

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition	:	
of	:	
Robert Bambino, Arthur Braude	:	
and Albert Devivo	:	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 Period	:	
8/1/78-4/26/79.	:	

State of New York  
County of Albany

David Parchuck, 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 18th day of March, 1983, he served the within notice of Decision by certified mail upon Robert Bambino, the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Robert Bambino  
115 Harding St.  
Massapequa Park, NY 11758

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  
18th day of March, 1983.

David Parchuck

James P. Hagelund

AUTHORIZED TO ADMINISTER  
OATHS PURSUANT TO TAX LAW  
SECTION 174

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :  
of :  
Robert Bambino, Arthur Braude :  
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: AFFIDAVIT OF MAILING  
for Redetermination of a Deficiency or a Revision :  
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Tax under Article 22 of the Tax Law for the Period :  
8/1/78-4/26/79. :

State of New York  
County of Albany

David Parchuck, 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 18th day of March, 1983, he served the within notice of Decision by certified mail upon Jessel Rothman the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Jessel Rothman  
170 Old Country Rd.  
Mineola, NY 11501

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  
18th day of March, 1983.

David Parchuck

Constance G. Auglund

AUTHORIZED TO ADMINISTER  
OATHS PURSUANT TO TAX LAW  
SECTION 174

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

March 18, 1983

Robert Bambino  
115 Harding St.  
Massapequa Park, NY 11758

Dear Mr. Bambino:

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  
Jessel Rothman  
170 Old Country Rd.  
Mineola, NY 11501  
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

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In the Matter of the Petition	:	
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Robert Bambino, Arthur Braude	:	
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Tax under Article 22 of the Tax Law for the Period	:	
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State of New York  
County of Albany

David Parchuck, 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 18th day of March, 1983, he served the within notice of Decision by certified mail upon Arthur Braude, the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Arthur Braude  
1141 E. 58th St.  
Brooklyn, NY 11234

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  
18th day of March, 1983.

David Parchuck

Gerrit A. Hagelund

NOTED TO ADMINISTRATOR  
GARYS PERSONAL ID NOT LAY  
SECTION 274

STATE OF NEW YORK

STATE TAX COMMISSION

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In the Matter of the Petition :  
of :  
Robert Bambino, Arthur Braude :  
and Albert Devivo :  
: 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 Period :  
8/1/78-4/26/79. :

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State of New York  
County of Albany

David Parchuck, 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 18th day of March, 1983, he served the within notice of Decision by certified mail upon Jessel Rothman the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Jessel Rothman  
170 Old Country Rd.  
Mineola, NY 11501

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  
18th day of March, 1983.

David Parchuck

Camille A. Hyslop

AUTHORIZED TO ADMINISTER  
OATHS PURSUANT TO TAX LAW  
SECTION 174

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

March 18, 1983

Arthur Braude  
1141 E. 58th St.  
Brooklyn, NY 11234

Dear Mr. Braude:

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  
Jessel Rothman  
170 Old Country Rd.  
Mineola, NY 11501  
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

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In the Matter of the Petition	:	
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Robert Bambino, Arthur Braude	:	
and Albert Devivo	:	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 Period	:	
8/1/78-4/26/79.	:	

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State of New York  
County of Albany

David Parchuck, 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 18th day of March, 1983, he served the within notice of Decision by certified mail upon Albert Devivo, the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Albert Devivo  
124 Harding St.  
Massapequa, NY 11762

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  
18th day of March, 1983.

David Parchuck

Annice A. Hjelund

AUTHORIZED TO ADMINISTER  
OATHS PURSUANT TO TAX LAW  
SECTION 174

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :  
of :  
Robert Bambino, Arthur Braude :  
and Albert Devivo :  
AFFIDAVIT OF MAILING :  
for Redetermination of a Deficiency or a Revision :  
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David Parchuck, 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 18th day of March, 1983, he served the within notice of Decision by certified mail upon Jessel Rothman the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Jessel Rothman  
170 Old Country Rd.  
Mineola, NY 11501

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  
18th day of March, 1983.

David Parchuck

Conrad A. Heglund

AUTHORIZED TO ADMINISTER  
OATHS PURSUANT TO TAX LAW  
SECTION 172



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

March 18, 1983

Albert Devivo  
124 Harding St.  
Massapequa, NY 11762

Dear Mr. Devivo:

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  
Jessel Rothman  
170 Old Country Rd.  
Mineola, NY 11501  
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

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In the Matter of the Petitions	:	
of	:	
ROBERT BAMBINO, ARTHUR BRAUDE	:	DECISION
and ALBERT DE VIVO	:	
for Redetermination of Deficiencies or for	:	
Refund of Personal Income Taxes under Article	:	
22 of the Tax Law for the Period August 1, 1978	:	
through April 26, 1979.	:	

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Petitioners, Robert Bambino, 115 Harding Street, Massapequa Park, New York 11762, Arthur Braude, 1141 East 58th Street, Brooklyn, New York 11234 and Albert DeVivo, 124 Harding Street, Massapequa Park, New York 11762, filed petitions for redetermination of deficiencies or for refund of personal income taxes under Article 22 of the Tax Law for the period August 1, 1978 through April 26, 1979 (File Nos. 29165, 29166 and 29167).

