

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition	:	
of	:	
Frank Wolfe	:	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 Year	:	
1973.	:	

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 18th day of March, 1983, he served the within notice of Decision by certified mail upon Frank Wolfe, the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Frank Wolfe
1107 Mylert St.
Jessup, PA 18434

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
18th day of March, 1983.

David Parchuck

Amur A. Haglund

ADMINISTRATOR
COMMISSIONER OF TAX LAW
SECTION 174

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of :
Frank Wolfe :

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 Year :
1973. :

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 18th day of March, 1983, he served the within notice of Decision by certified mail upon Donald J. Ball the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Donald J. Ball
505 E. Fayette St., Suite 250
Syracuse, NY 13202

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
18th day of March, 1983.

David Parchuck

Bennie R. Huganur

ADMINISTRATOR
STATE TAX COMMISSION
SECTION 174

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

March 18, 1983

Frank Wolfe
1107 Mylert St.
Jessup, PA 18434

Dear Mr. Wolfe:

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
Donald J. Ball
505 E. Fayette St., Suite 250
Syracuse, NY 13202
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition	:	
of	:	
FRANK WOLFE	:	DECISION
for Redetermination of a Deficiency or for	:	
Refund of Personal Income Tax under Article 22	:	
of the Tax Law for the Year 1973.	:	

Petitioner, Frank Wolfe, 1107 Mylert Street, Jessup, Pennsylvania 18434 filed a petition for redetermination of a deficiency or for refund of personal income tax under Article 22 of the Tax Law for the year 1973 (File No. 16308).

A formal hearing was held before Arthur Bray, Hearing Officer, at the offices of the State Tax Commission, 333 East Washington Street, Syracuse, New York, on June 17, 1982 at 10:45 A.M. Petitioner appeared by Donald J. Ball, Esq. The Audit Division appeared by Paul B. Coburn, Esq. (Anne W. Murphy, Esq., of counsel).

ISSUE

Whether petitioner is liable for the penalty asserted against him pursuant to section 685(g) of the Tax Law with respect to New York State withholding taxes due from Don Franco Brazzi Concrete Inc.

FINDINGS OF FACT

1. Don Franco Brazzi Concrete Inc. failed to pay New York State personal income tax withheld from the wages of its employees in the amount of \$2,944.60 for the withholding tax period June 1, 1973 through September 30, 1973 and \$434.17 for the withholding tax period October 1, 1973 through December 31, 1973.

2. On May 24, 1976, the Audit Division issued a Notice of Deficiency and Statement of Deficiency to petitioner asserting a penalty equal to the amount of unpaid New York State withholding tax due from the corporation for the year 1973.

3. At the beginning of 1973, petitioner was employed as a cement finisher. A cement finisher pours concrete, levels the surface of the concrete and finishes the surface of the concrete according to the project's specifications.

4. In March or April of 1973, petitioner began participating in a business venture with two other individuals, Don Juista and Joe Brazzi. This business venture, which was known as Don Franco Brazzi Concrete Inc. (the "corporation"), was formed to complete construction contracts which Mr. Brazzi had obtained from a construction company located in Albany, New York, known as Cosolino Construction ("Cosolino").

5. At the time the corporation was formed, petitioner held the title of vice-president and owned one-third of the original outstanding stock. The corporate headquarters were located in Syracuse, New York.

6. It was understood by petitioner and the other individuals that Mr. Brazzi's function was to solicit and obtain contracts for cement finishing. Mr. Juista's function was to be responsible for the financial aspects of the corporation, including the corporate records. Petitioner's duties were to supervise the employees of the corporation and see to it that the work contracted for was performed.

7. The contract which the corporation had with Cosolino entailed the construction of floors in and around Albany, New York. The work on these contracts began in April, 1973. At this time, petitioner supervised the employees at the construction site and personally did some of the work.

8. Each Friday, Mr. Brazzi would go to Cosolino and obtain the payroll for the corporation's employees. The amount of money which Mr. Brazzi would obtain depended upon the amount of work completed that week. After obtaining the funds, Mr. Brazzi would pay the employees. After meeting the payroll, Mr. Brazzi would take the balance of the funds to Syracuse. Thereafter, Mr. Brazzi and Mr. Juista had control over the corporate funds. Petitioner was not involved in the handling of the corporate funds until July, 1973.

