

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition
of
Stanley Peckins

:
:
: 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 Year :
1974.

State of New York
County of Albany

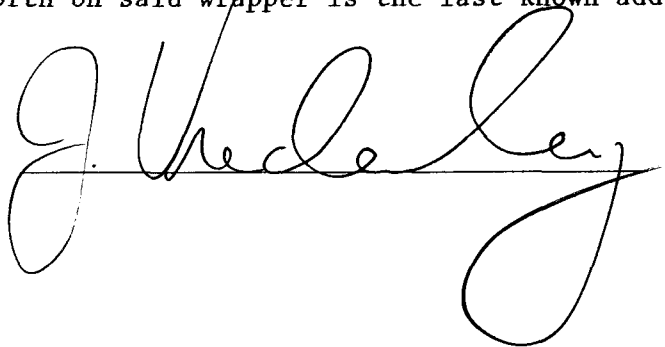
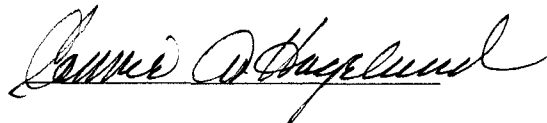
Jay Vredenburg, being duly sworn, deposes and says that he is an employee of the Department of Taxation and Finance, over 18 years of age, and that on the 12th day of October, 1982, he served the within notice of Decision by certified mail upon Stanley Peckins, the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Stanley Peckins
12 Chainwood Drive
Suffern, NY 10901

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
12th day of October, 1982.



AUTHORIZED TO ADMINISTER
OATHS PURSUANT TO TAX LAW
SECTION 174

STATE OF NEW YORK

STATE TAX COMMISSION

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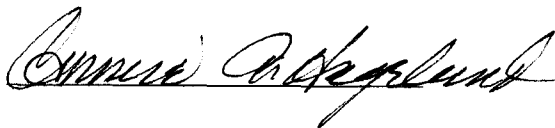
Jay Vredenburg, being duly sworn, deposes and says that he is an employee of the Department of Taxation and Finance, over 18 years of age, and that on the 12th day of October, 1982, he served the within notice of Decision by certified mail upon Richard Levine the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

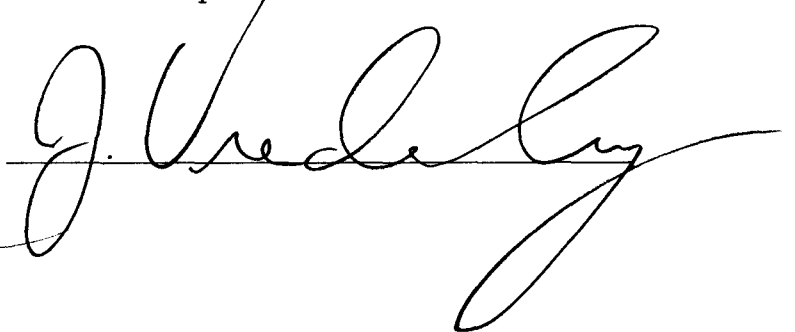
Richard Levine
990 Deer Park Ave.
N. Babylon, NY 11703

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
12th day of October, 1982.





AUTHORIZED TO ADMINISTER
OATHS PURSUANT TO THE TAX
SECTION 174

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

October 12, 1982

Stanley Peckins
12 Chainwood Drive
Suffern, NY 10901

Dear Mr. Peckins:

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
Richard Levine
990 Deer Park Ave.
N. Babylon, NY 11703
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

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

Petitioner, Stanley Peckins, 12 Chainwood Drive, Suffern, New York 10901, 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. 22927).

A formal hearing was commenced before Arthur Bray, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on January 11, 1982 at 1:40 P.M. and continued to conclusion before Arthur Bray, Hearing Officer, at the same offices, on January 12, 1982 at 3:10 P.M. Petitioner appeared by Richard Levine, Esq. The Audit Division appeared by Paul B. Coburn Esq. (Patricia L. Brumbaugh, Esq., of counsel).

