

STATE OF NEW YORK
STATE TAX COMMISSION

In the Matter of the Petition

of

BERNARD RODIN

for Redetermination of a Deficiency or for
Refund of Personal Income Tax under Article 22 :
of the Tax Law for the Years 1979 and 1980.

DECISION

In the Matter of the Petition

of

JOHN LUCIANI

for Redetermination *of* a Deficiency or for
Refund of Personal Income Tax under Article 22
of the Tax Law for the Years 1979 and 1980.

Petitioner, Bernard Rodin, 1 Executive Drive, Fort Lee, New Jersey 07024, 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 1979 and 1980 (File No. 46465).

Petitioner, John Luciani, 1 Executive Drive, Fort Lee, New Jersey 07024, 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 1979 and 1980 (File No. 46296).

A consolidated hearing was held before Daniel J. Ranalli, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on September 9, 1986 at 9:15 A.M., with all briefs to be submitted by December 31, 1986. Petitioners appeared by William M. Skehan, CPA. The Audit Division appeared by John P. Dugan, Esq. (Attorney General's Office).

ISSUE

Whether petitioners are liable to a penalty under Tax Law § 685(g) equal to the unpaid withholding taxes of Blue & Gold, Ltd.

FINDINGS OF FACT

1. On March 28, 1983, the Audit Division issued identical notices of deficiency to petitioners, Bernard Rodin and John Luciani. The deficiencies were stated as follows:

	<u>Deficiency</u>	<u>Penalty</u>	<u>Interest</u>	<u>Total</u>
1979	\$ 7,986.88	-0-	-0-	\$ 7,986.88
1980	26,352.00	-0-	-0-	<u>26,352.00</u>
			Total	\$34,338.88

Accompanying the notices were statements of deficiency which explained that the deficiencies were attributable to penalties for unpaid withholding taxes due from Blue & Gold, Ltd. for the years at issue.

2. Petitioners are successful businessmen and each is a 50 percent general partner in J & B Management Company of Fort Lee, New Jersey. During the periods at issue, petitioners' primary business was developing apartment complexes in the southeastern United States.

3. Petitioners are also sports enthusiasts and in 1978 were interested in obtaining a franchise in the North American Soccer League. They tried, but were unable to obtain the New England franchise and the League's commissioner suggested that they contact the principals of Blue & Gold, Ltd. ("the corporation": which owned the Rochester Lancers soccer team.

4. The corporation's three principal shareholders at that time were two Rochester lawyers, Charles Schiano and Pasquale DiNolfo, and Nuri Sabuncu, a Rochester businessman. There were also 30 to 40 small investors from the

Officer of the corporation and Mr. DiNolfo was President and Chief Operating Officer.

5. In April or May 1978, petitioner Rodin purchased a 20 percent interest in the corporation from Mr. Schiano for \$400,000.00. He became a vice-president and a director. Mr. Rodin never received compensation from the corporation, was not a signatory on corporate bank accounts, never signed checks or tax returns, and was not involved in the day-to-day operations of the corporation.

6. In 1979, petitioner Luciani purchased approximately 13 percent of the shares of the corporation from the small investors. He was named Vice Chairman of the Board, but was not an officer of the corporation. Like Mr. Rodin, Mr. Luciani received no compensation, was not a signatory on corporate bank accounts, never signed checks or tax returns, and was not involved in the day-to-day operations of the corporation.

7. During the period at issue, petitioner Luciani was also general partner of the New York Arrows of the Indoor Soccer League.

8. By 1979, the corporation did not have the resources to acquire and keep the caliber of players necessary for competition in the North American Soccer League. Petitioners, through their J & B Management Company, advanced \$1,150,000.00 for player payroll and related withholding taxes for 1979. The funds were paid to the players through a New York Arrows account, but the corporation executed promissory notes to J & B Management Company for the amounts advanced. Petitioners arranged to pay the players directly so that the funds would not be diverted to other uses.

9. In 1979, differences developed between the Rochester-based shareholders and the petitioners. At the end of the 1979 season, petitioners wanted to

bring in other investors to help finance the team.

and, at the end of 1979, Mr. Rodin and Mr. Luciani were discharged from their positions with the corporation.

10. Petitioners never attended any formal directors' meetings. They were present at several informal meetings at which no minutes were taken.

11. Petitioners were given no information after being discharged in late 1979, and in late April 1980, started a lawsuit against the corporation and the other principal shareholders for an accounting and the return of the \$1,150,000.00. The funds were never repaid and the lawsuit was still pending at the time of the hearing.

12. During the years at issue, Mr. Rodin lived in Miami Beach, Florida and Mr. Luciani in Allendale, New Jersey.

13. Mr. Rodin was in Rochester for about five home games during each of the 1978 and 1979 seasons. He went to the corporation's offices on two occasions. Mr. Luciani went to one game in Rochester and went to Rochester on another occasion for a meeting with the Rochester Chamber of Commerce.

14. Each petitioner first learned that payroll taxes were unpaid when he received his respective notice of deficiency.

CONCLUSIONS OF LAW

A. That Tax Law § 685(g) provides, in pertinent part, as follows:

"Willful failure to collect and pay over tax. -- 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 Tax Law § 685(n) provides, in pertinent part, as follows:

"Person defined. -- For purposes of subsections (g)...the term person includes an individual, corporation or partnership or an

tion), 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 petitioners were not persons required to collect, truthfully account for and pay over the withholding taxes of Blue & Gold, Ltd. They were primarily investors.- In any event, their positions with the corporation were terminated by the end of 1979 and it is noted that \$26,352.00 out of the \$34,338.88 in unpaid taxes is attributable to the year 1980.


D. That the petitions of Bernard Rodin and John Luciani are granted and the notices of deficiency issued March 28, 1983 are cancelled.

DATED: Albany, New York

STATE TAX COMMISSION

MAR 20 1987


PRESIDENT


COMMISSIONER


COMMISSIONER