

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of
Eugene Ingelfinger :

AFFIDAVIT OF MAILING

for Redetermination of a Deficiency or Revision :
of a Determination or Refund of Personal Income
Tax under Article(s) 22 of the Tax Law for the :
Years 1976, 1977 & 1982.
_____ :

State of New York :

ss.:

County of Albany :

David Parchuck/Janet M. Snay, being duly sworn, deposes and says that he/she is an employee of the State Tax Commission, that he/she is over 18 years of age, and that on the 30th day of June, 1986, he/she served the within notice of Decision by certified mail upon Eugene Ingelfinger the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Eugene Ingelfinger
640 East Quaker Rd.
East Aurora, NY 14052

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 petitioner herein and that the address set forth on said wrapper is the last known address of the petitioner.

Sworn to before me this
30th day of June, 1986.

David Parchuck

Janet M. Snay
Authorized to administer oaths
pursuant to Tax Law section 174

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

June 30, 1986

Eugene Ingelfinger
640 East Quaker Rd.
East Aurora, NY 14052

Dear Mr. Ingelfinger:

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
Audit Evaluation Bureau
Assessment Review Unit
Building #9, State Campus
Albany, New York 12227
Phone # (518) 457-2086

Very truly yours,

STATE TAX COMMISSION

cc: Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition	:	
of	:	
EUGENE INGELFINGER	:	DECISION
for Redetermination of a Deficiency or for	:	
Refund of Personal Income Tax under Article 22	:	
of the Tax Law for the Years 1976, 1977 and	:	
1982.	:	

Petitioner, Eugene Ingelfinger, 640 East Quaker Road, East Aurora, New York 14052, 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 1976, 1977 and 1982 (File No. 49151).

A hearing was held before James J. Morris, Jr., Hearing Officer, at the offices of the State Tax Commission, 65 Court Street, Buffalo, New York, on January 13, 1986 at 1:15 P.M., with additional documents to be submitted by March 7, 1986. Petitioner appeared pro se. The Audit Division appeared by John P. Dugan, Esq. (Deborah J. Dwyer, Esq., of counsel).

ISSUE

Whether petitioner, Eugene Ingelfinger, is a person required to collect and pay over certain withholding taxes pursuant to section 685(g) of the Tax Law, notwithstanding a claim of personal bankruptcy.

FINDINGS OF FACT

1. On November 28, 1983, the Audit Division issued a Notice of Deficiency to petitioner, Eugene Ingelfinger, together with a Statement of Deficiency, asserting liability for penalties under section 685(g) of the Tax Law for the withholding tax periods December 1, 1976 to December 31, 1976, April 1, 1977 to September 30, 1977 and March 1, 1982 to December 17, 1982 in the respective

amounts of \$534.49, \$2,626.07 and \$5,700.00. The penalty was asserted against petitioner as a person required to collect, truthfully account for and pay over withholding taxes of Siding Master, Inc., and K & B Supply Company, Inc.

2. It was conceded by the attorney for the Audit Division that the amount of the deficiency had been reduced from \$8,860.56 to \$3,160.54.¹ The reduction resulted from a determination at conference that petitioner was not a responsible officer of K & B Supply Company, Inc. during the period March 1, 1982 to December 17, 1982 and, as such, was not liable for the penalty asserted against petitioner in that capacity. The remaining portions of the assessment in the amounts of \$534.49 and \$2,626.07 for the periods December 1, 1976 to December 31, 1976 and April 1, 1977 to September 30, 1977, respectively, related to petitioner's liability for withholding taxes as an officer of Siding Master, Inc.

3. Petitioner was the president and owner of Siding Master, Inc. during the periods covered by the Notice of Deficiency. Petitioner worked at Siding Master, Inc. as a salesman during approximately 40 percent of his work week. He had the authority to issue checks and had the authority to hire and fire employees.

4. During the withholding tax periods covered by the Notice of Deficiency with reference to Siding Master, Inc. (i.e., December 1, 1976 to December 31, 1976, and April 1, 1977 to September 30, 1977), petitioner employed a bookkeeper who signed and issued checks in payment of New York State withholding taxes.

5. Petitioner presented photocopies of checks, signed by his bookkeeper and made payable to the New York State Income Tax Bureau, which petitioner believed represented payment of withholding taxes. The Audit Division's position was that the checks were for payment of withholding taxes for periods not covered

¹ The amount of the deficiency should actually have been \$3,160.56. There was a mathematical error made at conference which was carried forward at the hearing. Accordingly, the \$3,160.54 figure will be used.

by the Notice of Deficiency and one check was in payment of New York State unemployment insurance. Petitioner failed to produce any evidence to refute the Audit Division's assertion.

