

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of :
Donald A. Capoccia :
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 :
12/16/75 - 8/31/76. :

State of New York
County of Albany

Connie Hagelund, being duly sworn, deposes and says that she is an employee of the State Tax Commission, over 18 years of age, and that on the 10th day of November, 1983, she served the within notice of Decision by certified mail upon Donald A. Capoccia, the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Donald A. Capoccia
404 Hager Ave.
Rome, NY 13440

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
10th day of November, 1983.

Martha L. Smuelle

Connie A. Hagelund

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of :
Donald A. Capoccia :
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Tax under Article 22 of the Tax Law for the :
Period 12/16/75 - 8/31/76. :

State of New York
County of Albany

Connie Hagelund, being duly sworn, deposes and says that she is an employee of the State Tax Commission, over 18 years of age, and that on the 10th day of November, 1983, she served the within notice of Decision by certified mail upon Emlyn L. Griffith the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Emlyn L. Griffith
225 North Washington St.
Rome, NY 13440

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
10th day of November, 1983.

Maucha L. Sennelle

Connie A. Hagelund

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

November 10, 1983

Donald A. Capoccia
404 Hager Ave.
Rome, NY 13440

Dear Mr. Capoccia:

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
Emlyn L. Griffith
225 North Washington St.
Rome, NY 13440
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition	:	
of	:	
DONALD A. CAPOCCIA	:	DECISION
for Redetermination of a Deficiency or for	:	
Refund of Personal Income Tax under Article 22	:	
of the Tax Law for the Period December 16, 1975 :	:	
through August 31, 1976.	:	

Petitioner, Donald A. Capoccia, 404 Hager Avenue, Rome, New York 13440, filed a petition for redetermination of a deficiency or for refund of personal income tax under Article 22 of the Tax Law for the period December 16, 1975 through August 31, 1976 (File No. 26996).

A formal hearing was held before Arthur Johnson, Hearing Officer, at the offices of the State Tax Commission, 207 Genesee Street, Utica, New York, on March 7, 1983 at 1:15 P.M., with all briefs to be submitted by April 30, 1983. Petitioner appeared by Emlyn I. Griffith, Esq. The Audit Division appeared by John P. Dugan, Esq. (Alexander Weiss, Esq., of counsel).

ISSUE

Whether petitioner was a person who willfully failed to collect, truthfully account for and pay over the withholding taxes of the employees of C.M.B. Builders, Inc. and is thus subject to a penalty equal in amount to said unpaid withholding taxes.

FINDINGS OF FACT

1. On March 26, 1979, the Audit Division issued a Notice of Deficiency to petitioner, Donald A. Capoccia, imposing a penalty under section 685(g) of the Tax Law, in an amount equal to the unpaid withholding taxes due from C.M.B. Builders, Inc. ("CMB") for the periods December 16, 1975 through December 31,

1975 and January 1, 1976 through August 31, 1976. Said notice was issued on the grounds that petitioner was a person required to collect, truthfully account for and pay over the New York State withholding taxes of CMB and that he willfully failed to do so. The total penalty asserted in the notice was \$6,072.60.

2. In February, 1968, petitioner together with Charles J. Balog formed CMB. Petitioner was named president and Charles Balog became secretary-treasurer. The corporation was dissolved in August, 1976 when it became financially insolvent.

3. CMB was engaged in the construction business. Petitioner was responsible for soliciting and bidding for construction work and supervising field operations. Mr. Balog, a practicing accountant, was responsible for maintaining the books and records, paying the bills, preparing tax returns and other financial reports.

4. Upon the incorporation of CMB, petitioner was not required to invest any money; however, he became a stockholder and president because of his reputation in the construction business. As CMB experienced financial difficulties, petitioner loaned his personal funds to the corporation and executed bank loans on behalf of the corporation in an effort to keep CMB viable. These monies were turned over to Mr. Balog for deposit in the corporate bank account.

5. Petitioner testified that in discussions with Charles Balog, he was advised that payments to the government were current and that he first became aware that withholding taxes were not paid when he received the Notice of Deficiency. Petitioner further testified that had he known that Mr. Balog was not remitting the withholding taxes, he would have insisted that he do so.

6. Petitioner was an authorized signatory on the corporate bank account, although he very seldom signed any checks. The withholding tax returns were signed by one Camille A. Guglielmo. Petitioner hired and fired employees.

7. Petitioner argued that there was a clear division of responsibilities between himself and Mr. Balog. Mr. Balog signed the payroll checks, prepared the tax returns and knew that the withholding taxes were not paid. Petitioner thus concluded that there was no willful intent on his part for failure to pay over the withholding taxes.

CONCLUSIONS OF LAW

A. That section 685(g) of the Tax Law provides:

"Any person required to collect, truthfully account for, and pay over the tax imposed by this article who willfully fails to collect such tax or truthfully account for and pay over such tax or willfully attempts in any manner to evade or defeat the tax or the payment thereof, shall in addition to other penalties provided by law, be liable to a penalty equal to the total amount of the tax evaded, or not collected, or not accounted for and paid over."

B. That section 685(n) of the Tax Law defines the term "person" to include, inter alia, an officer or employee of a corporation who "is under a duty to perform the act in respect of which the violation occurs."

C. That the term "willful" as used in the statute means an act, default or conduct voluntarily done with knowledge that, as a result, trust funds belonging to the government will be used for other purposes; intent to deprive the government of its money need not be shown, merely something more than accidental nonpayment (Matter of Levin v. Gallman, 42 N.Y.2d 32, 396 N.Y.S.2d 623).

D. That "willful" failure includes actions of responsible corporate officers who disregard their fiduciary duty by delegating their responsibilities.

(Rosemarie Ragonesi, et al. v. State Tax Commission, 88 A.D.2d 707, 451 N.Y.S.2d 301).

E. That petitioner, David A. Capoccia, was a person required to collect, truthfully account for and pay over New York State withholding taxes due from C.M.B. Builders, Inc. for the period December 16, 1975 through August 31, 1976 in accordance with the meaning and intent of sections 685(g) and (n) of the Tax Law. (Malkin v. Tully, 65 A.D.2d 228, 412 N.Y.S.2d 186).

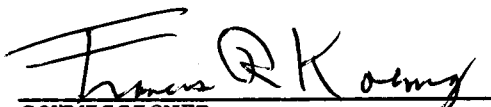
F. That the petition of Donald A. Capoccia is denied and the Notice of Deficiency issued March 26, 1979 is sustained.

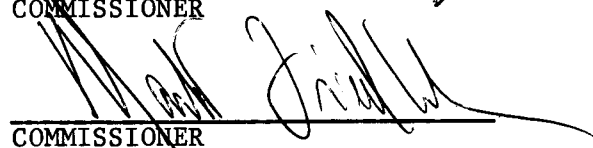
DATED: Albany, New York

STATE TAX COMMISSION

NOV 10 1983


PRESIDENT


COMMISSIONER


COMMISSIONER