A consolidated formal hearing was held before Robert F. Mulligan, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York on June 21, 1982 at 1:15 P.M. The petitioners appeared by Jessel Rothman, P.C. (Frederic Schneider, Esq., of counsel). The Audit Division appeared by Paul B. Coburn, Esq. (Alexander Weiss, Esq., of counsel).

ISSUE

Whether any of the petitioners are liable to a penalty under section 685(g) of the Tax Law arising from the failure of B & N Supermarket, Inc. to remit personal income taxes withheld from its employees.

FINDINGS OF FACT

1. On January 28, 1980 the Audit Division issued individual notices of deficiency and statements of deficiency to the petitioners, Robert Bambino,

Arthur Braude and Albert DeVivo,<sup>1</sup> for penalties under section 685(g) of the Tax Law in connection with unpaid personal income taxes withheld from the employees of B & N Supermarket, Inc. The taxes due were for the period August 1, 1978 through December 31, 1978 in the amount of \$4,383.65 and the period January 1, 1979 through April 26, 1979 in the amount of \$3,360.94 for a total of \$7,744.59.

2. B & N Supermarket, Inc. ("the corporation") was incorporated in September, 1977. The corporation operated one supermarket which opened on October 6, 1977 and was located at 150 South Wellwood Avenue, Lindenhurst, New York. The store occupied about 7,000 square feet. During the period at issue, the store was open seven days per week, from 8:00 A.M. to 6:00 P.M., except on Thursdays and Fridays when it remained open until 9:00 P.M.

3. The corporation acquired the store fixtures from petitioner Arthur Braude, who had purchased the fixtures of a Bohack supermarket at a bankruptcy auction for \$40,000.00. The corporation leased the same real property in which the Bohack store had been located from Bohack's former landlord.

4. Each of the petitioners owned one-third of the corporation's stock. Mr. Bambino served as president, Mr. DeVivo as treasurer and Mr. Braude as vice-president and secretary. Mr. Bambino and Mr. DeVivo admitted they were directors of the corporation. Mr. Braude is hereby found to have been a director of the corporation, although he testified that he did not know if he was a director.<sup>2</sup> There were no regular corporate meetings and the corporation

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<sup>1</sup> Mr. DeVivo's name was spelled "DeVitta" in the Notice of Deficiency and "DeVita" in the Statement of Deficiency. At the hearing, Mr. DeVivo acknowledged notice and waived the incorrect spelling.

<sup>2</sup> Since there were three shareholders, section 702(a) of the Business Corporation Law would require that there be at least three directors. None of the parties indicated that any other person was a director of the corporation.

appears to have operated on an informal basis. All three petitioners were authorized to sign checks. Checks required a combination of any two signatures.

5. Petitioner Robert Bambino managed the supermarket. He had previous experience as a supermarket manager. He worked a five, six or seven day week, depending on the circumstances. He was assisted by a grocery manager who was in charge of the store in his absence. Mr. Bambino performed virtually all of the hiring of employees and most of the firing. The grocery manager was sometimes involved in the firing of employees. Mr. Bambino invested \$15,000.00 in the corporation, receiving in return the aforementioned one-third stock interest, plus notes. He received a salary of \$300.00 to \$400.00 per week, but drew no salary for about two weeks immediately preceding the closing of the store. He received no dividends on his stock and the notes were never paid by the corporation.

6. Petitioner Albert DeVivo is Robert Bambino's uncle. He invested \$45,000.00 in the corporation, receiving notes payable over a five year period in addition to his one-third stock interest. He was employed as a postal worker and was not involved in the day-to-day operation of the store. He drew no salary from the corporation. Mr. DeVivo received no dividends on his stock and the notes were never presented for payment. Mr. DeVivo's wife worked in the store, earning a salary of about \$300.00 per week. He generally drove his wife to work and picked her up, although sometimes she would ride with Mr. Bambino, who resided across the street from the DeVivos. Mr. DeVivo would stop at the store two or three times per week for fifteen minutes to two hours. Mr. DeVivo testified that he rarely discussed store business with his nephew and that he was not aware of withholding tax problems until July or August, 1978, when Mr. Bambino told him that they had to get a loan to pay taxes. Mr. DeVivo's

testimony as to the books, records and financial condition of the corporation was vague.