ISSUE

Whether petitioner was a person required to collect, truthfully account for, and pay over personal income taxes withheld from the employees of Atlantic Linotype Co., Inc. for the year 1974 and, if so, whether this obligation was discharged in bankruptcy.

FINDINGS OF FACT

1. Atlantic Linotype Co., Inc. ("Atlantic Linotype") failed to pay New York State income taxes withheld from the wages of the employees carried on its books in the amount of \$9,825.33 for the period October 1, 1974 through December 31, 1974.

2. On May 22, 1978, the Audit Division issued a Notice of Deficiency against petitioner, Stanley Peckins, imposing a penalty against him equal to the amount of unpaid New York State withholding taxes due from Atlantic Linotype for the withholding tax period October 1, 1974 through December 31, 1974. The accompanying Statement of Deficiency explained that the penalty was issued on the ground that petitioner was a person required to collect, truthfully account for, and pay over the taxes at issue and that he willfully failed to do so.

3. During the period at issue, petitioner was a vice-president of Atlantic Linotype, which was owned by Emanuel Potash. The company provided typesetting services for its customers. Emanuel Potash owned three other companies that were involved in the printing business - Sterling Lithoplate Service, Inc. ("Sterling Lithoplate"); Taylor Made Rule Company ("Taylor Made Rule"); and Microlite. A fourth company, which provided printing related services, Computex, was owned by Michael Potash, the son of Emanuel Potash. In August, 1973 Michael Potash died and the ownership of the company vested in Michael Potash's widow.

4. Sterling Lithoplate provided lithographic services for its customers. Taylor Made Rule produced material from lead that would be utilized for spacing on forms. Taylor Made Rule also sold equipment as an agent for certain companies. Microlite was a company that provided service through the use of a particular type of printing plate. Computex provided photographic typesetting service. All of the employees of the above-mentioned companies were carried on the books of Atlantic Linotype.

5. Generally, there was a division of clients between the various corporations depending upon the type of work to be performed. However, there were occasions where more than one corporation would be involved in the production

of a particular product. On such occasions billing would be determined by the nature of the work done.

6. Petitioner performed sales related services for each of the corporations. During the period at issue petitioner was principally involved with the area of sales and production for Sterling Lithoplate. Petitioner's duties for Sterling Lithoplate entailed sales, customer contact, estimating the cost of a project for a customer, billing and seeing to it that schedules were maintained based upon the agreement with customers. Upon completing a sale, petitioner would discuss the customer's order with the plant manager of the respective corporation. However, petitioner never acted as a manager of the respective plant. Petitioner also performed similar work for Atlantic Linotype on a limited basis as an accommodation.

7. Petitioner did not own any stock in Atlantic Linotype.

8. Petitioner did not prepare Atlantic Linotype's franchise tax reports.

9. Atlantic Linotype maintained a payroll account and a general account to meet its expenses. Only net wages were paid from the payroll account. Withholding taxes were paid from the general account. Petitioner became authorized to sign checks drawn on the general account of Atlantic Linotype on June 5, 1973 in order to be available for an emergency. However, petitioner never signed a check drawn on Atlantic Linotype's general account through December 31, 1974. Petitioner was not authorized to sign checks drawn on Atlantic Linotype's payroll account until January, 1975.

10. Esther Schneiderman was the bookkeeper of Atlantic Linotype. As bookkeeper, Esther Schneiderman would prepare an analysis of Atlantic Linotype's bills and then present the bills and the analysis to Emanuel Potash. Emanuel

Potash would then direct Esther Schneiderman as to which bills to draft a check for and pay.

