

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition
of
Adele Amengual

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 2nd day of June, 1982, he served the within notice of Decision by certified mail upon Adele Amengual, the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Adele Amengual
314 Fulle Dr.
Valley Cottage, NY 10989

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
2nd day of June, 1982.

Charles A. Hapgood

J. Vredenburg

STATE OF NEW YORK
STATE TAX COMMISSION

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of :
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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 2nd day of June, 1982, he served the within notice of Decision by certified mail upon Joseph H. Crown the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Joseph H. Crown
c/o Tenzer, Greenblatt, Fallon & Kaplan
405 Lexington Ave.
New York, NY 10174

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
2nd day of June, 1982.

Ernie A. Heglund

J. Vredenburg

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

June 2, 1982

Adele Amengual
314 Fulle Dr.
Valley Cottage, NY 10989

Dear Ms. Amengual:

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
Law Bureau - Litigation Unit
Albany, New York 12227
Phone # (518) 457-2070

Very truly yours,

STATE TAX COMMISSION

cc: Petitioner's Representative
Joseph H. Crown
c/o Tenzer, Greenblatt, Fallon & Kaplan
405 Lexington Ave.
New York, NY 10174
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition	:	
of	:	
ADELE AMENGUAL	:	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, Adele Amengual, 314 Fulle Drive, Valley Cottage, New York 10989, filed a petition for a 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. 21934).

A formal hearing was held before Arthur Bray, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on April 30, 1981 at 3:50 P.M. Petitioner appeared by Tenzer, Greenblatt, Fallon & Kaplan, Esqs. (Joseph H. Crown, Esq., of counsel). The Audit Division appeared by Ralph J. Vecchio, Esq. (Patricia Brumbaugh, Esq., of counsel).

ISSUE

Whether petitioner is subject to a penalty in accordance with section 685(g) of the Tax Law as a person who willfully failed to collect, or truthfully account for and pay over withholding taxes on behalf of East Electric Corporation.

FINDINGS OF FACT

1. East Electric Corporation ("East Electric") failed to pay New York State personal income tax withheld from the wages of its employees in the amounts of \$2,947.90 for the period December 1, 1974 through December 31, 1974 and \$19,172.38 for the period February 1, 1975 through December 31, 1975.

2. On January 30, 1978 the Audit Division issued a Notice of Deficiency and a Statement of Deficiency against petitioner asserting a penalty equal to the amount of the unpaid New York State withholding tax due from East Electric for the periods December 1, 1974 through December 31, 1974 and February 1, 1975 through December 31, 1975.

3. East Electric was a minority-owned electrical contractor. It engaged in various construction jobs throughout New York City.

4. Fernando Rogue held the position of comptroller of East Electric from 1972 to sometime in 1976. In his capacity as comptroller, Fernando Rogue maintained the books and records of the corporation. He also prepared monthly cash budgets for the president of the corporation and managed and supervised office personnel.

5. Fernando Rogue would also prepare a monthly schedule of East Electric's liabilities, including withholding taxes, and then discuss these liabilities with the vice-president of East Electric, Mr. Samilenko. Mr. Samilenko would then decide which bills should be paid. If East Electric's income was less than its liabilities, Mr. Samilenko would decide which creditors should be given priority. Fernando Rogue would then prepare the checks whereupon they would be given to Samuel Amengual, the president of East Electric, for signature.

6. Payroll checks would be prepared manually on a weekly basis. The payroll checks would then be given to the payroll clerk, Julie Riveria. Only petitioner and her husband, Samuel Amengual, were authorized to sign checks. However, because of the number of payroll checks, they would be put through a check-signing machine. The key to the check-signing machine was kept by Julie Rivera. When Julie Rivera was given the payroll checks, she accompanied by Fernando Rogue, would take them to the machine and would activate it with the

key. The payroll checks would then go through the machine and print Samuel Amenguel's signature.

7. Prior to 1973 petitioner, Adele Amenguel, attended the University of Puerto Rico in San Juan, Puerto Rico for a period of two years.

8. In the fall of 1973 petitioner began attending Rockland Community College in Suffern, New York. Petitioner was in full-time attendance at Rockland Community College in a program in human services taking from twelve to fifteen credits each semester. Petitioner also took a couple of courses at night and on occasion would have a day off without classes. Classes would commence in September and conclude sometime in January. They would then reconvene in February and conclude in June.

