

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of
Louis Masser : 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


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 28th day of September, 1983, she served the within notice of Decision by certified mail upon Louis Masser, the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Louis Masser
102-10 66th Road
Forest Hills, NY 11375

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
28th day of September, 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 :
Louis Masser : AFFIDAVIT OF MAILING
for Redetermination of a Deficiency or a Revision :
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Tax under Article 22 of the Tax Law for the Years :
1975 & 1976.

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 28th day of September, 1983, she served the within notice of Decision by certified mail upon Stephen L. Packard the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Stephen L. Packard
420 Lexington Ave.
New York, NY 10017

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
28th day of September, 1983.





AUTHORIZED TO ADMINISTER
OATHS PURSUANT TO TAX LAW
SECTION 174

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

September 28, 1983

Louis Masser
102-10 66th Road
Forest Hills, NY 11375

Dear Mr. Masser:

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
Stephen L. Packard
420 Lexington Ave.
New York, NY 10017
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition	:	
	:	
of	:	
	:	
LOUIS MASSER	:	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, Louis Masser, 102-10 66th Road, Forest Hills, New York 11375, 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 1975 and 1976 (File No. 32340).

A small claims hearing was held before James Hoefer, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on October 28, 1982 at 2:45 P.M., with all briefs to be filed by February 28, 1983. Petitioner, Louis Masser, appeared by Stephen L. Packard, Esq. The Audit Division appeared by Paul B. Coburn, Esq. (Anna D. Colello, Esq., of counsel).

ISSUE

Whether petitioner was a person, as defined in section 685(n) of the Tax Law, under a duty to collect, truthfully account for and pay over the New York State withholding taxes of Rockaway Road Mattress Mfg. Co., Inc. and, if such a person, was his failure to collect, truthfully account for and pay over said withholding taxes willful.

FINDINGS OF FACT

1. On August 27, 1979, the Audit Division issued a Statement of Deficiency to petitioner, Louis Masser, imposing a penalty, pursuant to section 685(g) of

the Tax Law, equal in amount to the unpaid New York State withholding taxes due and owing from Rockaway Road Mattress Mfg. Co., Inc. (hereinafter "Rockaway"), for the period April 1, 1975 to December 31, 1976. The aforementioned Statement was issued on the grounds that petitioner was a person required to collect, truthfully account for and pay over the withholding taxes due from Rockaway and that he willfully failed to do so. Accordingly, on August 27, 1979, a Notice of Deficiency was also issued to petitioner for the period April 1, 1975 to December 31, 1976 in the amount of \$3,075.00.

2. During the period at issue petitioner was president of Rockaway and the owner of one-third of its outstanding stock. A Mr. Rueben Sherman was the secretary-treasurer of Rockaway and also a one-third owner of its outstanding stock.

3. Petitioner's primary duty or function with Rockaway was in the area of sales. During the period in question petitioner was the only salesperson for Rockaway and he spent approximately 60 percent of his time out of the office soliciting orders. Petitioner generally spent three days per week out of the office in the pursuit of sales and two days per week in the office.

4. Petitioner was an authorized signatory on Rockaway's corporate checking account, as was Mr. Rueben Sherman. Only one signature was required on corporate checks. Mr. Sherman was Rockaway's "inside man", having responsibility for the manufacturing end of the business, shipping, receiving and financial matters. When in the office, petitioner signed corporate checks and participated with Mr. Sherman in the determination as to which creditors received payment. Petitioner and Mr. Sherman were at all times aware of the withholding tax liability accruing to the State of New York. They elected to pay only those expenses necessary to keep Rockaway an operating concern.

5. Rockaway also failed to pay over to the Internal Revenue Service the Federal income tax withheld from wages. Petitioner, as president of Rockaway, entered into a weekly payment agreement with the Internal Revenue Service for the payment of said past due Federal taxes. The weekly payment arrangement proved unsuccessful and Mr. Sherman requested the Internal Revenue Service to close up Rockaway. The Internal Revenue Service seized the assets of Rockaway and sold them sometime in June 1976.

6. Prior to the period in question and up until January 1976, Rockaway had financed its accounts receivables with the Tree Foil Corporation. In January 1976 the Tree Foil Corporation refused to make any further advances to Rockaway due to its poor financial condition. Up until April 1976, the time that Rockaway ceased operating and filed for bankruptcy, all incoming checks were given to the Tree Foil Corporation in an effort to reduce Rockaway's loan balance. Petitioner maintains that since Rockaway had no funds with which to pay its New York State withholding tax liability, that his failure to pay over said withholding taxes cannot be deemed willful.

7. On December 12, 1975, petitioner signed and filed with the New York State Corporation Tax Bureau an application for an extension of time to file Rockaway's New York State corporation tax return for the fiscal year ended September 30, 1975. Petitioner's primary source of income was from the wages he received from Rockaway. Petitioner's wife, Mini Masser, was Rockaway's bookkeeper.

8. Petitioner initially questioned the propriety of the dollar amount of withholding taxes due from Rockaway as shown on the Notice of Deficiency dated August 27, 1979, however, he has failed to produce any evidence to show that the amounts as determined by the Audit Division are incorrect or erroneous.

CONCLUSIONS OF LAW

A. That petitioner, Louis Masser, was a person required to collect, truthfully account for and pay over taxes withheld from the wages of the employees of Rockaway for the period April 1, 1975 to December 31, 1976, within the meaning and intent of subsections (g) and (n) of section 685 of the Tax Law.

Petitioner was a shareholder and officer of Rockaway. He was an authorized signatory and signed checks on Rockaway's checking account and he also signed a request for an extension of time to file Rockaway's New York State corporation tax return. Petitioner participated in the determination as to which creditors were paid and petitioner's primary source of income was from Rockaway. [See: Matter of McLean v. State Tax Commission, 69 A.D.2d 951, affd., 49 N.Y.2d 920 (1980); Matter of McHugh v. State Tax Commission, 70 A.D.2d 987 (1979); Matter of Malkin v. Tully, 65 A.D.2d 228 (1978)].

B. That petitioner's failure to collect, truthfully account for and pay over the taxes was willful. Petitioner entered into, acceded to and continued the accounts receivable financing agreement with the Tree Foil Corporation under which other creditors were preferred to New York State. He was fully aware that the withholding tax liability was accruing. Petitioner was free to rescind the agreement with the Tree Foil Corporation if it involved him in a breach of the duties imposed upon him under sections 671 and 674 of the Tax Law. (See: Kalb v. United States, 505 F.2d 506 (2d Cir. 1974) and State Tax Commission decision in Matter of the Petitions of Morton Tillman and Sheldon M. Bernstein, signed April 9, 1982).

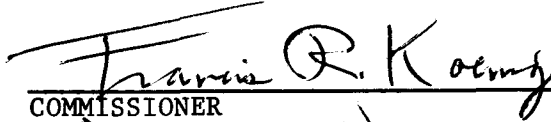
C. That the petition of Louis Masser is denied and the Notice of Deficiency dated August 27, 1979 is sustained.

DATED: Albany, New York

STATE TAX COMMISSION

SEP 28 1983


PRESIDENT


COMMISSIONER


COMMISSIONER