6. On December 17, 1982, the petitioner filed a voluntary petition in bankruptcy in the Western District of New York, under Case No. 82-13576.

7. Petitioner submitted a letter from Trecor Title Guarantee Company, 110 Franklin Street, Buffalo, New York 14202, which indicated that a warrant issued by the State Tax Commission of the State of New York against Eugene Ingelfinger, responsible officer of Siding Master, Inc. in the amount of \$3,966.50, dated October 15, 1981, was declared null and void by order of the Bankruptcy Court filed January 9, 1984. Petitioner failed to present the order of the Bankruptcy Court or any other information which indicated that the aforementioned warrant was related to the tax at issue herein. The Audit Division presented an order of the Bankruptcy Court, dated October 27, 1983, which held that a Tax Commission warrant in the amount of \$3,966.50 was null and void against the debtor's (petitioner's) interest in real estate located at 24 North Lane, Orchard Park, New York, because petitioner had no equity in the property and the Tax Commission was treated as an unsecured creditor.

8. Petitioner presented a warrant issued by the State Tax Commission to "Joyce Ingelfinger, individually and as officer of Siding Master, Inc.", in the amount of \$8,860.56 for the periods at issue herein. Joyce Ingelfinger and petitioner were divorced by order of the New York Supreme Court, County of Erie, dated June 29, 1981. Petitioner claims that the amount of the warrant should have been satisfied through the sale of his former wife's property in June of 1985, but petitioner failed to present any evidence to substantiate his claim.

CONCLUSIONS OF LAW

A. That section 685(g) of the Tax Law provides, in pertinent part, that:

"Any person required to collect, truthfully account for, and pay over the tax imposed by this article who willfully fails to collect such tax or truthfully account for and pay over such tax or willfully attempts in any manner to evade or defeat the tax or the payment thereof, shall, in addition to other penalties provided by law, be liable to 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 provides that:

"For purposes of subsections (g), (i), (o), (q) and (r), the 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 officer, employee, or member is under a duty to perform the act in respect of which the violation occurs."

C. That whether petitioner was a person required to collect, truthfully account for and pay over withholding taxes during the period in issue is a factual question (Matter of McHugh v. State Tax Commission., 70 A.D.2d 987 [1979]; Matter of MacLean v. State Tax Commission., 69 A.D.2d 951 [1979], aff'd 49 N.Y.2d 920 [1980]). Factors which are relevant to this determination 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 Commission., 95 A.D.2d 949 [1983]; Matter of Malkin v. Tully, 65 A.D.2d 228 [1978]). 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 Commission, supra).

D. That judged by the criteria set forth in Conclusion of Law "C", petitioner was a person responsible for the collection and payment of withholding taxes due from Siding Master, Inc. for the periods December 1, 1976 through December 31, 1976 and April 1, 1977 and September 30, 1977. In particular, petitioner was the president and owner of the subject corporation, he devoted

40 percent of his time to the business, he had the authority to issue checks and to hire and fire employees.

E. That petitioner cannot absolve himself of his responsibility to collect and pay withholding tax merely by failing to concern himself with whether the taxes were paid and delegating the duty to his bookkeeper (see Ragonesi v. New York State Tax Commission, 88 A.D.2d 707 [1982]; Malkin v. Tully, 65 A.D.2d 228 [1978])).


F. That petitioner's prior discharge in personal bankruptcy is not an effective legal bar to collection of the withholding tax penalty (Matter of Milton Weinstein, State Tax Commission, April 6, 1979; see also, In Re Sotelo, Bankrupts, 436 U.S. 268 [1978])).

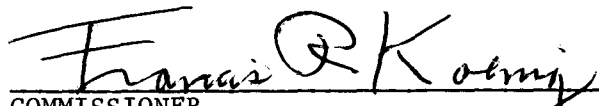
G. That the petition of Eugene Ingelfinger is granted to the extent indicated in Finding of Fact "2"; the Audit Division is hereby directed to modify the Notice of Deficiency issued November 28, 1983, and that, except as so granted, the petition is in all other respects denied.


DATED: Albany, New York

STATE TAX COMMISSION

JUN 30 1986


PRESIDENT


COMMISSIONER


COMMISSIONER