

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition

of

JOSEPH PALMESE

DETERMINATION

for Redetermination of a Deficiency or for
Refund of Personal Income Tax under Article 22
of the Tax Law for the Year 1980.

Petitioner, Joseph Palmese, 12 Kathryn Street, Lynbrook, New York 11563, 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 1980 (File No. 63054).

A hearing was held before Joseph W. Pinto, Jr., Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on June 10, 1987 at 10:45 A.M. Petitioner appeared pro se. The Audit Division appeared by John P. Dugan, Esq. (Irwin Levy, Esq., of counsel).

ISSUE

Whether petitioner is liable for the penalty asserted against him pursuant to section 685(g) of the Tax Law with respect to New York State withholding taxes due from Andrew Palmese & Co., Inc.

FINDINGS OF FACT

1. On September 24, 1984, the Audit Division issued to Joseph Palmese (hereinafter "petitioner") a Statement of Deficiency and Notice of Deficiency asserting a penalty pursuant to section 685(g) of the Tax Law as a person required to collect, truthfully account for and pay over withholding taxes of Andrew Palmese & Co., Inc. (hereinafter "Palmese Co.") in the amount of \$10,525.55 for the withholding tax period January 1, 1980 through December 31, 1980.

2. Palmese Co. was in the business of commercial lathing and plastering during the year 1980. The company was formed by petitioner's father, Andrew Palmese, and managed after his death by petitioner's brothers, Anthony and Angelo.

3. Petitioner was never an officer of the corporation, held no stock therein at any time, and never signed any State or Federal tax returns. Petitioner's position with the corporation was limited to acting as foreman at work sites and performing lathing work. Petitioner never hired crews from the union hall on behalf of the corporation nor did he solicit business on behalf of the corporation. Although petitioner had check-signing authority he never signed checks on behalf of the corporation.

4. Petitioner never made any capital contributions to the business and received wages for work performed by him on specific jobs. During petitioner's career as a lather he worked only for Palmese Co.

5. Petitioner never negotiated contracts on behalf of Palmese Co. nor did he have anything to do with keeping the books and records of the company.

6. Petitioner left the employ of Palmese Co. in or about the year 1981, when the company was unable to pay his salary due to a large loss incurred while working on the Franklin General Hospital.

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 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 Commission, 95 AD2d 949; McHugh v. State Tax Commission, 70 AD2d 987.)

C. That judged by these criteria, petitioner was not responsible for the collection and payment over of withholding taxes due from the corporation. Petitioner owned no stock in the corporation, was not a director or an officer, had no substantial managerial duties, had no knowledge of the books and records of the corporation or the keeping thereof, and never signed the corporation tax returns or checks, although he had the authority to do so.

D. That petitioner's minimal corporate involvement and his unexercised authority to sign checks was not sufficient to incur liability pursuant to section 685(g) of the Tax Law. Additionally, since petitioner was not a person obligated to collect, account for, or pay the company's withholding taxes the question of "willfull" failure to perform these functions is not reached herein.

E. That the petition of Joseph Palmese is granted and the Notice of Deficiency issued September 24, 1984 is hereby cancelled.

DATED: Albany, New York

SEP 03 1987


ADMINISTRATIVE LAW JUDGE