

STATE OF NEW YORK
STATE TAX COMMISSION

In the Matter of the Petition :
of
Gustave Partnoy :

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 Year 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 16th day of May, 1980, he served the within notice of Decision by certified mail upon Gustave Partnoy, the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Gustave Partnoy
676 Bruce Dr.
East Meadows, NY 11554

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
16th day of May, 1980.

Joanne Knapp

J. Vredenburg

STATE OF NEW YORK
STATE TAX COMMISSION

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of a Determination or a Refund of
Personal Income Tax :
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for the Year 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 16th day of May, 1980, he served the within notice of Decision by certified mail upon Bernard Wincig 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. Bernard Wincig
574 Fifth Ave.
New York, NY 10036

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
16th day of May, 1980.

Joanne Knapp

J. Vredenburg

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

May 16, 1980

Gustave Partnoy
676 Bruce Dr.
East Meadows, NY 11554

Dear Mr. Partnoy:

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
Bernard Wincig
574 Fifth Ave.
New York, NY 10036
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition	:	
of	:	
GUSTAVE PARTNOY	:	DECISION
for Redetermination of a Deficiency or for	:	
Refund of Personal Income Tax under Article 22	:	
of the Tax Law for the Year 1973.	:	

Petitioner, Gustave Partnoy, residing at 676 Bruce Drive, East Meadow, New York 11554, filed a petition for redetermination of a deficiency or for refund of personal income tax under Article 22 of the Tax Law for the year 1973 (File No. 14678).

A formal hearing was held at the offices of the State Tax Commission, Two World Trade Center, New York, New York, before James T. Prendergast, Hearing Officer, on August 15, 1978 at 9:30 A.M. and was continued to conclusion before Harry Issler, Hearing Officer, on November 30, 1978 at 9:50 A.M. Petitioner appeared by Bernard Wincig. The Audit Division appeared by Peter Crotty, Esq., (Bruce M. Zalaman, Esq. of counsel).

ISSUE

Whether petitioner was a person required to collect, truthfully account for and pay over withholding taxes due from Jayne Textile Printing Corp. for 1973.

FINDINGS OF FACT

1. On February 24, 1976, the Income Tax Bureau issued a Notice of Deficiency and a Statement of Deficiency against petitioner, Gustave Partnoy, for \$7,243.56 for the tax year 1973. The statement, in effect, alleged that petitioner was a person required to collect, truthfully account for and pay over withholding

taxes due from Jayne Textile Printing Corp. for 1973 pursuant to the provisions of subsections (g) and (n) of section 685 of the Tax Law.

2. The payroll taxes in question are owed by Jayne Textile Printing Corp. and cover the four quarters of 1973. Jayne Textile Printing Corp., incorporated under the laws of the State of New York, is engaged in the textile printing business. The exact date of incorporation of Jayne Textile Printing Corp. is unknown, but it was in business many years prior to 1973. The founders of Jayne Textile Printing Corp. were, and still continue to be, Mitchel Malian, President, Lucy Jayne Malian, Secretary (the president's wife) and Dick Malian, Treasurer (the president's brother).

3. Petitioner was employed in November, 1972 in the capacity of an outside salesman only. Between November, 1972 and February or March, 1973, petitioner loaned Jayne Textile Printing Corp. the sum of \$15,000.00 and in or about March, 1973 converted said loan of \$15,000.00 into stock of Jayne Textile Printing Corp. Petitioner was given the title of vice-president at such time, together with his responsibilities as sales manager for Jayne Textile Printing Corp. Jayne Textile Printing Corp. was undercapitalized and in continuous turmoil.

4. During the period of employment solely as sales manager for November, 1972 through about March, 1973, petitioner was not authorized to sign any company checks. An unsigned Corporate Resolution dated December 12, 1972, indicates that, for the purposes of issuing checks, only the signature of a single officer out of the following was required: president, vice-president, secretary and treasurer. The banking resolution further provides that only the president may sign for any other banking transactions such as loans or

letters of credit and negotiate notes, drafts and other commercial paper. Petitioner, as a matter of routine, never signed Jayne Textile Printing Corp. checks. It was only on very rare occasions that petitioner signed a check and that was only because of emergency deliveries being made to the plant and Mitchel Malian was not physically present and credit would not be extended to Jayne Textile Printing Corp. In 1973, it is admitted that petitioner, perhaps at best, had signed on an accommodation basis fifty (50) checks during the calendar year. All other checks issued were signed by Mitchel Malian, the president of Jayne Textile Printing Corp. Cosignators on Jayne Textile Printing Corp. were not required. Petitioner spent 3 to 4 days each week outside the plant functioning as a sales manager. Petitioner did not have the authority to hire or fire, purchase materials or purchase supplies and/or manufacturing equipment of any size or magnitude.

5. The bookkeeper of Jayne Textile Printing Corp. testified at the hearing that Mitchel Malian, the president of Jayne Textile Printing Corp., dominated the company and ran it with an iron hand. She further testified that the various payroll tax returns in question were always handled and signed only by Mitchel Malian; that there was a safe on the premises and the combination to said safe was only in the possession of Mitchel Malian. She further testified that petitioner's basic function and primary function was that of a salesman. Petitioner had nothing to do with the makeup of payroll nor was he responsible for the preparation of any of the various Federal tax forms the company was required to file.

6. Further, the petitioner was not responsible for, nor a participant in, the company's general office work. The bookkeeper further testified that Mitchel Malian kept a close watch on all checks and personally instructed the

issuance of particular checks at a particular time and programmed the payments accordingly. The bookkeeper further stated that petitioner did not have any authority whatsoever to decide which creditors, including the Internal Revenue Service, would be paid by Jayne Textile Printing Corp. and which would not be paid by Jayne Textile Printing Corp. In either of these instances, the President, Mitchel Malian, solely made the decision, the only decision and the final decision.

7. A subpoena dated June 2, 1975, In the Matter of the State Tax Commission of the State of New York against Gustave Partnoy (petitioner herein) was served on him demanding that he "give evidence under oath ... relative to payment of \$1,221.44 (as) sales tax" due for the tax period November 30, 1974 from Jayne Textile Printing Corp. However, petitioner testified at the hearing on August 15, 1978 that, notwithstanding the subpoena, the sales tax was paid by Mitchell Malian.

CONCLUSION OF LAW

A. That during the year at issue, subsection (g) of section 685 of the Tax Law provided in part:

"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."

During the year at issue, subsection (n) of section 685 of the Tax Law provided, in part, that:

"...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."

B. That petitioner was not a person required to collect, truthfully account for and pay over such tax within the meaning of section 685(g) of the Tax Law and is not liable to the penalty.

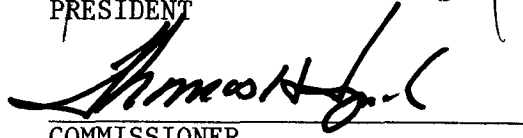
C. That the petition of Gustave Partnoy is granted, and the Notice of Deficiency dated February 24, 1976 is hereby cancelled.

DATED: Albany, New York

MAY 16 1980

STATE TAX COMMISSION


PRESIDENT


COMMISSIONER


COMMISSIONER