STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petitions	:	
of	:	
C. E. FLEMING CORPORATION AND CHARLES E. FLEMING	:	DETERMINATION
	:	DTA NOS. 817008 AND 817009
for Redetermination of Deficiencies or for Refund of New York State and New York City Personal Income Tax under Article 22 of the Tax Law and the Administrative Code of the City of New York for the Period January 1, 1987 through December 30, 1996.	:	

Petitioner C. E. Fleming Corporation, 400 Olive Street, St. Louis, Missouri 63102-2718, filed a petition for redetermination of a deficiency or for refund of New York State and New York City personal income tax under Article 22 of the Tax Law and the Administrative Code of the City of New York for the period January 1, 1987 through December 30, 1996.

Petitioner Charles E. Fleming, 400 Olive Street, St. Louis, Missouri 63102-2718, filed a petition for redetermination of a deficiency or for refund of New York State and New York City personal income tax under Article 22 of the Tax Law and the Administrative Code of the City of New York for the period January 1, 1987 through December 30, 1996.

A consolidated hearing was held before Timothy J. Alston, Administrative Law Judge, at the offices of the Division of Tax Appeals, 500 Federal Street, Troy, New York, on November 18, 1999 at 9:15 A.M., with all briefs to be submitted by February 17, 2000, which date began the six-month period for the issuance of this determination. Petitioners appeared by Fred B.

Wander, Esq. The Division of Taxation appeared by Barbara G. Billet, Esq. (Kevin R. Law, Esq., of counsel).

ISSUES

I. Whether the Division of Taxation should be estopped from asserting New York State and City withholding tax deficiencies against petitioner C. E. Fleming Corporation.

II. Whether penalties asserted against C. E. Fleming Corporation for failing to file withholding tax returns and wage and tax statements and for failing to remit withholding tax should be abated.

III. Whether the Division of Taxation properly determined that petitioner Charles E. Fleming was liable for penalties equal to 100 percent of C. E. Fleming Corporation's unremitted withholding taxes pursuant to Tax Law § 685(g) and (n).

FINDINGS OF FACT

1. On February 9, 1998, following an audit, the Division of Taxation ("Division") issued to petitioner C. E. Fleming Corporation ten notices of deficiency which asserted New York State withholding tax due for the period January 1, 1987 through December 30, 1996 as follows:

Year	*Assessment No.*	*Tax Amount Assessed*
1987	L014658339	$ 4,087.24
1988	L014658340	7,496.96
1989	L014658344	7,802.48
1990	L014658342	29,100.50
1991	L014658346	49,176.14
1992	L014658348	35,566.05
1993	L014658350	41,629.04
1994	L014658352	39,571.64

1995	L014658354	34,268.24
1996	L014658356	36,653.00

2. Also on February 9, 1998, the Division issued to petitioner C. E. Fleming Corporation nine notices of deficiency which asserted New York City withholding tax due for the period January 1, 1988 through December 30, 1996 as follows:

Year	***Assessment No.***	***Tax Amount Assessed***
1988	L014658341	$ 2,145.63
1989	L014658345	2,006.70
1990	L014658343	6,862.18
1991	L014658347	11,550.24
1992	L014658349	11,177.97
1993	L014658351	13,932.71
1994	L014658353	14,855.05
1995	L014658355	12,593.68
1996	L014658357	12,494.73

3. The notices of deficiency issued to petitioner C. E. Fleming Corporation also asserted penalties pursuant to Tax Law § 685(a)(1); (b) and (h), plus interest.

4. On March 30, 1998, the Division issued to petitioner Charles E. Fleming 19 notices of deficiency (Notice numbers L014748885 through L014748903) which asserted penalty under Tax Law § 685(g) equal to the amount of New York State and City withholding tax asserted against C. E. Fleming Corporation pursuant to the notices of deficiency referenced above.

5. Petitioner C. E. Fleming Corporation ("the corporation") is an architectural and engineering firm. Its principal office is in St. Louis, Missouri. During the period at issue

petitioner had an office in New York City. The corporation withheld New York State and City personal income tax from its New York employees during that time and issued W-2 forms to these employees documenting the amounts so withheld. The corporation did not file any New York State or City withholding tax returns during that period and did not remit any of the tax withheld from its employees to New York State.

6. C. E. Fleming Corporation was selected for a withholding tax audit as a result of a screening program in the Division's withholding tax database matching amounts reported as withheld by employees and their employers. In this case, the program revealed that the corporation's New York employees had reported New York State and City tax withheld, but that petitioner had not remitted any such tax or filed any withholding tax returns.

