

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition of Joseph Hoppl	: : : : : :	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 1973 & 1974.		

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 Hoppl, the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Joseph Hoppl
1 Wallace Ct.
Valley Stream, NY 11582

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.

David Parchuck

James O'Hegarty

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 Hoppl :
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 :
1973 & 1974. :

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 James W. Dougherty the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

James W. Dougherty
269 Hempstead Ave.
Malverne, NY 11565

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

James W. Dougherty

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 Hoppl
1 Wallace Ct.
Valley Stream, NY 11582

Dear Mr. Hoppl:

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
James W. Dougherty
269 Hempstead Ave.
Malverne, NY 11565
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition	:	
	:	
of	:	
	:	
JOSEPH HOPPL	:	DECISION
	:	
for Redetermination of a Deficiency or for	:	
Refund of Personal Income Tax under Article	:	
22 of the Tax Law for the Years 1973 and	:	
1974.	:	

Petitioner, Joseph Hoppl, 1 Wallace Court, Valley Stream, New York 11582, 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 1973 and 1974 (File No. 18971).

A formal hearing was held before Daniel J. Ranalli, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on January 14, 1983 at 9:45 A.M. Petitioner appeared by James W. Dougherty, Esq. The Audit Division appeared by Paul B. Coburn, Esq. (Patricia Brumbaugh, Esq., of counsel).

ISSUE

Whether petitioner was a person required to collect, truthfully account for and pay over withholding taxes under section 685(g) of the tax Law.

FINDINGS OF FACT

1. On February 28, 1977, the Audit Division issued a Notice of Deficiency along with a Statement of Deficiency asserting a penalty pursuant to section 685(g) of the Tax Law against petitioner, Joseph Hoppl, as a person required to collect, truthfully account for, and pay over withholding taxes of Carl Hoppl and Sons in Baldwin, Inc. ("Baldwin") in the amount of \$24,338.23 for the years 1973 and 1974.

2. During the years in issue petitioner acted as the manager of the Valley Stream Park Inn ("Park Inn"), a restaurant owned by a New York partnership consisting of petitioner, his father, Carl Hoppl, and his brother, Charles Hoppl. Petitioner was unsure of the extent of his partnership interest in Park Inn. During this period petitioner owned $49\frac{1}{2}$ shares of stock in the Westbury Manor Corporation ("Westbury"). Charles Hoppl also owned $49\frac{1}{2}$ shares and Carl Hoppl owned 102 shares of 1000 shares outstanding. Park Inn owned the remainder. Westbury operated a restaurant in Westbury, New York which was managed by Charles Hoppl. Petitioner also owned $49\frac{1}{2}$ shares of stock in Baldwin and Charles Hoppl owned $49\frac{1}{2}$ shares of 1000 shares outstanding. Carl Hoppl owned the remainder. Baldwin operated a restaurant in Baldwin, New York which was managed by Carl Hoppl. Carl Hoppl was also the general manager of all three restaurants.

3. Petitioner's duties as manager of Park Inn involved responsibility for operation of the dining room, kitchen and the catering service. He had authority to hire and fire department heads at Park Inn. However, petitioner had no authority to sign checks for Park Inn. All purchases were signed for by Park Inn employees and the bills sent to Carl Hoppl who, along with his secretary, had sole authority to sign checks. Carl Hoppl also had sole responsibility for the payroll accounts and withholding of taxes. Petitioner had no responsibility for any part of the Park Inn's finances. Petitioner described his father, Carl, as a very "strong" person who allowed his sons very little responsibility in running the businesses.

4. Petitioner had no duties, responsibilities or authority with respect to the Baldwin and Westbury operations. He held a small amount of stock and had the title of Secretary-Treasurer of Baldwin. However, petitioner had no

voice in the running of either Baldwin or Westbury, he could not hire or fire employees, he had no authority to sign checks, and he had no responsibilities with respect to the financial aspects of either corporation including payroll and withholding of taxes. Carl Hoppl signed all corporate tax returns for the years in issue. In or about December, 1976 petitioner was ousted from Park Inn and the partnership was reformed in the names of Carl and Charles.

5. As indicated in Finding of Fact No. 1., the Statement of Deficiency referred to Carl Hoppl and Sons in Baldwin, Inc. T/A Westbury Manor. The Audit Division was unsure as to whether the Notice of Deficiency was intended to cover the unpaid withholding taxes of only one of the three restaurants or of all three. The Audit Division's position was that if petitioner was liable for one restaurant, he was liable for all three.

CONCLUSIONS OF LAW

A. That section 685(g) of the Tax Law provides that any person required to collect, truthfully account for, and pay over personal income tax, 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 word "person", for the purpose of section 685(g), and reads as follows:

"For purposes of subsections (g)...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."


C. That "the question of whether or not someone is a 'person' required to collect and pay over withholding taxes is a factual one. Factors determinative of the issue can include whether petitioner owned stock, signed the tax returns, or exercised authority over employees and the assets of the corporation" (McHugh v. State Tax Commission, 70 A.D. 2d 987, 988). Inasmuch as petitioner had no authority to sign checks, did not exercise authority over the payroll or withholding of taxes, had no authority to hire or fire employees of either Baldwin or Westbury, exercised no authority over the assets of any of the restaurants, and owned only a small percentage of the total stock outstanding of both Baldwin and Westbury, he cannot be considered a person required to collect, truthfully account for and pay over withholding taxes within the meaning and intent of sections 685(g) and 685(n) of the Tax law.

D. That the petition of Joseph Hoppl is granted and the Notice of Deficiency issued February 28, 1977 is cancelled.

DATED: Albany, New York

STATE TAX COMMISSION

MAY 27 1983


PRESIDENT


COMMISSIONER


COMMISSIONER