

STATE OF NEW YORK

STATE **TAX** COMMISSION

In the Matter of the Petition

of

LOUIS F.

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 January 1, 1983 through November 30, 1983 and March 1, 1984 through March 31, 1984.

Petitioner, Louis F. Lindauer, 43 Meadowrue Lane, East Northport, New York 11731, 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 January 1, 1983 through November 30, 1983 and March 1, 1984 through March 31, 1984 (File No. 61946).

A 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 January 15, 1987 at 9:15 A.M., with all briefs to be submitted by April 15, 1987. Petitioner appeared by Certilman, Haft, Lebow, Balin, Buckley & Kremer, **Esqs.** (David M. Brandes, Esq., of counsel). The Audit Division appeared by John P. Dugan, **Esq.** (Gary Palmer, 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 Broadcast

Technology, Inc., who willfully failed to do so and is therefore liable for the penalty imposed under section 685(g) of the Tax Law.

FINDINGS OF FACT

1. On March 25, 1985, the Audit Division issued a Statement of Deficiency ("statement") to petitioner, Louis F. Lindauer, asserting that he was a person required to collect, truthfully account for and pay over the New York State and City withholding taxes of Broadcast Technology, Inc. (hereinafter "the corporation") for the periods January 1, 1983 through November 30, 1983 and March 1, 1984 through March 31, 1984. 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 \$10,956.32. Accordingly, on March 25, 1985, the Audit Division issued a Notice of Deficiency to petitioner for the years 1983 and 1984 asserting a deficiency of \$10,956.32.

2. The corporation designed, manufactured and marketed audio equipment for the broadcast industry. Petitioner was the president of the corporation from its inception in 1980 to his resignation on July 9, 1984. The corporation had entered into a financing agreement with New Venture Capital Corp. ("New Venture") under which New Venture would provide capital to the corporation in exchange for acquiring controlling interest in the corporation. In the spring of 1983, New Venture became the majority stockholder. Petitioner issued the shares of stock although New Venture had not fulfilled its funding obligations under the agreement.

3. New Venture was not living up to its financial commitments and was constantly in arrears. By letter dated May 5, 1983, petitioner advised the Board of Directors of New Venture of the problems encountered with the lack of

funding and indicated specifically that the corporation was delinquent in State withholding taxes. In June 1984, the funding policy of New Venture changed. Instead of funding the accounts of the corporation, New Venture began paying the corporation's debts directly. Petitioner resigned as president of the corporation on July 9, 1984 because of his lack of control over the operation of the business.

4. Following petitioner's resignation, there was a period that New Venture attempted to reconcile its differences with petitioner. During this time, petitioner took the role of caretaker of the corporation's assets. Petitioner went to the Tax Department district office in Hauppauge and offered a check in part payment of the delinquent withholding taxes. The check was dated prior to petitioner's resignation. The check was refused because the policy of the district office was to accept only certified checks. Petitioner could not get the check certified since it was predated and the date when he offered the check in payment was after the date of his resignation.

5. Petitioner advised the Department of Taxation and Finance that the assets of the corporation were stored at Fort Knox Mini Storage, 1960 Veteran's Memorial Highway, Central Islip, New York.

6. During the period at issue, petitioner was the chief executive officer of the corporation and was responsible for the day-to-day management and its financial affairs. Petitioner hired and fired employees, signed checks and the withholding tax returns. Petitioner owned 47 percent of the stock of the corporation and received a substantial salary. Petitioner was aware that withholding taxes were not paid over to the State and were diverted to pay other creditors. Petitioner's capacity as chief executive officer would imply that he had control over the business receipts.

7. Petitioner did not pay the withholding taxes for fear that New Venture would discontinue funding the corporation and he would no longer have a job.

8. Petitioner argued that his failure to collect and pay over withholding taxes to the State was not willful on his part because de facto control of the corporation had passed to New Venture pursuant to the funding agreement set forth in Finding of Fact "2". Petitioner also argued that his offer of payment illustrated his lack of willfulness.

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 _____

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 petitioner was a person required to collect, truthfully account for and pay over the taxes withheld from wages of the employees of Broadcast Technology, Inc. for the periods January 1, 1983 through November 30, 1983 and March 1, 1984 through March **31**, 1984 in accordance with section 685(n) of the Tax Law.


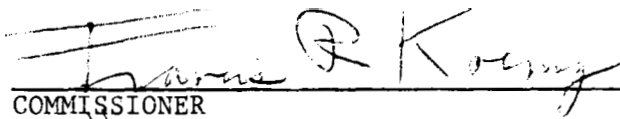
F. That petitioner's failure to collect, truthfully account for and pay over the taxes was willful. Accordingly, petitioner is liable for the penalty imposed under section 685(g) of the Tax Law.

G. That the petition of Louis **F.** Lindauer is denied and the Notice of Deficiency issued March 25, 1985 is sustained.

DATED: Albany, New York

STATE TAX COMMISSION

AUG 12 1987


PRESIDENT

COMMISSIONER