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WINTER v. U.S., Cite as 86 AFTR 2d 2000-6846, 10/04/2000 , Code Sec(s) 31; 7422

Michael G. WINTER and Lynn M. WINTER, PLAINTIFFS v. UNITED STATES OF AMERICA, DEFENDANT.

Case Information:

Code Sec(s):	31; 7422
Court Name:	U.S. District Court, Southern Dist. of Texas,
Docket No.:	Docket No. 98-3292,
Date Decided:	10/04/2000.
Tax Year(s):	Years 1991, 1992.
Disposition:	Decision for Taxpayers in part.
Cites:	

HEADNOTE

1. Withholding tax credits—liability for tax—employee vs. independent contractor—proof.

Magistrate judge granted taxpayer refund, subject to adjustment, for income tax withholdings ex-employer orally agreed to take from his gross pay but didn't remit to IRS: IRS's refusal to issue taxpayer withholdings credit was improper where his and 1 IRS expert's credible and consistent testimonies showed taxpayer was employee, not independent contractor, and that his gross pay was actually reduced by claimed withholding amount. Also, employer's vague, self-serving testimony that taxpayer wasn't employee contradicted earlier assertion that taxpayer was issued Form W-2 and didn't explain discrepancies between later issued Form 1099 and taxpayer's net pay; and employee's right to credit was independent of employer's remittance.

Reference(s): ¶ 315.01(20) ; ¶ 74,225.05(5) Code Sec. 31 ; Code Sec. 7422

OPINION

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In the United States District Court for the Southern District of Texas, Houston Division.

Judgment

Judge: STACY, Magistrate Judge:

The Court, having filed its findings of fact and conclusions of law directing the entry of judgment in favor of the Plaintiffs and against the Defendant, it is

Adjudged that in the 1992 tax year Plaintiff's employer withheld from the wages of Plaintiff, Michael

Winter, the sum of \$3,916. Of the withheld amounts, \$1,198 was withheld as the employer portion of social security tax and \$2,718 was withheld as income tax.

It is further adjudged that Plaintiffs are entitled to a refund of \$2,693 as well as a refund of interest paid by Plaintiff's [sic] on that amount.

It is further adjudged that Plaintiffs are entitled to interest on their refund at the rates prescribed by the Internal Revenue Code from date of payment until receipt of their refund.

It is further adjudged that Plaintiffs are entitled to a refund of all penalties they have paid together with interest at the rates prescribed by the Internal Revenue Code from date of payment until receipt of their refund.

It is further Adjudged that Plaintiffs' entitlement to litigation costs and attorney's fees is reserved for future consideration upon appropriate motion of Plaintiffs.

Signed this 4th day of October, 2000.

James H. Stacy Judge Presiding

Agreed As To Form:

Donald J. Domrowski, Attorney for Plaintiffs

Manuel P. Lena, Jr., Attorney, Tax Division, Department of Justice

On January 22, 1999, the parties to the above captioned matter unanimously consented to proceed before United States Magistrate Judge Frances H. Stacy. Upon such consent, the District Judge transferred the matter to Judge Stacy for further proceedings, including final judgment. (Document No. 8). The United States moved for summary judgment, but the Court, based on the parties' submissions, found that genuine issues of material fact precluded summary judgment. On June 9, 2000, all parties appeared through their respective counsel, and this matter was tried to the bench.