7. The Division sent the corporation a letter dated January 21, 1997 advising that petitioner's withholding tax returns for the period January 1, 1993 through December 31, 1995 had been selected for audit. The letter further advised petitioner that the Division's records indicated that employees had been claiming withholding under petitioner's employer identification number, but that the Division had no record of the corporation's filing of any withholding tax returns during the period. The letter requested that petitioner provide the Division with copies of all records pertinent to the preparation of its withholding tax returns, including New York forms WT-1 and WT-4A and Federal forms 940, 941, W-2 and W-3.

8. The corporation provided documents in response to the Division's request. Upon review of such documents, the Division concluded that petitioner did not file withholding tax returns for the 1993 through 1995 period and that it withheld, but did not remit, New York State and City income tax during the same period. The Division expanded the audit period to include 1987 through 1992 and 1996. Upon review of documentation provided by the corporation for

these years the Division determined that petitioner did not file withholding tax returns and that it withheld, but did not remit, withholding tax during this expanded portion of the audit period.

9. For the years 1987 through 1991, and 1996, the Division determined the amount of State and City withholding tax that petitioner withheld but did not remit by totaling the amounts reported as withheld on W-2 wage and tax statements provided to the Division during the audit. For the years 1993 through 1995, because of discrepancies between C. E. Fleming Corporation's W-2's and general ledger, the Division determined the amount of withholding tax due using the general ledger. For the year 1992, the general ledger did not indicate New York State or City withholding. The Division determined the amount withheld for this year by subtracting the New York taxes withheld for the years 1987 through 1991 from the amount that was accrued as payable on the general ledger as of January 1, 1993.

10. The corporation did not take issue with the Division's method of calculating the subject withholding tax deficiencies.

11. During the audit, petitioner C. E. Fleming Corporation produced a letter addressed to the Division's "Withholding Tax Unit" dated March 16, 1993, which stated, in relevant part, "[a]t this time we would like to again request State of New York Withholding tax forms & instruction materials for the C. E. Fleming Corporation." The letter was signed by Mark Vleisides of the corporation's accounting department. Petitioner offered no evidence regarding the mailing of this letter and the Division produced no evidence of receipt.

12. The corporation also produced a letter addressed to the Division's Revenue Opportunity Division dated November 6, 1995, which advised of the return of certain questionnaires. This letter makes no reference to withholding tax.

13. During the audit, the corporation, by its controller, Timothy J. Rickard, sent a letter dated March 14, 1997 to the Division which stated that the "letters [dated March 16, 1993 and November 6, 1995] were sent after numerous prior attempts were made to obtain the proper information from the State." Mr. Rickard also sent a letter to the Division dated December 29, 1997 following the Division's issuance of its audit report in this matter. This letter states, in part: "We further attempted to contact the State numerous times by mail and telephone to request the proper [withholding tax] filing information yet never once received a response to any of our inquiries."

14. Petitioner Charles E. Fleming was president of C. E. Fleming Corporation and owned 100 percent of its stock. He was an employee of the corporation and the sole signatory on the corporate checking account. Mr. Fleming was aware that the corporation was withholding New York State and City taxes from employee wages but not remitting such taxes to the Division. Mr. Fleming did not personally attempt to obtain information from the Division regarding the corporation's withholding tax obligations because he had charged others in the organization with this responsibility, notably the corporation's controller, who had greater knowledge of such matters.

SUMMARY OF PETITIONERS' POSITION

15. Petitioners asserted that the Division should be estopped from assessing the subject State and City withholding tax deficiencies against C. E. Fleming Corporation because the Division failed to respond to correspondence from this petitioner regarding its withholding tax obligations. Petitioners asserted that a response from the Division to the request would have avoided the circumstances which resulted in the issuance of the statutory notices herein. Petitioners also asserted that penalties assessed against C. E. Fleming Corporation should be

abated for the same reason. Petitioners contended that the circumstances of this case do not rise to a level of willful neglect as claimed by the Division. Petitioners also asserted that the penalty assessed against petitioner Charles E. Fleming should be cancelled because Mr. Fleming was not a responsible person as defined in Tax Law § 685 (n) and his conduct was not willful within the meaning of Tax Law § 685(g).

CONCLUSIONS OF LAW

A. As a general proposition, the doctrine of estoppel is not applicable to governmental acts absent a showing of exceptional facts which require its application to avoid a manifest injustice (***Matter of Sheppard-Pollack v. Tully***, 64 AD2d 296, 409 NYS2d 847; ***Matter of Turner Construction Co. v. State Tax Commn.***, 57 AD2d 201, 394 NYS2d 78). This general rule is particularly applicable with respect to the Division of Taxation, for public policy favors full and uninhibited enforcement of the Tax Law (***Matter of Turner Construction Co. v. State Tax Commn.***, ***supra***, 394 NYS2d at 80). Exceptions to this rule "have indeed been rare and limited to unusual fact situations" (***Matter of Harry's Exxon Serv. Sta.***,Tax Appeals Tribunal, December 6, 1988).

