

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition

of

MICHAEL LaCERTOSA

DECISION

for Redetermination of a Deficiency **or** for
Refund of Personal Income Tax under Article 22 :
of the Tax Law for the Year 1984.

Petitioner, Michael LaCertosa, 249-05 Cullman Avenue, Little Neck, New York 11362, 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 1984 (File No. 64510).

A hearing was held before Dennis M. Galliher, Bearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on December 2, 1986 at 1:15 P.M. Petitioner appeared pro se. The Audit Division appeared by John P. Dugan, Esq. (Angelo Scopellito, Esq., of counsel).

ISSUE

Whether petitioner was a person required to collect, truthfully account for and pay over withholding tax with respect to Signal Heating and Air Conditioning Corp., and willfully failed to do **so**, thus becoming liable for a penalty under section 685(g) **of** the Tax Law.

FINDINGS OF FACT

1. **By** a Notice of Deficiency and a Statement **of** Deficiency, both dated August 26, 1985, the Audit Division notified petitioner, Michael LaCertosa, of a deficiency for the year 1984. This asserted deficiency, totalling \$2,719.07, covered the period March 1, 1984 through May 31, 1984, and related to unpaid withholding tax due from Signal Heating and Air Conditioning Corp.

2. Signal Heating and Air Conditioning Corp. ("Signal") was, during the period in issue, engaged in the business of selling, installing and servicing heating and air conditioning systems and components thereof.

3. Petitioner founded and was the president and sole shareholder of Signal. In terms of his day-to-day activities, petitioner was primarily involved with obtaining work for Signal, laying out and setting up jobs, and supervising Signal's employees in completing jobs. Petitioner's son-in-law, one Richard Belmont, was involved more directly in handling the bookkeeping and financial aspects of Signal's operation. Petitioner did have signatory authority on Signal's checks and did sign payroll and other checks, as well as tax returns.

4. Petitioner asserts that he did not involve himself to any great extent in the financial affairs of Signal. Petitioner noted that his son-in-law embezzled large sums of money from Signal, which embezzlement was discovered during the course of Signal's filing for protection under Chapter **XI** of the Bankruptcy Code.

5. At hearing, petitioner did not specifically contest his liability as a person responsible for the amount at issue. Rather, petitioner asserted that sufficient funds exist in the hands **of** the Trustee in Bankruptcy to pay the taxes owed by Signal (upon which the instant deficiency is premised), that payment has been authorized by order of the Bankruptcy Court and that payment is imminent although, as of the date of the hearing, such payment had not been made.

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 tax, section 685(g) of the Tax Law imposes **on** such person "a penalty equal

to the total amount of tax evaded, or not collected, or not accounted for and paid over."

B. 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...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 who is a "person" required to collect and pay over withholding taxes is to be determined on the basis of the facts presented. Some of the factors to be considered include whether petitioner owned stock, signed tax returns, **or** exercised authority over the employees and the assets of the corporation. (McHugh v. State Tax Commn., 70 AD2d 987. ~~See also~~ MacLean v. State Tax Commn., 69 AD2d 951, affd. 49 NY2d 920; Malkin v. Tully, 65 AD2d 228.)



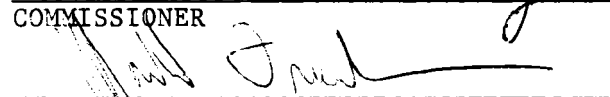
D. That petitioner, Michael LaCertosa, has not presented such evidence as would absolve him from the status of a person under a duty to collect and pay over withholding taxes on behalf of Signal Heating and Air Conditioning Corp. Further, there is no evidence that payment of the taxes owed by Signal, upon which the deficiency against petitioner is premised, have been paid by the Trustee in Bankruptcy or otherwise. Accordingly, the deficiency asserted against petitioner must be sustained.

E. That the petition of Michael LaCertosa is hereby denied and the Notice of Deficiency dated August 26, 1985 is sustained.

DATED: Albany, New York

STATE TAX COMMISSION

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PRESIDENT

COMMISSIONER

COMMISSIONER