Upon consideration of the testimony of the witnesses, the evidence properly offered and admitted into the record, and the parties' post-trial briefs, the Court makes the following Findings of Fact and Conclusions of Law:

I. The Parties

- (1.) Plaintiffs, Michael G. Winter ("Winter") and his wife, Lynn M. Winter, reside at 5523 Glenmere Lane, Spring, Texas 77379. Michael G. Winter's social security number is 282-38-8230. Lynn M. Winter's social security number is 293-46-6879. Plaintiffs instituted this action against the United States seeking a refund of \$2,718.16, which Plaintiffs paid when the Internal Revenue Service ("IRS") refused to allow them a tax credit for amounts that W. Winter's former employer, Chemcolit, Inc., ("Chemcolit") allegedly withhold as tax. (Document No. 1).
- (2.) Defendant is the United States on behalf of its agency, the IRS.
- (3.) While not named as a party to this litigation, Chemcolit, is a corporation located at 5625 FM 1960 West, Suite 415, Houston, Texas 7709. Mr. Winter went to work for Chemcolit on August 1, 1991. The President of Chemcolit is Manfred Krueter ("Krueter").

[pg. 2000-6848]

1. Findings of Facts ¹

- (1.) Winter specialized in buying and selling plastics, and he had developed a customer base for these types of products.
- (2.) In 1991, Winter and Chemcolit, through its President, Krueter, discussed the possibility of Winter coming to work, in a sales position, for Chemcolit.
- (3.) All discussions, regarding the term and conditions of Winter's employment, were oral, and none of their conversations were memorialized in writing.
- (4.) Winter and Krueter testified concerning their respective recollections of the terms and conditions of Winter's employment with Chemcolit, and in particular whether Chemcolit agreed to withhold taxes.
- (5.) Winter's oral work arrangement provided that he would be paid \$6,000 per month as a draw for a six month probationary period.
- (6.) Winter and Krueter agreed that because Winter needed \$4,500 a month to cover his monthly expenses, Chemcolit would "gross up" this amount by 25% to cover his FICA and social security taxes, withhold this amount, and pay him the balance as his net pay. Under this method of computation, Winter would always take home the minimum amount required for him to satisfy his monthly obligations, that is, \$4,500.
- (7.) Winter never complained to Krueter that he did not receive \$6,000 a month, because he knew he was not to receive his full salary, but instead was to receive 75 percent of the monies paid, and he assumed that the 25 percent withheld went to the government.
- (8.) Chemcolit often experienced cash flow problems, which resulted in Winter often being paid untimely. Krueter confirmed that Chemcolit did not always have money in the bank account on the first and last day of the month, and would wait for lines of credit to be cashed before payroll obligations could be satisfied.
- (9.) When Winter started working for Chemcolit, three people worked in the Chemcolit's office, including himself, and Krueter.
- (10.) Winter worked Monday through Friday, generally from eight or eight-thirty until five.
- (11.) Chemcolit provided, for Winter's use, a computer, fax machine, and telephone.
- (12.) Krueter directed and controlled Winter's work.
- (13.) If Winter had to travel for business, such as going to downtown Houston, he drove his own vehicle, but Chemcolit provided him with a company credit card to cover his expenses such as gas.
- (14.) Winter did not complete a Form W-4 when hired by Chemcolit.
- (15.) Winter has a background in sales, not in accounting or business.
- (16.) Winter had no involvement with, or knowledge of, Chemcolit's bookkeeping or accounting practices.
- (17.) Likewise, Winter had no knowledge regarding Chemcolit's withholding practices for its other employees, or knowledge of any filings made by Chemcolit with state or federal taxing authorities.
- (18.) In particular, Winter did not know that Chemcolit had employees for whom it issued W-2 forms and withheld federal income taxes.
- (19.) In September 1992, Chemcolit filed its IRS Form W-3 for taxable year 1991. For tax year 1991, Chemcolit issued a single Form W-2 to one employee, Ms. Cecilia Kuhn. In 1991, Chemcolit paid \$14,218.14 in employee wages to Ms. Kuhn and withheld \$2,269.52 in federal income taxes, \$881.53 in social security tax, and \$206.16 in Medicare tax. The wages paid to Ms. Kuhn are reflected in Chemcolit's Texas Employer's Quarterly Reports for 1991.
- (20.) Similarly, in January 1993, Chemcolit filed its IRS Form W-3 for 1992. It contains Form W-2s for two employees: Ms. Kuhn and Ms. Melinda [pg. 2000-6849] Tatum. In 1992, Chemcolit paid \$22,025.33 in employee wages to these two women. Chemcolit, also withheld \$3,252.83 in federal income taxes, \$1,365.57 in social security tax, and \$319.36 in Medicare tax. The wages paid Ms. Kuhn and Ms. Tatum are also listed in Chemcolit's Texas Employer's Quarterly Reports for 1992.
- (21.) On December 27, 1991, Krueter completed a request for verification of employment to Houston Home Mortgage on Winter's behalf. At that time, Winter was still in the probationary period as an independent salesman for Chemcolit. Krueter reported Winter's draw as \$6,000 monthly and furnished the date Winter began work.
- (22.) Krueter testified emphatically that Winter was not an employee but rather was an independent contractor, and therefore responsible for his own withholding. However, Krueter could provide no specifics as to his agreement with Winter.
- (23.) When questioned about the particular details of Winter's work relationship with Chemcolit, Krueter's memory failed, he had no recollection of any specific details, and his testimony was vague and evasive. For instance, he had no explanation concerning why Winter was treated differently

