

STATE OF NEW YORK

STATE TAX COMMISSION

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In the Matter of the Petition :  
of :  
Herman Gillman :  
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 :  
1971 - 1973.

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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 Herman Gillman, the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Herman Gillman  
25 Franklin Blvd.  
Long Beach, NY 11561

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.

*James A. Hagelund*

*J. Vredenburg*

STATE OF NEW YORK  
STATE TAX COMMISSION

In the Matter of the Petition :  
of  
Herman Gillman :

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 :  
1971 - 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 F. J. Duval the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

F. J. Duval  
263 Forest Rd.  
Douglaston, NY 11363

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.

*Connie P. Haglund*

*J. Vredenburg*

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

October 2, 1981

Herman Gillman  
25 Franklin Blvd.  
Long Beach, NY 11561

Dear Mr. Gillman:

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  
F. J. Duval  
263 Forest Rd.  
Douglaston, NY 11363  
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

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In the Matter of the Petition	:	
	:	
of	:	
	:	
HERMAN GILLMAN	:	DECISION
	:	
for Redetermination of Deficiencies or	:	
for Refunds of Personal Income Tax under	:	
Article 22 of the Tax Law for the Years	:	
1971, 1972 and 1973.	:	

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Petitioner, Herman Gillman, 25 Franklin Boulevard, Long Beach, New York 11561, filed petitions for redetermination of deficiencies or for refunds of personal income tax under Article 22 of the Tax Law for the years 1971, 1972 and 1973 (File Nos. 11612 and 11613).

A formal hearing was held before Frank Romano, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on March 24, 1977 at 9:15 A.M., continued on June 16, 1977 at 2:45 P.M. and September 26, 1978 at 2:45 P.M., and concluded on November 9, 1978 at 9:30 A.M. Petitioner appeared by F. J. Duval, Esq. 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 the withholding taxes of the employees of Sol G. Construction Corp. within the meaning and intent of subsections (g) and (n) of section 685 of the Tax Law for the years 1971, 1972 and 1973 and, if so required, whether the petitioner willfully failed to do so within the meaning and intent of subsection (g) of section 685 of the Tax Law.

FINDINGS OF FACT

1. Sol G. Construction Corp. (hereinafter sometimes called the "Corporation") failed to pay over to New York State personal income taxes withheld from its employees for the periods January 1, 1971 through October 31, 1972 and November 1, 1972 through December 31, 1973 in the respective amounts of \$17,603.56 and \$3,314.70.

2. On August 26, 1974, the Audit Division issued a Statement of Deficiency against the petitioner, Herman Gillman, imposing a penalty equal to the amount of the New York State withholding taxes due from the Corporation for the period January 1, 1971 through October 31, 1972 on the grounds that the petitioner was a person required to collect, truthfully account for and pay over said taxes and that he willfully failed to do so. A Notice of Deficiency dated August 26, 1974 was issued against the petitioner in the amount of \$17,603.56, together with the aforesaid Statement of Deficiency.

3. On October 28, 1974, the Audit Division issued an additional Statement of Deficiency against the petitioner imposing a penalty equal to the amount of the New York State withholding taxes due from the Corporation for the period November 1, 1972 through December 31, 1973 on the grounds that the petitioner was a person required to collect, truthfully account for and pay over said taxes and that he willfully failed to do so. A Notice of Deficiency dated October 28, 1974 was issued against the petitioner in the amount of \$3,314.70, together with the aforesaid Statement of Deficiency.

4. Petitioner timely filed separate petitions for redetermination of a deficiency or for refund of personal income tax under Article 22 of the Tax Law for the years 1971, 1972 and 1973, as contained in the aforesaid notices and statements of deficiency, on the grounds that the financial affairs and bank

accounts of the Corporation were not under his control during the periods in question and that the statute of limitations excludes the proposed penalty assessment for periods prior to August 26, 1971.

5. The Corporation was incorporated in the State of New York in or about October, 1970 and was in the construction business, rehabilitating housing in conjunction with non-profit sponsors who held title to the properties and who obtained Federal funds (from HUD or FHA) for purposes of rehabilitation. At the outset, petitioner was the Corporation's sole officer (president) and shareholder, having invested approximately \$175,000.00 to finance the new venture. The petitioner and his wife were directors of the Corporation.

6. From the date of its incorporation, the Corporation maintained a regular business account in Security National Bank together with regular and payroll accounts in National Bank of North America. Until mid-1971, under circumstances more fully described infra, the petitioner had sole check authorization and decided which creditors were to be paid. Petitioner also signed New York State Income Tax Bureau monthly returns on behalf of the Corporation during 1971 with respect to personal income taxes withheld from the employees of the Corporation.

7. In or about October, 1970, the Corporation took over three construction projects in the City and State of New York, which projects were under-financed and in danger of being abandoned as the predecessor contractors failed. These projects were known as (i) Good Neighbor (104th Street); (ii) UPACA-II (117th Street); and (iii) Emanuel (138th Street and 7th Avenue). These projects represented the Corporation's only source of income during the years in question.

8. Mr. David Bakun and Mr. Alex Tiseo each owned 50 percent interest in two companies (East Hills Construction Corp. and Blue Ribbon Partition, Corp.)

which rendered carpentry sub-contracting services to the Corporation at each of the aforesaid project sites during the years in question.

