

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of :
Dasid Fabrics Corp. :

AFFIDAVIT OF MAILING

for Redetermination of a Deficiency or for Refund :
of Franchise Tax on Business Corporations under :
Articles 9-A and 27 of the Tax Law for the Fiscal :
Year Ended August 31, 1975 through the Fiscal Year :
Ended August 31, 1980. :

State of New York :

ss.:

County of Albany :

David Parchuck, being duly sworn, deposes and says that he is an employee of the State Tax Commission, that he is over 18 years of age, and that on the 18th day of January, 1985, he served the within notice of Decision by certified mail upon Dasid Fabrics Corp., the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Dasid Fabrics Corp.
38 W. 32nd St.
New York, NY 10001

and by depositing same enclosed in a postpaid properly addressed wrapper in a post office under the exclusive care and custody of the United States Postal Service within the State of New York.

That deponent further says that the said addressee is the petitioner herein and that the address set forth on said wrapper is the last known address of the petitioner.

Sworn to before me this
18th day of January, 1985.

David Parchuck

Samuel A. Strickland
Authorized to administer oaths
pursuant to Tax Law section 174

STATE OF NEW YORK

STATE TAX COMMISSION

_____ :
 In the Matter of the Petition :
 of :
 Dasid Fabrics Corp. :

AFFIDAVIT OF MAILING

for Redetermination of a Deficiency or for Refund :
of Franchise Tax on Business Corporations under :
Articles 9-A and 27 of the Tax Law for the Fiscal :
Year Ended August 31, 1975 through the Fiscal Year :
Ended August 31, 1980. :

_____ :
State of New York :
 ss.:
County of Albany :

David Parchuck, being duly sworn, deposes and says that he is an employee of the State Tax Commission, that he is over 18 years of age, and that on the 18th day of January, 1985, he served the within notice of Decision by certified mail upon Joseph H. Carter, the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Joseph H. Carter
218 Hungry Harbor Road
N. Woodmere, NY 11581

and by depositing same enclosed in a postpaid properly addressed wrapper in a post office under the exclusive care and custody of the United States Postal Service within the State of New York.

That deponent further says that the said addressee is the representative of the petitioner herein and that the address set forth on said wrapper is the last known address of the representative of the petitioner.

Sworn to before me this
18th day of January, 1985.

David Parchuck

William A. Houckend
Authorized to administer oaths
pursuant to Tax Law section 174

STATE OF NEW YORK
STATE TAX COMMISSION
ALBANY, NEW YORK 12227

January 18, 1985

Dasid Fabrics Corp.
38 W. 32nd St.
New York, NY 10001

Gentlemen:

Please take notice of the Decision of the State Tax Commission enclosed herewith.

You have now exhausted your right of review at the administrative level. Pursuant to section(s) 1090 of the Tax Law, a proceeding in court to review an adverse decision by the State Tax Commission may be instituted only under Article 78 of the Civil Practice Law and Rules, and must be commenced in the Supreme Court of the State of New York, Albany County, within 4 months from the date of this notice.

Inquiries concerning the computation of tax due or refund allowed in accordance with this decision may be addressed to:

NYS Dept. Taxation and Finance
Law Bureau - Litigation Unit
Building #9, State Campus
Albany, New York 12227
Phone # (518) 457-2070

Very truly yours,

STATE TAX COMMISSION

cc: Petitioner's Representative
Joseph H. Carter
218 Hungry Harbor Road
N. Woodmere, NY 11581
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

<p style="text-align: center;">In the Matter of the Petition</p> <p style="text-align: center;">of</p> <p style="text-align: center;">DASID FABRICS CORP.</p> <p>for Redetermination of a Deficiency or for Refund of Franchise Tax on Business Corporations under Articles 9-A and 27 of the Tax Law for the Fiscal Year Ended August 31, 1975 through the Fiscal Year Ended August 31, 1980.</p>	<p>:</p> <p>:</p> <p>:</p> <p>:</p> <p>:</p> <p>:</p> <p>:</p> <p>:</p> <p>:</p> <p>:</p> <p>:</p> <p>:</p> <p>:</p> <p>:</p>	<p>DECISION</p>
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Petitioner, Dasid Fabrics Corp., 38 West 32nd Street, New York, New York 10001, filed a petition for redetermination of a deficiency or for refund of franchise tax on business corporations under Articles 9-A and 27 of the Tax Law for the fiscal year ended August 31, 1975 through the fiscal year ended August 31, 1980 (File No. 36552).