than Chemcolit's other employees. Likewise, he had no recollection about whether Winter asked about withholding. He could not explain whether Winter's six thousand dollar a month "draw" was tied to Winter's sales, or how long it would take Winter to develop a sales basis, or the frequency of payments to Winter. Moreover, he knew nothing about the Form 1099 Chemcolit submitted to the IRS in 1992 which identified that for tax year 1992 Winter received \$20,250. Krueter's vague, conclusory, and unsupported testimony that Winter was an independent contractor and therefore responsible for his own withholding is not credible.

(24.) In 1991, Winter's gross earnings for the four and a half months he worked, from August 15, 1991 to December 31, 1991 were \$27,000. ($\$6,000 \times 4\text{-}1/2$). Pursuant to Winter's agreement with Chemcolit that 25% be withheld, he would have received \$20,250. ($\$4,500 \times 4\text{-}1/2$). Winter actually received \$15,250, from Krueter individually or Krueter Investments, or Chemcolit.

(25.) Of the five Chemcolit checks paid to Winter in 1991, none specify any deductions for withholding, social security, or federal employment taxes:

Check Number	Date	Amount
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1230	11/06/91	\$1,200
1247	11/20/91	\$3,000
1264	11/25/91	\$3,000
1267	12/06/91	\$1,800
1268	12/19/91	\$1,500

(26.) In February 1992, Winter notified the IRS that he had not received a form W-2 from Chemcolit for 1991. He requested assistance regarding how he should complete his tax return, and in particular, how he should report his wages from Chemcolit and the tax that was withheld. The IRS issued to Winter form 4598 which advised that Chemcolit had been requested to provide a W-2, and IRS form 4852 to be attached as a substitute for form W-2.

(27.) Based on what he was told by the IRS, Winter attached form 4852, a substitute for Form W-2, to Plaintiffs' 1991 tax return.

(28.) Because Winter received \$15,250 from Chemcolit in 1991, he calculated his gross pay for 1991 as \$20,333.33 ($\$15,250/.75$). Based on this amount of wages, Winter calculated income tax withholding of \$2,718.16 and the amount withheld for FICA taxes as \$1198.50.

(29.) Plaintiffs never heard from the IRS regarding any effort or deficiencies in their 1991 return. [pg. 2000-6850]

(30.) In January and February 1992, Winter received from Chemcolit the following checks:

Check Number	Date	Amount
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1279	1/03/92	\$2,700
1280	1/07/92	\$2,300
1306	2/28/92	\$2,250

No amounts were identified on any of these checks as deductions for withholding social security or federal employment taxes.