9. In 1974 Julie Rivera became pregnant. However, during the period of her pregnancy she continued to work at East Electric. One particular week Julie Rivera had to go to the hospital because she was about to give birth prematurely. Fernando Rogue failed to get the key to the check-signing machine before Julie Rivera left for the hospital.

10. In the summer of 1974, petitioner went to work at East Electric during that period that Julie Rivera was unable to work. While she was at East Electric, petitioner would answer the telephone and type short letters.

11. During the period that Julie Rivera was out of the office, Fernando Rogue continued to prepare the payroll records and checks. Since Fernando Rogue did not have the key to the check-signing machine and the president of East Electirc, Samuel Amengual, was unavailable, Fernando Rogue requested petitioner to sign the payroll checks. Petitioner signed the payroll checks at this time. Petitioner only signed payroll checks during this one week period in August, 1974.

12. During this period in August, 1974 petitioner drew an East Electric check payable to herself in the amount of \$94.60.

13. When Julie Rivera returned to her employment at East Electric, the procedure of utilizing the check-signing machine was resumed.

14. Petitioner was the Secretary of East Electric. The by-laws of East Electric prescribed that the Secretary had the following duties:

- "(a) attend all meetings of the board and of the shareholders;
- (b) record all votes and minutes of all proceedings in a book to be kept for that purpose;
- (c) give or cause to be given notice of all meetings of shareholders and of special meetings of the board;
- (d) keep in safe custody the seal of the corporation and affix it to any instrument when authorized by the board;
- (e) when required, prepare or cause to be prepared and available at each meeting of shareholders a certified list in alphabetical order of the names of shareholders entitled to vote thereat, indicating the number of shares of each respective class held by each;
- (f) keep all the documents and records of the corporation as required by law or otherwise in a proper and safe manner;
- (g) perform such other duties as may be prescribed by the board."

15. Petitioner did not own any stock in East Electric.

16. Petitioner had access to the books of East Electric but did not inspect them. Petitioner never inquired whether the bills of East Electric were being paid. However, petitioner knew that taxes were owing by the end of 1974.

17. Petitioner testified that she did not supervise the employees of East Electric. However, a memorandum submitted by petitioner to the District Director of the Internal Revenue Service stated in part:

"Adele Amengual was employed by the Corporation as office manager at various times. Her duties involved supervising the

clerical staff, secretarial work pertaining to correspondence, answering the telephone, and maintaining the files of the Corporation."

It is hereby found that petitioner was employed at various times as an office manager of East Electric and that her duties included supervising the clerical staff.

18. The Internal Revenue Service asserted liability against petitioner pursuant to Internal Revenue Code Section 6672. This liability was sustained on two occasions following conferences. At the time of the hearing, this proceeding was pending before the Appellate Division of the Internal Revenue Service.

CONCLUSIONS OF LAW

A. That section 685(g) of the Tax Law provides:

"Willful failure to collect and pay over tax.-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..."

B. That in view of the facts: that petitioner was the Secretary of East Electric; that on occasion petitioner was the office manager of East Electric and had duties involving the supervision of the clerical staff; and that petitioner had the authority to sign checks, petitioner was a "person" within the meaning of Tax Law §685(g).

C. That the term "willful" as used in subdivision (g) of section 685 of the Tax Law "...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)" (Matter

of McHugh v. State Tax Comm., 70 A.D.2d 987, 989). "Knowledge that withholding taxes have not been remitted and failure to investigate or correct this mismanagement of corporate funds is enough to constitute willful conduct (citations omitted)." (Matter of MacLean v. State Tax Comm., 69 A.D.2d 951, 952, aff'd. 49 N.Y.2d 920).

D. That since petitioner was aware that the withholding taxes due were not being paid and she failed to take action to correct the mismanagement of corporate funds, petitioner's action was "willful" within the meaning of subdivision (g) of section 685 of the Tax Law.

E. That the petition of Adele Amengual is denied and the Notice of Deficiency issued January 30, 1978 is sustained.

DATED: Albany, New York

JUN 2 1982

STATE TAX COMMISSION


PRESIDENT


COMMISSIONER


COMMISSIONER