

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of
Murray A. Falick : 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 Years :
1975 - 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 1st day of April, 1983, he served the within notice of Decision by certified mail upon Murray A. Falick, the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Murray A. Falick
71 Planting Field Rd.
East Hills, NY 11577

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
1st day of April, 1983.

David Parchuck

James A. DeGennaro
AUTHORIZED TO ADMINISTER
OATHS PURSUANT TO TAX LAW
SECTION 174

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition
of

Murray A. Falick

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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 Years :
1975 - 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 1st day of April, 1983, he served the within notice of Decision by certified mail upon David M. Stern the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

David M. Stern
Hanigsberg, Stern & Keiser
99 Park Ave., 18th Floor
New York, NY 10016

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
1st day of April, 1983.

David Parchuck

Camie De Hagedorn

AUTHORIZED TO ADMINISTER
OATHS PURSUANT TO TAX LAW
SECTION 174

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

April 1, 1983

Murray A. Falick
71 Planting Field Rd.
East Hills, NY 11577

Dear Mr. Falick:

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
David M. Stern
Hanigsberg, Stern & Keiser
99 Park Ave., 18th Floor
New York, NY 10016
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition	:	
of	:	
MURRAY A. FALICK	:	DECISION
for Redetermination of a Deficiency or for	:	
Refund of Personal Income Tax under Article 22	:	
of the Tax Law for the Years 1975 and 1976.	:	

Petitioner, Murray A. Falick, 71 Planting Field Road, East Hills, New York 11577, filed a petition for a redetermination of a deficiency or for refund of personal income tax under Article 22 of the Tax Law for the years 1975 and 1976 (File Nos. 24230 and 27019).

A formal hearing was held before Robert A. Couze, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York on June 25, 1982 at 9:25 A.M. Petitioner appeared by Hanigsberg, Stern & Keiser, P.C. (David M. Stern, Esq. and Neil Feinstein, C.P.A.) The Audit Division appeared by Paul B. Coburn, Esq., (Barry M. Bresler, Esq., of counsel).

ISSUE

Whether petitioner was a person required to collect, truthfully account for and pay over withholding taxes due for the years 1975 and 1976.

FINDINGS OF FACT

1. On September 1, 1978, the Audit Division issued a Notice of Deficiency and a Statement of Deficiency against petitioner, Murray A. Falick, in the amount of \$51,587.65 for the year 1976.

2. On March 26, 1979, the Audit Division also issued a Notice of Deficiency and a Statement of Deficiency against petitioner in the amount of \$7,078.16 for the year 1975.

3. The notices and statements, in effect, asserted that petitioner was a person required to collect, truthfully account for and pay over withholding taxes due from Encore Litho, Inc. ("Encore") for 1975 and Mutual Lithographers, Inc. ("Mutual") for 1976, pursuant to the provisions of subsections (g) and (n) of section 685 of the Tax Law.

4. Encore and Mutual were lithographic printers.

5. Encore was a wholly-owned subsidiary of Encore Industries, Inc. ("Encore Industries") during 1975.

6. Paste-Ups Unlimited, Inc. ("Paste-Ups") also was a wholly owned subsidiary of Encore Industries during 1975.

7. Gary Grubard, an accountant, and Ted Jasmine were each one-third shareholders of Encore Industries during 1975.

8. In 1975, Encore and Encore Industries became respectively, Mutual and Mutual Industries, Inc. ("Mutual Industries"). The business carried on through Encore was thereafter carried on through Mutual.

9. During 1976, Mutual and Paste-Ups were wholly owned subsidiaries of Mutual Industries.

10. Both Gary Grubard and Ted Jasmine were one-third shareholders of Mutual Industries during 1976.

11. Petitioner was president of Paste-Ups during 1975 and 1976.

12. Petitioner was the secretary of Encore during 1975 and the secretary of Mutual during 1976.

13. Gary Grubard was the treasurer of Encore during 1975 and president of Mutual during 1976.

14. The offices of Encore and Mutual were at all relevant times located at 195 Hudson Street, New York, New York.

15. The office of Paste-ups was at all relevant times located at 72 Fifth Avenue, New York, New York.

16. Paste-Ups was at all relevant times an art studio which produced and designed artwork for printing.

17. Petitioner was at all relevant times a commercial artist and engaged in said profession through Paste-Ups.

18. Petitioner first became affiliated with Encore in 1966 at which time he owned 50 percent of the stock of Paste-Ups. Encore was at the time owned by one Marvin Hammerman and one Norman Pomeranz.

19. In 1966, Encore purchased 66 2/3 percent of Paste-Ups, leaving petitioner with 33 1/3 percent of the stock; the other former 50 percent owner of Paste-Ups retired.

20. In 1969, Encore Industries was formed with petitioner, Marvin Hammerman, and Norman Pomeranz, each owning one-third of the stock; 100 percent of the stock of Encore and Paste-Ups was thereafter owned by Encore Industries.

21. Ted Jasmine and Michael Newman, then salesmen for Encore, acquired the respective stock interests of Marvin Hammerman and Norman Pomeranz in 1972.

