

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :

of

Lawrence Peska :

AFFIDAVIT OF MAILING

for Redetermination of a Deficiency or for Refund :
of Personal Income Tax under Article 22 of the Tax
Law and Chapter 46, Titles T and/or U of the :
Administrative Code of the City of New York for the
Years 1977 & 1978.

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 Lawrence Peska, the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Lawrence Peska
12 Frederick St.
Garnerville, NY 10923

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

Lawrence Peska
12 Frederick St.
Garnerville, NY 10923

Dear Mr. Peska:

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	:	
LAWRENCE PESKA	:	DECISION
for Redetermination of a Deficiency or for	:	
Refund of Personal Income Tax under Article 22	:	
of the Tax Law and Chapter 46, Titles T and/or U	:	
of the Administrative Code of the City of New	:	
York for the Years 1977 and 1978.	:	

Petitioner, Lawrence Peska, 12 Frederick Street, Garnerville, New York 10923, filed a petition for redetermination of a deficiency or for refund of New York State personal income tax under Article 22 of the Tax Law, New York City personal income tax and /or New York City non-resident earnings tax under Chapter 46 Titles T and U of the Administrative Code of the City of New York for the years 1977 and 1978 (File No. 24372).

A small claims hearing was held before Harry Huebsch, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on July 6, 1981 at 1:15 P.M. Petitioner, Lawrence Peska, appeared pro se. The Audit Division appeared by Ralph J. Vecchio, Esq. (William Fox, Esq., of counsel).

ISSUES

I. Whether petitioner, Lawrence Peska, is liable for a penalty equal in amount to the unpaid New York State and New York City withholding taxes due from Lawrence Peska Assoc., Inc.

II. Whether the Audit Division has properly determined the amount of unpaid withholding taxes due and owing from Lawrence Peska Assoc., Inc. for the period December 16, 1977 to January 18, 1978.

FINDINGS OF FACT

1. Under date of November 27, 1978 the Audit Division issued a Statement of Deficiency to petitioner imposing a penalty, pursuant to section 685(g) of the Tax Law, in an amount equal to the alleged unpaid withholding taxes due from Lawrence Peska Assoc., Inc. (hereinafter "Peska") for the periods September 16, 1977 to September 30, 1977 and December 16, 1977 to January 18, 1978. Said statement was issued on the grounds that petitioner was a person required to collect, truthfully account for and pay over the New York State and New York City withholding taxes of Peska and that he willfully failed to do so. Accordingly, on November 27, 1978 a Notice of Deficiency was issued against petitioner in the amount of \$2,503.74, said amount computed in the following manner:

<u>PERIOD</u>	<u>NEW YORK STATE</u>	<u>NEW YORK CITY</u>	<u>TOTAL</u>
09/16/77 - 09/30/77	\$434.80	\$141.94	\$ 576.74
12/16/77 - 12/31/77	666.00	217.00	883.00
01/01/78 - 01/18/78	792.00	252.00	1,044.00
Total			<u>\$2,503.74</u>

2. Peska filed Form IT-2101, Employer's Return of Tax Withheld, for the semi-monthly period September 16, 1977 to September 30, 1977, indicating New York State tax withheld of \$434.80 and New York City tax withheld of \$141.94, for a total of \$576.74. Although required, the \$576.74 was not paid by Peska with the filing of Form IT-2101. The Audit Division estimated the amounts of New York State and New York City tax withheld and due from Peska for the periods ending December 31, 1977 and January 18, 1978.

3. Petitioner, Lawrence Peska, was president of Peska during the periods involved in this proceeding. Prior to October 7, 1977, Peska filed a petition for arrangement under Chapter 11 of Title 11, Bankruptcy, United States Code.

Pursuant to the written order of Bankruptcy Judge Joel Lewittes, dated October 7, 1977, Peska was authorized to continue business as a debtor in possession.

4. In accordance with Judge Lewittes' order, Peska was

"...authorized to employ its president, Lawrence Peska, for services rendered as its chief operating officer, and his compensation to be fixed at the local Rule XI-4 being subject thereafter to further order of the Court."

Said order also provided:

"That the debtor in possession (Peska) be and it hereby is authorized from time to time, until further order of this Court, out of the funds heretofore or hereafter coming into its possession, to pay all necessary current expenses..." and "That the officers of the debtor in possession are hereby authorized to make all payments and to draw all checks..." and "That the debtor in possession segregate and hold apart from other funds, all moneys withheld or collected for taxes under any law of any state or subdivision thereof and deposit the same in a separate designated bank account not later than within the calendar week next succeeding such collection or withholding; said funds may be withdrawn from said bank account only to pay the proper authorities the appropriate amounts at the times and in the manner prescribed by law."

5. Petitioner admitted that he was a responsible person for the withholding taxes due for the period September 16, 1977 to September 30, 1977, but contended that moneys were set aside for payment of said taxes. Petitioner also argued that after October 7, 1977, the effective date that Peska began conducting business as a debtor in possession, that he lost control of the affairs of Peska, which he alledged were taken over by the trustee in bankruptcy. It was also asserted by petitioner that the amounts of tax withheld and due from Peska for the periods ending December 31, 1977 and January 18, 1978, as estimated by the Audit Division, were excessive in that Peska ceased doing business on January 4, 1978 and all employees were dismissed.

6. Petitioner was allowed a period of 30 days from the close of the hearing held herein within which to submit documentary or other evidence in

support of the arguments enumerated in Finding of Fact "5", supra. The time frame was thereafter extended to September 20, 1981. No documentary or other credible evidence was submitted by petitioner.

CONCLUSIONS OF LAW

A. That the personal income tax imposed by Chapter 46, Title T of the Administration Code of the City of New York is by its own terms tied into and contains essentially the same provisions of Article 22 of the Tax Law. Additionally, the non-resident earnings tax imposed by Chapter 46, Title U of said Administrative Code as it relates to the issue presented herein contains essentially the same provisions as Article 22 of the Tax Law. Therefore, all references to particular sections of Article 22 shall be deemed references (though uncited) to the corresponding sections of Chapter 46, Titles T and U.

B. That subsection (e) of section 689 of the Tax Law places the burden of proof upon the petitioner to overcome a deficiency. That petitioner, Lawrence Peska, has failed to sustain the burden of proof to show that he was not a person required to collect, truthfully account for and pay over the New York State and New York City withholding taxes due and owing from Peska for the periods ending September 30, 1977, December 31, 1977 and January 18, 1978, within the meaning and intent of subsections (g) and (n) of section 685 of the Tax Law.

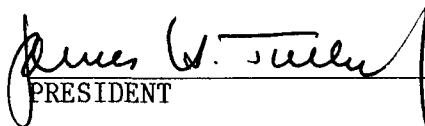
C. That petitioner has failed to sustain the burden of proof to show that the amounts of tax withheld and not remitted by Peska, as determined by the Audit Division, were incorrect and "...through his complete failure to present any proof as to the incorrectness of the statement of deficiency, has surrendered to the statutory presumption of correctness..." (Tavolacci v. State Tax Commission, 77 A.D.2d 759, 431 N.Y.S.2d 174).

D. That the petition of Lawrence Peska is denied and the Notice of Deficiency dated November 27, 1978 is sustained.

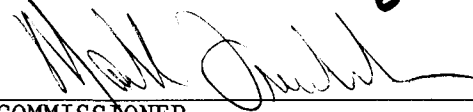
DATED: Albany, New York

APR 09 1982

STATE TAX COMMISSION


PRESIDENT


COMMISSIONER


COMMISSIONER