(31.) Winter's gross pay for the one and a half months of 1992 should have been \$9,000. ($\$6,000 \times 1\text{-}1/2$). Pursuant to Winter and Chemcolit's agreement, had 25% been withheld, he would have received \$6,750 ($\$4,500 \times 1\text{-}1/2$). In fact, he received \$11,750. This sum reflected \$5,000 owed by Chemcolit to Winter in back pay for 1991, and \$6,750 ($\$4,500 \times 1\text{-}1/2$).

(32.) In February 1992, because Winter failed to generate sufficient sales for Chemcolit, he and Chemcolit ended their employment relationship.

(33.) In 1993, Winter notified the IRS that he had not received a Form W-2 from Chemcolit for 1992. Again, he sought IRS assistance concerning the appropriate actions to take in filing his income tax return.

(34.) Plaintiffs filed their tax year 1992 return, in the same fashion as they had for tax year 1991.

(35.) Winter received \$11,750 from Chemcolit in 1992. Based on his actual pay, Winter calculated his gross pay for 1992 at \$15,666.66 in wages. ($\$11,750/.75 = 15,677$). Based on this amount of wages, Winter calculated income tax withholding of \$2,718.16 and the amount withheld for FICA

taxes as \$1,198.50.

(36.) Plaintiffs attached two Form W-2s to their 1992 tax return: one, reflecting Lynn Winter's wages of \$3,802.96, the other a "substitute for Form W-2", form 4852, reporting \$15,666.66 in wages for Winter, and claiming \$2718.16 in federal income tax withheld, and \$1,198.50 in social security tax withheld. Winter stated on Form 4852, question #13, that "[t]he balance of gross pay minus the 7.65% [for Social Security Tax] minus net pay received was calculated as the amount of Federal income Tax withheld." In the aggregate, Plaintiffs reported \$19,469.62 in total wages on line 7 of their Form 1040 for the taxable year 1992.

(37.) Consistent with their Form 4852, Plaintiffs claimed a tax credit [Form 1040, line 54] of \$2,734.61 in federal income tax putatively withheld: \$16.45 attributable to Lynn Winter's employment and \$2,718.16 attributable to Winter's alleged withholding by Chemcolit.

(38.) Plaintiffs' 1992 tax return contains no entries for self-employment income attributable to Chemcolit and no entries for self-employment taxes paid. [Form 1040, line 47].

(39.) Plaintiffs reported owing total tax of \$3,721.24 (Form 1040, line 53), which when reduced by the \$2,734.61 credit for the federal income tax claimed to have been withheld [Form 1040, line 54] resulted in Plaintiffs owing \$986.63 in tax. [Form 1040, line 64]. Plaintiffs timely filed their 1992 return and included a check for \$986.63.

(40.) Kenneth Anderson, a twenty year IRS employee, who has been assigned for 10 years to the Appeals Division, testified as an expert in employment tax in this case. Anderson examined the books and records of the IRS with respect to Plaintiffs' claim, and indeed, had worked on Plaintiffs' 1992 refund request. In addition, he listened to the testimony of Winter and Krueter, prior to proffering expert testimony in the instant action.

(41.) Mr. Anderson testified that whole dollar withholding, while not common, is not unheard of, impossible, or improper, [pg. 2000-6851] either. Mr. Anderson estimated that one in a hundred returns have whole dollar amount withholding. Usually, however, the amount withheld includes some cents, such as \$2,011.13.

(42.) Mr. Anderson testified that generally the employer's characterization of an employment relationship controls. However, in the event there is an audit, the IRS disregards the employer's characterization, and instead looks to all the facts and circumstances.

(43.) Based on Winter's testimony and Krueter's testimony, Anderson characterized Winter as an employee of Chemcolit, not an independent contractor.

(44.) Anderson further testified that because Winter was an employee, Chemcolit had an obligation to withhold income taxes on amounts received.

(45.) Anderson stated that an employer, such as Chemcolit, has this obligation, no matter what, to withhold income tax.

(46.) Anderson also stated Winter would be entitled to credit for withholding taxes, regardless of whether Krueter or Chemcolit, paid the withheld amount over to the IRS.

