

CALIFORNIA FRANCHISE TAX BOARD

Legal Ruling No. 254

August 21, 1964

FRANCHISE – WITHHOLDING – FAILURE OF AGENT TO WITHHOLD CORPORATE TAX

Syllabus:

Taxpayers were delinquent in their income tax and a notice to withhold the amount of the tax and delinquencies thereon was served upon a corporation which was owned 100% by taxpayers. The corporation failed to withhold and transmit the amount of the tax and delinquencies thereon to the Franchise Tax Board as designated in said notice.

An examination of the corporate records disclosed that taxpayers had an open account payable on the corporate books which had been charged with a payment to a creditor and with the rental value of a residence used by taxpayers. These charges were made after the receipt of the notice and order to withhold tax. The corporation was notified by registered mail of its liability for failure to withhold and the demand was made for payment. The corporate attorney denied liability and stated that no funds were available for payment.

1. Must an assessment be made against the corporate withholding agent to establish statutory liability?

2. What collection action must be taken against the withholding agent?

1. The trust fund theory of the Federal Government does not apply to the withhold provisions under the Bank and Corporation Tax Law. The liability is statutory and since the liability is a statutory liability, an assessment is unnecessary to establish liability on the part of the corporate withholding agent for its failure to withhold the amount of the tax and delinquencies thereon specified in the notice to withhold.

In this particular instance the amounts expended for rental of taxpayer's residence and the amount expended to pay a creditor is income to the taxpayers and should have been withheld by the corporate withholding agent. Whichever amount, as between the notice and the account payments, is lesser, should have been withheld by the corporate withholding agent.

Unfortunately, section 26132 of the Bank and Corporation Tax Law merely provides that any bank, corporation or person failing to withhold the amounts specified in the withhold notice and transmit the same to the Board shall be liable for such amounts.

The section does not provide that such amounts withheld required to be withheld at the source are subject to the same administrative provisions of the statute as taxes assessed directly against an individual taxpayer. The withholding agent is especially made liable for the amounts by statute without further mention.

2. The law specifies that the Board may by notice, served personally or by registered mail, require any person, etc., to withhold from any person who fails to honor a withhold notice or it may sue to recover the statutory liability of the withholding agent for its failure to honor the notice.

The Bank and Corporation Tax Law (section 23037) has this definition of taxpayer: "Taxpayer means any person or bank subject to the tax imposed under Chapter 2 or Chapter 3 of this part." By the provisions of section 26132 the withholding agent is made liable for the tax and additions thereto imposed upon the taxpayer. The court in the Houston Street Corporation case (84 F. 2d 821) regarding a similar problem said: "We see no distinction between the phrases 'liable for such tax' and 'subject to a tax.' Both connote payment of the tax. We consider the terms interchangeable. See Webster's Dictionary, Standard Dictionary and Century Dictionary 'liable' 'subject.' -- A person liable for a tax is a person subject to a tax and comes squarely within the definition of a taxpayer in the statute." (U. S. v. Updike, 281 U.S. 489; Comm. v. N. Y. Trust Co., 54 F. 2d 463; White v. Hopkins, 51 F. 2d 159; GCM-CB 1937-1, p. 159.)

Further, under section 26134 withholding agents are includible within the definition of a taxpayer and thus entitled to seek refunds under specific conditions.

In the absence of specific statutory authorization it would seem that the Board should not resort to proposed additional assessments; however, the statute does authorize the Board to employ the jeopardy assessment procedure if it believes that the collection of the tax will be jeopardized by a delay. Further, if the jeopardy assessment procedure is employed no lien problem would arise.