

STATE OF NEW YORK

STATE TAX COMMISSION

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In the Matter of the Petition

of

THOMAS SHELDON

DECISION

for Redetermination of a Deficiency or for  
Refund of Personal Income Tax under Article 22 :  
of the Tax Law for the Period January 1, 1981  
through June 30, 1981.

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Petitioner, Thomas Sheldon, 209 Rosewood Street, Mandeville, Louisiana 70448, filed a petition for redetermination of a deficiency or for refund of personal income tax under Article 22 of the Tax Law for the period January 1, 1981 through June 30, 1981 (File No. 49955).

A hearing was held before James J. Morris, Jr., Hearing Officer, at the offices of the State Tax Commission, State Office Building, 65 Court Street, Buffalo, New York, on January 16, 1986 at 9:15 A.M. Petitioner appeared by Hodgson, Russ, Andrews, Woods & Goodyear (William H. Gardner, Esq., of counsel). The Audit Division appeared by John P. Dugan, Esq. (Deborah J. Dwyer, Esq., of counsel).

#### ISSUE

Whether petitioner is liable to a penalty under section 685(g) of the Tax Law equal to the unpaid withholding taxes of Buy-Lo Beverage Center, Inc.

#### FINDINGS OF FACT

1. On November 28, 1983, the Audit Division issued a Notice of Deficiency and Statement of Deficiency to petitioner, Thomas Sheldon, imposing a penalty of \$510.60, on the grounds that he was a person required to collect, truthfully account for and pay over New York State withholding taxes of Buy-Lo Beverage Center, Inc.

Center, Inc. and that he willfully failed to collect such tax or truthfully account for and pay over the tax or willfully attempted to evade or defeat the tax or the payment thereof.

2. Petitioner was president, treasurer and sole shareholder of Buy-Lo Beverage Center, Inc. ("Buy-Lo"), which operated a retail beverage store at 2228 Seneca Street, Buffalo, New York.

3. As a result of business difficulties, Buy-Lo filed a voluntary petition under Chapter **XI** of the United States Bankruptcy Act on April 15, 1980.

4. On May 12, 1980, petitioner and Buy-Lo entered into an agreement with Norman J. Castine, Inc. ("NJC") whereby NJC agreed to purchase Buy-Lo's assets, including its wholesale beer license. The agreement was contingent, inter alia, on the approval of the United States Bankruptcy Court and the approval of the transfer of the license by the State Liquor Authority.

5. Under the terms of the May 12, 1980 agreement, the direction and control of Buy-Lo's business operations were to be under the co-management of petitioner, or his nominee, and NJC, or its nominee. Paragraph "5" of the agreement provided, in part:

"It is understood and agreed that SHELDON is specifically named herein **for** the purpose of assuring him that he will have some opportunity to control and observe the operation of the business of (Buy-Lo) and satisfy himself that the same is being properly operated."

Petitioner was free to elect not to work in the business.

6. The agreement between petitioner, Buy-Lo and NJC was approved by the Bankruptcy Court on July 2, 1980.

7. On July 3, 1980, Norman J. Castine, owner of the stock of NJC, entered into an agreement with one Alfred R. Santiago, wherein Mr. Castine agreed to sell his stock to Mr. Santiago. The agreement was contingent on the approvals

8. From July 3, 1980, the business was operated by Alfred R. Santiago and members of his family. Mr. Santiago continued to use the Buy-Lo name for withholding tax and sales tax purposes and for the purpose of purchasing from certain distributors.

9. During the period at issue, petitioner, although nominally an officer and the sole shareholder of Buy-Lo, was not involved in the operation of the business.

10. Although the business continued to lose money, Mr. Santiago continued to operate it because of the value of the wholesale beer license. He tried to keep the business in operation long enough to realize a profit on the sale of the license after the transfer had been approved by the State Liquor Authority. However because of losses, he was forced to close the business on May 31, 1981.

11. The State Liquor Authority did not approve the aforementioned license transfer. The license was eventually acquired by Mr. Castine's daughter.

12. The bankruptcy proceeding was transferred from a Chapter XI proceeding to a Chapter VII proceeding and an order for relief under Chapter VII was entered on November 8, 1982.

#### CONCLUSIONS OF LAW

A. That section 685(g) of the Tax Law 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 section 685(n) of the Tax Law provides, in pertinent part, as

"Person defined. -- For purposes of subsections (g) ...the term person includes 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, Thomas Sheldon, was a person required to collect, truthfully account for and pay over the withholding taxes of Buy-Lo Beverage Center, Inc. However, any failure ~~to~~ collect such tax or truthfully account for and pay over such tax was not willful on his part. The business was actually being operated by another entity and Alfred R. Santiago caused the withholding tax returns to be filed in Buy-Lo's name, apparently because the license transfer had not taken place.

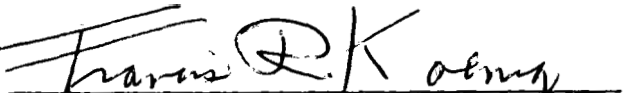
D. That the petition of Thomas Sheldon is granted and the Notice of Deficiency is cancelled.


DATED: Albany, New York

STATE TAX COMMISSION

JUN 30 1986

  
PRESIDENT

  
COMMISSIONER

  
COMMISSIONER