A formal hearing was held before Doris E. Steinhardt, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on May 22, 1984 at 9:15 A.M., with all briefs to be submitted by August 11, 1984. Petitioner appeared by Joseph H. Carter, P.A. The Audit Division appeared by John P. Dugan, Esq. (Patricia L. Brumbaugh, Esq., of counsel).

ISSUES

- I. Whether the Audit Division properly disallowed petitioner's deductions of commission expenses as illegal payments.
- II. Whether the Audit Division properly imposed against petitioner the fifty percent fraud penalty.
- III. Whether, in the issuance of the notices of deficiency for the fiscal years ended August 31, 1975, August 31, 1976 and August 31, 1977, the Audit Division properly relied upon Tax Law section 1083(c)(1)(B), which provides

that assessment of franchise tax may be made at any time where a false or fraudulent return is filed with the intent to evade tax.

FINDINGS OF FACT

1. On January 15, 1982, the Audit Division issued to petitioner, Dasid Fabrics Corp. ("Dasid"), six notices of deficiency, asserting additional franchise tax due under Article 9-A of the Tax Law, plus interest and penalty under section 1084 and section 1085(e), respectively, of Article 27 for the fiscal year ended August 31, 1975 through the fiscal year ended August 31, 1980, scheduled as shown below.

<u>FISCAL YEAR</u>	<u>TAX</u>	<u>INTEREST</u>	<u>PENALTY</u>	<u>TOTAL</u>
8/31/75	\$3,573.76	\$2,003.09	\$1,786.88	\$ 7,363.73
8/31/76	4,468.00	2,124.53	2,234.00	8,826.53
8/31/77	1,188.55	464.13	594.27	2,246.95
8/31/78	321.07	98.09	160.54	579.70
8/31/79	210.98	46.52	105.49	362.99
8/31/80	189.79	25.72	94.89	310.40
	<u>\$9,952.15</u>	<u>\$4,762.08</u>	<u>\$4,976.07</u>	<u>\$19,690.30</u>

On or about August 30, 1981, Benard Fried executed on petitioner's behalf as its authorized representative a consent extending the period of limitations for assessment of tax for the fiscal year 1978 to April 15, 1982. In the issuance of the notices of deficiency for fiscal years 1975, 1976 and 1977, the Audit Division relied upon Tax Law section 1083(c)(1)(B), which provides that assessment of franchise tax may be made at any time in the event a false or fraudulent return is filed with the intent to evade tax.

2. Dasid, a corporation organized under the laws of New York in August, 1965, is engaged in the business of textile conversion. Mr. Sidney Gladstone has served as its president since its inception. Petitioner purchases gray goods from various suppliers and arranges for the application of one or more processes (e.g., bleaching, dyeing and flocking) to the raw fabric by finishers.

On occasion, petitioner purchases and resells gray goods without finishing. Because petitioner does not have warehouse facilities, the goods remain at the premises of the various mills and finishers until shipment to petitioner's customers.

3. For many years, Dasid purchased goods from M. Lowenstein Corporation ("Lowenstein"), a textile fabric manufacturer, most frequently from the shirting department. From time to time, Lowenstein also located customers for petitioner's goods. Sometime in 1975, one Jerry Silverman, supervisor of the Lowenstein shirting department, approached Mr. Gladstone, proposing the following arrangement: Lowenstein would sell fabric to Dasid, presumably at attractive prices, with payment for the fabric to be made by check and payment for the sales representative's commission to be made in cash. (For example, Lowenstein might charge Dasid 38¢ per yard for the fabric, plus 2¢ per yard for the commission.) Mr. Gladstone discussed this proposal with Dasid's accountant who advised against paying the commissions in cash. Mr. Gladstone and Mr. Silverman therefore entered into the arrangement as previously described, except that all payments from Dasid to Lowenstein's sales representatives were by check drawn on Dasid's corporate account. At the end of each month, Lowenstein billed Dasid via invoices for the fabric purchased; a handwritten note was appended to the invoices, indicating the amount of commissions to be paid to Lowenstein's sales representatives.

