

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition
of
Jack E. Keck

:

:

: 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 :
1974 & 1976

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 5th day of June, 1981, he served the within notice of Decision by certified mail upon Jack E. Keck, the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Jack E. Keck
55 Conmar Drive
Rochester, NY 14609

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
5th day of June, 1981.

Annex R. Hagelund

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 5th day of June, 1981, he served the within notice of Decision by certified mail upon Patrick J. Lane 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. Patrick J. Lane
Dibble, Koff, Lane, Stern & Stern
Suite 500, One Exchange St.
Rochester, NY 14614

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
5th day of June, 1981.

Cornie A. Hageland

J. Vredenburg

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

June 5, 1981

Jack E. Keck
55 Conmar Drive
Rochester, NY 14609

Dear Mr. Keck:

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
Patrick J. Lane
Dibble, Koff, Lane, Stern & Stern
Suite 500, One Exchange St.
Rochester, NY 14614
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition	:	
of	:	
JACK E. KECK	:	DECISION
for Redetermination of a Deficiency or	:	
for Refund of Personal Income Tax under	:	
Article 22 of the Tax Law for the Years	:	
1974 and 1976.	:	

Petitioner, Jack E. Keck, 55 Conmar Drive, Rochester, New York 14609, 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 1974 and 1976 (File No. 24299).

A small claims hearing was held before Carl P. Wright, Hearing Officer, at the offices of the State Tax Commission, One Marine Midland Plaza, Rochester, New York, on October 22, 1980 at 2:45 P.M. Petitioner, Jack E. Keck, appeared with Patrick J. Lane, Esq. The Audit Division appeared by Ralph J. Vecchio, Esq. (Alexander Weiss, Esq., of counsel).

ISSUES

I. Whether petitioner was a person required to collect, truthfully account for and pay over New York State withholding taxes of Mallia Paving Corporation for 1974 and 1976.

II. Whether the Notice of Deficiency issued to petitioner on June 26, 1978 and imposing a penalty pursuant to section 685(g) of the Tax Law, was issued within the period of limitation set forth in section 683 of the Tax Law.

FINDINGS OF FACT

1. Mallia Paving Corporation failed to pay over, to the Withholding Tax Unit of the Department of Taxation and Finance, New York State personal income taxes withheld from its employees' wages for the periods December 16, 1974 through December 31, 1974, February 1, 1976 through February 15, 1976 and March 1, 1976 through March 31, 1976.

2. On June 26, 1978, the Audit Division issued a Statement of Deficiency against petitioner imposing a penalty equal to the amount of New York State withholding taxes due from Mallia Paving Corporation for the aforementioned periods. 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 June 26, 1978 the Audit Division issued a Notice of Deficiency against him for \$260.20 for 1974 and \$695.90 for 1976, for a total due of \$956.10.

3. The New York State employer's return of tax withheld for the period December 16, 1974 through December 31, 1974 failed to show that it was filed later than April 15, 1975.

4. During the periods at issue, petitioner Jack E. Keck was president, director and one-third shareholder in Mallia Paving Corporation. Petitioner had the authority, along with the other two shareholders and from time to time other employees, to sign checks on behalf of the corporation. Petitioner Jack E. Keck, contends that he did not sign any payroll checks or withholding tax returns. Petitioner did sign corporation tax returns. Petitioner's duties consisted of supervising paving projects for Mallia Paving Corporation.

5. Petitioner, Jack E. Keck, contended that he did not participate in any decision, to determine whether or not any one creditor or set of creditors of

Mallia Paving Corporation should be preferred over any other creditors. That he relied upon other corporate officers and corporate employees to prepare the payroll, payroll tax returns and withholding tax remittances and to sign all the necessary checks and other documents in connection therewith. Petitioner further contended that he had no knowledge of Mallia Paving Corporation's failure to pay the withholding tax in question until he received his Notice of Deficiency.

CONCLUSIONS OF LAW

A. That petitioner, Jack E. Keck, was a person required to collect, truthfully account for and pay over New York State withholding taxes due from Mallia Paving Corporation for the years 1974 and 1976 in accordance with the meaning and intent of sections 685(n) and 685(g) of the Tax Law.

B. That the term "willful" as used in the statute means an act, default or conduct voluntarily done with knowledge that, as a result, trust funds belonging to the government will be used for other purposes (Matter of Levin v. Gallman, 42 N.Y.2d 32, 396 N.Y.S.2d 623, 364 N.E.2d 1316). The court further stated that no showing of intent to deprive the Government of its money is necessary only something more than accidental nonpayment is required (id. at 34). In light of these principles petitioners cannot avoid responsibility by failing to concern himself and seeing that taxes are being paid when he is obviously in charge of assets of the corporation. McHugh v. State Tax Commission, 70 A.D.2d 987, 417 N.Y.S.2d 799. An examination of the instant record establishes that petitioner was president of the corporation, was authorized to sign checks, signed tax forms and owned one third of the stock. The petitioner's statement that he did not participate in the management of the business,

without supporting proof, fails to meet his burden that he, in fact, was not "willful" in his responsibilities.

C. That the Notice of Deficiency dated June 26, 1978 was erroneous, in that it assessed a withholding tax penalty for 1974 after the expiration of the three-year period of limitation set forth in section 683 of the Tax Law.

D. That the Audit Division is hereby directed to modify the Notice of Deficiency to the extent of reducing the deficiency for withholding tax penalty to \$695.90.

E. That the petition of Jack E. Keck is granted to the extent indicated in Conclusion of Law "D"; and that, except as so granted, is in all other respects denied.

DATED: Albany, New York

JUN 5 1981

STATE TAX COMMISSION


PRESIDENT


COMMISSIONER


COMMISSIONER