9. During the summer of 1971, the Corporation was unable to continue the projects due to economic factors. At or about this time, Mr. Bakun and Mr. Tiseo became officers of the Corporation to assist the Corporation with its finances and, henceforth (to the end of 1971), their subcontracting companies did not receive payment from the Corporation for work performed at the three job sites.

10. From 1971 to February, 1972, the petitioner had authority to sign payroll and other checks and, in fact, did so. Moreover, the petitioner had responsibility and authority to decide which creditor was going to be paid.

11. When the projects continued to experience financial difficulties, the Corporation voluntarily entered into an arrangement whereby, pursuant to performance and payment bonds, Travelers Indemnity Company (hereinafter "Travelers"), in or about February, 1972, guaranteed completion of the Good Neighbor project and Agricultural Insurance Company (hereinafter "Agricultural"), in or about August, 1972, guaranteed completion of the UPACA and Emanuel projects.

12. In February, 1972, an account was opened for the Corporation in the Chase Manhattan Bank as to which Travelers had check authority; in August, 1972, an account was opened in the name of the Corporation in Marine Midland Bank, as to which Agricultural had check authority. The Corporation's other accounts were continued, however, and there was some activity in such accounts during the years in question.

13. After Travelers and Agricultural entered the scene, Mr. Bakun and Mr. Tiseo, remained officers of the Corporation and continued to render carpentry subcontracting services (for which they were compensated) at the various job

sites. However, Mr. Bakun and Mr. Tiseo no longer exercised check authorization and had no direct dealings with Travelers or Agricultural.

14. Petitioner continued as President of the Corporation and its sole shareholder, being solely responsible for the Corporation's dealing with representatives of Travelers and Agricultural. At the direction of the petitioner, the Corporation's bookkeeper would prepare a weekly requisition or schedule of checks to be paid which would include amounts to satisfy claims for payment (or, in some instances, filed liens) by subcontractors and suppliers, payroll, taxes and the like. The total sum requisitioned could not exceed the funds made available by the Federal government and the petitioner had the primary responsibility to determine which creditor appeared on the requisition or payment schedule. Each week, the petitioner would present the requisition or payment schedule to a representative of Travelers and Agricultural for approval so that the banks in question would honor the checks drawn by the Corporation against the particular account.

15. Petitioner was advised by the Corporation's accountant of the tax liability for the years in question, yet other creditors were paid while New York State withholding taxes were due and owing. This situation continued, with the knowledge and acquiescence of the petitioner, for the periods that Travelers and Agricultural were in the picture.

16. For the years 1972 and 1973, the Corporation operated out of the office of East Hills Construction Corp., a company in which Mr. Bakun and Mr. Tiseo each had a fifty percent interest but the evidence did not establish that they knew, or should have known, of the tax liability of the Corporation.

17. The Corporation ceased its operations in September of 1973 because the projects were no longer funded by the Federal government.



18. The Internal Revenue Service has issued an assessment against the petitioner for his failure to collect and pay over Federal withholding taxes of the Corporation.

CONCLUSIONS OF LAW

A. That petitioner knew or should have known that Sol G. Construction Corp. failed to pay to the Income Tax Bureau the taxes withheld by it for the years 1971, 1972 and 1973, which taxes constituted trust funds pursuant to section 675 of the Tax Law.

B. That petitioner was a person required to collect, truthfully account for and pay over the withholding taxes of the employees of Sol G. Construction Corp. for the years 1971, 1972 and 1973, within the meaning and intent of subsections (g) and (n) of section 685 of the Tax Law.

C. That petitioner willfully failed to collect, truthfully account for and pay over the taxes withheld by Sol G. Construction Corp. for the years 1971, 1972 and 1973, within the meaning and intent of subsection (g) of section 685 of the Tax Law. Matter of Levin v. Gallman, 42 N.Y.2d 32, 396 N.Y.S.2d 623 (1977). See also, Kalb v. United States, 505 F.2d 506 (2d Cir. 1974), Cert. denied, 421 U.S. 979 (1975). Cf. United States v. Falino, 441 F. Supp. 153 (E.D.N.Y. 1977).

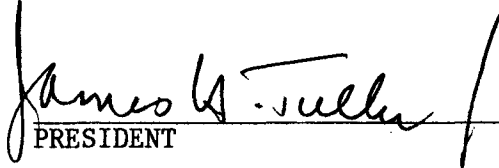
D. That if a return of withholding tax for any period ending with or within a calendar year is filed before April fifteenth of the succeeding calendar year, such return shall be deemed to be filed on April fifteenth of such succeeding calendar year pursuant to section 683(b)(2) of the Tax Law. Accordingly, the period of limitation on assessment for the monthly returns filed during 1971 did not expire prior to the issuance of the Notice of Deficiency.


E. That the petition of Herman Gillman is hereby denied and the notices of deficiency issued August 26, 1974 and October 28, 1974 are sustained.

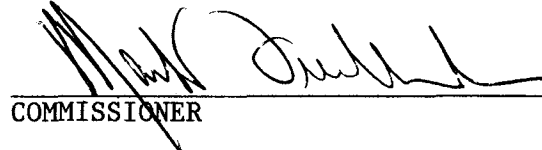
DATED: Albany, New York

OCT 02 1981

STATE TAX COMMISSION

  
PRESIDENT

  
COMMISSIONER

  
COMMISSIONER