

STATE OF NEW YORK  
STATE TAX COMMISSION

In the Matter of the Petition  
of

Michael Levy

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 1972, 1973 & 1974. :

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 March, 1981, he served the within notice of Decision by certified mail upon Michael Levy, the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Michael Levy  
28 Knox Ln.  
Englishtown, NJ 07726

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 March, 1981.

*Annie A. Berglund*

*J. Vredenburg*

STATE OF NEW YORK  
STATE TAX COMMISSION

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Personal Income Tax :  
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for the Years 1972, 1973 & 1974. :

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 March, 1981, he served the within notice of Decision by certified mail upon Frank A. Wortmann 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. Frank A. Wortmann  
60 E. 42nd St.  
New York, NY 10017

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 March, 1981.

*Cornelia P. Hagelund*

*J. Vredenburg*

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

March 6, 1981

Michael Levy  
28 Knox Ln.  
Englishtown, NJ 07726

Dear Mr. Levy:

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  
Frank A. Wortmann  
60 E. 42nd St.  
New York, NY 10017  
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

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|---|---|----------|
| In the Matter of the Petition               | : |          |
|   | : |          |
| of  | : |          |
|   | : |          |
| MICHAEL LEVY                                | : | DECISION |
|   | : |          |
| for Redetermination of a Deficiency or      | : |          |
| for Refund of Personal Income Taxes under : | : |          |
| Article 22 of the Tax Law for the Years     | : |          |
| 1972, 1973 and 1974.                        | : |          |

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Petitioner, Michael Levy, 28 Knox Lane, Englishtown, New Jersey 07726, filed a petition for redetermination of a deficiency or for refund of personal income taxes under Article 22 of the Tax Law for the years 1972, 1973 and 1974 (File No. 15503).

A formal hearing was held before Harry Issler, Esq., Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on November 16, 1977 and continued on December 1, 1978 (Frank Romano, Hearing Officer), and February 9, 1979 (Herbert Carr, Hearing Officer). Petitioner appeared by Frank A. Wortmann, Esq. The Audit Division appeared by Peter Crotty, Esq. (Alexander Weiss and Abraham Schwartz, Esqs., of counsel).

ISSUE

Whether petitioner was a person required to collect, truthfully account for and pay over withholding tax with respect to Kennedy, Scheidel & Young, Inc., and willfully failed to do so, thus becoming liable for a penalty under section 685(g) of the Tax Law.

FINDINGS OF FACT

1. By Notice of Deficiency dated May 19, 1975, the Audit Division asserted penalties of \$122,948.27 against petitioner pursuant to subdivision (g) of section 685 of the Tax Law predicated upon the failure of Kennedy, Scheidel &

Young Inc. ("the Corporation") to remit withholding tax in the aforesaid amount during 1972, 1973 and 1974.

2. The Corporation was engaged in business as a mechanical trades contractor during the tax period in question until October 1, 1974 when a general assignment for the benefit of creditors was executed by James I. Kennedy, president and majority stockholder of the Corporation.

3. By agreement dated September 1, 1967 between James I. Kennedy, Walter K. Pettersen, Thomas J. O'Connor and Michael R. Levy, Kennedy, as sole stockholder and president of the Corporation, agreed to sell 49 percent of the Corporation's capital stock to Pettersen, O'Connor and Levy, each of whom was to receive an equal number of shares according to various terms and conditions providing inter alia for installment payments by them and gradual acquisition of the shares, and pursuant to which Pettersen, O'Connor and Levy were effectively constituted vice-president, secretary and treasurer, respectively and Pettersen was constituted a director. The agreement further provided that Pettersen, O'Connor and Levy should devote full time to the business of the Corporation, that notes, checks and other negotiable instruments of the Corporation might be signed by any one of its officers "signing singly", and that Pettersen, O'Connor and Levy "shall supervise and control the operation of the business of the Corporation, subject, however, to the right of Kennedy to have the final word with respect thereto so long as Kennedy is a stockholder of the Corporation."