B. Petitioners' estoppel claim must fail. Erroneous advice given by an employee of a governmental agency does not rise to the level of an unusual circumstance sufficient to support an estoppel claim against a government agency (***see***, ***Smith v. New York State and Local Retirement Systems***, 199 AD2d 763, 605 NYS2d 429, 431). As the Division correctly notes in its brief, if giving erroneous advice will not support an estoppel claim, then surely the failure to to provide forms and instructions, as alleged in this case, also will not support such a claim. Furthermore, a concealment or false misrepresentation is a necessary element of any estoppel claim (***see***, ***Griesmer v. Bourst***, 141 AD2d 919, 529 NYS2d 232, 233). In this case, there is no

evidence that the Division of Taxation made any misrepresentations to the corporation.[1] Additionally, estoppel may not be invoked against governmental entities where "reasonable diligence by a good-faith inquirer would have disclosed the true facts and the bureaucratic error" (***Parkview Associates v. City of New York***, 71 NY2d 274, 279, 525 NYS2d 176). Here, as the Division correctly notes in its brief, any failure by the Division to respond to requests for forms and instructions easily could have been remedied by consulting with a tax professional familiar with New York State and City withholding tax. Finally, the corporation clearly bears the bulk of responsibility for the situation in which it finds itself, for it knowingly withheld and failed to remit taxes over a ten-year period. Certainly, even if the corporation had shown that the Division failed to respond to numerous requests for forms and instructions, and even if such a failure could be construed as a misrepresentation by the Division, any resulting injury to the corporation could not be considered "profound and unconscionable" (***see***, ***Schuster v. Commissioner***, 312 F2d 311, 317), and therefore would not outweigh the strong principles against imputing estoppel to the State in tax matters (***see***, ***Matter of Turner Construction Co. v. State Tax Commn.***, ***supra***, 394 NYS2d at 80).

---

[1] The corporation alleged that it made numerous requests for forms and instructions. The record, however, reveals only the letter dated March 16, 1993 requesting withholding tax forms and instructions (***see***, Finding of Fact "11") and there is no evidence in the record that the corporation mailed this letter or that the Division received it. Contrary to petitioner's assertion, the record does not support a finding that petitioner made any other attempts to obtain withholding tax forms and instructions. The references to such other attempts in the letters dated March 16, 1993, March 14, 1997 and December 29, 1997 are general and nonspecific (***see***, Finding of Fact "13") and such other claimed attempts are otherwise undocumented in the record. Furthermore, the testimony of Charles E. Fleming on this point lacked both specificity and direct knowledge (e.g., "I was told, and I'm aware of letters going out . . . I understand there was [sic] phone calls, and I think one visit." [Hearing transcript pp 35, 36]). Considering that Mr. Fleming was concededly not personally involved in these purported attempts to obtain information, his testimony provides little support to petitioners' assertion. Additionally, the letter dated November 6, 1995, while referred to in the March 14, 1997 letter as an attempt to obtain information and forms, in fact contains no reference to withholding tax and merely indicates the return of an unidentified questionnaire (***see***, Finding of Fact "12").

C. The Division asserted penalties against C. E. Fleming Corporation pursuant to Tax Law § 685(a)(1); (b) and (h). Penalties imposed under section 685(a)(1) and (h) are properly abated if the taxpayer shows that its failure was "due to reasonable cause and not due to willful neglect." Penalties imposed under section 685(b) are properly abated if the taxpayer establishes that its failure is not "due to negligence or intentional disregard" of the Tax Law.

The regulations of the Division of Taxation as in effect during the period at issue provided that "[r]easonable cause may be determined to exist only where the taxpayer has acted in good faith" (***see***, 20 NYCRR former 102.7 [g][1], ***renum*** 20 NYCRR former 107.6[g][1]). "In determining whether reasonable cause exists, an important factor is the extent of the taxpayer's efforts to ascertain its tax liability" (***Matter of Kal Assocs.***, Tax Appeals Tribunal, October 17, 1991).

D. The corporation has failed to show that any abatement of penalty in this case is warranted. Indeed, the facts of this case support the imposition of penalties. Specifically, the corporation knew of its obligation to withhold State and City income tax and it did, in fact, withhold State and City tax from its employees' wages from 1987 through 1996. Despite these facts, the corporation did not report or pay over any of the tax it had withheld from its employees during this ten-year period. Nor did petitioner seek the advice of any tax professionals to help to bring it into compliance. Petitioner's conduct clearly falls within the meaning of "willful neglect" for purposes of Tax Law §685(a)(1) and (h) penalties and "intentional disregard of the Tax Law" for purposes of Tax Law § 685(b).

