

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :  
of :  
David Saunders :

AFFIDAVIT OF MAILING

for Redetermination of a Deficiency or a Revision :  
of a Determination or a Refund of NYS & NYC Income :  
Tax under Article 22 & 30 of the Tax Law for the :  
Years 1976 & 1977. :

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 8th day of September, 1982, he served the within notice of Decision by certified mail upon David Saunders, the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

David Saunders  
5C Avon Circle  
Portchester, NY 10573

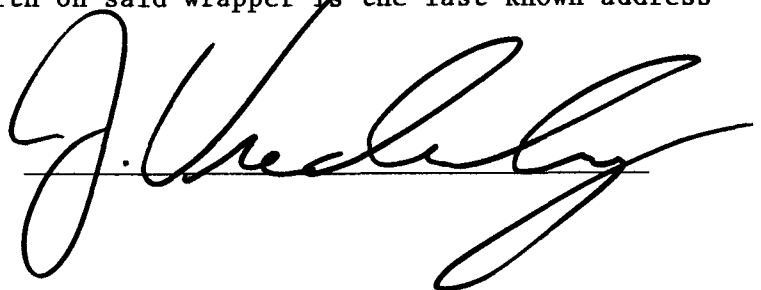
and by depositing same enclosed in a postpaid properly addressed wrapper in a (post office or official depository) under the exclusive care and custody of the United States Postal Service within the State of New York.

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  
8th day of September, 1982.



AUTHORIZED TO ADMINISTER  
OATHS PURSUANT TO TAX LAW  
SECTION 174



STATE OF NEW YORK

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for Redetermination of a Deficiency or a Revision :  
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Tax under Article 22 & 30 of the Tax Law for the :  
Years 1976 & 1977. :

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 8th day of September, 1982, he served the within notice of Decision by certified mail upon Herbert Kushner the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Herbert Kushner  
271 North Ave., Suite 803  
New Rochelle, NY 10801

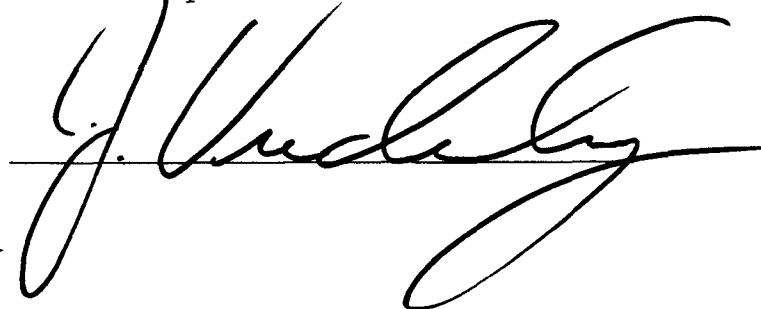
and by depositing same enclosed in a postpaid properly addressed wrapper in a (post office or official depository) under the exclusive care and custody of the United States Postal Service within the State of New York.

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  
8th day of September, 1982.



AUTHORIZED TO ADMINISTER  
OATHS PURSUANT TO TAX LAW  
SECTION 174



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

September 8, 1982

David Saunders  
5C Avon Circle  
Portchester, NY 10573

Dear Mr. Saunders:

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 & 1312 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  
Herbert Kushner  
271 North Ave., Suite 803  
New Rochelle, NY 10801  
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition

of

DAVID SAUNDERS

DECISION

for Redetermination of a Deficiency or for  
Refund of Personal Income Tax under Article 22  
of the Tax Law for the Years 1976 and 1977 and  
under Article 30 of the Tax Law for the Year  
1976.

Petitioner, David Saunders, 5C Avon Circle, Port Chester, New York 10573, 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 1976 and 1977 and under Article 30 of the Tax Law for the year 1976 (File No. 25963).

A 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 January 27, 1982 at 2:45 P.M. Petitioner appeared by Herbert M. Kuschner, CPA. The Audit Division appeared by Paul B. Coburn, Esq. (Irwin Levy, Esq., of counsel).

ISSUE

Whether petitioner was a person required to collect, truthfully account for and pay over withholding taxes of Graybarn Enterprises, Inc., d/b/a Spaghetti Works, during the periods at issue, who willfully failed to do so, and is therefore liable for the penalty imposed under subdivision (g) of section 685 of the Tax Law.

FINDINGS OF FACT

1. On December 18, 1978, the Audit Division issued to petitioner, David Saunders, a Statement of Deficiency asserting penalties equal to the amount of

New York State withholding taxes of Graybarn Enterprises, Inc. ("Graybarn"), d/b/a Spaghetti Works, which were due and unpaid for the periods July 1, 1976 through December 31, 1976 and January 1, 1977 through October 25, 1977 in the amounts of \$1,971.91 and \$3,420.04, respectively. On December 18, 1978, the Audit Division issued to petitioner a Statement of Deficiency asserting penalties equal to the amount of New York City withholding taxes of the corporation for the period January 1, 1976 through June 30, 1976 in the amount of \$785.93. On the same date, the Audit Division also issued to petitioner a Notice of Deficiency for all the aforementioned amounts.

