

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition
of
Alfred & Barbara Wonesh

:

:

: 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 :
1973 and 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 17th day of July, 1981, he served the within notice of Decision by certified mail upon Alfred & Barbara Wonesh the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Alfred & Barbara Wonesh
21 Alexa Pl.
Red Bank, NJ 07701

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
17th day of July, 1981.

Christie A. Haglund

J. Vredenburg

STATE OF NEW YORK
STATE TAX COMMISSION

In the Matter of the Petition :
of :
Alfred & Barbara Wonesh :

: 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 :
1973 and 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 17th day of July, 1981, he served the within notice of Decision by certified mail upon Steven Rubin the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Steven Rubin
Tunstead & Schechter
331 Madison Ave.
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
17th day of July, 1981.

Cynthia A. Haglund

J. Vredenburg

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

July 17, 1981

Alfred & Barbara Wonesh
21 Alexa Pl.
Red Bank, NJ 07701

Dear Mr. & Mrs. Wonesh:

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
Steven Rubin
Tunstead & Schechter
331 Madison Ave.
New York, NY 10017
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition	:	
of	:	
ALFRED WONESH	:	DECISION
for Redetermination of a Deficiency or	:	
for Refund of Personal Income Tax under	:	
Article 22 of the Tax Law for the Years	:	
1973 and 1975.	:	

Petitioner, Alfred Wonesh, 21 Alexa Place, Red Bank, New Jersey 07701, 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 1973 and 1975 (File No. 20586).

A formal hearing was held before Herbert Carr, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on August 24, 1979 at 11:30 A.M. Petitioner appeared by Tunstead & Schechter, Esqs. (Steve Rubin, Esq., of counsel). The Audit Division appeared by Peter Crotty, Esq. (Bruce M. Zalaman, Esq., of counsel). The hearing was continued at the same location on March 27, 1980 at 10:30 A.M. before William J. Dean, Hearing Officer, with petitioner appearing by Tunstead & Schechter, Esqs. (John R. Maguire, Esq., of counsel) and the Audit Division appearing by Ralph J. Vecchio, Esq. (Angelo A. Scopellito, Esq., of counsel).

ISSUE

Whether petitioner was a person required to collect, truthfully account for and pay over withholding taxes on behalf of Three Boro Sheet Metal & Ventilating Co., Inc. and who wilfully failed to do so.

FINDINGS OF FACT

1. By a Statement of Deficiency and Notice of Deficiency dated September 26, 1977, the Audit Division notified petitioner of a deficiency in the amount of \$5,249.07 for 1973 and \$2,909.45 for 1975, for a total of \$8,158.52. Claims against petitioner related to unpaid withholding taxes of Three Boro Sheet Metal & Ventilating Co., Inc. (herein "Three Boro") for withholding tax due during the years in question, namely, from May 1, 1973 through July 31, 1973 and from January 1, 1975 through April 30, 1975

2. Petitioner, Alfred Wonesh, served as president of Three Boro during the period herein at issue.

3. Petitioner spent most of his time working in the field on various Three Boro projects. His duties included being estimator, salesman and project manager for the company's jobs.

4. In his capacity as president, petitioner had full control over the activities and affairs of Three Boro. He signed checks, determined which creditors would be paid and in what amounts they would be paid.

CONCLUSIONS OF LAW

A. That a person required to collect, truthfully account for and pay over withholding taxes who wilfully fails to do so is liable to "...a penalty equal to the total amount of the tax evaded, not collected, or not accounted for and paid over." Section 685(g) of the Tax Law.

B. That section 685(n) of the Tax Law defines a person, for purposes of section 685(g) of the Tax Law, to include:

"...an individual, corporation, or partnership or an officer or employee of any corporation...who as such officer, employee or member is under a duty to perform the act in respect of which the violation occurs."

C. That the question of who is a "person" required to collect and pay over withholding taxes is to be determined on the basis of the facts presented. Some of the factors to be considered include whether petitioner owned stock, signed tax returns, or exercised authority over employees and the assets of the corporation. McHugh v. State Tax Comm., (70 A.D.2d 987, 417 N.Y.S.2d 799). Other factors to be considered are whether the person derived a substantial part of his income from the corporation or had the right to hire and fire employees. MacLean v. State Tax Comm., (69. A.D.2d 951, 415 N.Y.S.2d 492). See also Malkin v. Tully, (65 A.D.2d 228, 412 N.Y.S.2d 186).

D. That petitioner, Alfred Wonesh, was a person under a duty to collect, truthfully account for and pay withholding tax on behalf of Three Boro, and wilfully failed to do so.

