

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
 of :
 Morton Tillman :
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 :
1974. :
_____:

AFFIDAVIT OF MAILING

State of New York
County of Albany

Connie Hagelund, being duly sworn, deposes and says that she is an employee of the Department of Taxation and Finance, over 18 years of age, and that on the 9th day of April, 1982, she served the within notice of Decision by certified mail upon Morton Tillman, the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Morton Tillman
49 Shelbourne Lane
New Hyde Park, NY 11040

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
9th day of April, 1982.

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

April 9, 1982

Morton Tillman
49 Shelbourne Lane
New Hyde Park, NY 11040

Dear Mr. Tillman:

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

Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of :
Sheldon M. Bernstein :
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 :
1974. :
_____:

AFFIDAVIT OF MAILING

State of New York
County of Albany

Connie Hagelund, being duly sworn, deposes and says that she is an employee of the Department of Taxation and Finance, over 18 years of age, and that on the 9th day of April, 1982, she served the within notice of Decision by certified mail upon Sheldon M. Bernstein, the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Sheldon M. Bernstein
775 Bonnie Dr.
Baldwin, NY 11510

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
9th day of April, 1982.

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

April 9, 1982

Sheldon M. Bernstein
775 Bonnie Dr.
Baldwin, NY 11510

Dear Mr. Bernstein:

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

Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
 :
 of :
 :
 MORTON TILLMAN :
 :
 for Redetermination of a Deficiency or for :
 Refund of Personal Income Tax under Article 22 :
 of the Tax Law for the Year 1974. :

DECISION

In the Matter of the Petition :
 :
 of :
 :
 SHELDON M. BERNSTEIN :
 :
 for Redetermination of a Deficiency or for :
 Refund of Personal Income Tax under Article 22 :
 of the Tax Law for the Year 1974. :

Petitioner, Morton Tillman, 49 Shelbourne Lane, New Hyde Park, New York 11040, 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 1974 (File No. 26007).

Petitioner, Sheldon M. Bernstein, 775 Bonnie Drive, Baldwin, New York 11510, 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 1974 (File No. 26005).

A consolidated formal hearing was held before Doris E. Steinhardt, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on October 28, 1981 at 1:15 P.M. Petitioners appeared pro se. The Audit Division appeared by Ralph J. Vecchio, Esq. (James F. Morris, Esq., of counsel).

ISSUES

I. Whether petitioners were persons responsible for collecting and paying over to the State Tax Commission taxes withheld from the wages of employees of Lafayette Electric Corp., who willfully failed to do so, and are therefore liable for the penalty imposed under section 685(g) of the Tax Law.

II. Whether the Audit Division improperly applied payments received in the bankruptcy proceeding of Lafayette Electric Corp. to any post-petition withholding tax liability.

FINDINGS OF FACT

1. On October 30, 1978, the Audit Division issued to petitioner Morton Tillman a Statement of Deficiency and a Notice of Deficiency, asserting penalties equal to the amount of New York State withholding taxes of Lafayette Electric Corp. ("Lafayette") which were due and unpaid for the year 1974 in the amount \$4,467.06.

On the same date, the Audit Division issued to petitioner Sheldon M. Bernstein a Statement of Deficiency and a Notice of Deficiency, asserting penalties equal to the amount of New York State withholding taxes of Lafayette which were due and unpaid for 1974 in the amount \$4,467.06.

The Statement of Deficiency issued to both petitioners indicated that the withholding tax period at issue was September 1 through September 30, 1974.

2. The Audit Division advised the Tax Appeals Bureau of the State Tax Commission, by memorandum dated October 28, 1980, that the liability of Lafayette for unpaid withholding taxes for the period September 1 through November 13, 1974 had been reduced to \$4,009.56.

3. At the formal hearing, counsel for the Audit Division stipulated that Lafayette had filed bankruptcy under Chapter 11 and that the Audit Division received two payments in that matter in the amounts of \$2,816.70 and \$173.91.

4. Mr. Tillman was vice-president of Lafayette. His primary duties were in marketing, and he supervised sales personnel.

Mr. Bernstein is a certified public accountant who performed bookkeeping for the corporation, although tax returns were prepared by outside accountants. Mr. Bernstein also participated in sales and distribution. He signed the 1973 franchise tax report on June 13, 1974 as secretary of the corporation; on Schedule F (Officers and Certain Stockholders) of said report, he is listed as secretary-treasurer. The franchise tax report for 1974, signed by the trustee in bankruptcy on July 25, 1975, also indicates Mr. Bernstein's position as secretary-treasurer.

5. Lafayette was the wholly-owned subsidiary of Tilar Industries, Inc. ("Tilar"), a holding company which owned two other subsidiaries. Both petitioners were shareholders in and officers of Tilar.

6. Eight persons, including Mr. Tillman and Mr. Bernstein, were authorized to write checks on the Lafayette corporate account. Two signatures were required on each check. Petitioners did, in fact, write checks on the account.