The corporation relied on the alleged failure by the Division to respond to its requests for forms and instructions to excuse its failure to report and pay over tax. Petitioner failed, however, to establish any such failure on the part of the Division (***see***, Conclusion of Law "B", footnote

"1"). Even accepting the corporation's claim that it made numerous attempts to contact the Division for forms and instructions, such a failure by the Division is a wholly unreasonable excuse for the corporation's failure to report and pay over withholding tax under the circumstances herein. Indeed, petitioner's claims as alleged constitute, at best, a handful of attempts over a ten-year period, during which time petitioner continued to withhold tax from its employees.

E. In order for the Division to hold an individual liable for penalties of 100 percent of unremitted withholding taxes, the individual must be a "person" who acted "willfully" under Tax Law § 685(g) and (n) in his or her failure to remit the appropriate withholding taxes. Section 685(g) provides:

> [a]ny 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 . . . 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.

The definition of "person" for purposes of Tax Law § 685(g) is contained in Tax Law § 685(n). The definition of "person" as set forth in that section includes "an officer or employee of any corporation (including a dissolved corporation) . . . who as such officer [or] employee . . . is under a duty to perform the act in respect of which the violation occurs."

It is well established that the question of whether someone is a "person" required to collect and pay over withholding tax is a factual one. Factors considered are whether the individual in question signed the corporation's tax returns, derived a substantial part of his or her income from the corporation, or had the right to hire and fire employees (***Matter of Malkin v. Tully***, 65 AD2d 228, 412 NYS2d 186, 188; ***Matter of MacLean v. State Tax Commn.***, 69 AD2d 951, 415 NYS2d 492, 494, ***affd*** 49 NY2d 920, 428 NYS2d 675). Other relevant factors include the

person's official duties, the amount of corporate stock owned, and the authority to pay corporate obligations (***Matter of Amengual v. State Tax Commn.***, 95 AD2d 949, 464 NYS2d 272, 273; ***Matter of McHugh v. State Tax Commn.***, 70 AD2d 987, 417 NYS2d 799, 801).

F. The record in this matter indicates that Charles E. Fleming was a "person" within the meaning of Tax Law § 685(n). Mr. Fleming was president and 100 percent shareholder of C. E. Fleming Corporation. He was an employee of the corporation and the sole signatory on the corporate checking account. Clearly, Mr. Fleming had or could have had sufficient authority and control over the affairs of the corporation to be considered a person under a duty to remit the withholding taxes in question (***see***, ***Matter of Constantino***, Tax Appeals Tribunal, September 27, 1990).

G. Next it must be determined whether Mr. Fleming acted "willfully" in his failure to remit the appropriate withholding taxes to the State. The test for willfulness in this context is well-established:

> [T]he test is whether the act, default, or conduct is consciously and voluntarily 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 . . . . No showing of intent to deprive the Government of its money is necessary but only something more than accidental nonpayment is required. (***Matter of Levin v. Gallman,*** 42 NY2d 32, 396 NYS2d 623, 624-625.)

H. Charles E. Fleming's failure to remit the withholding taxes of C. E. Fleming Corporation during the period at issue meets the willfulness standard articulated above. Like the petitioner in ***Levin v. Gallman (supra)***, Mr. Fleming was fully aware that the corporation was withholding taxes from its employees, but not filing returns or paying over the taxes it withheld. Mr. Fleming took no action to correct the situation and allowed subordinates to perpetuate the corporation's failure. This is willfulness for purposes of the section 685(g) penalty. Contrary to

petitioner's assertion, Mr. Fleming's delegation of responsibility does not negate a finding of willfulness, because Mr. Fleming had knowledge of the corporation's continuing failure to file returns and remit withheld taxes. A lack of willfulness has been found in responsible officer cases where there has been a both reasonable delegation of authority and a lack of knowledge of the corporation's failure (***see***, ***Matter of Gallo***, Tax Appeals Tribunal, September 9, 1988). Neither such condition is present here, for, as has been noted, Mr. Fleming knew of the corporation's failure, and his delegation of responsibility cannot be said to have been reasonable where the subordinates consistently failed to discharge their duty.

I. The petitions of C. E. Fleming Corporation and Charles E. Fleming are denied and the notices of deficiency dated February 9, 1998 and March 30, 1998, are sustained.

DATED: Troy, New York
May 4, 2000

/s/ Timothy J. Alston
ADMINISTRATIVE LAW JUDGE