

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition of James Harbison	: : :	: : :
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 & 1974.		: :

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 13th day of August, 1982, he served the within notice of Decision by certified mail upon James Harbison, the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

James Harbison
4041 Ransomville Rd.
Ransomville, NY 14131

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
13th day of August, 1982.

Connie A. Hageland

J. Vredenburg

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of :
James Harbison :

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 & 1974. :

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 13th day of August, 1982, he served the within notice of Decision by certified mail upon Donald N. Fries the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Donald N. Fries
1104 Walbridge Bld.
Buffalo, NY 14202

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
13th day of August, 1982.




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

August 13, 1982

James Harbison
4041 Ransomville Rd.
Ransomville, NY 14131

Dear Mr. Harbison:

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
Donald N. Fries
1104 Walbridge Bld.
Buffalo, NY 14202
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition
of
JAMES HARBISON
for Redetermination of a Deficiency or for
Refund of Personal Income Tax under Article 22 :
of the Tax Law for the Years 1973 and 1974.

DECISION

Petitioner, James Harbison, 4041 Ransomville Road, Ransomville, New York 14131, 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 1974 (File No. 16274).

A formal hearing was held before Alan R. Golkin, Hearing Officer, at the offices of the State Tax Commission, State Office Building, 65 Court Street, Buffalo, New York, on March 20, 1979 at 2:45 P.M. The hearing was continued to conclusion before Allen R. Golkin, Hearing Officer, at the same offices on March 21, 1979 at 8:45 A.M. Petitioner appeared by Donald N. Fries, Esq. The Audit Division appeared by Peter Crotty, Esq. (Alexander Weiss, Esq., of counsel).

ISSUE

Whether petitioner was a person required to collect, truthfully account for and pay over personal income taxes withheld from employees of Dressing Transport, Inc. for 1973 and 1974.

FINDINGS OF FACT

1. On June 28, 1976, the Audit Division issued a Statement of Deficiency and a Notice of Deficiency against petitioner, James Harbison, asserting penalties equal to the amount of New York withholding taxes of Dressing Transport,

Inc. (hereinafter "the corporation") which were due and unpaid for the periods at issue, as follows:

<u>WITHHOLDING TAX PERIOD</u>	<u>DEFICIENCY</u>
1/1/73 - 12/31/73	\$4,151.00
1/1/74 - 3/31/74	400.40
TOTAL	<u>\$4,551.40</u>

2. From January 1, 1973 through April 12, 1973, petitioner, as president of the corporation, was a corporate officer and employee of the corporation, though he actually had nothing to do with filing or paying of the New York State withholding taxes.

3. Ernest LaFever held the title of vice-president and treasurer of the corporation. He was responsible for the payroll and withholding taxes for January, February and March of 1973. During the second quarter of 1973, April through June, Ernest LaFever and his wife, the secretary, handled the corporation's checks and payroll. Neither Mr. LaFever nor his wife had authority to write checks during these periods. Both petitioner and Ernest LaFever were the only shareholders of the corporation.

4. Petitioner had a checking account with the Marine Midland Bank ("Marine") and exercised check-signing authority from January 3, 1973 to at least June, 1973 because the corporation's bank refused to accept the other corporate officer as a signatory.

5. After April 12, 1973, petitioner had no role in corporate decision-making, and, in fact, did nothing other than sign some checks to protect himself and Marine through which he had borrowed money. His remaining duties consisted of dispatching incoming and outgoing freight.

6. Petitioner did not know that the withholding taxes had gone unpaid since Ernest LaFever made a point of showing petitioner a group of checks made

out to various taxing authorities. As a result, petitioner assumed that all withholding taxes had been paid though, in fact, said checks were never mailed.

7. In late July, 1973, Manufacturers and Traders Trust Co. ("M & T") loaned money to Ernest LaFever in order that he could take over the corporation. In August of 1973, Mr. LaFever opened a M & T corporate account in which only he had check-signing authority. Petitioner signed a formal statement of resignation from the corporation on April 12, 1973, at which time the corporation had obtained financing to clear up its obligations and release petitioner who was bound by earlier financing.

8. During August of 1973, petitioner lessened his financial obligations to Marine by turning over all corporate checkbooks and channeling all accounts receivable directly to Marine. Thereafter, no checks could be written on the Marine account. The accounts receivable were used to pay off loans which petitioner obtained from Marine.

9. Petitioner stated that the last time he went to the premises of the corporation for business purposes was August 19, 1973. He also stated that after he resigned as stockholder and officer of the corporation he continued to have authority to sign checks and in fact did since Marine would not do business with Mr. LaFever.

10. Dressing Transport, Inc. was adjudicated bankrupt on October 23, 1974.

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."

B. That 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."

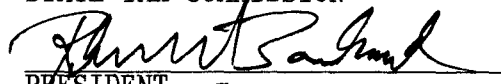

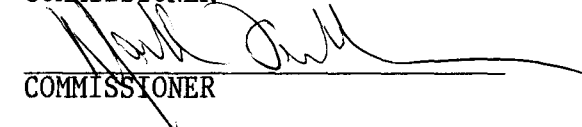
C. That the question of whether petitioner is a "person" required to collect and pay over withholding taxes is a factual one (Matter of Malkin v. Tully, 65 A.D.2d 228, 412 N.Y.S.2d 186).

D. That petitioner had the final word as to what bills should or should not be paid and when (see Dudley v. United States, 428 F. 2d 1196 (1970) and Wilson v. United States, 250 F. 2d 316). Although petitioner resigned April 12, 1973 he had authority to sign checks until August 19, 1973, and in fact did sign checks after the date of his resignation.

E. That petitioner, James Harbison, was a person required to collect, truthfully account for and pay over New York State withholding taxes due from Dressing Transport, Inc. for the period January 1, 1973 through August 19, 1973, within the meaning and intent of subdivisions (g) and (n) of section 685 of the Tax Law; therefore, he is liable to penalty under section 685(g) of the Tax Law.

F. That the petition of James Harbison is granted to the extent indicated in Conclusion of Law "E" supra; and that, except as so granted, the petition is in all other respects denied.

DATED: Albany, New York
AUG 13 1982

STATE TAX COMMISSION
ACTING 
PRESIDENT

COMMISSIONER

COMMISSIONER