

STATE OF NEW YORK
STATE TAX COMMISSION

In the Matter of the Petition :
of
Oswald Tabacchi :

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

Oswald Tabacchi
400 Adolphus Ave.
Cliffside Park, NJ 07010

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.

Annice A. Hagelend

J. Vredenburg

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

March 6, 1981

Oswald Tabacchi
400 Adolphus Ave.
Cliffside Park, NJ 07010

Dear Mr. Tabacchi:

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

Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

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| In the Matter of the Petition | : | |
| | : | |
| of | : | |
| | : | |
| OSWALD TABACCHI | : | 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 1975. | : | |

Petitioner, Oswald Tabacchi, 400 Adolphus Avenue, Cliffside Park, New Jersey 07010, 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 1975 (File No. 20141).

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 3, 1980 at 11:30 A.M. Petitioner appeared pro se. The Audit Division appeared by Ralph J. Vecchio, Esq. (Angelo Scopellito, Esq., of counsel).

ISSUE

Whether petitioner was a person required to collect, truthfully account for and pay over New York State withholding taxes of Roy Barnaby, Inc. during the periods at issue and who willfully failed to do so and is thus liable for the penalty imposed under section 685(g) of the Tax Law.

FINDINGS OF FACT

1. On March 28, 1977, the Audit Division issued to petitioner, Oswald Tabacchi, a Statement of Deficiency and a Notice of Deficiency, asserting penalties equal to the amount of New York State withholding taxes of Roy Barnaby, Inc. which were due and unpaid for the periods at issue, as follows:

| <u>WITHHOLDING TAX PERIOD</u> | <u>DEFICIENCY</u> |
|-------------------------------|-------------------|
| 7/1/74 - 12/31/74 | \$116,467.60 |
| 1/1/75 - 5/31/75 | 47,287.57 |
| 6/1/75 - 10/10/75 | <u>67,632.46</u> |
| TOTAL | \$231,387.63 |

2. During the periods at issue, petitioner held the title of vice-president in Roy Barnaby, Inc., a construction firm, but he was not a shareholder therein. His principal duty consisted of the preparation of estimates for materials and labor. Until May, 1974, Mr. Tabacchi possessed conditional authority to sign checks of the corporation, i.e., he signed such checks at the direction of the firm's president, Mr. Roy Barnaby. Until May, 1974, petitioner had authority to sign, and did sign, returns for New York State personal income taxes withheld from employees of Roy Barnaby, Inc.

3. Prior to 1974, the corporation employed the accounting firm of Blonder, Seymour & Shapss. Although Roy Barnaby had control of all financial records of the corporation, petitioner was able to procure some information regarding corporate finances from the accountants. However, commencing with the year 1974, Mr. Barnaby terminated the aforementioned accounting firm and employed another firm. Petitioner attempted to examine the corporate books and to elicit information from the accountants, but was denied access by Mr. Barnaby and by the accounting firm.

4. Unable to obtain any information about corporate finances, petitioner relinquished his signatory authority on the corporate account in May, 1974. Petitioner did not notify the State or the bank at which the corporation maintained its account that he had so relinquished his authority. He retained his title of vice-president and continued his duty of preparing estimates.

5. Petitioner became aware, late in 1974, of the financial difficulties of the corporation and of the accruing tax liability; he made attempts to discuss these matters with Mr. Barnaby but his efforts were unavailing.

Mr. Barnaby continued to pay employee wages, utilizing the taxes withheld. Petitioner submitted to the Tax Commission photocopies of salary checks issued to him in September and October, 1975, bearing the signature facsimile of Roy Barnaby, which were subsequently dishonored by the bank.

6. During September, 1975, Roy Barnaby, Inc. ceased doing business, due to lack of funds. Shortly thereafter, it was adjudicated a bankrupt.

7. On September 6, 1978, the City of New York issued to petitioner a "Final Determination", which stated that his liability for withholding taxes of Roy Barnaby, Inc. for the periods January 1, 1972 through October 10, 1975 and October 11, 1975 through October 24, 1975 in the total sum \$37,773.00 had been cancelled.

CONCLUSIONS OF LAW

A. That subdivision g of section 685 of the Tax Law imposes a civil penalty, 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."

For purposes of the aforesaid subdivision, subdivision n of section 685 furnishes the following definition of "person":

"[T]he term person includes...an officer or employee of any corporation (including a dissolved corporation), or a member or employee of any partnership, who as such officer, employee, or member is under a duty to perform the act in respect of which the violation occurs."

B. That petitioner was not a responsible officer of Roy Barnaby, Inc., within the meaning of subdivisions n and g of section 685. At no time during the period at issue did petitioner possess the authority to make financial decisions for the corporation, including decisions as to payment of taxes.

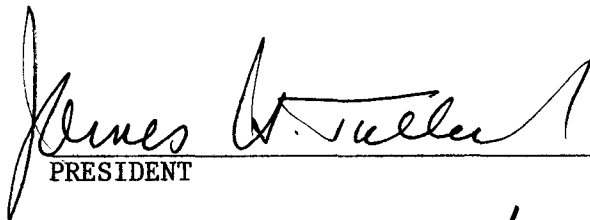
The only financial information to which petitioner was privy was that which he managed to obtain from Blonder, Seymour & Shapss. In 1974 and thereafter, petitioner attempted to keep himself apprised of the financial affairs of the corporation and also to dissuade the corporation's president from utilizing taxes withheld for payment of other obligations, but his efforts were fruitless. (See Matter of William Panzella, State Tax Comm'n, March 28, 1980.) Under these circumstances, petitioner's holding of the title vice-president is not sufficient in itself to impose the penalty upon him.

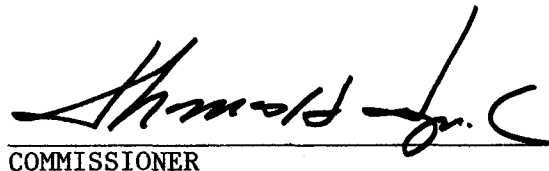
C. That the petition of Oswald Tabacchi is hereby granted, and the Notice of Deficiency issued March 28, 1977 is cancelled in full.


DATED: Albany, New York

MAR 06 1981

STATE TAX COMMISSION


PRESIDENT


COMMISSIONER


COMMISSIONER