E. That the petition of Alfred Wonesh is denied and the Notice of Deficiency dated September 26, 1977 is sustained.

DATED: Albany, New York

JUL 17 1981

STATE TAX COMMISSION


PRESIDENT


COMMISSIONER


COMMISSIONER

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition	:	
of	:	
BARBARA WONESH	:	DECISION
for Redetermination of a Deficiency or	:	
for Refund of Personal Income Tax under	:	
Article 22 of the Tax Law for the Years	:	
1973 and 1975.	:	

Petitioner, Barbara Wonesh, 21 Alexa Place, Red Bank, New Jersey 07701, 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 1973 and 1975 (File No. 20585).

A formal hearing was held before Herbert Carr, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on August 24, 1979 at 11:30 A.M. Petitioner appeared by Tunstead & Schechter, Esqs. (Steve Rubin, Esq., of counsel). The Audit Division appeared by Peter Crotty, Esq. (Bruce M. Zalaman, Esq., of counsel). The hearing was continued at the same location on March 27, 1980 at 10:30 A.M. before William J. Dean, Hearing Officer, with petitioner appearing by Tunstead & Schechter, Esqs. (John R. Maguire, Esq., of counsel) and the Audit Division appearing by Ralph J. Vecchio, Esq. (Angelo A. Scopellito, Esq., of counsel).

ISSUE

Whether petitioner was a person required to collect, truthfully account for and pay over withholding taxes on behalf of Three Boro Sheet Metal & Ventilating Co., Inc. and who wilfully failed to do so.

FINDINGS OF FACT

1. By a Statement of Deficiency and Notice of Deficiency dated September 26, 1977, the Audit Division notified petitioner of a deficiency in the amount of \$5,249.07 for 1973 and \$2,909.45 for 1975, for a total of \$8,158.52. Claims against petitioner related to unpaid withholding taxes of Three Boro Sheet Metal & Ventilating Co., Inc. (herein "Three Boro") for withholding tax due during the years in question, namely, from May 1, 1973 through July 31, 1973 and from January 1, 1975 through April 30, 1975

2. Petitioner, Barbara Wonesh, served as treasurer of Three Boro for a number of years.

3. In her capacity as treasurer, petitioner Barbara Wonesh had authority to sign checks for Three Boro, but did not have the authority to decide which creditors were to be paid. She did not control what amounts could be paid, nor could she take any action on her own initiative with respect to company funds.

4. Petitioner's authority to sign Three Boro's checks was granted as a matter of convenience in aid of the operation of Three Boro. Her actions as a signatory were perfunctory and were done under directions from others.

CONCLUSIONS OF LAW

A. That a person required to collect, truthfully account for and pay over withholding taxes who wilfully fails to do so is liable to "...a penalty equal to the total amount of the tax evaded, not collected, or not accounted for and paid over." Section 685(g) of the Tax Law.

B. That section 685(n) of the Tax Law defines a person, for purposes of section 685(g) of the Tax Law, to include:

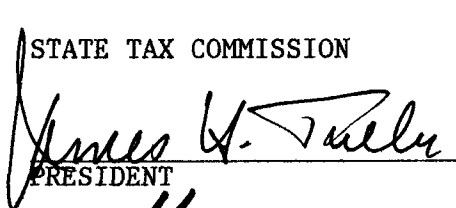
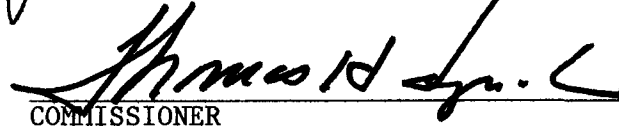
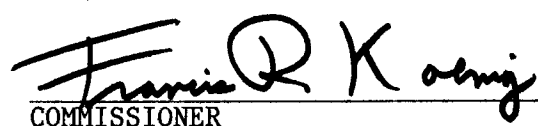
"...an individual, corporation, or partnership or an officer or employee of any corporation...who as such officer, employee or member is under a duty to perform the act in respect of which the violation occurs."

C. That the question of who is a "person" required to collect and pay over withholding taxes is to be determined on the basis of the facts presented. Some of the factors to be considered include whether petitioner owned stock, signed tax returns, or exercised authority over employees and the assets of the corporation. McHugh v. State Tax Comm., (70 A.D.2d 987, 417 N.Y.S.2d 799). Other factors to be considered are whether the person derived a substantial part of his income from the corporation or had the right to hire and fire employees. MacLean v. State Tax Comm., (69 A.D.2d 951, 415 N.Y.S.2d 492). See also Malkin v. Tully (65 A.D.2d 228, 412 N.Y.S.2d 186).

D. That petitioner, Barbara Wonesh, was not a person under a duty to collect, truthfully account for and pay over a withholding tax on behalf of Three Boro, since she had no authority to decide which creditors were to be paid, nor to make any other decision concerning the operation of the corporation or use of its assets.

E. That the petition of Barbara Wonesh is granted and the Notice of Deficiency dated September 26, 1977 is cancelled.

DATED: Albany, New York
JUL 17 1981

STATE TAX COMMISSION

PRESIDENT

COMMISSIONER

COMMISSIONER