

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition
of
Edward Holland

:

:

: AFFIDAVIT OF MAILING

for Redetermination of a Deficiency or a Revision :
of a Determination or a Refund of NYS & NYC Income :
Tax under Article 22 & 30 of the Tax Law for the :
Years 1976 -1977.

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 6th day of November, 1981, he served the within notice of Decision by certified mail upon Edward Holland, the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

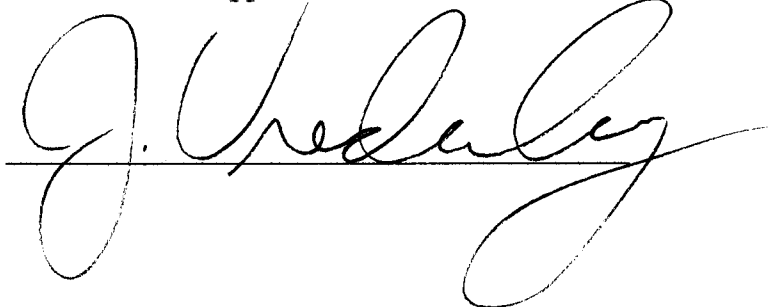
Edward Holland
17 Cathy Terrace
Englewood Cliffs, NJ 07632

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
6th day of November, 1981.


Annie A. Haglund


J. Vredenburg

STATE OF NEW YORK
STATE TAX COMMISSION

In the Matter of the Petition
of
Edward Holland

:

:

: AFFIDAVIT OF MAILING

for Redetermination of a Deficiency or a Revision :
of a Determination or a Refund of NYS & NYC Income :
Tax under Article 22 & 30 of the Tax Law for the :
Years 1976 -1977

:

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 6th day of November, 1981, he served the within notice of Decision by certified mail upon Eliot Zuckerman the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

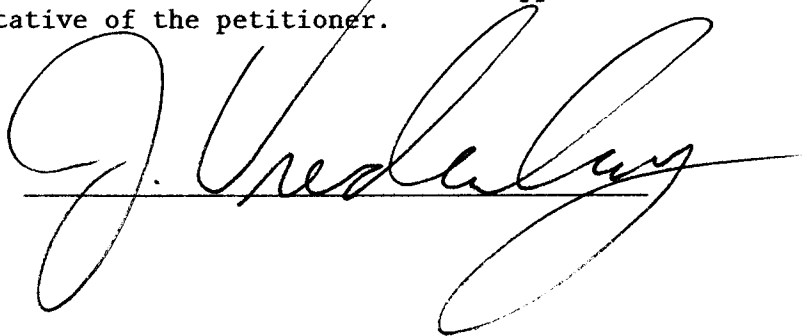
Eliot Zuckerman
Sonnenschein, Sherman & Deutsch
10 Columbus Circle
New York, NY 10019

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
6th day of November, 1981.





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

November 6, 1981

Edward Holland
17 Cathy Terrace
Englewood Cliffs, NJ 07632

Dear Mr. Holland:

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 & 1312 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
Eliot Zuckerman
Sonnenschein, Sherman & Deutsch
10 Columbus Circle
New York, NY 10019
Taxing Bureau's Representative

STATE OF NEW YORK
STATE TAX COMMISSION

In the Matter of the Petition	:	
of	:	
EDWARD HOLLAND	:	DECISION
for Redetermination of a Deficiency or for	:	
Refund of Personal Income Tax under Articles	:	
22 and 30 of the Tax Law for the Years 1976	:	
and 1977.	:	

Petitioner, Edward Holland, 17 Cathy Terrace, Englewood Cliffs, New Jersey 07632, filed a petition for redetermination of a deficiency or for refund of personal income tax under Articles 22 and 30 of the Tax Law for the years 1976 and 1977 (File No. 23294).

A formal hearing was held before Doris Steinhardt, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on October 31, 1980 at 9:40 A.M. Petitioner appeared by Sonnenschein, Sherman & Deutsch, Esqs. (Eliot H. Zuckerman, Esq., of counsel). The Audit Division appeared by Ralph J. Vecchio, Esq. (Samuel Freund, Esq., of counsel).

ISSUE

Whether petitioner was a person required to collect, truthfully account for and pay over New York State and New York City withholding taxes of Holland Beef Corporation during the period at issue, who willfully failed to do so, thereby becoming liable for the penalty imposed under subdivision (g) of section 685 of the Tax Law.

FINDINGS OF FACT

1. On June 26, 1978, the Audit Division issued to petitioner, Edward Holland, a Notice of Deficiency, asserting penalties equal to the amount of

New York State and New York City withholding taxes of Holland Beef Corporation, which were due and unpaid for the periods at issue, as follows:

	WITHHOLDING TAX PERIOD	
	<u>3/16/76-12/3/76</u>	<u>5/1/77-5/9/77</u>
NYS Withholding Tax	\$15,130.32	\$59.20
NYC Withholding Tax	<u>235.64</u>	<u>13.55</u>
	\$15,365.96	\$72.75

2. From approximately 1962 through 1977, petitioner Edward Holland was president of Holland Beef Corporation, a wholesale meat company located at 838 Greenwich Street, New York, New York, which supplied steamship lines and New York metropolitan area eating establishments and had expanded into the overseas market.

