

STATE OF NEW YORK

STATE TAX COMMISSION

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In the Matter of the Petition

of

RAYMOND J. DIFFEN

DECISION

for Redetermination of a Deficiency or for Refund of New York State Personal Income Tax : under Article 22 of the Tax Law and New York City Personal Income Tax under Chapter 46, Title T of the Administrative Code of the City of New York for the Periods October 1, 1977 through December 31, 1977 and April 1, 1978 through December 31, 1978.

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Petitioner, Raymond J. Diffen, 311 Springtown Road, New Paltz, New York 12561, filed a petition for redetermination of a deficiency or for refund of New York State personal income tax under Article 22 of the Tax Law and New York City personal income tax under Chapter 46, Title T of the Administrative Code of the City of New York for the periods October 1, 1977 through December 31, 1977 and April 1, 1978 through December 31, 1978 (File No. 55783).

A 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 June 19, 1986 at 2:45 P.M., with all briefs to be submitted by July 19, 1986. Petitioner appeared by Albert Kalter, Esq. The Audit Division appeared by John P. Dugan, Esq. (Irwin Levy, Esq., of counsel).

ISSUE

Whether petitioner was a person required to collect, truthfully account for and pay over the New York State and City withholding taxes of Ray Diffen Stage Clothes, Inc. and who willfully failed to do so, thus becoming liable for a penalty equal to such unpaid withholding taxes.

FINDINGS OF FACT

1. On June 25, 1984, the Audit Division issued a Statement of Deficiency ("statement") to petitioner, Raymond J. Diffen, asserting that he was a person required to collect, truthfully account for and pay over the New York State and City withholding taxes of Ray Diffen Stage Clothes, Inc. (hereinafter "the corporation") for the periods October 1, 1977 through December 31, 1977 and April 1, 1978 through December 31, 1978. The aforementioned statement further alleged that petitioner willfully failed to collect, truthfully account for and pay over said withholding taxes and that he was therefore subject to a penalty equal in amount to the unpaid withholding taxes of \$17,330.72. Accordingly, on June 25, 1984, the Audit Division issued a Notice of Deficiency to petitioner for the years 1977 and 1978 asserting a deficiency of \$17,330.72.

2. During the periods at issue, petitioner was president of Ray Diffen Stage Clothes, Inc. Petitioner, together with one Harry Good, owned all of the outstanding stock *of* said corporation.

3. Prior to August of 1976, petitioner was active in the day-to-day management and operation of the corporation. The corporation was not financially successful and therefore petitioner was unable to draw an adequate salary. Effective August of 1976, petitioner accepted a full-time position as head of the costume department and resident designer for the Metropolitan Opera House. Petitioner's duties and responsibilities with the Metropolitan Opera House were demanding and required that he work approximately 60 hours per week. Petitioner received a substantial salary while employed at the Metropolitan Opera House.

4. On July 16, 1976, petitioner, as president of the corporation, executed a power of attorney appointing one James G. Meares to make, sign and deliver checks drawn on the corporation's business checking account. Mr. Meares was a

trusted employee of the corporation and effective on or about August 1, 1976 became, at an increased salary, its de facto chief executive officer.

5. From August of 1976 to September 13, 1979, petitioner was not active in the day-to-day affairs or management of the corporation. During this three year period petitioner did not (i) sign checks on behalf of the corporation; (ii) determine which corporate creditors were to be paid; (iii) sign corporate tax returns; (iv) hire or fire employees; or (v) receive any compensation or remuneration from the corporation. Petitioner did not visit the corporation's office or in any manner participate in the corporation's management since Mr. Meares resented any involvement by petitioner. Mr. Diffen retained the title of president of the corporation in order to protect his capital investment in said corporation.

6. On some unknown date in 1979, the corporation's accountant contacted petitioner and advised him that there were problems at the corporation and further suggested to Mr. Diffen that he examine its books and records. On September 13, 1979, petitioner, after his examination, revoked the power of attorney given to Mr. Meares and resumed control of the corporation's day-to-day operation. Petitioner attempted to straighten out the affairs of the corporation, however, it was in poor condition financially and in October of 1979 the corporation made an assignment for the benefit of its creditors.

7. The Internal Revenue Service issued a proposed 100 percent penalty assessment against petitioner for past due Federal withholding and social security taxes of the corporation for the periods ending June 30, 1979, September 30, 1979 and December 31, 1979. Petitioner filed a protest with the Internal Revenue Service and, as the result of evidence and argument submitted by petitioner, he was "relieved of liability" for said periods.

CONCLUSIONS OF LAW

A. That the personal income tax imposed by Chapter 46, Title T of the Administrative Code of the City of New York is by its own terms tied into and contains essentially the same provisions as Article 22 of the Tax Law. Therefore, in addressing the issues presented herein, unless otherwise specified all references to particular sections of Article 22 shall be deemed references (though uncited) to the corresponding sections of Chapter 46, Title T.

B. 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."

C. 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...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."

D. That the question of whether petitioner was a person 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 petitioner signed the corporation's tax returns, possessed the right to hire and discharge employees or derived a substantial portion of his income from the corporation. Other relevant factors include the amount of stock petitioner held, the actual sphere of his duties and his 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.)

Finally, the test of willfulness is whether the act, default or conduct was "voluntarily done with knowledge that, as a result, trust funds of the government

will not be paid over; 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 Commn., 88 AD2d 707, 708 [citation omitted]).

E. That in the instant matter, petitioner was president of the corporation, a substantial stockholder in said corporation and he also had authority to sign corporate checks. Accordingly, petitioner was a person under a duty to collect and pay over the corporation's withholding taxes.

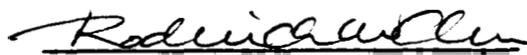
F. That petitioner did not willfully fail to collect, truthfully account for and pay over the corporation's withholding taxes. Petitioner relinquished control of the corporation to a trusted employee in August of 1976 and from said date until September 13, 1979 he did not sign corporate checks or tax returns, did not determine which credits were to be paid, did not participate in the management of the corporation and did not receive any compensation from the corporation. When petitioner first learned that the corporation had not remitted the proper withholding taxes, he immediately took control of the corporation's affairs. Under these circumstances it cannot be found that petitioner acted willfully. (Matter of Reyers v. State Tax Commn., 116 AD2d 880.)

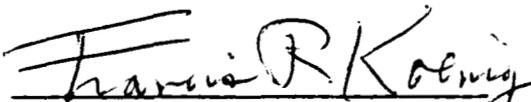
G. That the petition of Raymond J. Diffen is granted and the Notice of Deficiency dated June 25, 1984 is cancelled in its entirety.

DATED: Albany, New York

STATE TAX COMMISSION

JAN 09 1987

  
PRESIDENT

  
COMMISSIONER

  
COMMISSIONER