11. Esther Schneiderman also computed the amount of withholding tax due and prepared Atlantic Linotype's withholding tax returns. Thereafter, an accountant would verify the accuracy of Esther Schneiderman's computations. If Esther Schneiderman's computations were correct she would draft a check for the amount due. Ms. Schneiderman would then place the check and the forms in a folder and give them to Emanuel Potash. Petitioner was not involved in the preparation of withholding taxes through December 31, 1974.

12. The hiring and firing of employees would be performed by the respective managers of the various plants. These managers reported directly to Emanuel Potash. If petitioner sought to have an employee dismissed he would discuss it with Emanuel Potash who would then present petitioner with the option of either finding a new employee or performing the work himself.

13. In the middle of 1974 petitioner stopped drawing a salary from Atlantic Linotype because Atlantic Linotype's financial position became strained.

14. While sales were generated in New York, operations were performed in both New York and Florida. Until 1974, a majority of petitioner's time was spent in New York. During 1974 about fifty percent of petitioner's time was spent in New York.

15. In January, 1975 an offer was made by Atlantic Linotype and accepted by Bankers Trust Company that some of the employees would continue working for Atlantic Linotype and be paid by revenues generated by their production. The balance of revenue would be paid to Bankers Trust Company in satisfaction of Atlantic Linotype's debt. Petitioner was involved with this arrangement to the

extent that he would discuss the payment of taxes with the bank. However, the bank made the payment of the taxes which were withheld in 1975.

16. When petitioner initially assumed some responsibility for the payment of withholding taxes in 1975 he was not aware that withholding taxes had not been paid to New York State. On January 31, 1975, petitioner, at the direction of Emanuel Potash, signed a reconciliation of personal income tax withheld form which showed that \$43,424.79 had been withheld from the employees on the books of Atlantic Linotype and that a payment of \$33,599.26 had been made. Petitioner did not make a payment of the withholding taxes due at this time.

17. On February 13, 1975, Bankers Trust Company took control of the funds in the bank accounts of Atlantic Linotype and the related companies. There were sufficient funds in the bank accounts of Atlantic Linotype to satisfy Atlantic Linotype's withholding tax liability prior to Bankers Trust Company's action of February 13, 1975.

18. In April, 1975, petitioner was sued by Bankers Trust Company on the basis that petitioner was the guarantor of certain loans which Bankers Trust Company had made to the various corporations. Petitioner had guaranteed the loans at the request of Emanuel Potash in the early 1970's. Subsequently, petitioner was discharged from the liability in bankruptcy.

19. Emanuel Potash died in September, 1980. At the hearing, petitioner's representative maintained that the only reason liability was assessed against petitioner was that the truly responsible officer had died.

20. Petitioner was a "responsible person" during the period that Atlantic Linotype operated in 1975.

CONCLUSIONS OF LAW

A. That petitioner's duties in 1974, noted in Finding of Fact "6", did not render him a "person" within the meaning of section 685(n) of the Tax Law under a duty to collect, truthfully account for, and pay over taxes withheld from the employees on the books of Atlantic Linotype in 1974.

B. That petitioner has failed to sustain his burden of proof of establishing that the corporate funds available when he became a responsible person in 1975 were not impressed with a trust under section 675 of the Tax Law (Tax Law §689(e); Compare Brown v. United States, 591 F.2d 1136 with Slodov v. United States, 436 U.S. 238). Therefore, petitioner was a "person" within the meaning of section 685(n) of the Tax Law under the duty imposed by section 685(g) of the Tax Law to collect, truthfully account for and pay over the withholding taxes due from Atlantic Linotype for 1974.

C. That petitioner's duty under section 685(g) of the Tax Law was not discharged in bankruptcy (United States v. Sotelo, 436 U.S. 268, reh. den., 438 U.S. 907).

D. That the petition of Stanley Peckins is denied and the Notice of Deficiency issued May 22, 1978 is sustained.

DATED: Albany, New York

STATE TAX COMMISSION

OCT 12 1982

ACTING PRESIDENT
COMMISSIONER
COMMISSIONER