortly after the layoff of employees occurred, Codata was contacted by the New York State Department of Labor ("Labor") and informed that its voluntary employment arrangement violated certain provisions of the State Labor Law. Although it disagreed with Labor's position, Codata, under threat of criminal prosecution, began making payments of back wages to its ex-employees. This included payment of wage supplements consisting of vacation pay. A Labor representative periodically reviewed Codata's books and records to determine the appropriate level of payments. Codata made payments directly to the Commissioner of Labor who distributed the funds directly to the ex-employees.

Labor did not withhold taxes from the payments it made to the ex-employees. Pursuant to Labor policy at the time, all of Codata's available funds were assessed for the payment of back wages, and no allowance was made for withholding taxes. By the end of 1981, Codata had satisfied all wage claims against it.

6. Although Codata was operating at a loss from 1978 through 1981, it remained in business because petitioners, Carl Dorfman and Bertrand Dorfman, were threatened with criminal prosecution if Codata failed to meet its back wage obligations. In 1980, criminal charges were brought against Codata, Bertrand Dorfman and Carl Dorfman for violations of section 198 of the Labor Law. With the agreement of the Court, the case was adjourned with the understanding that it would not be prosecuted as long as Codata continued to make payments to Labor's satisfaction. The case against petitioners and Codata was dismissed on October 19, 1981, after all monies due under the Labor Law were paid.

7. Codata was formed by Bertrand Dorfman, who was a shareholder and president of Codata. Throughout 1981, Bertrand Dorfman was a signatory on corporation bank accounts, hired and fired employees, controlled corporate assets and determined which bills were to be paid and which were not. Bertrand Dorfman conceded that he was a person under a duty to collect, truthfully account for and pay over withholding taxes to the State. It is his position that his failure to pay over taxes was not willful but resulted from the actions of the New York State Department of Labor over which he had no control.

8. Carl Dorfman was an employee of Codata from 1975 through 1982. He worked as an accountant and was neither an officer nor shareholder of the corporation. Although Carl Dorfman was a signatory on corporate bank accounts and signed corporate tax returns, he did so only under the instruction and with

the approval of Bertrand Dorfman. Each week, Carl presented Bertrand with a list of all liabilities and Bertrand determined which bills would be paid and which would not. Carl did not have the authority to control corporate assets and he signed corporate checks and tax returns only when Bertrand was unavailable and authorized Carl to do so.

■ 9. Codata timely submitted withholding tax returns for the periods in question but did not submit payment with the returns.

10. Petitioners submitted two corporation checks and a postal money order totalling \$1,200.00. On each one, it was indicated that the payment should be applied to the tax periods March 1981 and April 1981. Instead, the Audit Division applied these payments to outstanding assessments for prior periods.

CONCLUSIONS OF LAW

A. That Tax Law § 685(g) provides as follows:

"Any person required to collect, truthfully account for, and pay over the tax imposed by [Article 22] 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 Tax Law § 685(n) defines the word "person", as it is used in section 685(g), as follows:

"[T]he term person includes an individual, corporation or partnership or an officer or employee of any corporation (including a dissolved corporation) . . . who as such officer [or] employee is under a duty to perform the act in respect of which the violation occurs."

C. That determining whether a corporate officer or an employee is a "person" required to collect and pay over withholding taxes requires a factual inquiry. Relevant factors to be considered are whether he signed the company's tax return, exercised authority over employees and assets of the corporation or derived a substantial portion of his income from the corporation (Matter of

MacLean v. State Tax Commn., 69 AD2d 951, affd 49 NY2d 920; Matter of Fisher v. State Tax Commn., 90 AD2d 910; Matter of Amengual v. State Tax Commn., 95 AD2d 949). Other pertinent areas of inquiry include the person's official duties, the amount of corporation stock he owned and his authority to pay corporate obligations (Matter of Fisher v. State Tax Commn., 90 AD2d 910, supra). The term "willful" as used in section 685(g) means an act, default or conduct voluntarily done with knowledge that, as a result, trust funds belonging to the government will be used for other purposes (Matter of Levin v. Gallman, 42 NY2d 32). An intent to deprive the government of its money need not be shown, merely something more than accidental nonpayment (Matter of Ragonesi v. New York State Tax Com.mn, 88 AD2d 707).

D. That Carl Dorfman was not a person required to collect or pay over withholding taxes. His position at Codata was that of accountant, and as such he occasionally signed checks and tax returns. However, he acted at all times at the direction of Bertrand Dorfman. Carl Dorfman did not control corporate assets, did not have the power to hire or fire employees, was not responsible for corporate obligations, and was not under a duty to collect and pay over withholding taxes to the State.

E. That Bertrand Dorfman was a person required to collect and pay over withholding taxes and willfully failed to do so. Bertrand Dorfman was aware of Codata's withholding tax obligations. He had control of corporate assets, and each week he determined which obligations would be satisfied and which would not. There is not sufficient evidence to show that Labor's actions denied him all ability to make provision for the payment of withholding taxes due to the State.

F. That Codata manifested to the Audit Division how the payments indicated in Finding of Fact "10" should be applied. The Audit Division incorrectly applied these payments to earlier outstanding assessments. Accordingly, the payments of \$1,200.00 should be credited against the notices of deficiency at issue herein (Datlof v. United States, 252 F Supp 11 [1966]).

G. That the petition of Carl Dorfman is granted, and the notices of deficiency issued on April 28, 1983 and March 26, 1984 are cancelled.

H. That the petition of Bertrand Dorfman is granted to the extent indicated in Conclusion of Law "F". The Audit Division is hereby directed to modify the notices of deficiency issued April 28, 1983 and March 26, 1984; and that, except as so granted, the petition is in all other respects denied.


DATED: Albany, New York

STATE TAX COMMISSION

AUG 28 1987


PRESIDENT


COMMISSIONER


COMMISSIONER