4. Under Mr. Gladstone's direction, the commission payments to Lowenstein's sales representatives were recorded in Dasid's cash disbursements book as "commissions", and at the end of each calendar year, Dasid issued to the Lowenstein representatives federal forms 1099 (Miscellaneous Income), reflecting commissions and fees paid to them.

5. In 1981, as the result of his conduct vis-a-vis the arrangement with Dasid and similar arrangements with other companies, Jerry Silverman was indicted by the grand jury of New York County on one count of grand larceny in the second degree and on 139 counts of commercial bribe receiving (see People v. Silverman, 106 Misc.2d 468 [Sup. Ct. N.Y. Co. 1980]).

In 1981, also as the result of his conduct in carrying out the arrangement between Dasid and Silverman, Mr. Gladstone was indicted by the grand jury of New York County on: 7 counts of falsifying business records in the first degree in violation of section 175.10 of the Penal Law, by making and causing to be made false entries in Dasid's business records; on 64 counts of commercial bribing in violation of section 180.00 of the Penal Law, by conferring, offering and agreeing to confer a benefit upon a Lowenstein employee without the consent of Lowenstein and with intent to influence the employee's conduct in relation to his employer's affairs; and on 24 counts of commercial bribing in the first degree in violation of section 180.03 of the Penal Law, by conferring, offering and agreeing to confer a benefit upon a Lowenstein employee without the consent of Lowenstein and with intent to influence the employee's conduct in relation to his employer's affairs, the value of such benefit being in excess of \$1,000.00.

At the formal hearing held herein, Mr. Gladstone testified, "I didn't feel I was guilty of bribery. I had done something that I was practically coerced into, and it was the only way I could get merchandise from my supplier." However, after consultation with his attorney and after consideration of the time and expense of a trial, Mr. Gladstone pleaded guilty to the eighth and seventy-second counts of the indictment which had charged him as follows:

"Said defendant, in the County of New York, from on or about January 1, 1975 to on or about August 31, 1976 conferred, offered and agreed to confer a benefit upon an employee of M. Lowenstein Corp. without the consent of said employer and with intent to influence the

employee's conduct in relation to his employer's affairs, and the value of the benefit conferred, offered and agreed to be conferred, having an aggregate value of \$102,203 U.S. Currency.

"Said defendant, in the County of New York, from on or about September 1, 1976 to on or about December 31, 1979, conferred, offered and agreed to confer a benefit upon an employee of M. Lowenstein Corp. without the consent of said employer and with intent to influence the employee's conduct in relation to his employer's affairs, and the value of the benefit conferred, offered and agreed to be conferred, having an aggregate value of \$50,479 U.S. Currency."

Mr. Gladstone received a conditional discharge as to the eighth count and was fined \$8,000.00 as to the seventy-second count.

6. In or about June, 1981, the district attorney of New York County referred the Gladstone matter to the Audit Division for investigation regarding any tax liability which might have arisen from the Dasid-Silverman arrangement, and furnished the Division with photocopies of checks drawn on the Dasid account and made payable to members of the "Silverman group", those Lowenstein representatives who received payments from Dasid in accordance with the arrangement.¹

7. The Audit Division assigned an examiner to review Dasid's books and records with attention solely to the commission expenses. The examiner analyzed such expenses by reference to the photocopies of the checks and Dasid's general ledger and cash disbursements journal. He disallowed as deductions for franchise tax purposes commissions paid to the members of the "Silverman group" as identified by the district attorney and additional members of the group as identified by petitioner's accountant.