3. Shortly after the enactment of the Wholesale Meat Act of 1972, a Department of Agriculture inspector examined the business premises of the corporation and advised the corporation that its license to conduct a wholesale meat business would be revoked unless steps were taken to substantially increase the size of the facilities. The corporation arranged for loans of approximately one million dollars in order to purchase and renovate the adjacent structure.

4. Subsequently, the corporation's line of credit, upon which it had relied to obtain the financing, was reduced by two-thirds, making it nearly impossible for the corporation to meet its obligations. In addition, the corporation learned that it had been seriously misled by the Federal inspector and that indeed, it was not necessary to increase the size of its facilities.

5. Holland Beef Corporation entered into a refinancing agreement with Hartford National Bank, under which the corporation would obtain 85 percent of its receivables advanced. However, the bank entered a difficult period and offered for sale a portfolio of obligations, which included that of the Holland

Beef Corporation, thereby making it impossible for the corporation to refinance with another institution. (It is considered unethical business practice to extract one account from a portfolio offered.)

6. During 1976, Holland Beef Corporation employed approximately thirty persons, who were paid by checks drawn on the general corporate account and signed by petitioner. Certain key persons had authority to sign payroll checks in petitioner's absence. Wages were paid until the last day of business.

7. As the business worsened, petitioner managed crises as they arose. The corporation continued to run up large bills with utilities, the truck-leasing company and meat suppliers. Nominal payments were made to keep the business alive; it was petitioner's firm belief that the business could be salvaged. Petitioner deposited his personal resources with the bank which handled the general corporate account, as evidence of his commitment to save the business. At the formal hearing, petitioner testified that he had been unaware at that time of the accumulating withholding tax liabilities because he was preoccupied with keeping the business afloat, paying bills as absolutely necessary and gathering funds to pay any overdrafts of the general account.

8. Returns of personal income tax withheld were filed by the corporation throughout the periods at issue and were signed by petitioner in his capacity as president.

9. On December 3, 1976, the corporation filed for reorganization pursuant to Chapter XI of the Bankruptcy Law. Petitioner's efforts to reorganize the business proved unsuccessful, and he thereafter fully cooperated with the trustee to assemble the maximum possible estate for the creditors. The Bankruptcy Court required petitioner to establish tax accounts, and Mr. Holland did so.

10. Mr. Holland stated that it was never his intention to evade payment of any taxes; that he fully recognized that tax monies withheld from employee wages constituted trust funds; and that until December 3, 1976, he believed his business would survive and all creditors would be paid.

11. The bankruptcy proceeding is drawing to a close, and petitioner anticipates that there will be sufficient funds to satisfy all priority claims, including the deficiencies which are the subject of this proceeding.

CONCLUSIONS OF LAW

A. That a penalty is imposed by subdivision (g) of section 685 of the Tax Law for willful failure to collect and pay over withholding taxes to the State Tax Commission, as follows:

"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 petitioner was clearly a person required to collect, truthfully account for and remit to the State Tax Commission taxes withheld from employee wages within the meaning and intent of subdivision (n) of section 685 of the Tax Law. The question remaining is whether his failure to do so was "willful".

C. That the test of willfulness has been stated by the Court of Appeals as follows:

"whether the 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 [citations omitted]." Levin v. Gallman, 42 N.Y.2d 32, 34 (1977).

No showing of evil motive or intent to defraud is necessary. Kalb v. United States, 505 F.2d 506 (2d Cir.), cert. den. 421 U.S. 979 (1975).

D. That petitioner's application of tax monies withheld from employee wages to other purposes was conscious and voluntary. Though his actions may have been undertaken in the exercise of his business judgment and in an effort to salvage the corporation, such actions nonetheless constituted a willful failure to account for and pay over the tax amounts to the State Tax Commission. Consequently, he is liable for the penalty asserted under subdivision (g) of section 685 of the Tax Law.

E. That in accordance with the reasoning and the results reached in Conclusions of Law "A" through "D", petitioner is likewise liable to a penalty equal to the amount of New York City personal income taxes withheld from employee wages, but not remitted to the State Tax Commission within the meaning and intent of section 1312 of Article 30 of the Tax Law.

F. That the deficiency asserted against petitioner is in the nature of a penalty; therefore the Commission need not proceed against the corporation before asserting such deficiency against him. Maguire v. United States, 80-1 U.S.T.C. (CCH) ¶9300 (W.D.N.Y. 1980).

G. That the petition of Edward Holland is hereby denied and the Notice of Deficiency issued June 26, 1978 is sustained in full.

DATED: Albany, New York

NOV 06 1981

STATE TAX COMMISSION


PRESIDENT


COMMISSIONER


COMMISSIONER