

STATE OF NEW YORK
STATE TAX COMMISSION

In the Matter of the Petition :
of
William Panzella :

for Redetermination of a Deficiency or a Revision :
of a Determination or a Refund of
Personal Income Tax :
under Article 22 of the Tax Law
for the Years 1972, 1973. :

AFFIDAVIT OF MAILING

State of New York
County of Albany

Jay Vredenburg, being duly sworn, deposes and says that he is an employee of the Department of Taxation and Finance, over 18 years of age, and that on the 28th day of March, 1980, he served the within notice of Decision by certified mail upon William Panzella, the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

William Panzella
149 Newbrook Ln.
Bay Shore, NY

and by depositing same enclosed in a postpaid properly addressed wrapper in a (post office or official depository) 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
28th day of March, 1980.

Joanne Knapp

J. Vredenburg

STATE OF NEW YORK
STATE TAX COMMISSION

In the Matter of the Petition :
of :
William Panzella :
AFFIDAVIT OF MAILING
for Redetermination of a Deficiency or a Revision :
of a Determination or a Refund of :
Personal Income Tax :
under Article 22 of the Tax Law :
for the Years 1972, 1973. :

State of New York
County of Albany

Jay Vredenburg, being duly sworn, deposes and says that he is an employee of the Department of Taxation and Finance, over 18 years of age, and that on the 28th day of March, 1980, he served the within notice of Decision by certified mail upon Theodore Decker the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

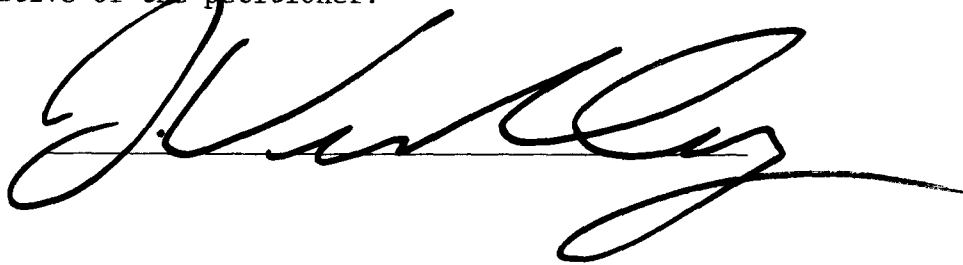
Mr. Theodore Decker
250 W. 57th St.
New York, NY 10019

and by depositing same enclosed in a postpaid properly addressed wrapper in a (post office or official depository) 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
28th day of March, 1980.

Joanne Knapp



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

March 28, 1980

William Panzella
149 Newbrook Ln.
Bay Shore, NY

Dear Mr. Panzella:

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) 690 of the Tax Law, any proceeding in court to review an adverse decision by the State Tax Commission can only be instituted under Article 78 of the Civil Practice Laws 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
Deputy Commissioner and Counsel
Albany, New York 12227
Phone # (518) 457-6240

Very truly yours,

STATE TAX COMMISSION

cc: Petitioner's Representative
Theodore Decker
250 W. 57th St.
New York, NY 10019
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of :
WILLIAM PANZELLA : DECISION
for Redetermination of a Deficiency or for :
Refund of Personal Income Tax under Article 22 :
of the Tax Law for the Years 1972 and 1973. :

Petitioner, William Panzella, 149 Newbrook Lane, Bay Shore, New York, 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 1972 and 1973 (File No. 15753).

A formal hearing was held before James T. Prendergast, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on September 19, 1978 at 11:15 A.M. Petitioner appeared by Theodore Decker, Esq. The Audit Division appeared by Peter Crotty, Esq. (Paul A. Lefebvre, Esq. of counsel).

ISSUE

Whether petitioner was a person responsible for remitting withholding taxes, and whether his failure to remit these taxes was willful.

FINDINGS OF FACT

1. Autochem Laboratories, Inc. ("Autochem") filed New York State employer's returns for personal income tax withheld, for the following periods and amounts:

1/1 - 1/15/73	\$ 1,799.45
1/16 - 1/31/73	1,799.45
2/16 - 2/28/73	1,909.70
3/16 - 3/31/73	2,443.80
4/1 - 4/15/73	909.80
4/16 - 4/30/73	805.80
5/1 - 5/15/73	867.40
5/16 - 5/30/73	40.70
	<hr/>
	\$10,576.10

2. Autopath Laboratories, Inc. ("Autopath") filed New York State employer's returns for personal income tax withheld, for the following periods and amounts:

7/1 - 9/30/72	\$483.60
4/1 - 4/30/73	<u>72.28</u>
	\$555.88

3. On March 31, 1975 a Statement of Deficiency and a Notice of Deficiency were issued against petitioner, William Panzella, for 1972 and 1973, for withholding taxes due from Autochem and Autopath, in the amount of \$11,131.98.