(47.) Anderson testified that Winter's story, as related to the IRS and the agents he has worked with, has always been consistent.

(48.) Here, Anderson testified that Winter acted appropriately by contacting the IRS when he did not receive Form W-2 for tax years 1991 and 1992.

(49.) Because Winter had no written documentation to substantiate his withholding arrangement with Chemcolit, the IRS at the administrative level declined to give him credit for withholding.

(50.) Anderson testified that, based on the testimony, he knew of no documentation that Winter could have provided the IRS.

(51.) No one from the IRS ever sought independent verification from Chemcolit or Krueter about Winter's employment status.

(52.) Indeed, when the IRS attempted to contact Chemcolit in 1992 concerning Winter's request for a Form W-2, Chemcolit was uncooperative and unresponsive to IRS inquiries.

(53.) The IRS' internal notes of conversations between Winter, Chemcolit and an IRS representative show that Winter has been steadfastly consistent in his story, and that he always cooperated with the IRS. The notes make clear that Winter, at all times, maintained that he worked for Chemcolit, earned wages, and that withholding was taken out. Chemcolit, on the otherhand, was unresponsive to IRS inquires, and more importantly, had no documentation readily available for the tax year in question, and required additional time:

Note Date 3-10-95 Note: tp agrees he worked for company but says he earned wages and withholding was taken out.

Note Date 3-16-95 Note: Called payer about amount earned and w/h amount. getting run around from company they stated they will call me back in one hour it is now 905 am I will give them [sic] till 1100 then I(sic) will call back.

Note Date 3-16-95 Note: payer called back and will not have this info until March 28th. Call back on march 28th and ask if they have info ready.

Note Date 3-30-95 Note: have made repeated attempts to contact the payer by phone to verify the amount earned in 1992 and have gotten the big run around by the people at the company. 713-587- 2332. Sending cp 2000 and 2625 per c kirk.

Note Date 6-20-95 Note: TP called and left message on recorder. Returned his call 713-376-6330. TP says he was an employee of the company and they were withholding taxes. He has sent all the information he has. There is nothing else he can provide. He states he believes Company kept the amount withheld and only reported net income pd. Based on gross income of 36,000(20,000 in 1991 & 15,000 in 1992). TP is figuring this as shown ($36,000 \times 75\% = 20,250$). TP states he reported income from this company in 1991 of 20,000. He does not believe we received an income doc from payer in 1991. He believes company [pg. 2000-6852] combined both yrs and reported in 1992. If we do not accept his explanation, he feels he should be given credit for amount reported in 1991. Based on previous case note I advised TP that we would contact him after we received response from payer or time expired on ltr sent to paper. I now realize that 2626 was sent again after payer ltr.

Date 8-15-95 Note: I would accept the t/ p's determination of the amount of income for 1992. But we can't allow withholding without verification. If we don't allow the withholding credit, we should reduce the taxable income amount to exclude it as well. And we should propose employee share FICA on the net wage amount.

Pl. Ex. 5.

(54.) Following repeated requests from the IRS to respond about Winter's employment status, and notwithstanding Chemcolit's earlier representation to the IRS that a form W-2 had been sent to Winter, and the IRS, in turn, advising Winter of the same in a letter dated May 12, 1993, Chemcolit provided the IRS with Form 1099, reflecting non-employee compensation of \$20,250 paid to Winter for 1992.

(55.) Pursuant to their agreement, Winter should have been paid a gross salary of \$36,000 for the six months he worked ($\$6,000 \times 6$), less the twenty-five percent withheld by Chemcolit for tax ($\$60,000.75$ or $\$36,000 - 9,000 = \$27,000$). Winter actually received a total of \$27,000 in either checks or cash from Chemcolit during 1991 and 1992.

(56.) It is undisputed that the Form 1099 submitted by Chemcolit to the IRS is inaccurate and misstates the monies paid by Chemcolit to Winter for the reported tax year.