7. Franklin National Bank had provided financing to Lafayette until the bank ceased operations in June, 1974. Thereafter, Trefoil Capital Corp. ("Trefoil") and Lafayette entered into a financing arrangement, apparently as the result of a conversation or meeting between Mr. Bernstein and a former employee of European American Bank who took a position with Trefoil. Trefoil advanced funds to Lafayette, secured by the accounts receivable and inventory.

8. During the summer of 1974, Lafayette began to experience financial difficulties. By mid-August, the corporation's finances had so declined that Trefoil stationed two to four employees on Lafayette's premises each business day to assume the tasks of accounts receivable bookkeepers. All incoming funds were received by Trefoil personnel and deposited to a special Lafayette account. Petitioners stated that they had no alternative but to accede to this arrangement; Trefoil otherwise threatened to cease all advancements to Lafayette.

9. All funds were disbursed by Trefoil employees. According to Mr. Bernstein, he and Mr. Tillman constantly argued with Trefoil concerning which creditors should be paid and frequently raised the issue of the accruing tax liabilities.

10. Trefoil retained its own accountants who prepared the tax returns necessary from mid-August through November, 1974.

11. All but approximately six employees left Lafayette for other jobs, because wages were paid only intermittently. Those who stayed on, including petitioners, had their salaries reduced. For the last six weeks prior to the filing in bankruptcy, petitioners were not occupied full-time at Lafayette.

12. In November, 1974, petitioners retained an attorney to prepare the petition in bankruptcy. Said petition was filed by Mr. Tillman and Mr. Bernstein on November 13, 1974.

13. Lafayette had been in business for over 50 years and according to Mr. Tillman, the corporation had an excellent tax compliance record.

14. It is petitioners' position that from mid-August, 1974 forward, they exercised no control over Lafayette and had no power to pay any expenses or

taxes owed by the corporation. In addition, petitioners allege that a portion of or all funds paid over to the State Tax Commission in the bankruptcy proceeding were misapplied to the post-petition tax liability.

15. Neither the Audit Division nor petitioners produced at the hearing copies of payroll tax returns filed by Lafayette or any other corporate books or records. Petitioners did, however, produce a copy of this Commission's amended claim in the bankruptcy proceeding, in the amount of \$4,009.56 plus interest of \$29.13.

16. Petitioners made requests of Lafayette's former accountants and the trustee in bankruptcy for access to any corporate books and records. They were able to examine only a few bank statements.

CONCLUSIONS OF LAW

A. That petitioners, Morton Tillman and Sheldon M. Bernstein, were persons required to collect, truthfully account for and pay over taxes withheld from the wages of employees of Lafayette Electric Corp. Section 685(g) and (n) of the Tax Law.

Petitioners were shareholders and officers of the parent corporation and officers of Lafayette. They were authorized signatories and signed checks on the Lafayette corporation account. Petitioners signed and filed the petition in bankruptcy on November 13, 1974. And Mr. Bernstein made the arrangements with Trefoil whereby the latter financed Lafayette's operations.

B. That petitioners' failure to truthfully account for and pay over the taxes was willful. Section 685(g) of the Tax Law. They entered into, acceded to and continued the financing arrangements with Trefoil under which other

creditors were preferred to New York State. They were fully aware that the withholding tax liability was accruing. They were free to rescind the agreement with Trefoil if it involved them in breaches of the duties imposed upon them under sections 671 and 674 of the Tax Law. Kalb v. United States, 505 F. 2d 506 (2d Cir. 1974).

C. That petitioners adduced no proof that the amount of withholding taxes asserted by the Audit Division as due from Lafayette was erroneous. Section 689(e) of the Tax Law. The memorandum from the Audit Division to the Tax Appeals Bureau and this Commission's amended claim in the bankruptcy proceeding corroborate the amount of penalty as set forth in the statements of deficiency and notices of deficiency issued to petitioners. Said memorandum and claim also clarify that the period at issue was September 1 through November 13, 1974.

Nor have petitioners adduced any proof that payments received in the bankruptcy matter were improperly applied to any period after November 13, 1974.

D. That, in accordance with Findings of Fact 2 and 3, the penalties asserted against petitioners are reduced to \$1,018.95 each.

E. That the petition of Morton Tillman is granted to the extent indicated in Conclusion of Law "D"; the Notice of Deficiency issued October 30, 1978 is to be modified accordingly; and except as so modified, the deficiency is in all other respects sustained.

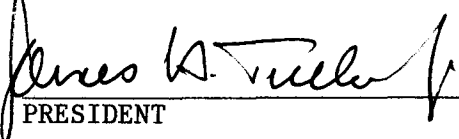
The petition of Sheldon M. Bernstein is granted to the extent indicated in Conclusion of Law "D"; the Notice of Deficiency issued October 30, 1978 is

to be modified accordingly; and that except as so modified, the deficiency is in all other respects sustained.

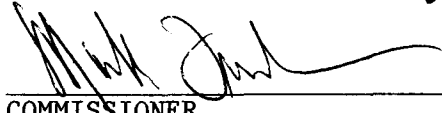
DATED: Albany, New York

APR 09 1982

STATE TAX COMMISSION


PRESIDENT


COMMISSIONER


COMMISSIONER