

STATE OF NEW YORK

STATE TAX COMMISSION

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In the Matter of the Petition :  
of :  
Irving Ornstein : 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 :  
1974, 1976 & 1977. :

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State of New York  
County of Albany

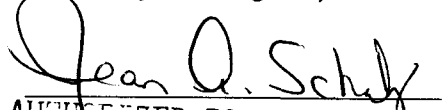
Connie Hagelund, being duly sworn, deposes and says that she is an employee of the Department of Taxation and Finance, over 18 years of age, and that on the 12th day of August, 1983, she served the within notice of Decision by certified mail upon Irving Ornstein, the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Irving Ornstein  
Scarborough Manor Apts.  
Scarborough, NY 10510

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  
12th day of August, 1983.

  
AUTHORIZED TO ADMINISTER  
OATHS PURSUANT TO TAX LAW  
SECTION 174

  
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STATE OF NEW YORK

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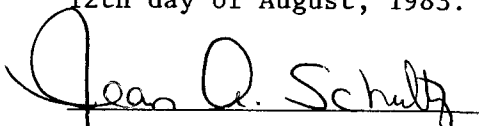
Connie Hagelund, being duly sworn, deposes and says that she is an employee of the Department of Taxation and Finance, over 18 years of age, and that on the 12th day of August, 1983, she served the within notice of Decision by certified mail upon Jack Schlossberg the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Jack Schlossberg  
41 East 42nd Street  
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  
12th day of August, 1983.

  
Jean A. Schultz

AUTHORIZED TO ADMINISTER  
OATHS PURSUANT TO TAX LAW  
SECTION 174

  
Connie A. Hagelund

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

August 12, 1983

Irving Ornstein  
Scarborough Manor Apts.  
Scarborough, NY 10510

Dear Mr. Ornstein:

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  
Jack Schlossberg  
41 East 42nd Street  
New York, NY 10017  
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

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In the Matter of the Petition	:	
of	:	
IRVING ORNSTEIN	:	DECISION
for Redetermination of a Deficiency or for	:	
Refund of Personal Income Tax under Article 22	:	
of the Tax Law for the Years 1974, 1976 and	:	
1977.	:	

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Petitioner Irving Ornstein, Scarborough Manor Apts., Scarborough, New York 10510, 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 1974, 1976 and 1977 (File No. 26991).

A small claims hearing was held before Allen Caplowaith, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on June 18, 1982 at 10:30 A.M. Petitioner appeared with Jack Schlossberg, Esq. The Audit Division appeared by Paul B. Coburn, Esq. (Anna Colello, Esq., of counsel).

ISSUES

I. Whether petitioner, Irving Ornstein, is subject to a penalty pursuant to section 685(g) of the Tax Law as a person who willfully failed to collect, truthfully account for and pay over the New York State withholding taxes due from Marcel Boucher Inc.

II. Whether the deficiency asserted against petitioner correctly reflects the outstanding balance of withholding taxes due from Marcel Boucher Inc. for the periods at issue herein.

FINDINGS OF FACT

1. Pursuant to a Statement of Deficiency issued March 26, 1979, Marcel Boucher Inc., 119 West 24th Street, New York, New York 10011, failed to pay over the New York State personal income tax taxes withheld from the wages of its employees for the periods as follows:

<u>Withholding Tax Period</u>	<u>Amount</u>
November 1, 1974 through December 31, 1974	\$ 664.82
June 1, 1976 through June 15, 1976	264.12
August 16, 1976 through December 31, 1976	1,656.85
January 1, 1977 through February 25, 1977	662.68
August 16, 1977 through December 31, 1977	<u>1,904.00</u>
TOTAL.....	<u>\$5,152.47</u>

2. On March 26, 1979, the Audit Division issued a Notice of Deficiency against Irving Ornstein (hereinafter petitioner) wherein a penalty was asserted pursuant to section 685(g) of the Tax Law for an amount equal to the New York State withholding taxes due from Marcel Boucher Inc. Said penalty was asserted on the grounds that petitioner was a person required to collect, truthfully account for and pay over the withholding taxes at issue, and that he wilfully failed to do so.

3. During the years at issue petitioner was president of Marcel Boucher Inc., a wholesaler of wristwatches. Said company was a wholly owned subsidiary of Daborn Industries Ltd. Petitioner held twenty percent of the outstanding stock in Daborn Industries Ltd.

4. All checks issued by Marcel Boucher Inc. required the dual signatures of the vice president and either petitioner or his brother, who held the title of secretary.

5. Petitioner contended that his chief duties and responsibilities were in the areas of merchandising, marketing and sales. He alleged that most of

the responsibility for withholding and payment of taxes was within the purview of the office controller and that the vice president was actually the chief operating officer. Tax returns, he claimed, were signed by any available officer.

6. Petitioner testified that on February 27, 1977 Marcel Boucher Inc. and its parent, Daborn Industries Ltd., filed for Chapter XI bankruptcy. The companies, he claimed, were discharged in April, 1978 and liquidated by the court. Subsequently, petitioner filed for personal bankruptcy.

7. Pursuant to the petition of Irving Ornstein, dated June 19, 1979, petitioner alleged that:

(a) "On Schedule A-1 (of the Petition in Bankruptcy), Boucher disclosed an indebtedness of \$3,904.74 to the State of New York for withholding taxes."