(57.) Further, because Winter was a Chemcolit employee, this type of tax reporting form, Form 1099, should not have been used.

(58.) Neither Anderson or Krueter could correlate the amount on the Form 1099 ($\$ 20,250$) with the amounts Winter received for tax year 1991 ($\$15,250$), tax year 1992 ($\$11,750$), or the years combined ($\$27,000$).

(59.) It appears that Form 1099 was prepared by Chemcolit in response to IRS inquires, and was not prepared in the routine course of business.

(60.) Once the IRS received Chemcolit's Form 1099, which reflected non-employee compensation of \$20,250 paid to Mr. Winter for 1992 and also reflected that no payroll taxes were withheld, the IRS notified Plaintiffs that it had received information contrary to that reported by Plaintiffs.

(61.) On April 8, 1996, Plaintiffs filed IRS Form 1040X for tax year 1992, again claiming a \$2,718.16 withholding credit.

(62.) The IRS reversed the \$2,718.16 withholding tax credit and made adjusting entries [see 23C entries dated 3/25/96 on Gov. Ex. 1] that ultimately resulted in a balance due from Plaintiffs of \$5,539.26. The IRS first proposed adjusting Winter's wages to the "gross" wages claimed, and denying the withholding credit and imposing self-employment taxes. Under this proposed

adjustment, the tax greatly exceeded the benefit of the withholding credit. Winter rejected this and several other approaches, insisting on the withholding credit. Eventually, the IRS adjusted Winter's wages to the amount he actually received, \$11,750, reversed the withholding credit of \$2,718.16, included the employee portion of the FICA taxes \$899 ($\$11,750/7.65=\899), and made the necessary adjustments resulting from the disallowance, including interest. Pursuant to that adjustment, Winter was not made to pay tax on amounts he never received; he was, however, denied credit for the amounts he claimed were withheld by Chemcolit.

(63.) Winter disputed the IRS' disallowance of the \$2,718.16 withholding credit, and filed an appeal with the IRS. The appeal was rejected by both IRS appeals and its problem resolution group.

(64.) The Plaintiffs' refund claim was ultimately disallowed by the IRS at the administrative level. [pg. 2000-6853]

(65.) On October 12, 1998, plaintiffs paid the \$5,539.26 to the IRS and later filed this Complaint seeking a refund of \$2,718.16 in tax, plus interest and penalties paid thereon, for their federal income (1040) taxes for tax year 1992.

(66.) Upon weighing the evidence and comparing the credibility of the witnesses, the court finds the testimony of Krueter is not credible.

(67.) Krueter's assertion that he did not agree to withhold money is not credible.

(68.) Krueter's testimony that Winter was an independent contractor was self-serving and not credible. If Krueter had testified that Winter were a Chemcolit employee, then Chemcolit, or Krueter, personally, would be responsible for amounts withheld for taxes but not remitted to the IRS.

(69.) The more credible evidence demonstrates that Winter was an employee of Chemcolit, that he was paid in accord with the agreement struck between himself and Krueter, to wit, he received his net pay, that Chemcolit actually withheld 25 percent of his gross pay for his FICA and Social Security taxes, and that these amounts were not remitted to the IRS.



(70.) Although Plaintiffs have no documentary evidence to support their allegations, such as a Form W-2, notations on checks reflecting withholding, or other such written documentation, and although it is undisputed that Chemcolit had prepared Form W-2 for other employees, and reported those individuals' withholding on the appropriate tax forms to the appropriate governmental entities, the preponderance of the evidence, nonetheless, shows that Plaintiffs have been unequivocal and steadfast in their position that Chemcolit actually withheld tax, and that they sought assistance from the IRS concerning what they should do when Chemcolit, for tax years 1991 and 1992, failed to give Winter a Form W-2. In each instance, Plaintiffs filed the substitute for Form W-2, and reported their income in the manner testified to in Court. Finally, Plaintiffs have been unwavering in their pursuit of their refund claim at the administrative and judicial levels. Winter's testimony in this case was credible and fully supportive of Plaintiffs' claim to a refund.


