

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition of Joseph Bender	: : : : : : :	: : : : : : :
		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 1976.		

State of New York
County of Albany

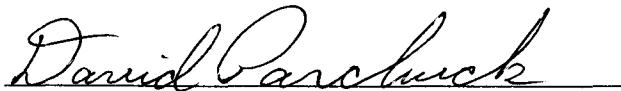
David Parchuck, being duly sworn, deposes and says that he is an employee of the Department of Taxation and Finance, over 18 years of age, and that on the 27th day of May, 1983, he served the within notice of Decision by certified mail upon Joseph Bender, the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Joseph Bender
372 Howard Ave.
Woodmere, NY 11598

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
27th day of May, 1983.





AUTHORIZED TO ADMINISTER
OATHS PURSUANT TO TAX LAW
SECTION 174

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of :
Joseph Bender :
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 :
1976. :

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 27th day of May, 1983, he served the within notice of Decision by certified mail upon Barry Manson the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Barry Manson
255-55 Union Turnpike
Glen Oaks, NY 11004

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
27th day of May, 1983.

David Parchuck

Quinn G. Hylleberg

AUTHORIZED TO ADMINISTER
OATHS PURSUANT TO TAX LAW
SECTION 174

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

May 27, 1983

Joseph Bender
372 Howard Ave.
Woodmere, NY 11598

Dear Mr. Bender:

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 Law 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
Building #9 State Campus
Albany, New York 12227
Phone # (518) 457-2070

Very truly yours,

STATE TAX COMMISSION

cc: Petitioner's Representative
Barry Manson
255-55 Union Turnpike
Glen Oaks, NY 11004
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition	:	
	:	
of	:	
	:	
JOSEPH BENDER	:	DECISION
	:	
for Redetermination of a Deficiency or for	:	
Refund of Personal Income Tax under Article 22	:	
of the Tax Law for the Year 1976.	:	

Petitioner, Joseph Bender, 372 Howard Avenue, Woodmere, New York 11598, 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 1976 (File No. 32252).

A formal hearing was held before Frank W. Barrie, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on October 29, 1982 at 10:30 A.M. Petitioner, Joseph Bender, appeared by Barry Manson, Esq. The Audit Division appeared by Paul B. Coburn, Esq. (Thomas C. Sacca, Esq., of counsel).

ISSUE

Whether petitioner, Joseph Bender, is liable for a penalty equal in amount to the unpaid New York State withholding taxes due from A & D Electric Co., Inc.

FINDINGS OF FACT

1. On November 26, 1979, the Audit Division issued a Statement of Deficiency against petitioner, Joseph Bender, imposing a penalty pursuant to Tax Law §685(g) in the amount of \$12,200.00 which was equal to the unpaid withholding taxes due from A & D Electric Co., Inc. (hereinafter "A & D Electric") for the period October 1, 1976 through December 31, 1976. On November 26, 1979, the

Audit Division also issued a Notice of Deficiency against petitioner in the amount of \$12,200.00 for the 1976 taxable year.

2. Petitioner's father-in-law started A & D Electric in the 1930's and petitioner became involved in the business in the early 1970's. During the year at issue, petitioner, as Secretary-Treasurer of A & D Electric, was an operating officer of the company. He testified that he and the president of the company "ran the business". A & D Electric did strictly electrical work for constructions and alterations. Petitioner was unable to testify to the number of employees of A & D Electric during the year at issue, although he noted that "the most we ever employed at any one time was about 130 people".

3. On January 27, 1977, A & D Electric and David Coyne & Co., Inc. entered into an agreement which provided as follows:

"Effective January 12, 1977 any work performed by A & D Electrical Industries Corp...for A & D Electric Co., Inc. will be performed as a joint venture between A & D Electrical Industries Corp. and David Coyne & Co., Inc. This joint venture will require the joint and continuous rendition of services by David Coyne & Co., Inc. and A & D Electrical Industries Corp. for the completion of said contracts.

The profits of the joint venture after the payment of all expenses, costs, loans, interest, etc. will be divided in the following fashion:

50% - David Coyne & Co., Inc.
50% - Creditors of A & D Electric Co., Inc.
in the order of their priority."

Although the agreement is dated January 27, 1977 and is effective January 12, 1977, petitioner alleges that David Coyne & Co., Inc. took over contracting jobs of A & D Electric between September of 1976 and December of 1976 and argues that his liability for the withholding taxes at issue was assumed by David Coyne & Co., Inc. However, petitioner testified that he did not know who had control of the books and records of A & D Electric in October, 1976, although he admitted that he signed payroll checks in September, 1976.

4. Petitioner untimely filed a New York Corporation Franchise Tax Report on behalf of A & D Electric for the 1976 taxable year which he signed on December 14, 1977. The report showed that petitioner received salary and compensation of \$36,400.00 from A & D Electric during 1976. He could not remember if his salary for 1977 was paid by A & D Electric or David Coyne & Co., Inc., although it appears that he received a salary of \$18,400.00 from A & D Electric during 1977.

CONCLUSIONS OF LAW

A. That Tax Law §685(g) 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.

Tax Law §685(n) provides, in part, that for purposes of §685(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 petitioner was a person required to collect, truthfully account for and pay over personal income taxes withheld from the employees of A & D Electric and willfully failed to do so, within the meaning and intent of Tax Law §685(g). Petitioner has not sustained his burden of proof imposed by Tax Law §689(e) to show that, in the face of his position as Secretary-Treasurer of A & D Electric, he was 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 by the assignment of a withholding tax liability to a third party will not shoulder this burden. Furthermore, petitioner's


vague testimony as to the financial affairs of A & D Electric adds nothing to the credibility of his claim. Matter of Robert Bambino, Arthur Braude and Albert DeVivo, State Tax Commission, March 18, 1983.


C. That the petition of Joseph Bender is denied and the Notice of Deficiency is sustained.

DATED: Albany, New York

STATE TAX COMMISSION

MAY 27 1983


PRESIDENT


COMMISSIONER


COMMISSIONER