

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition

of

SUSAN M. LAFOUNTAIN

DECISION

for Redetermination of a Deficiency or for
Refund of Personal Income Tax under Article 22
of the Tax Law for the Period January 1, 1980 :
through December 31, 1981.

Petitioner, Susan M. LaFountain, 31 Clinton Street, Keesville, New York 12944, 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 January 1, 1980 through December **31**, 1981 (File No. 61285).

A hearing was held before Arthur Bray, Hearing Officer, at the offices of the State Tax Commission, W.A. Harriman State Office Building Campus, Albany, New York on December **8**, 1986 at 1:15 P.M. Petitioner appeared by Stanley Eisenberg, C.P.A. The Audit Division appeared by John P. Dugan, Esq. (Thomas C. Sacca, Esq., of counsel).

ISSUE

Whether petitioner **is** liable for the penalty asserted against her pursuant to section 685(g) of the Tax Law with respect to New York State withholding taxes due from Betty's Cleaners, Inc.

FINDINGS OF FACT

1. On March 25, 1985, the Audit Division issued a Notice of Deficiency and a Statement of Deficiency to petitioner, Susan **X**. LaFountain, asserting a deficiency equal to the amount **of** unpaid withholding tax which the Audit Division determined was due from Betty's Cleaners, Inc. ("the corporation").

Said documents asserted that \$4,467.90 was due for 1980 and \$3,953.50 was due for 1981.

2. The corporation's activities consisted of linen rental, laundry and dry cleaning.

3. During the periods in issue, the president of the corporation was Frank Mussen and the vice-president of the corporation was Frank Mussen's wife, Patricia Mussen. The corporate decisions were made by **Mr.** and Mrs. Mussen.

4. Depending upon the season, the corporation had approximately 25 to 50 employees.

5. Petitioner was not involved in deciding as to whom to hire **or** fire; all such decisions were made by Mr. and Mrs. Mussen.

6. The corporation's employees were supervised by **Mr.** Mussen **or** by the corporation's manager, Theodore LaBounty. Petitioner did not have any responsibility to supervise employees.

7. Petitioner's duties consisted of waiting **on** customers, maintaining records **of** the inventory of linen, gathering time cards, totalling hours worked and preparing bank deposit slips. Petitioner would also check whether the correct amount **of** cash was placed in each employee's payroll envelope by **Mrs.** Mussen.

8. Petitioner was authorized to sign checks and was listed as treasurer on records filed with the corporation's bank. Petitioner never signed checks when Mr. or **Mrs.** Mussen were present. However, there were occasions when Mr. and **Mrs.** Mussen would not be on the corporate premises and they knew that some item was about to be delivered. On such occasions, petitioner would be

instructed to draft a check to a particular supplier. Petitioner never drafted a check without prior consent.

9. The corporation's tax returns, including withholding tax returns, were prepared and signed by Patricia Mussen. Petitioner neither reviewed nor signed tax returns.

10. Petitioner was not involved in deciding which creditors would be paid and she did not know that withholding taxes were not paid to New York State.

11. Petitioner did not own any stock of the corporation or make any investment in the corporation. The only income she received from the corporation was in the form of salary.

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 the 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 as follows:

"[T]he term person includes an individual, corporation or partnership **or** an officer or employee of any corporation (including a dissolved 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 factors relevant to the determination of whether petitioner was a person required to collect, truthfully account for and pay over Withholding taxes during the period in issue include whether the individual signed the company's tax returns and possessed the right to hire and fire employees

(Matter of Amengual v. State Tax Commn., 95 AD2d 949, 950; Matter of Malkin v. Tully, 65 AD2d 228). Other factors considered are the amount of stock owned, the authority to pay corporate obligations and the individual's official duties (Matter of Amengual v. State Tax Commn., supra).

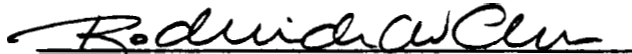
D. That in view of the fact that petitioner had only ministerial duties and did not have the authority to direct the payment of corporate obligations, petitioner was not a person required to collect, truthfully account for and pay over withholding taxes within the meaning of section 685(g) of the Tax Law.


E. That the petition of Susan M. LaFountain is granted and the Notice of Deficiency, issued March 25, 1985, is cancelled.


DATED: Albany, New York

STATE TAX COMMISSION

APR 15 1987


PRESIDENT


COMMISSIONER


COMMISSIONER