

STATE TAX COMMISSION

In the Matter of the Petition
of
Hans K. Liffman

for Redetermination of a Deficiency or Revision
of a Determination or Refund of Personal Income
Tax under Article 22 of the Tax Law for the Years
1975 & 1976.

State of New York }
County of Albany } ss.:

Hans K. Liffman
3762 Falconhead Drive
Rancho Palos Verdes, CA 90274

That deponent further says that the said addressee is the petitioner herein and that the address set forth on said wrapper is the last known address of the petitioner.

Daniel Archuck

James A. Hapgood
Authorized to administer oaths
pursuant to Tax Law section 174

STATE TAX COMMISSION

State of New York }
County of Albany } ss.:

David Parchuck, being duly sworn, deposes and says that he is an employee of the State Tax Commission, that he is over 18 years of age, and that on the 1st day of June, 1984, he served the within notice of Decision by certified mail upon Gary N. Moss, the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Gary N. Moss
Moss & Kalish
122 E. 42nd St.
New York, NY 10168

and by depositing same enclosed in a postpaid properly addressed wrapper in a post office under the exclusive care and custody of the United States Postal Service within the State of New York.

That deponent further says that the said addressee is the representative of the petitioner herein and that the address set forth on said wrapper is the last known address of the representative of the petitioner.

Sworn to before me this
1st day of June, 1984.

David Carlucci

James Oberhelman
Authorized to administer oaths
pursuant to Tax Law section 174

STATE OF NEW YORK
STATE TAX COMMISSION
ALBANY, NEW YORK 12227

June 1, 1984

Hans K. Liffman
3762 Falconhead Drive
Rancho Palos Verdes, CA 90274

Dear Mr. Liffman:

Please take notice of the Decision of the State Tax Commission enclosed herewith.

You have now exhausted your right of review at the administrative level. Pursuant to section(s) 690 of the Tax Law, a proceeding in court to review an adverse decision by the State Tax Commission may be instituted only under Article 78 of the Civil Practice Law and Rules, and must be commenced in the Supreme Court of the State of New York, Albany County, within 4 months from the date of this notice.

Inquiries concerning the computation of tax due or refund allowed in accordance with this decision may be addressed to:

NYS Dept. Taxation and Finance
Law Bureau - Litigation Unit
Building #9, State Campus
Albany, New York 12227
Phone # (518) 457-2070

Very truly yours,

STATE TAX COMMISSION

cc: Petitioner's Representative
Gary N. Moss
Moss & Kalish
122 E. 42nd St.
New York, NY 10168
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition	:	
of	:	
HANS K. LIFFMAN	:	DECISION
for Redetermination of a Deficiency or for	:	
Refund of Personal Income Tax under Article 22	:	
of the Tax Law for the Years 1975 and 1976.	:	

Petitioner, Hans K. Liffman, 3762 Falconhead Drive, Rancho Palos Verdes, California 90274, filed a petition for redetermination of a deficiency or for refund of personal income tax under Article 22 of the Tax Law for the years 1975 and 1976 (File No. 20691).

A formal hearing was held before Arthur Bray, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on September 21, 1982 at 9:15 A.M., with all briefs to be submitted by October 30, 1983. Petitioner appeared by Moss & Kalish, Esqs. (Gary M. Moss, Esq., of counsel). The Audit Division appeared by Paul B. Coburn, Esq. (Anne Murphy, Esq., of counsel).

ISSUES

I. Whether the asserted deficiency against Hans K. Liffman should be dismissed for failure to serve a timely answer upon a proper party.

II. 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 Long Island Processing Corp.

FINDINGS OF FACT

1. Long Island Processing Corp. ("the corporation") failed to pay New York State personal income tax withheld from the wages of its employees in the

amount of \$11,407.17 for the period January 16, 1975 to April 15, 1975 and \$1,690.51 for the period August 1, 1976 to August 15, 1976.

2. On July 25, 1977, the Audit Division issued a Notice of Deficiency accompanied by a Statement of Deficiency to petitioner, Hans K. Liffman, asserting a penalty equal to the amount of unpaid withholding tax due from the corporation.

3. The corporation manufactured yarns suitable for knitting or dying. The yarns were then sold to other manufacturers for use in knitting fabrics.

4. During the periods in issue, petitioner was the president of the corporation and owned ninety percent of the outstanding stock. As its president, petitioner was active in and in complete charge of all of the activities of the corporation ranging from financial to technical matters.

5. Petitioner had the authority to sign checks and his name appeared as the signatory on the payroll checks. The actual checks were prepared by a payroll service known as Itel.

6. The corporation had a factoring agreement with James Talcott, Inc. ("Talcott"). Under this agreement, all of the corporation's receipts were either paid directly to Talcott or, if they were sent to the corporation, mailed by the corporation to Talcott. Tax refunds were signed over to the order of Talcott.

7. The corporation maintained one checking account for payroll and another checking account for general expenses. When the corporation needed funds for either payroll or other expenses, it would call Talcott and request that the funds be deposited in the appropriate account. The corporation would then draw the check on its account.

8. On April 4, 1975, the corporation filed for protection under the Bankruptcy Act of the United States. Upon filing, petitioner was permitted to continue to manage the corporation. However, the corporation needed the approval of the court to disburse funds. If court approval was obtained, the corporation would ask Talcott to advance the funds for expenses.

9. On September 2, 1976, Mr. William Otte was appointed as the trustee of the corporation and petitioner surrendered his role with the corporation. Mr. Otte remained as the trustee throughout the conclusion of the periods in issue.