2. Petitioner makes his living primarily as a fashion model. Sometime in 1974 he made an investment in Graybarn in the amount of \$44,000.00 and became an officer and director of said corporation. The corporation operated a restaurant on Lexington Avenue in New York, and Mr. Saunders' principal duty was to greet customers and act as maitre d'hotel.

3. Petitioner did not personally appear at the hearing in the instant matter. His representative, Mr. Kushner, testified, "When [petitioner] went into this business as a stockholder and officer, he had no knowledge of the money end of it and had nothing to do with that end of it." He further testified that petitioner did not have authority to hire or discharge employees nor did he ever maintain the books and records of the corporation. Mr. Kushner had no knowledge regarding whether petitioner was an authorized signatory on the corporate account(s).

4. Mr. Kushner offered into evidence a photocopy of a letter to him dated March 5, 1980 from one Howard Shain, the accountant retained by Graybarn, wherein Mr. Shain stated in part:

"When the financial condition of the company became weakened and the company was short of working capital, the responsibility for paying

creditors was taken on exclusively by Thomas Jung, the President of the company, who had had previous experience in a similar situation. He would decide how much of the available funds each creditor would receive."

Mr. Kushner also offered into evidence a photocopy of a letter to him dated August 25, 1980 from Peter Giaquinto, an employee of the Audit Division Central Sales Tax Section, which letter canceled assessment number S780911451C issued against petitioner. The letter states in part, "Based on information submitted, we have determined that David Saunders is not a person required to collect tax as defined in Section 1131(1) of the New York Tax Law." The letter does not indicate for which period(s) the assessment had been made.

5. The annual reconciliations of New York City income and earnings taxes withheld and of New York State personal income taxes withheld for 1976 were signed by E. Thomas Jung, as president of Graybarn.

6. On January 11, 1977, petitioner sold his shares in Graybarn to Thomas Jung, thereby rendering Mr. Jung the sole shareholder, and resigned as officer and director of the corporation.

7. On his federal income tax return for 1977, petitioner availed himself of a short-term capital loss deduction in the amount of \$2,000.00, based upon the bad debt of \$44,000.00 from Graybarn.

#### CONCLUSIONS OF LAW

A. That the personal income tax imposed by Article 30 of the Tax Law is by its own terms tied into and contains essentially the same provisions as Article 22 of the Tax Law. Therefore, in addressing the issue presented, unless otherwise specified all references to particular sections of Article 22 shall be deemed references (though uncited) to the corresponding sections of Article 30.

B. That in determining whether petitioner is liable for the penalty asserted against him pursuant to subdivision (g) of section 685 of the Tax Law, the threshold question is whether he was a person required to collect, truthfully account for and pay over taxes withheld from the wages of employees of Graybarn Enterprises, Inc. Section 685(n). Relevant factors include whether petitioner signed tax returns, derived a substantial portion of his income from the corporation and exercised authority over the employees and assets of the corporation. Matter of MacLean v. State Tax Commission, 69 A.D.2d 951, affd., 49 N.Y.2d 920 (1980); Matter of McHugh v. State Tax Commission, 70 A.D.2d 987 (1979); Matter of Malkin v. Tully, 65 A.D.2d 228 (1978).

C. That all penalties asserted against petitioner for the period subsequent to January 11, 1977, the date he ceased to be an officer, director and shareholder of the corporation, are hereby canceled.

D. That regarding the penalties remaining (under Article 22 for the period July 1, 1976 through January 10, 1977 and under Article 30 for the period January 1, 1976 through June 30, 1976), the evidence presented is insufficient to show by a fair preponderance of the evidence that petitioner, as one of two corporate officers and shareholders, was not a person required to collect and pay over withholding taxes. Tax Law section 689(e). It is completely unknown, for example, whether or not petitioner was authorized to sign and did sign checks on the corporate account.

E. That turning next to the question whether petitioner's failure to collect, account for and pay over the taxes was willful, the test for determining willfulness is "whether the act, default, or conduct is consciously and voluntarily done with knowledge that as a result, trust funds belonging to the Government will not be paid over but will be used for other purposes." Matter

of Levin v. Gallman, 42 N.Y.2d 32, 34 (1977). A finding of willfulness does not require an intent to deprive the Government of its funds. "Knowledge that withholding taxes have not been remitted and a failure to investigate or correct this mismanagement of corporate funds is enough to constitute willful conduct [citations omitted]." Matter of MacLean, supra at 952. Again, the evidence presented is insufficient to show that petitioner's failure to collect, account for and pay over the taxes due was other than willful. His representative's statement that he (petitioner) had nothing to do with the financial affairs of the corporation falls far short of the quantum of evidence needed to sustain the burden of proof.

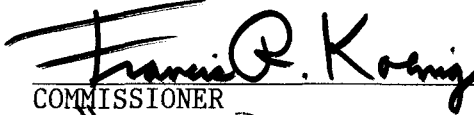
F. That the petition of David Saunders is granted to the extent indicated in Conclusion of Law "C"; that the Notice of Deficiency issued December 18, 1978 is to be modified accordingly; and that except as so modified, the deficiency is in all other respects sustained.

DATED: Albany, New York

SEP 03 1982

STATE TAX COMMISSION

  
ACTING PRESIDENT

  
COMMISSIONER

  
COMMISSIONER