4. Petitioner subsequently filed a timely petition for revision of the deficiency.

5. Of the \$10,576.10, due from Autochem, only \$927.38 has been received, leaving a balance due of \$9,648.72.

6. Of the \$555.88 due from Autopath, nothing has been received; therefore, the full \$555.88 is still due.

7. Until March of 1972, Autopath's business was operated as a proprietorship; it was then incorporated and its shares were owned solely by Gerald Finkel. In March of 1972, Autochem acquired all the stock of Autopath from Gerald Finkel. After that Autopath was a wholly-owned subsidiary of Autochem and was totally controlled by it and its officers.

8. On March 2, 1973, petitioner, William Panzella, resigned all of his positions, with Autochem and Autopath.

9. Until his resignation, petitioner was the vice-president of Autochem. His main responsibility lay in the technical aspects of the business, namely, laboratory tests. Financial affairs were handled predominantly by the president, Robert A. Canter.

10. Petitioner, William Panzella, signed most of the payroll checks after March of 1972 and signed the 1971 franchise tax return of Autochem. He was

contacted by creditors, who knew him personally, when they thought that their bills were overdue, and he took up the matter of the bills with Robert Canter. Mr. Canter took an extended business trip for at least four weeks in 1972, after which the petitioner became aware of the firm's financial problems. While Mr. Panzella was with the firm, he and Mr. Canter had informal officers' meetings from time to time, in order to discuss the affairs of the business.

11. Similarly, petitioner was an officer of Autopath.

CONCLUSIONS OF LAW

A. That this is a proceeding for a penalty under section 685(g) of the Tax Law. It provides that a "person" (as defined by section 685(n) of the Tax Law) who willfully fails to collect or truthfully account for, and pay over such tax, may be penalized an amount equal to the tax evaded, not collected or not accounted for and paid over.

B. That these subsections are modeled on sections 6671 and 6672 of the Internal Revenue Code. (See Levin v. Gallman 42 N.Y.2d 32 (1977)).

C. That a person who shares in the financial decision-making of a corporation and, in particular, one who shares in the determinations of what bills are paid, is a person responsible for the payment of withholding taxes within the meaning of section 685(n) of the Tax Law and section 6671 of the Internal Revenue Code. (Ferguson v. Warren 63-2 U.S.T.C. Par. 9783; see Hewitt v. U.S. 377 F.2d 921, 22 A.L.R. 3d 1 (1967); and note following "Withholding Taxes - Penalties" 22 A.L.R.2d 8, at p.50.)

D. That petitioner, William Panzella, shared in these determinations (together with Robert Canter) until he resigned on March 2, 1973; therefore, he was a "person" within the meaning of sections 685(g) and (n) of the Tax Law.

E. That the burden of proof is on petitioner in this proceeding. (Levin v. Gallman, supra; see also note in 22 A.L.R.3d at p. 207 ff.)

F. That his conduct was willful within the meaning of the statute. Deliberate fraud need not be proved. The cases that have considered this question in detail and that have absolved a responsible corporate officer from his duty to see that the withholding taxes were paid have found that he attempted to meet his duties in this regard, but his efforts were thwarted. (Levy v. U.S. 140 F. Supp 834 (1956); see note in 22 A.L.R.2d at p. 98 ff.; see also Levin v. Gallman, supra). Petitioner made no such showing in this case.

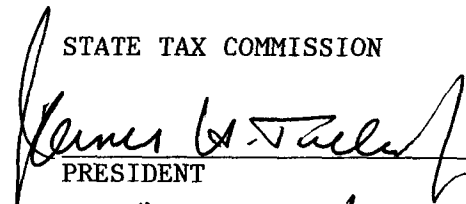
G. That petitioner is a person responsible for the payment of a total of \$5,992.20 in withholding taxes owing from Autochem Laboratories, Inc. and from Autopath Laboratories, Inc., the amount due from said corporations at the time of his resignation on March 2, 1973. The Audit Division is directed to modify accordingly the Notice of Deficiency dated March 31, 1975.


H. That the petition is granted to the extent provided for in Conclusion of Law "G" and the Notice of Deficiency as modified is sustained.

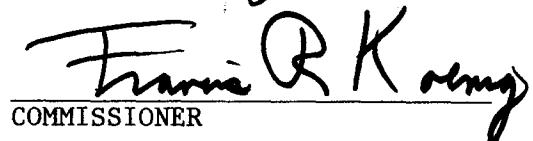
DATED: Albany, New York

MAR 28 1980

STATE TAX COMMISSION


PRESIDENT


COMMISSIONER


COMMISSIONER