

STATE OF NEW YORK

STATE TAX COMMISSION

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In the Matter of the Petition

of

MICHAEL L. POLKA

DECISION

for Redetermination of a Deficiency or for  
Refund of Personal Income Tax under Article 22  
of the Tax Law for the Years 1981 and 1982.

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Petitioner, Michael L. Polka, 2001 Earl Road, P.O. Box 2123, Oshkosh, Wisconsin 54903, 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 1981 and 1982 (File No. 47370).

On July 22, 1986, petitioner advised the State Tax Commission, in writing, that he desired to waive a formal hearing and submit the case to the State Tax Commission upon the entire record contained in the file, with submission of additional evidence and documents by August 6, 1986. After due consideration of said record, the Commission renders the following decision.

#### ISSUE

Whether petitioner, Michael L. Polka, is subject to a penalty pursuant to section 685(g) of the Tax Law as a person who willfully failed to collect, truthfully account for and pay over the New York State withholding taxes due from Polsen Metal Recovery, Inc. for the years 1981 and 1982.

#### FINDINGS OF FACT

1. Polsen Metal Recovery, Inc. (hereinafter "Polsen") failed to pay over the New York State personal income taxes withheld from the wages of its employee for the following periods:

<u>Withholding Tax Period</u>	<u>Amount</u>
May I, 1981 through August 31, 1981	\$1,373.50
February 1, 1982 through August 11, 1982	<u>3,900.00</u>
TOTAL	<u><u>\$5,273.50</u></u>

2. On June 27, 1983, the Audit Division issued a Notice of Deficiency against Michael L. Polka (hereinafter "petitioner") wherein a penalty was asserted pursuant to section 685(g) of the Tax Law for an amount equal to the New York State withholding taxes due from Polsen for the aforesated periods. Such penalty was asserted on the grounds that petitioner was a person required to collect, truthfully account for and pay over said taxes and that he willfully failed to do so.

3. Petitioner was president of Polsen until his resignation on September 1981.

4. The portion of the deficiency asserted for 1982 of \$3,900.00 was cancelled at a pre-hearing conference. Accordingly, only the remaining \$1,373.50 asserted for 1981 remains at issue herein.

5. Petitioner held 25% of the outstanding stock in Polsen. Philip Rosen, petitioner's uncle was the Chairman of the Board of Polsen and held 25% of the stock. His wife Devorah ROsen, was secretary/treasurer of Polsen and held 25% of the stock. Philip and Devorah Rosen's son held the remaining 25% of the stock in Polsen.

6. Both Polsen and Rosen Brothers, which was located directly across the road from Polsen, were engaged in the purchase and sale of scrap metal. Philip and Devorah Rosen were the principals of Rosen Brothers.

7. Petitioner was involved in litigation respecting his responsibility for the payment of Polsen's Federal withholding taxes for 1981. In Michael Polk v. The United States of America, United States District Court, Eastern District

of Wisconsin several in depth pre-trial depositions were taken of former employees of Polsen and ~~Rosen~~ Brothers.

8. The following facts have been established from the aforestated depositions :

- a. That petitioner had no control over the financial affairs of Polsen.
- b. That the Roaens kept Polsen's books and records on the premises of Rosen Brothers.
- c. That the Rosens had full control of Polsen's financial affairs and they made the decisions as to which of Polsen's creditors would be paid. This was done on many occasions over the objections of petitioner.
- d. That the Rosens were responsible for the payment of employment taxes.

#### CONCLUSIONS OF LAW

A. That section 685(g) of the Tax Law provides that:

"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 section 685(n) of the Tax Law provides that, for purposes of subdivision (g) , the term "person":

"[I]ncludes 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 petitioner was not a person responsible for the collection and payment of the withholding taxes of Polsen during 1981. Accordingly, the penalty asserted against him pursuant to section 685(g) of the Tax Law is

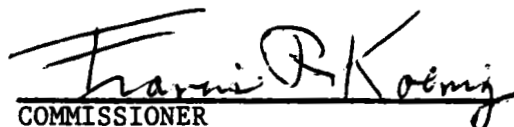
D. That ~~the~~ petition of Michael L, Polka is granted and the Notice of Deficiency issued against him on June 27, 1983 is cancelled.

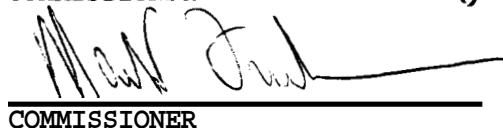
DATED: Albany, New York

STATE TAX COMMISSION

JAN 30 1987

PRESIDENT

  
COMMISSIONER

  
COMMISSIONER