

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of
Susan M. LaFountain :

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 Period 1/1/80-12/31/81.

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 15th day of April, 1987, he served the within notice of Decision by certified mail upon Stanley Eisenberg, the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Stanley Eisenberg
105 Wolf Rd., Suite 26
Albany, NY 12205

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
15th day of April, 1987.

David Parchuck
Authorized to administer oaths
pursuant to Tax Law section 174

Janet M. Snay

STATE OF NEW YORK

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Janet M Snay

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

April 15, 1987

Susan M. LaFountain
31 Clinton Street
Keeseville, NY 12944

Dear Ms. LaFountain:

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

Petitioner's Representative:
Stanley Eisenberg
105 Wolf Rd., Suite 26
Albany, NY 12205

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :

of :

SUSAN M. LAFOUNTAIN : DECISION

for Redetermination of a Deficiency or for :
Refund of Personal Income Tax under Article 22
of the Tax Law for the Period January 1, 1980 :
through December 31, 1981.

Petitioner, Susan M. LaFountain, 31 Clinton Street, Keesville, New York 12944, filed a petition for redetermination of a deficiency or for refund of personal income tax under Article 22 of the Tax Law for the period January 1, 1980 through December 31, 1981 (File No. 61285).

A hearing was held before Arthur Bray, Hearing Officer, at the offices of the State Tax Commission, W.A. Harriman State Office Building Campus, Albany, New York on December 8, 1986 at 1:15 P.M. Petitioner appeared by Stanley Eisenberg, C.P.A. The Audit Division appeared by John P. Dugan, Esq. (Thomas C. Sacca, Esq., of counsel).

ISSUE

Whether petitioner is liable for the penalty asserted against her pursuant to section 685(g) of the Tax Law with respect to New York State withholding taxes due from Betty's Cleaners, Inc.

FINDINGS OF FACT

1. On March 25, 1985, the Audit Division issued a Notice of Deficiency and a Statement of Deficiency to petitioner, Susan M. LaFountain, asserting a deficiency equal to the amount of unpaid withholding tax which the Audit Division determined was due from Betty's Cleaners, Inc. ("the corporation").

Said documents asserted that \$4,467.90 was due for 1980 and \$3,953.50 was due for 1981.

2. The corporation's activities consisted of linen rental, laundry and dry cleaning.

3. During the periods in issue, the president of the corporation was Frank Mussen and the vice-president of the corporation was Frank Mussen's wife, Patricia Mussen. The corporate decisions were made by Mr. and Mrs. Mussen.

4. Depending upon the season, the corporation had approximately 25 to 50 employees.

5. Petitioner was not involved in deciding as to whom to hire or fire; all such decisions were made by Mr. and Mrs. Mussen.

6. The corporation's employees were supervised by Mr. Mussen or by the corporation's manager, Theodore LaBounty. Petitioner did not have any responsibility to supervise employees.

7. Petitioner's duties consisted of waiting on customers, maintaining records of the inventory of linen, gathering time cards, totalling hours worked and preparing bank deposit slips. Petitioner would also check whether the correct amount of cash was placed in each employee's payroll envelope by Mrs. Mussen.

8. Petitioner was authorized to sign checks and was listed as treasurer on records filed with the corporation's bank. Petitioner never signed checks when Mr. or Mrs. Mussen were present. However, there were occasions when Mr. and Mrs. Mussen would not be on the corporate premises and they knew that some item was about to be delivered. On such occasions, petitioner would be

instructed to draft a check to a particular supplier. Petitioner never drafted a check without prior consent.

9. The corporation's tax returns, including withholding tax returns, were prepared and signed by Patricia Mussen. Petitioner neither reviewed nor signed tax returns.

10. Petitioner was not involved in deciding which creditors would be paid and she did not know that withholding taxes were not paid to New York State.

11. Petitioner did not own any stock of the corporation or make any investment in the corporation. The only income she received from the corporation was in the form of salary.

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 section 685(n) of the Tax Law defines "person", for purposes of section 685(g) of the Tax Law as follows:

"[T]he 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 such officer, employee, or member is under a duty to perform the act in respect of which the violation occurs."

C. That factors relevant to the determination of whether petitioner was a person required to collect, truthfully account for and pay over withholding taxes during the period in issue 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 Commn., 95 AD2d 949, 950; Matter of Malkin v. Tully, 65 AD2d 228). 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 Commn., *supra*).


D. That in view of the fact that petitioner had only ministerial duties and did not have the authority to direct the payment of corporate obligations, petitioner was not a person required to collect, truthfully account for and pay over withholding taxes within the meaning of section 685(g) of the Tax Law.

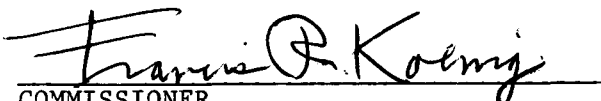
E. That the petition of Susan M. LaFountain is granted and the Notice of Deficiency, issued March 25, 1985, is cancelled.

DATED: Albany, New York

STATE TAX COMMISSION

APR 15 1987


PRESIDENT


COMMISSIONER


COMMISSIONER