(b) "To the extent the deficiency herein asserted or the tax on which it is based exceeds \$3,904.74 for the periods upto and including February 25, 1977 taxpayer protests the assessment thereof as erroneous."

(c) "To the extent the deficiency herein asserted or the tax on which it is based is attributable to the period on and after February 25, 1977 until May 24, 1978, such deficiency occurred during the administration of Boucher estate by a Trustee appointed by the Bankruptcy Judge and were and are the responsibility of such Trustee."

8. No documentation was submitted by petitioner with respect to the bankruptcy proceedings addressed herein.

9. The deficiency herein asserted and the tax on which it is based totals \$3,248.47 for the periods up to and including February 25, 1977.

10. Petitioner testified that from August, 1977 through December, 1977 Marcel Boucher Inc. had no employees and no payroll.

11. During the hearing held herein the Audit Division sought to raise the deficiency asserted for the period August 16, 1976 through December 31, 1976 from \$1,656.85 to a purportedly corrected amount of \$2,774.17. Pursuant to a copy of the Reconciliation of Personal Income Tax Withheld submitted by

Marcel Boucher Inc. for the year 1976, the total tax withheld was indicated as \$7,192.71 and total payments, of which none were made for periods after the first half of August, was indicated as \$4,418.54.

12. Two claims were filed on July 28, 1978 on behalf of the State Tax Commission in the bankruptcy proceedings of Marcel Boucher, Inc. Such claims were filed with the United States District Court, Southern District of New York in the amounts and for the periods as specified in the Statement of Deficiency issued March 26, 1979. One claim, which was solely for the period August 16, 1977 through December 31, 1977 in the amount of \$1,904.00 was "for the expense of administration". Said amount was an estimate of the unpaid withholding tax pursuant to a Notice and Demand issued to Marcel Boucher, Inc. on July 21, 1978.

13. Although the Reconciliation of Personal Income Tax withheld for 1976 indicates a payment of \$264.42 for the first half of June, a deficiency was asserted for such period since, pursuant to the Audit Division, the check submitted for such payment was dishonored.

14. The deficiency asserted for the period November 1, 1974 through December 31, 1974 in the amount of \$664.82 was pursuant to a computer printout secured from the bankruptcy unit of the Department of Taxation and Finance.

15. The deficiency asserted for the period January 1, 1977 through February 25, 1977 in the amount of \$662.68 was estimated pursuant to a Notice and Demand issued June 24, 1977.

#### CONCLUSIONS OF LAW

A. That section 689(e) of the Tax Law provides that:

(e) Burden of Proof - In any case before the tax commission under this article, the burden of proof shall be upon the petitioner except for the following issues, as to which the burden of proof shall be upon the tax commission:

(1) Whether the petitioner has been guilty of fraud with intent to evade tax;

(2) Whether the petitioner is liable as the transferee of property of a taxpayer, but not to show that the taxpayer was liable for the tax; and

(3) Whether the petitioner is liable for any increase in a deficiency where such increase is asserted initially after a notice of deficiency was mailed and a petition under this section filed, unless such increase in deficiency is the result of a change or correction of federal taxable income or federal items of tax preference....

B. That petitioner has failed to sustain his burden of proof required pursuant to section 689(e) of the Tax Law to show that he was not a person required to collect, truthfully account for and pay over the New York State withholding taxes due from Marcel Boucher Inc. for the periods at issue herein or, that the deficiency asserted against him was erroneous.

C. That the testimony rendered by petitioner is unacceptable in the instant case since it was not supported by documentation. The commission is not bound to accept petitioner's testimony (cf. Matter of Donato v. Wyman, 32 A.D.2d 1061).

D. That petitioner was a person, as defined in section 685(n) of the Tax Law, who willfully failed to collect, truthfully account for and pay over the withholding taxes due from Marcel Boucher, Inc. for the periods at issue herein. Accordingly, he is properly subject to the penalty imposed pursuant to section 685(g) of the Tax Law.

E. That the Audit Division has sustained its burden of proof required pursuant to section 689(e)(3) of the Tax Law to establish that the deficiency asserted for the period August 16, 1976 through December 31, 1976 should properly be increased from \$1,656.85 to \$2,774.17.

F. That with respect to the increased deficiency, the Audit Division is not required to collect the unpaid withholding taxes from the corporation, or




from its trustee in bankruptcy, before imposing on and collecting from responsible officers the penalty imposed by section 685(g) of the Tax Law. Stanley Yellin, State Tax Commission, June 22, 1979.

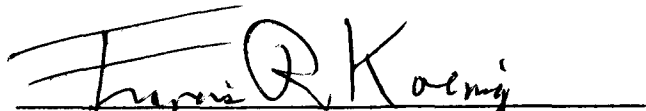
G. That the petition of Irving Ornstein is denied and the Notice of Deficiency dated March 26, 1979 is to be increased by \$1,117.32 as per Conclusion of Law "E", supra.

DATED: Albany, New York

STATE TAX COMMISSION

AUG 12 1983

  
PRESIDENT

  
COMMISSIONER

  
COMMISSIONER