

STATE TAX COMMISSION

AFFIDAVIT OF MAILING

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 9th day of November, 1982, he served the within notice of Decision by certified mail upon Ringland F. Kilpatrick, the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

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.

Sworn to before me this
9th day of November, 1982.

AUTHORIZED TO ADMINISTER
OATHS PURSUANT TO TAX LAW
SECTION 174

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

November 9, 1982

Ringland F. Kilpatrick
250 Beach Rd.
Tequesta, FL 33458

Dear Mr. Kilpatrick:

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
John K. Antholis
Edwards & Antholis
95 Madison Ave.
Morristown, NJ 07960
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition
of
RINGLAND F. KILPATRICK
for Redetermination of a Deficiency or for
Refund of Personal Income Tax under Article 22
of the Tax Law for the Year 1975.

:
:
:
:
:
:
:

DECISION

Petitioner, Ringland F. Kilpatrick, 250 Beach Road, Tequesta, Florida 33458, 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 1975 (File No. 23844).

A formal hearing was held before Julius E. Braun, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on December 14, 1981 at 2:45 P.M. Petitioner appeared by John K. Antholis, Esq. The Audit Division appeared by Ralph J. Vecchio, Esq. (Thomas Sacca, Esq., of counsel).

ISSUE

Whether petitioner willfully failed to collect, truthfully account for and pay over withholding taxes due from Olin of New York, Inc. for the year 1975.

FINDINGS OF FACT

1. Olin of New York, Inc. ("Olin"), 5100 Northern Boulevard, Woodside, New York, failed to pay over to the New York State Income Tax Bureau personal income taxes withheld from its employees' wages for the period August 16, 1975 through October 23, 1975 in the amount of \$24,757.59.

2. On June 26, 1978, the Audit Division issued a Statement of Deficiency and a Notice of Deficiency against Ringland F. Kilpatrick imposing a penalty

equal to the amount of unpaid New York State withholding taxes due from Olin for the period August 16, 1975 through October 23, 1975 in the amount of \$24,757.59.

3. Ringland F. Kilpatrick was the president and major stockholder of Olin, a car rental agency. From July 1, 1975, his activities were primarily directed towards attempting to rescue the corporation from its financial difficulties and attempting to secure additional lines of credit and obtaining insurance for the fleet of automobiles. He was a director and had authority to sign checks and file tax returns on behalf of the corporation.

4. Petitioner claimed that despite inability to directly supervise the day-to-day management, he recognized his responsibilities as chief operating officer and, especially, the corporate tax obligations. He alleged that he instructed the treasurer, assistant treasurer and controller that taxes receive top priority. On inquiry, he was assured that tax payments were current. Not until the corporation filed for bankruptcy did he ascertain that taxes were not paid. Petitioner argued that he was not willful in failing to collect, account for or pay over the taxes required to be withheld by Olin.

5. On October 23, 1975, Olin filed a Chapter XI petition for bankruptcy.

6. Petitioner further claimed that had he personally known of the outstanding liability, the corporation could have paid the taxes. Olin had gross sales of \$17,000,000 and the amount owed was less than three quarters of one percent of total sales on an annualized basis.

CONCLUSIONS OF LAW

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

"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 section 685(n) of the Tax Law defines the term "person" to include, inter alia, an officer or employee of a corporation who "is under a duty to perform the act in respect of which the violation occurs."

C. That passive delegation of an important duty by a corporate officer does not relieve him of his own responsibility. (Matter of Emanuel Kopell, State Tax Commission, May 1, 1974.)

D. That "willful" failure includes actions of responsible corporate officers who disregard their fiduciary duty by delegating their responsibilities. (Rosemarie Ragonesi, et al. v. State Tax Comm., ___ A.D.2d ___, 3d Dept. May 13, 1982.)

E. That petitioner Ringland F. Kilpatrick was a person required to collect, truthfully account for and pay over New York State withholding tax due from Olin within the meaning of subdivisions (n) and (g) of section 685 of the Tax Law. Accordingly, petitioner is subject to a penalty equal to said sum under subsection (g) of section 685 of the Tax Law.

F. That the petition of Ringland F. Kilpatrick is denied and the Notice of Deficiency issued June 26, 1978 is sustained.

DATED: Albany, New York

NOV 09 1982

STATE TAX COMMISSION

ACTING

PRESIDENT

COMMISSIONER

COMMISSIONER