

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of :
Sheldon Farewell :
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 2nd day of October, 1981, he served the within notice of Decision by certified mail upon Sheldon Farewell, the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Sheldon Farewell
77 Holly St.
Yonkers, NY 10704

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
2nd day of October, 1981.

Ann R. Haglund

J. Vredenburg

STATE OF NEW YORK
STATE TAX COMMISSION

In the Matter of the Petition :
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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 2nd day of October, 1981, he served the within notice of Decision by certified mail upon Lawrence L. Kerker the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Lawrence L. Kerker
Kaufman & Kerker
704 E. Tremont Ave.
Bronx, NY 10457

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
2nd day of October, 1981.

Carrie A. Haglund

J. Vredenburg

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

October 2, 1981

Sheldon Farewell
77 Holly St.
Yonkers, NY 10704

Dear Mr. Farewell:

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,
Kathy Pfaffenbach

STATE TAX COMMISSION

cc: Petitioner's Representative
Lawrence L. Kerker
Kaufman & Kerker
704 E. Tremont Ave.
Bronx, NY 10457
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition	:	
	:	
of	:	
	:	
SHELDON FAREWELL	:	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, Sheldon Farewell, 77 Holly Street, Yonkers, 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 year 1973 (File No. 19916).

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 August 20, 1979 at 2:00 P.M. Petitioner appeared by Kaufman & Kerker, Esqs. (Lawrence L. Kerker, Esq., of counsel). The Audit Division appeared by Peter Crotty, Esq. (Frank Levitt, Esq., of counsel).

ISSUE

Whether petitioner was a person required to collect, truthfully account for and pay over personal income taxes withheld from the employees of Loon Lake Estates, Inc. and willfully failed to do so and is thus liable to a penalty under section 685(g) of the Tax Law.

FINDINGS OF FACT

1. On February 28, 1977, the Audit Division issued a Notice of Deficiency and a Statement of Deficiency against petitioner, Sheldon Farewell, imposing a penalty of \$3,201.56, an amount equal to the amount of unpaid New York State withholding tax due from Loon Lake Estates, Inc. (hereinafter "the corporation") for 1973.

2. Petitioner held the titles of vice-president and treasurer of the corporation and was a member of its board of directors in 1973. He maintained that he did not participate in the day-to-day management of the corporation and that Anthony D'Elia, the corporation's president, took care of the operation of the business, including bookkeeping.

3. The corporation's business was developing property in the Adirondack area of New York State for purposes of sale. Petitioner contends that although he is a self-employed painting contractor at 3179 East Tremont Avenue, Bronx, New York, he did not perform any painting on the 10 model homes completed by the corporation.

4. Petitioner owned 18 percent of the stock of the corporation in 1972 and 1973, making him a major stockholder. Petitioner was a member of the Board of Directors and was present at some of the meetings. He maintained that his whole essential involvement in the enterprise was that of an investor.

5. Petitioner did not sign any State income tax returns for the corporation.

6. Petitioner had the authority to sign payroll checks but did not exercise that right. In 1973, he signed one check in behalf of the corporation as a deposit for the purchase of a vehicle.

7. Petitioner asserts that the corporation is now defunct and it is no longer in operation after the property was foreclosed in 1977.

CONCLUSIONS OF LAW

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

"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 defines the term "person" to include, inter alia, an officer or employee of a corporation who "...is under a duty to perform the act in respect of which the violation occurs."

C. That whether petitioner, Sheldon Farewell, is a "person" required to collect and pay over withholding taxes is a factual one (Matter of Malkin v. Tully, 65 A.D.2d 228, 412 N.Y.S.2d 186).

D. That passive delegation of an important duty by a corporate officer does not relieve him of his own responsibility. (Matter of Manuel Kopell, State Tax Commission, May 1, 1974.)

E. That the term "willful" as used in section 685(g) of the Tax Law means an "...act, default or conduct is consciously and voluntarily done with knowledge that as a result, trust funds belonging to the Government will not be paid over but will be used for other purposes. No showing of intent to deprive the Government of its money is necessary but only something more than accidental nonpayment is required." (Matter of Levin v. Gallman, 49 A.D.2d 434, rev'd. 42 N.Y.2d 32.)

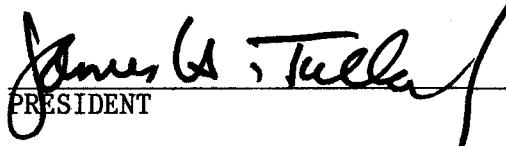
F. That petitioner, Sheldon Farewell, was a person required to collect, truthfully account for and pay over New York State withholding tax due from Loon Lake Estates, Inc. for 1973 in the sum of \$3,201.56 and willfully failed to do so, within the meaning of subdivisions (n) and (g) of section 685 of the Tax Law. Accordingly, petitioner is subject to a penalty equal to said sum under subsection (g) of section 685 of the Tax Law.

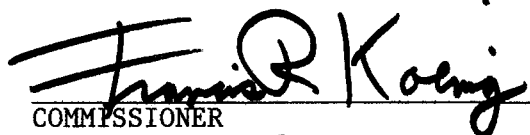
G. That the petition of Sheldon Farewell is denied and the Notice of Deficiency issued on February 28, 1977 is sustained.

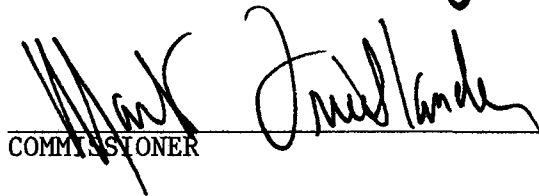
DATED: Albany, New York

STATE TAX COMMISSION

OCT 02 1981


PRESIDENT


COMMISSIONER


COMMISSIONER