7. Petitioner Arthur Braude was not involved in the day to day operation of the supermarket. He testified that his role was that of an investor. As noted in Finding of Fact "3", he was instrumental in starting up the business. When the supermarket opened, Mr. Braude was about 70 years of age and resided about an hour's drive away, in Brooklyn. About six to eight months later, Mr. Braude opened another store in Brooklyn with partners. He visited the Lindenhurst store about once every two to three weeks. Mr. Braude drew a salary of about \$125.00 per week up until the time the corporation developed financial difficulties. In addition to the \$40,000.00 worth of assets Mr. Braude transferred to the corporation, he invested an additional \$10,000.00. He received his one-third stock interest, plus a note for \$50,000.00.<sup>3</sup> He received no dividends on the stock and nothing has been paid on the notes.

In his testimony, Mr. Braude, like Mr. DeVivo, was vague as to the financial affairs of the corporation: he claimed that he did not know whether the corporation filed income tax returns; that he never had occasion to examine corporate books and records; and that he did not know that the corporation owed taxes to New York State.

8. The corporation had between twenty-five and thirty-five employees at any one time. Every employee was paid weekly by check. At the end of each week, Mr. Bambino (or sometimes Mrs. DeVivo or a cashier) would total up the hours worked by each employee and call the figures in to A.D.P. Payroll Services, which would automatically prepare the checks with facsimile signatures.

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<sup>3</sup> It is noted that treatment of the three petitioners' contributions as loans would infer that the corporation was formed without capital investment.

9. The corporation had engaged an accountant who was to prepare the tax returns. Mr. Bambino testified that one reason the corporation failed was because the accountant did not come in once a month as he had agreed to, but rather once every two and one-half to three months and, as a result, he (Mr. Bambino) was unaware of the true financial condition of the corporation. Mr. Bambino testified that he first became aware that the corporation was in financial trouble when he was called by the corporation's bank to be told that the checking account was overdrawn. He claimed that the accountant was of no assistance and had to be replaced.

10. In July or August, 1978, shortly after the time when the financial difficulties surfaced, Mr. Bambino told Mr. DeVivo and Mr. Braude that additional funds were needed. The corporation then borrowed \$25,000.00 from a nearby Chemical Bank branch. The loan was guaranteed by the three petitioners. Most, if not all of the proceeds of the loan were used to pay tax liabilities.

11. Because of financial difficulties, the petitioners decided that the store should be sold. A buyer was found and it was agreed that the buyer would assume an existing debt to a dairy supplier and pay an additional \$25,000.00. While the transaction was pending, certain creditors forced the corporation into involuntary bankruptcy. The store was closed in late April, 1979 and the \$25,000.00 paid by the buyer was still being held by a trustee as of the date of the hearing.

12. The liability of petitioner Robert Bambino was conceded at the hearing. Petitioners Arthur Braude and Albert DeVivo, however, claimed that they were merely investors and co-owners and were not involved in the day-to-day operation of the business and therefore should not be held liable.

CONCLUSIONS OF LAW

A. That subsection (g) of section 685 of the Tax Law provides that any person required to collect, truthfully account for, and pay over personal income tax who willfully fails to do so, or who willfully attempts in any manner to evade or defeat the tax or the payment thereof, shall be liable to a penalty equal to the total amount of the tax evaded, or not collected, or not accounted for and paid over.

Subsection (n) of section 685 of the Tax Law provides, in part, that for purposes of subsection (g) the term "person" includes an officer or employee of any corporation who as such officer or employee is under a duty to perform the act in respect of which the violation occurs.


B. That each of the three petitioners were persons required to collect, truthfully account for and pay over personal income taxes withheld from the employees of B & N Supermarket, Inc. and willfully failed to do so, within the meaning and intent of section 685(g) of the Tax Law. The petitioners were officers and directors of the corporation and each owned one-third of its shares and held corporate notes. Petitioner Robert Bambino actively managed the business and his liability has been admitted. Petitioners Arthur Braude and Albert DeVivo have not sustained the burden of proof imposed by section 689(e) of the Tax Law to show that, in the face of their respective offices, their ownership interests and their interests as creditors, that they were not under a duty to see to it that all personal income taxes were properly remitted to the State of New York. Abdication of the responsibilities of an office will not overcome this burden. Moreover, vague testimony as to the financial affairs of a corporation by individuals with substantial investments in the business certainly adds nothing to the credibility of their claims.

C. That the petitions of Robert Bambino, Arthur Braude and Albert DeVivo are denied and the notices of deficiency are sustained.


DATED: Albany, New York

STATE TAX COMMISSION

MAR 18 1983

  
PRESIDENT

  
COMMISSIONER

  
COMMISSIONER