

STATE OF NEW YORK

STATE **TAX** COMMISSION

In the Matter of the Petitions

of

MURRAY GALIN

for Redetermination of Deficiencies or for
Refunds of Personal Income Tax under Article 22 :
of the Tax Law for the Period February 1, 1982
through April 15, 1984.

DECISION

In the Matter of the Petitions

of

THOMAS MUTARELLI

for Redetermination of Deficiencies or for
Refunds of Personal Income Tax under Article 22 :
of the Tax Law for the Period February 1, 1982
through April 15, 1984.

Petitioner, Murray Galin, 4811 Avenue J, Brooklyn, New York 11234, filed petitions for redetermination of deficiencies or for refunds of personal income tax under Article 22 of the Tax Law for the period February 1, 1982 through April 15, 1984 (File Nos. 60122 and 61265).

Petitioner, Thomas Mutarelli, 89-08 175th Street, Jamaica, New **York** 11432, filed petitions for redetermination of deficiencies or for refunds of personal income tax under Article 22 of the Tax Law for the period February 1, 1982 through April 15, 1984 (File **Nos.** 59927 and 61266).

A consolidated 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 14, 1987 at 9:15 A.M. Petitioners appeared by Goldstein

and Lieberman, Esqs. (David Goldstein, Esq., of counsel). The Audit Division appeared by John P. Dugan, Esq. (Kevin A. Cahill, Esq., of counsel).

ISSUES

I. Whether petitioner, Thomas Mutarelli, was a person required to collect, truthfully account for and pay over withholding taxes with respect to Galin Press Corporation for the period February 1, 1982 through April 15, 1984 and willfully failed to do so, thereby becoming liable for a penalty imposed pursuant to section 685(g) of the Tax Law.

II. Whether petitioner, Murray Galin, a person who was required to collect, truthfully account for and pay over withholding taxes with respect to Galin Press Corporation for the period February 1, 1982 through April 15, 1984, did pay such withholding taxes, thereby exempting himself from the penalty imposed pursuant to section 685(g) of the Tax Law.

FINDINGS OF FACT

1. On March 25, 1985, the Audit Division issued to Murray Galin and to Thomas Mutarelli statements of deficiency and notices of deficiency for withholding tax due from Galin Press Corporation for the following periods:

<u>Period</u>	<u>Amount</u>
February 1, 1982 through December 31, 1982	\$14,256.80
January 1, 1983 through December 31, 1983	11,866.62
January 1, 1984 through January 31, 1984	<u>1,183.12</u>
Total	\$27,306.54

2. On April 29, 1985, the Audit Division issued to Murray Galin and to Thomas Mutarelli statements of deficiency and notices of deficiency asserting withholding tax due from Galin Press Corporation in the amount of \$3,023.10 for the period February 1, 1984 through April 15, 1984.

3. At the hearing held herein, petitioner Murray Galin, by his representative, David Goldstein, Esq., admitted that he was a person who was required

to collect, truthfully account for and pay over withholding taxes with respect to Galin Press Corporation for the period February 1, 1982 through April 15, 1984. Petitioner Murray Galin contends, however, that all or a substantial portion of the amount of withholding taxes of Galin Press Corporation, asserted to be due by the aforesaid notices of deficiency, have been paid. In an attempt to prove such payment, petitioner Murray Galin offered photocopies of certain checks and money orders which he alleges were received by the Department of Taxation and Finance for payment of such deficiencies. On most of these copies, there was no indication as to the purpose of these payments. On others, an assessment number relating to a sales tax assessment was contained thereon. Several of the copies of the money orders were illegible.

4. Petitioner Thomas Mutarelli became associated with Galin Press Corporation in 1970. At that time, petitioners Thomas Mutarelli and Murray Galin took over the business from Mr. Galin's brother, Willie Galin. Petitioner Thomas Mutarelli became secretary of the corporation, while Murray Galin became president. Petitioner Thomas Mutarelli put up no money, but agreed that the corporation would assume previous corporate debts amounting to approximately \$135,000.00.

5. The corporation did business at 38 East First Street, New York, New York. Petitioner Thomas Mutarelli's duties consisted of supervising production and delivery and repairing printing presses when they broke down. He received a straight salary and never received bonuses, dividends or shares of corporate profits. He supervised approximately 18 to 20 workers in the printing shop. He had the authority to hire and fire these workers, but had no such authority with respect to the employees who worked in the office. Such office employees were hired, fired and supervised by Murray Galin. Murray Galin and his office

-4-

employees were in charge of soliciting customer orders and, thereafter, billing customers for the printed materials produced by the corporation. Galin Press Corporation's tax returns were prepared by Murray Galin and the corporation's accountant and were signed by Murray Galin. Petitioner Thomas Mutarelli neither prepared nor signed such returns. He did, however, sign corporate checks issued for purposes of payment of the corporation's taxes, since his signature, along with Murray Galin's, was required on all corporate checks. Prior to the closing of the business by a secured creditor, petitioner Thomas Mutarelli was not made aware that corporate taxes remained unpaid.

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 the tax evaded, or not collected, or not accounted for and paid over" .

B. That section 685(n) of the Tax Law defines the term "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."

C. That the question of whether petitioner Thomas Mutarelli 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 [3d Dept 1983]; McHugh v. State Tax Commn., 70 AD2d 987 [3d Dept. 1979].) 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 [citation omitted]." (Matter of Ragonesi v. New York State Tax Commn., 88 AD2d 707, 707-708 [3d Dept. 1982].)

D. That, with respect to Galin Press Corporation, although petitioner Thomas Mutarelli was an officer, possessed the authority to sign corporate checks and to hire and fire certain employees and derived a substantial portion **of** his income from the corporation, the actual sphere of his duties related only to the production and delivery of the printed materials and the repair of the corporation's printing presses. He had nothing whatsoever to do with preparing and signing the corporation's tax returns or any other aspect of office functions. He performed no duties relating to the financial operations of the corporation.

E. That petitioner Thomas Mutarelli was not a person who was responsible for the collection and payment **of** the withholding taxes of Galin Press Corporation for the period at issue herein and is, therefore, not liable for the penalty asserted against him pursuant to section 685(g) **of** the Tax Law.

F. That petitioner Murray Galin has not sustained his burden of proof, imposed pursuant to section 689(e) of the Tax Law, to show that the withholding taxes of Galin Press Corporation, for the period at issue herein, were paid. Since he has conceded that he was a person who was required to collect, truthfully account for and pay over the withholding taxes of said corporation, the penalty

imposed pursuant to section 685(g) of the Tax Law **was** properly asserted against him by the Audit Division.


G. That the petitions **of** Thomas Mutarelli are granted and the notices **of** deficiency issued against him on March 25, 1985 and April 29, 1985 are hereby cancelled.

H. That the petitions of Murray Galin are denied and the notices **of** deficiency issued against him on March **25**, 1985 and April 29, 1985 are hereby sustained.

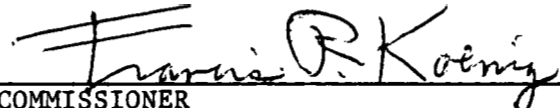
DATED: Albany, New York

STATE TAX COMMISSION

MAY 26 1987



PRESIDENT



COMMISSIONER



COMMISSIONER