¹ Several of these individuals were indicted along with Jerry Silverman for receiving commercial bribes.

<u>FYE</u>	<u>TOTAL COMMISSIONS PAID</u>	<u>COMMISSIONS DISALLOWED</u>
8/31/75	\$ 99,980.34	\$ 55,930
8/31/76	125,619.45	60,713
8/31/77	152,831.47	33,213
8/31/78	136,883.28	7,324
8/31/79	72,837.32	3,753
8/31/80	77,939.94	10,190
	<u>\$666,091.80</u>	<u>\$171,123</u>

<u>SALES REPRESENTATIVE</u>	<u>DISALLOWED COMMISSIONS</u>					
	<u>FYE 8/31/75</u>	<u>FYE 8/31/76</u>	<u>FYE 8/31/77</u>	<u>FYE 8/31/78</u>	<u>FYE 8/31/79</u>	<u>FYE 8/31/80</u>
"Representative A"	\$54,535.98	\$58,652.00	\$18,638	--	\$ 841	\$ 444
"Representative B"	--	--	6,486	7,324	2,912	5,745
"Representative C"	--	--	5,658	--	--	4,001
"Representative D"	--	--	2,431	--	--	--
"Representative E"	--	604.44	--	--	--	--
"Representative F"	661.20	459.00	--	--	--	--
"Representative G"	--	499.00	--	--	--	--
"Representative H"	732.85	499.00	--	--	--	--
	<u>\$55,930.03</u>	<u>\$60,713.44</u>	<u>\$33,213</u>	<u>\$7,324</u>	<u>\$3,753</u>	<u>\$10,190</u>

8. Petitioner offered in evidence its file copies of various federal forms 1099 issued to certain individuals identified as part of the "Silverman group".

(a) 1975

<u>RECIPIENT</u>	<u>COMMISSIONS AND FEES</u>
"Representative H"	\$732.85
"Representative F"	661.20

(b) 1976

<u>RECIPIENT</u>	<u>COMMISSIONS AND FEES</u>
"Representative A"	\$56,130.00

(c) 1977

<u>RECIPIENT</u>	<u>COMMISSIONS AND FEES</u>
"Representative D"	\$2,431.00
"Representative C"	5,658.00

(d) 1978	COMMISSIONS AND FEES
<u>RECIPIENT</u> "Representative B"	<u>\$6,629.00</u>
(e) 1979	COMMISSIONS AND FEES
<u>RECIPIENT</u> "Representative A"	<u>\$1,285.00</u>
(f) 1980	COMMISSIONS AND FEES
<u>RECIPIENT</u> "Representative C"	<u>\$4,001.00</u>

9. When asked by petitioner's representative at the formal hearing held herein whether he engaged in the arrangement with Jerry Silverman for the purpose of defrauding the federal or state government, Mr. Gladstone testified, "At no time. As a matter of fact, I told him the reason we are going to do it this way is as so not to get involved as far as fraud was concerned, I was going to make everything out by check. It was on the books, and 1099's would be filed."

CONCLUSIONS OF LAW

A. That Sidney Gladstone, petitioner's president, entered a guilty plea to the eighth count and the seventy-second count of the indictment returned against him by the grand jury of New York County. The eighth count charged him with conferring benefits in the total amount of \$102,203.00 upon a Lowenstein employee during the period January 1, 1975 through August 31, 1976, in violation of former section 180.00 of the Penal Law² which provided in part:

² The Laws of 1976, chapter 458 split the formerly single-degree crime of commercial bribing (former section 180.00 of the Penal Law) into two degrees, commercial bribing in the second degree (current section 180.00) and commercial bribing in the first degree (current section 180.03), effective September 1, 1976.

"A person is guilty of commercial bribing when he confers, or offers or agrees to confer, any benefit upon any employee, agent or fiduciary without the consent of the latter's employer or principal, with intent to influence his conduct in relation to his employer's or principal's affairs."