22. Michael Newman's shares were redeemed by Encore Industries in or about 1972 or 1973 leaving petitioner and Ted Jasmine each 50 percent owners.

23. In 1973, Gary Grubard acquired a one-third interest in Encore Industries. Thereafter, the three stockholders each owned one-third of the stock of Encore Industries.

24. Petitioner's arrangement with Marvin Hammerman, Norman Pomeranz and Michael Newman, until they left, and with Ted Jasmine and Gary Grubard, until

1974, was that Encore and Paste-Ups would be run independently and that petitioner would exclusively manage all operations of Paste-Ups and the others would exclusively manage all operations of Encore.

25. Petitioner's arrangement with Ted Jasmine and Gary Grubard beginning in 1974 and during 1975 and 1976 was that he would manage only artwork operations and sales at Paste-Ups. All of Paste-Ups' financial operations, including the maintenance of books, records and checking accounts, approval of purchases, payments of bills, preparation of payroll, signing and preparation of checks (except the countersigning of payroll checks which were sent to petitioner for delivery to Paste-Ups' employees) and filing of tax returns, were handled by Gary Grubard and Ted Jasmine out of the 195 Hudson Street office. All of Paste-Ups' books and records were sent down to the Hudson Street office in 1974.

26. Petitioner was strongly opposed to this modification of the business arrangement with respect to the financial operations of Paste-Ups, but was overruled by Jasmine and Grubard.

27. With respect to Encore and Mutual, petitioner's arrangement with Ted Jasmine and Gary Grubard that Jasmine and Grubard would continue to exclusively manage Encore and Mutual, including all financial operations, did not change.

28. Petitioner did not sign or file Encore or Mutual tax returns.

29. Petitioner did not have possession of any Encore or Mutual checks.

30. Petitioner, Ted Jasmine and Gary Grubard were the signatories on Encore and Mutual checking accounts. Petitioner, however, did not sign any Encore or Mutual checks except possibly in emergencies.

31. Petitioner did not hire or fire any employees at Encore or Mutual.

32. Petitioner did not prepare payroll or payroll tax returns for Encore or Mutual.

33. Petitioner performed no duties as secretary of Encore or Mutual; no board meetings were held and petitioner never recorded or even saw any corporate minutes.

34. During the times in issue, petitioner did not devote any time to Encore or Mutual.

35. Petitioner was present at the Encore and Mutual offices only approximately once or twice per week and only to discuss technical aspects of jobs Paste-Ups was engaged to perform for Encore or Mutual.

36. Petitioner did not have an office at the 195 Hudson Street location of Encore or Mutual.

37. Ted Jasmine and/or Gary Grubard were responsible for deciding which Encore, Mutual and Paste-Ups bills would be paid.

38. Petitioner was generally unaware of Encore or Mutual liabilities and did not decide or participate in the decision as to what liabilities of Encore or Mutual would be paid.

39. Petitioner's salary was for services performed for Paste-Ups and not Encore or Mutual.

40. Petitioner was unaware of the New York State liabilities at issue until approximately November, 1976.

41. Petitioner, upon becoming aware of unpaid Encore and Mutual Federal withholding tax liabilities in 1975, made demands on Ted Jasmine and Gary Grubard to pay them and was assured by them that the liabilities would be paid.

42. Petitioner in 1976 again became aware of unpaid Federal liabilities and through an accountant attempted to examine the books and records of Encore

and Mutual. Gary Grubard told petitioner that the liabilities would be paid, that he was an accountant and was in charge of the books and records and that petitioner could not examine them.

43. Petitioner, because he was denied access to the books of Encore, Mutual and Paste-ups, because he was denied participation in decision making at Paste-Ups and because of unpaid tax liabilities, agreed to sell back his stock in Mutual Industries to the corporation and resigned all employment, offices and directorships with respect to Mutual Industries, Mutual, Paste-Ups and other affiliated companies on December 23, 1976. Petitioner, however, did not receive payment from the corporation for the aforementioned sale of stock.

CONCLUSION OF LAW

A. That during the years at issue, subsection (g) of section 685 of the Tax Law provided in part:

"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 tax evaded, or not collected, or not accounted for and paid over."

During the years at issue, subsection (n) of section 685 of the Tax Law provided, in part, that:

"...the term person includes an individual, corporation or partnership or an officer or employee of any corporation (including a dissolved corporation), or a member or employee of any partnership, who as such officer, employee, or member is under a duty to perform the act in respect of which the violation occurs."


B. That petitioner was not a person required to collect, truthfully account for and pay over such tax within the meaning of section 685(n) of the Tax Law; therefore, he is not liable to the penalty asserted by section 685(g) of the Tax Law.

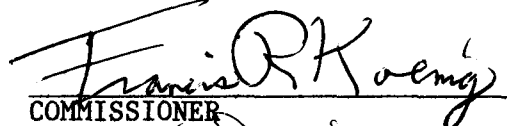
C. That the petitions herein are granted and the Notices of Deficiency herein, dated September 1, 1978 and March 26, 1979, are cancelled.


DATED: Albany, New York

STATE TAX COMMISSION

APR 01 1983


PRESIDENT


COMMISSIONER


COMMISSIONER