4. The aforesaid agreement was superseded by an agreement dated June 6, 1972 between the same parties, which by its terms acknowledged the then ownership of  $7\frac{1}{2}$  shares each of Pettersen, O'Connor and Levy ( $7\frac{1}{2}$  shares representing 5 percent) and which provided inter alia for the installment sale of all remaining shares by Kennedy to them in equal numbers for the total sum of \$70,333.69.

Said agreement contained the identical provisions regarding the powers, duties and responsibilities of petitioner as had been enumerated in the prior agreement.

5. Petitioner, Michael R. Levy, held the titles of treasurer and secretary/ treasurer after O'Connor's departure in 1973, except that on July 18, 1974 Levy was fired by Kennedy, notwithstanding that such discharge was in apparent violation of the agreement dated June 6, 1972.

6. Levy was a full time employee of the Corporation who devoted 90 percent of his work time to soliciting business, purchasing materials and supervising construction projects.

7. Levy signed 60 - 65 percent of the Corporation's checks.

8. Levy signed checks for payroll, office rent, utilities, general bills of the Corporation and withholding tax.

9. Levy signed tax returns of the Corporation.

10. Levy did not keep the books and records of the Corporation. These were kept by a bookkeeper and a firm of accountants retained by Kennedy.

11. Levy knew that withholding tax balances existed but did not know the exact amount which remained unpaid.

12. Levy submitted to or acquiesced in the decisions of Kennedy with respect to financial matters of the Corporation.

#### CONCLUSIONS OF LAW

A. That petitioner was a person required to collect, truthfully account for and pay over withholding tax with respect to Kennedy, Scheidel & Young, Inc., of which he was an officer possessing general supervisory power with the written authority to sign corporate checks, and who in fact signed checks for payroll and general creditors; and signed tax returns. (Tax Law §685(g); Matter of McHugh v. State Tax Commission, 70 A.D.2d 987; Matter of MacLean v.

State Tax Commission, 69 A.D.2d 951, aff'd 49 N.Y.2d 920; Matter of Malkin v. Tully, 65 A.D.2d 228.)

B. That petitioner willfully failed to collect withholding tax in that he intentionally neglected to concern himself with whether the tax was paid although he clearly possessed the authority, pursuant to written contract, to manage the Corporation and issue checks on his own signature. His submission to or acquiescence in the will and decisions of Kennedy was in derogation of his duties and responsibilities to the Corporation and to the State of New York with respect to payment of withholding tax. He cannot "...avoid liability by failing to concern himself with whether the taxes were being paid." (Matter of Malkin v. Tully, supra, p. 231; Matter of Levin v. Gallman, 42 N.Y.2d 32.)

C. That petitioner is not liable for penalty arising after his discharge on July 18, 1974.

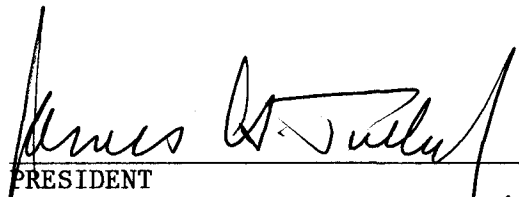
D. That the Notice of Deficiency is modified to the extent indicated in Conclusion of Law "C", and except as so modified is sustained.

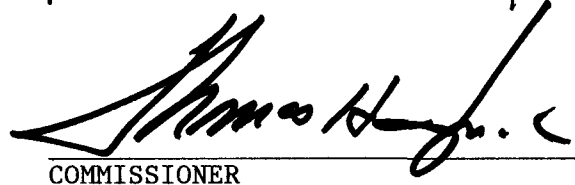
E. That the petition of Michael Levy is denied except as indicated above.

DATED: Albany, New York

MAR 06 1981

STATE TAX COMMISSION

  
PRESIDENT

  
COMMISSIONER

  
COMMISSIONER