The seventy-second count charged him with conferring benefits in the total amount of \$50,479.00 upon a Lowenstein employee during the period September 1, 1976 through December 31, 1979, in violation of section 180.03 of the Penal Law which, as in effect prior to September 1, 1983, provided in part:

"A person is guilty of commercial bribing in the first degree when he confers, or offers or agrees to confer, any benefit upon any employee, agent or fiduciary without the consent of the latter's employer or principal, with intent to influence his conduct in relation to his employer's or principal's affairs, and when the value of the benefit conferred or offered or agreed to be conferred exceeds one thousand dollars."

"A plea of guilty 'is more than a confession which admits that the accused did various acts; it is itself a conviction [and] nothing [else] remains but to give judgment and determine punishment' (Boykin v. Alabama, 395 U.S. 238, 242)." People v. Lynn, 28 N.Y.2d 196, 201. Furthermore, "[a] judgment of conviction is conclusive proof of the underlying facts in a subsequent civil action [citations omitted]." Alexander v. City of Peekskill, 80 A.D.2d 626 (2nd Dept. 1981). Thus, Gladstone's conviction, by plea, of commercial bribing and commercial bribing in the first degree establishes that the "commissions" remitted by Dasid to the Lowenstein representatives during the period January 1, 1975 through December 31, 1979 in accordance with the Dasid-Silverman arrangement constituted commercial bribes. There is nothing in the record to distinguish "commissions" paid pursuant to the arrangement during 1980 from these commercial bribes; nor is there anything in the record to distinguish "commissions" paid to Lowenstein representatives identified by petitioner's accountant as members of the "Silverman group" (in addition to those representatives identified by

the district attorney) from these commercial bribes. Accordingly, all "commissions" paid by petitioner to Lowenstein representatives during the fiscal year at issue must be considered commercial bribes.

B. That pursuant to Internal Revenue Code section 162(c)(2), which disallows the deduction of "any payment...made, directly or indirectly, to any person, if the payment constitutes an illegal bribe...", and Tax Law section 208.9, the Audit Division properly denied petitioner deductions during fiscal year 1975 through fiscal year 1980 for commercial bribes paid.³

C. That turning next to the imposition of the fraud penalty, in order to prevail the Audit Division must show by clear and convincing evidence every element of fraud, including willful, knowledgeable and intentional wrongful acts or omissions constituting false representation by petitioner and resulting in deliberate nonpayment or underpayment of taxes due and owing. Matter of Walter Shutt, State Tax Comm., June 4, 1982. It is our conclusion that the Audit Division has met its burden. Petitioner availed itself of deductions for illegal bribes paid, concealing the nature of such payments by denominating them in its books and returns as "commissions". By this course of action, it deliberately underpaid its franchise taxes for the fiscal years in question. See C. F. Malanka and Sons, Inc. v. Commr., 38 T.C.M. 778.

D. That from our finding of fraud it follows that the statute of limitations does not bar assessment and collection of the deficiencies in tax and

³ Code section 162(c)(2) imposes upon the Secretary of the Treasury the burden of proof in respect of the issue of whether a payment constitutes an illegal bribe, "to the same extent as he bears the burden of proof under section 7454 (concerning the burden of proof when the issue relates to fraud)." There is no analogous provision in the Tax Law. It is nonetheless clear that the evidence presented by the Audit Division would be sufficient to carry any burden of proof imposed upon it by New York conformity with Code section 162(c)(2) (through use of federal taxable income as the starting point for computing entire net income).


the additions to tax for fiscal years 1975, 1976 and 1977. Tax Law section 1083(c)(1)(B).


E. That the petition of Dasid Fabrics Corp. is denied, and the notices of deficiency issued on January 15, 1982 are sustained.

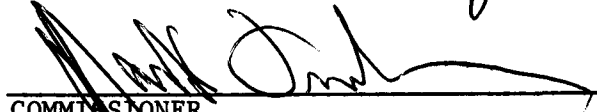
DATED: Albany, New York

STATE TAX COMMISSION

JAN 18 1984


PRESIDENT


COMMISSIONER


COMMISSIONER