

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of :
Donald A. Fisher :
: 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 :
1968 - 1971.

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 19th day of June, 1981, he served the within notice of Decision by certified mail upon Donald A. Fisher, the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Donald A. Fisher
4843 Rogers Rd.
Hamburg, NY 14075

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
19th day of June, 1981.

Cherie A. Hagelund

J. Vredenburg

STATE OF NEW YORK
STATE TAX COMMISSION

In the Matter of the Petition :
of :
Donald A. Fisher :

: 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 :
1968 - 1971.

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 19th day of June, 1981, he served the within notice of Decision by certified mail upon Richard N. Blewett 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. Richard N. Blewett
Cohen, Lombardo, Blewett, Fisher, Hite & Spandau
Suite 1515, Genesee Bldg., One W. Genesee St.
Buffalo, NY 14202

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
19th day of June, 1981.

Ernie A. Hagedorn

J. Vredenburg

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

June 19, 1981

Donald A. Fisher
4843 Rogers Rd.
Hamburg, NY 14075

Dear Mr. Fisher:

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
Richard N. Blewett
Cohen, Lombardo, Blewett, Fisher, Hite & Spandau
Suite 1515, Genesee Bldg., One W. Genesee St.
Buffalo, NY 14202
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition	:	
of	:	
DONALD A. FISHER	:	DECISION
for Redetermination of a Deficiency or	:	
for Refund of Personal Income Tax under	:	
Article 22 of the Tax Law for the Years	:	
1968 through 1971.	:	

Petitioner, Donald A. Fisher, 4843 Rogers Road, Hamburg, New York 14075, 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 1968 through 1971 (File No. 10765).

A formal hearing was held before Julius E. Braun, Hearing Officer, at the offices of the State Tax Commission, State Office Building, 65 Court Street, Buffalo, New York, on October 1, 1980 at 9:15 A.M. Petitioner appeared by Cohen, Lombardo, Blewett, Fisher, Hite and Spandau (Anthony M. Nosek, Esq., of counsel). The Audit Division appeared by Ralph J. Vecchio, Esq. (Patricia Brumbaugh, Esq., of counsel).

ISSUE

Whether petitioner was a person required to collect, truthfully account for and pay over withholding taxes due from Cardinal Air Service Corporation for the years 1968 through 1971.

FINDINGS OF FACT

1. Cardinal Air Service Corporation, 85 Benbro Drive, Cheektowaga, New York failed to pay over to the New York State Income Tax Bureau personal

income taxes withheld from its employees' wages for the years 1968 through 1971 totaling \$8,172.85.

2. On April 14, 1972, the Income Tax Bureau issued a Statement of Deficiency against Donald A. Fisher imposing a penalty equal to the amount of New York State withholding taxes due from Cardinal Air Service Corporation for the years 1968 through 1971. This was done on the grounds that he was a person required to collect, truthfully account for and pay over said taxes and that he willfully failed to do so. Accordingly, on said date, a Notice of Deficiency for \$8,172.85 was issued against petitioner.

3. Donald A. Fisher, an attorney and partner in the Buffalo law firm of Cohen, Lombardo, Blewett, Fisher, Hite and Spandau since 1953, acted on behalf of clients in forming a trucking company to be known as Cardinal Air Service Corporation in 1963 (hereinafter referred to as "Cardinal"). About one year later, petitioner invested \$2,000.00 to purchase the one-third interest of a stockholder in the company who was about to move to the Southwest. He then became a member of the three man Board of Directors. He also became secretary-treasurer of the firm. In 1967 or 1968, another investor came into the firm and petitioner's interest was reduced to 25% (as were the interests of the other two officers). Petitioner remained the corporate attorney of Cardinal. He attended corporate meetings, prepared agreements of sale between stockholders, and certifications of the minute book. As the company grew, it acquired two or three businesses. He negotiated the union contract with the Teamsters' union, involving the company's 20 to 25 drivers. In 1969, the company made a public offering of stock raising forty or fifty thousand dollars so that petitioner's percentage of stock ownership was reduced to 20%. On September 25, 1970, petitioner resigned from Cardinal as an officer and member of the Board of

Directors. Subsequently, when the company developed financial trouble, Mr. Spandau, a partner with petitioner's law firm, filed for reorganization under Chapter X of the Bankruptcy Act, and when that proved unsuccessful, filed for a straight bankruptcy. The company was adjudicated bankrupt March 23, 1971. Petitioner earned about six or seven thousand dollars from the corporation during the period in issue. Of some 1,216 billable hours worked for his law firm, petitioner charged Cardinal some 66 hours for legal work as per petitioner's diary. This was for fifteen months that the firm acted for Cardinal. Petitioner had authority to sign corporate checks and did so until he resigned.

4. On October 30, 1978, a portion of the deficiency asserted against petitioner was reduced from \$8,172.85 to \$6,466.00 in view of petitioner's resignation from Cardinal on September 25, 1970. A collection sheet indicated a payment of \$63.05 in 1968 which would further reduce the deficiency to \$6,402.95.

5. In April or May of 1970 petitioner became aware that Cardinal also failed to pay over to the Internal Revenue Service federal withholding taxes. He and Marvin Malwitz, a stockholder, borrowed \$20,000.00 to pay substantially all the federal withholding taxes. Subsequently, he learned that additional federal withholding taxes were owed. A settlement was effected by petitioner to pay one-fifth of the additional federal withholding tax owed. A specific part of that settlement was that no liability was admitted.

CONCLUSIONS OF LAW

A. That Cardinal Air Service Corporation was an employer required to deduct withholding taxes due from its employees' wages for the period January 1, 1968 through March 23, 1971 within the meaning and intent of section 671 of the Tax Law.

B. That petitioner, Donald A. Fisher, knew or should have known that Cardinal Air Service Corporation failed to pay to the Income Tax Bureau the taxes withheld for the period January 1, 1968 through September 25, 1970, which taxes constitute trust funds pursuant to section 675 of the Tax Law.

C. That petitioner, Donald A. Fisher, was a person required to collect, truthfully account for and pay over the taxes withheld by Cardinal Air Service Corporation during the period January 1, 1968 through September 25, 1970, and who willfully failed to do so within the meaning and intent of section 685(g) of the Tax Law.

D. That the Audit Division is instructed to modify the Notice of Deficiency issued on April 14, 1972 against Donald A. Fisher in accordance with Finding of Fact "4" above; that, except as so modified, the Notice is otherwise sustained; and that the petition of Donald A. Fisher is in all other respects denied.

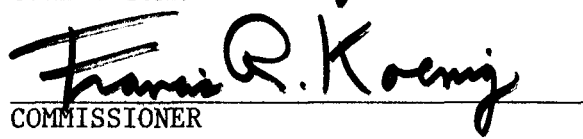
DATED: Albany, New York

JUN 19 1981

STATE TAX COMMISSION


PRESIDENT


COMMISSIONER


COMMISSIONER