

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of :
Leonard Schlusell :
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 Year :
1975. :

AFFIDAVIT OF MAILING

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 27th day of November, 1981, he served the within notice of Decision by certified mail upon Leonard Schlusell, the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Leonard Schlusell
c/o Wellbilt Equipment Corp.
611 Broadway
New York, NY 10012

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
27th day of November, 1981.

Annice R. Haglund

J. Vredenburg

STATE OF NEW YORK
STATE TAX COMMISSION

In the Matter of the Petition :
of :
Leonard Schlusel :

AFFIDAVIT OF MAILING

for Redetermination of a Deficiency or a Revision :
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Tax under Article 22 of the Tax Law for the Year :
1975.

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 27th day of November, 1981, he served the within notice of Decision by certified mail upon M. A. Rainbeau the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

M. A. Rainbeau
663 5th Ave.
New York, NY 10022

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
27th day of November, 1981.

Annie P. Hegeland

J. Vredenburg

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

November 27, 1981

Leonard Schlusell
c/o Wellbilt Equipment Corp.
611 Broadway
New York, NY 10012

Dear Mr. Schlusell:

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
M. A. Rainbeau
663 5th Ave.
New York, NY 10022
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition	:	
of	:	
LEONARD SCHLUSSEL	:	DECISION
for Redetermination of a Deficiency or	:	
for Refund of Personal Income Tax under	:	
Article 22 of the Tax Law for the Year	:	
1975.	:	

Petitioner, Leonard Schlusssel, c/o Wellbuilt Equipment Corp., 611 Broadway, New York, New York 10012, filed a petition for redetermination of a deficiency or for refund of personal income tax under Article 22 of the Tax Law for the year 1975 (File No. 24548).

A small claims hearing was held before Samuel Levy, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on October 24, 1980 at 9:15 A.M. Petitioner appeared by M. A. Rainbeau, CPA. The Audit Division appeared by Ralph J. Vecchio, Esq. (Samuel Freund, Esq., of counsel).

ISSUE

Whether petitioner is subject to a penalty under section 685, subdivisions (g) and (n) of the Tax Law, as a person who wilfully failed to collect, account for and pay over withholding tax due and owing from Sullivan County Dorms and Hotel Operating Corp. (hereinafter "Sullivan") for 1975.

FINDINGS OF FACT

1. On June 26, 1978, the Audit Division issued a Notice of Deficiency and Statement of Deficiency against petitioner, Leonard Schlusssel, imposing a penalty against him equal to the amount of unpaid New York withholding taxes due and owing from Sullivan in the amount of \$1,889.29 for 1975. The penalty

was issued on the ground that petitioner was a person required to collect, truthfully account for and pay over taxes at issue, and that he wilfully failed to do so.

2. Sullivan, incorporated under the laws of New York, was the owner and operator of a dormitory and summer camp business. The founders of Sullivan were petitioner, Leonard Schlusell as president, Irving Schlusell as secretary; and Martin E. Biederman, who held the offices of vice-president and treasurer. Each of the incorporators held a one-third interest in the outstanding stock of the corporation.

3. Mr. Martin E. Biederman was the only member of Sullivan with previous experience in the management and operation of a dormitory and summer camp. In recognition of his experience, petitioner as president of Sullivan entered into an employment contract with him under date of January 14, 1975, which agreement, in addition to appointing him its executive vice-president and treasurer, also provided, in relevant part, that,

"The employee (Mr. Biederman), shall be and is the chief supervising and operation officer of the corporation and shall oversee the hiring of all employees required by the employer; negotiate all contracts on behalf of the employer; supervise all maintenance and construction undertaken by the employer.... supervise and direct all bookkeeping and record keeping required by the employer.... It is intended that he shall be in full charge of the operation...."

4. Prior to the formation of Sullivan, petitioner held a second mortgage on the hotel and dormitory. When the mortgagor was unable to meet its obligation, the petitioner foreclosed on the property to protect his equity from foreclosure by the first mortgagee. Petitioner contended that he was a passive investor who attempted to prevent default on his second mortgage, and therefore formed Sullivan to take over operation of the hotel and dormitory.

5. Petitioner was authorized to sign corporate checks, but contends that he did not have any occasion to exercise this authority.

6. Petitioner on occasion discussed business matters with Sullivan's management through phone conversations, and did spend time at Sullivan's principal place of business in Sullivan County, New York.

7. Petitioner contended that he was unaware that the corporation was encountering financial difficulties. Petitioner further contended that he relied on the verbal assurances of the corporate manager and therefore he did not require monthly financial reports or seek to review the books and records maintained at Sullivan's principal place of business.

CONCLUSIONS OF LAW

A. That the responsibilities of a corporate officer are serious and mere inaction on the part of such officer or passive delegation of responsibilities to other officers will not relieve him of his own responsibility (State Tax Commission Decision, May 1, 1974, in the matter of Emmanuel Kopell).

That one cannot avoid responsibility by failing to concern himself that taxes due and owing are being paid when they are obviously in charge of assets of the corporation (McHugh v. New York State Tax Commission, 70 A.D.2d 987 417 N.Y.S.2d 799).

B. Petitioner's reliance on verbal assurance of Sullivan's management did not negate his obligation and duty to assure himself that the closely held corporation was not meeting its tax obligation. One is not permitted to shield himself and hold himself harmless by the use of an intermediary where there is a duty imposed on him to see that taxes due and owing are timely paid.

C. That petitioner Leonard Schlusell was a person required to collect, truthfully account for and pay over the tax imposed by Article 22 of the Tax Law within the meaning and intent of section 685(g) and (n) of the Tax Law.


D. That the petition of Leonard Schlusell is denied and the Notice of Deficiency issued June 26, 1978 is sustained.

DATED: Albany, New York

NOV 27 1981

STATE TAX COMMISSION


PRESIDENT


COMMISSIONER


COMMISSIONER