(71) Plaintiffs reduced their 1992 income tax liability by incorrectly claiming a \$2,797.60 exclusion on a premature IRS distribution which reduced their income tax liability by \$280,

(72.) Plaintiffs' improvident mistake does not call into question Winter's credibility concerning his contention that he was an employee of Chemcolit or that Chemcolit withheld certain amounts from his compensation for tax, which were never remitted to the IRS.

Conclusions of Law

(1.) The Court has jurisdiction pursuant to  26 U.S.C. section 7402 and 25 U.S.C. sections 1340 and 1345.

(2.)  26 U.S.C. section 31(a)(1) provides in pertinent part that "[t]he amount withheld as tax under chapter 24 shall be allowed to the recipient of the income as a credit against the tax imposed by 14 this substitute." The statute's related treasury regulation,  Reg. section 1.31-1 provides as follows:

 Reg. section 1.31-1 Credit for tax withheld on wages. (A) The tax deducted and withheld at the source upon wages... is allowable as a credit against the tax imposed by subtitle A of the Internal Revenue code... upon receipt of the income. If the tax has actually been withheld at the source, credit or refund shall be made to the recipient of the income even though such

tax has not been paid over to the government by the employer.

(3.) The Fifth Circuit in *Mazo v. United States*, 591 F.2d 1151, 1153 [43 AFTR 2d 79-853] (5th Cir.), cert. denied, 444 U.S. 842 (1979) interpreted these provisions and held:

When net wages are paid to the employee, the taxes that were, or should have been, withheld are credited to the employee even if they are never remitted to the government; so the IRS has recourse only against the employer for their payment.

[pg. 2000-6854]

(4.) "[T]his construction does not prejudice the rights of the IRS in any way. In fact, the Code itself places the burden of tax remittance on the withholding agent.... In light of the IRS's ability to monitor and punish a withholding agent for its illegal retention of withholding payments, it is unnecessary and unjust to hold an innocent taxpayer responsible for such illegal acts by preventing the adjudication of a refund claim." *Weisman v. Commissioner Internal Revenue Service*, 103 F.Supp. 2d 621, 2000 WL 973682 *8, 2000-2 USTC P50,557 (E.D.N.Y. June 30, 2000)(Civil Action No. 97-CV-5302(DGT)).

(5.) Based on the credible testimony proffered by Winter and the IRS's expert, Mr. Anderson, Plaintiffs' unwavering diligence and consistent position taken at the administrative and judicial level, the manner in which Chemcolit responded to the IRS inquiries, and Krueter's vague and self-serving testimony, Plaintiffs have established their assertion that Chemcolit actually withheld amounts from Winter's gross wages in 1992 to cover Winter's federal income tax obligation but that such amounts were never remitted as withholding to the IRS.

(6.) Based on these findings, Plaintiffs are entitled to a tax refund of \$2,718.16, plus interest and penalties paid for their federal income (1040) taxes for tax year 1992 for amounts that were actually withheld. This refund should be reduced as necessary to correct the amount improperly taken by Plaintiffs' as a \$2,797.60 exclusion.

(7.) In the event any of the foregoing Findings of Fact constitute Conclusions of Law, they are adopted as such. In the event any of the foregoing Conclusions of Law constitute Findings of Fact, they are adopted as such.

(8.) A final judgment consistent with the foregoing findings of fact and conclusions of law shall be submitted to the Court within ten days after entry of this order.

Signed at Houston, Texas, this 19th day of September, 2000

Frances H. Stacy, U.S. Magistrate Judge.

1

The undersigned has integrated the substance of the parties' stipulated facts set forth in the Pretrial Order, with the Court's findings.

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