

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition of Martin J. Kamp	: : :	: : :
		AFFIDAVIT OF MAILING
for Redetermination of a Deficiency or for Refund of Personal Income Tax under Article 22 of the Tax Law and Chapter 46, Title T of the Administrative Code of the City of New York for the Year 1977.	: : : :	

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 20th day of May, 1983, he served the within notice of Decision by certified mail upon Martin J. Kamp, the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Martin J. Kamp
25 Kent Rd.
Scarsdale, NY 10583

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
20th day of May, 1983.

David Parchuck

James A. Highland

AUTHORIZED TO ADMINISTER
OATHS PURSUANT TO TAX LAW
SECTION 174

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

May 20, 1983

Martin J. Kamp
25 Kent Rd.
Scarsdale, NY 10583

Dear Mr. Kamp:

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 & 1312 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

Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition	:	
of	:	
MARTIN J. KAMP	:	DECISION
for Redetermination of a Deficiency or for	:	
Refund of Personal Income Tax under Article 22	:	
of the Tax Law and Chapter 46, Title T of the	:	
Administrative Code of the City of New York for	:	
the Year 1977.	:	

Petitioner, Martin J. Kamp, 25 Kent Road, Scarsdale, New York 10583, filed a petition for redetermination of a deficiency or for refund of New York State personal income tax under Article 22 of the Tax Law and New York City personal income tax under Chapter 46, Title T of the Administrative Code of the City of New York for the year 1977 (File No. 34365).

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 November 30, 1982 at 1:30 P.M. Petitioner appeared pro se. The Audit Division appeared by Paul B. Coburn, Esq. (Michael Gitter, Esq., of counsel).

ISSUE

Whether the Audit Division must attempt to collect a section 685(g) penalty equally from all persons required to collect, truthfully account for, and pay over withholding taxes, before it imposes a penalty on petitioner equal to the total amount due.

FINDINGS OF FACT

1. On January 26, 1981 the Audit Division issued a Notice of Deficiency along with a Statement of Deficiency imposing a penalty pursuant to section 685(g) of the Tax Law against Martin J. Kamp as a person required to collect,

truthfully account for, and pay over withholding taxes of Update Apparel, Ltd. ("Update") in the amount of \$7,702.45 for the year 1977. Of this amount, \$5,467.60 applied to New York State tax and \$2,234.85 applied to New York City tax.

2. Update was located in an economically depressed area of Brooklyn. The company was never able to turn a profit and eventually had to cease operations. Because of its poor financial condition, the company at times did not have enough money to pay both its employees and its withholding taxes and, as a result, failed to pay its taxes. Petitioner conceded the amount of the liability and the fact that he was a person required to collect, truthfully account for, and pay over withholding taxes along with two other officers.

3. Petitioner's only argument was that, since there were three officers, all liable under section 685(g), he should only be held liable for one-third of the penalty and that the Audit Division must attempt to collect the penalty equally from all three responsible officers before imposing the entire penalty on him.

CONCLUSIONS OF LAW

A. That the Personal Income Tax imposed by Chapter 46, Title T of the Administrative Code of the City of New York is by its own terms tied into and contains essentially the same provisions as Article 22 of the Tax Law. Therefore, in addressing the issues presented herein, unless otherwise specified all references to sections of Article 22 shall be deemed references to the corresponding sections of Chapter 46, Title T.

B. That section 685(g) of the Tax law provides that any person required to collect, truthfully account for and pay over withholding taxes, who willfully fails to collect, account for, and pay over such taxes, will be liable to a

penalty equal to the total amount of the tax not collected, accounted for, and paid over.

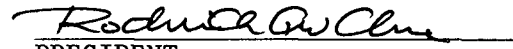
C. That section 685(g) of the Tax Law is modeled after section 6672 of the Internal Revenue Code and, as a result, federal cases are used for guidance (Yellin v. New York State Tax Commission, 81 A.D.2d 196). The penalty imposed by section 685(g) creates joint and several liability (Hartman v. United States, 538 F.2d 1336, 1340 [8th Cir. 1976]). "A taxpayer who is equally liable with another for the payment of accrued but unpaid tax, cannot avoid collection against himself on the ground that the Government should first collect it from the other party" (Kelly v. Lethert, 362 F.2d 629, 635 [8th Cir. 1966]). Therefore, petitioner may not use as a defense to the 685(g) penalty the fact that there may be other persons who are equally liable.

D. That the petition of Martin J. Kamp is denied and the Notice of Deficiency issued January 26, 1981 is sustained.

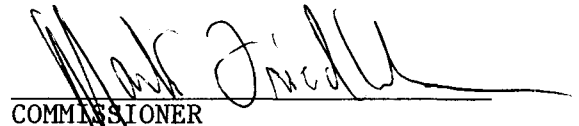
DATED: Albany, New York

MAY 20 1983

STATE TAX COMMISSION


PRESIDENT


COMMISSIONER


COMMISSIONER