10. In either late July or August, 1976, the corporation and Talcott ceased using the payroll accounts. As a result, all of the funds placed by Talcott at the corporation's disposition were deposited into the corporation's general account.

11. In August, 1976, petitioner drafted upon Citibank and mailed to the Department of Taxation and Finance a check in the amount of \$1,690.51 in order to satisfy the August 1, 1976 to August 15, 1976 withholding tax liability. Thereafter, the check was returned by Citibank with the notation "insufficient funds". Petitioner then inquired at Citibank as to the reason why the check had been dishonored. It was discovered at this time that the check was dishonored in error by Citibank. However, by the time Citibank's error was established, Mr. Otte, as the trustee in bankruptcy, had assumed control of the corporation and petitioner was unable to draft a second check in payment of the withholding tax liability.

12. The corporation has claims for refund based upon a net operating loss carryback in the amount of \$9,010.00 from New York State and \$7,210.00 from New York City. These claims have not been filed with the Audit Division because

the corporation has not been able to obtain Federal form 4188 which petitioner believes is a prerequisite to a refund claim. The reason this form was not received was because the Federal refund due the corporation was applied to another liability. On October 13, 1977, petitioner filed with his petition corporate refund claims with the intention of placing the State Tax Commission on notice of funds due to the corporation.

13. In 1978, petitioner filed for and was adjudicated bankrupt.

14. A report by Mr. Otte in 1980 on the status of the corporation's bankruptcy stated that, at that time, the estate had net funds of \$132,121.01.

15. The answer of the Audit Division was not mailed to the individuals who, at the time of the mailing of the answer, were authorized to represent petitioner. The answer of the Audit Division contained, in substance, perfunctory statements contending that petitioner was responsible for the taxes the corporation collected and failed to pay over to New York State.

CONCLUSIONS OF LAW

A. That although the Audit Division failed to serve the proper party with its answer to the petition, petitioner has neither argued nor demonstrated that the failure to be served with the answer prejudiced petitioner's position. It is noted, that the answer primarily contained conclusory allegations of liability. In addition, the Statement of Deficiency, which was received in evidence without objection, amply placed petitioner on notice of the basis of the Audit Division's position. Accordingly, the failure to serve the answer upon petitioner's representative must be considered a harmless error.

B. That the obligation to collect, truthfully account for and pay over taxes withheld from the employees of the corporation was not discharged in bankruptcy (United States v. Sotelo, 436 U.S. 268 (1978)).

C. That the penalty imposed upon the failure to collect, truthfully account for and pay over withholding taxes is in the nature of a penalty and personal to petitioner [Tax Law §685(g)]. Accordingly, whether or not the corporation is entitled to a refund is irrelevant to this determination. It is noted that no determination is being made in this decision as to whether or not the corporation is entitled to a refund based upon a net operating loss. Similarly, it is noted that since the penalty asserted pursuant to section 685(g) of the Tax Law is personal in nature, the fact that the estate in bankruptcy may have had sufficient funds to satisfy the withholding tax liability is irrelevant.

D. That the issue of whether petitioner is a person required to collect, truthfully account for and pay over withholding taxes during the period in issue is a question of fact (Matter of McHugh v. State Tax Comm., 70 A.D.2d 987; Matter of MacLean v. State Tax Comm., 69 A.D.2d 951, aff'd. 49 N.Y.2d 920). Factors which are relevant to the determination of the issue include whether petitioner owned stock, signed tax returns, or supervised employees (Matter of McHugh v. State Tax Comm., supra, p. 989; Matter of MacLean v. State Tax Comm., supra; Matter of Malkin v. Tully, 65 A.D.2d 228). Other factors which have been examined are whether the individual was authorized and did in fact sign checks and whether the individual had responsibilities regarding the payroll (Matter of McHugh v. State Tax Comm., supra). In view of the fact that petitioner had complete control over the affairs of the corporation, he was 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 test of whether conduct is willful as used in subdivision (g) of section 685 of the Tax Law is "...whether the act, default, or conduct is

consciously done with knowledge that as a result, trust funds belonging to the Government will not be paid over but will be used for other purposes (citations omitted)" (Matter of Levin v. Gallman, 42 N.Y.2d 32, 34). In view of the fact that the corporation voluntarily chose to engage in the financing agreement with Talcott, petitioner is held responsible for the effects thereof and, therefore, the failure to pay the withholding taxes due for the period January 16, 1975 to April 15, 1975 was willful within the meaning of section 685(g) of the Tax Law (Matter of Donald M. Meyers, State Tax Commission, April 27, 1983).

F. That petitioner did not willfully fail to pay over taxes withheld from the employees of the corporation for the period August 1, 1976 to August 15, 1976, since, at the time he submitted a check for taxes for this period, there were sufficient funds in the corporation's checking account to cover the check. Moreover, by the time the bank's error was established, petitioner no longer had the authority to draft the check. Therefore, petitioner is not liable for the penalty imposed pursuant to section 685(g) of the Tax Law for this period (Matter of Harold H. Roberts, State Tax Commission, January 20, 1984).

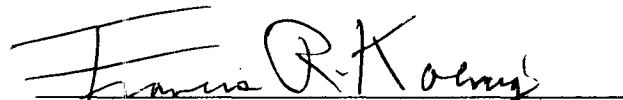
G. That the petition of Hans K. Liffman is granted only to the extent of Conclusion of Law "F" and the Audit Division is directed to modify the Notice of Deficiency accordingly; the petition is, in all other respects, denied.


DATED: Albany, New York

STATE TAX COMMISSION

JUN 01 1984


PRESIDENT


COMMISSIONER


COMMISSIONER