9. In early July, 1973 Mr. Brazzi disassociated himself from the corporation. Following Mr. Brazzi's departure, an undetermined amount of corporate funds were found to be missing.

10. Petitioner became the secretary-treasurer of the corporation and assumed the obligation of handling the payroll after Mr. Brazzi's departure. Therefore, on each Friday petitioner would obtain funds from Cosolino. The amount of money obtained was determined by the amount of concrete laid that week. Initially, petitioner would obtain cash and then pay the net payroll. This procedure continued until October or November, 1973 when the contract with Cosolino was completed. Prior to July, 1973, petitioner did not have the authority to sign checks on behalf of the corporation.

11. During the period in issue, petitioner was paid in the same manner as the other employees of the corporation. Taxes were withheld from the paychecks. Taxes continued to be withheld when petitioner took responsibility for the payroll. However, because of the corporation's financial difficulties, the amounts withheld were utilized for payroll or maintenance of the corporation's equipment.

12. When Mr. Brazzi left the corporation, petitioner took the corporation's books and records to an accountant. It took the accountant about a month to

put the corporation's books and records in proper order. Petitioner was not aware that the corporation was having financial difficulties until this time.

13. On October 25, 1973 petitioner signed a withholding tax return as secretary-treasurer of the corporation. Petitioner did not remit withholding tax to New York at this time because there were not sufficient funds available to pay the tax.

14. Petitioner had access to the corporation's books and records from the formation of the corporation. However, he did not review the corporation's books and records until after Mr. Brazzi left the corporation.

15. The corporation ceased to function when the contracts with Cosolino were completed.

16. The Internal Revenue Service issued an assessment against petitioner for withholding taxes due for the same period of time as the deficiency herein. Petitioner was not represented by counsel until the time to challenge the federal deficiency had expired.

CONCLUSIONS OF LAW

A. That the issue of whether petitioner is a person required to collect, truthfully account for, and pay over withholding taxes during the period in issue is a question of fact (Matter of McHugh v. State Tax Comm. 70 A.D. 2d 987; Matter of McLean v. State Tax Comm., 69 A.D. 2d 951, aff'd. 49 N.Y.2d 920). Factors which are relevant to the determination of the issue include whether petitioner owned stock, signed tax returns, or supervised employees (Matter of McHugh v. State Tax Comm., 70 A.D. 2d 987, 989, supra; Matter of McLean v. State Tax Comm., 69 A.D. 2d 951; Matter of Malkin v. Tully, 65 A.D. 2d 228). Other factors which have been examined are whether the individual was authorized to and did in fact sign checks and whether the individual had responsibilities regarding the payroll (Matter of McHugh v. State Tax Comm., supra).

B. That in view of the facts that prior to July, 1973 petitioner did not have any responsibility for the financial affairs of the corporation, have any authority to sign checks, or have any responsibility regarding the corporation's payroll, petitioner was not a person within the meaning of subdivision (n) of section 685 of the Tax Law under the duty imposed by subdivision (g) of section 685 of the Tax Law with respect to withholding taxes due prior to July, 1973 (See generally, Matter of Edward Spano, Jr., State Tax Commission, December 11, 1981).

C. That in view of the facts that as of July, 1973, petitioner possessed and exercised the right to sign checks and had at least partial control over the financial affairs of the corporation, in addition to his stock ownership, corporate office, and responsibilities, petitioner was a person within the meaning of subdivision (n) of section 685 of the Tax Law under the duty imposed by subdivision (g) of the Tax Law with respect to withholding taxes due as of July, 1973.

D. That the test of whether conduct is willful as used in subdivision (g) of section 685 of the Tax Law is "...whether the act, default, or conduct is consciously done with knowledge that as a result, trust funds belonging to the Government will not be paid over but will be used for other purposes (citations omitted)" (Matter of Levin v. Gallman, 42 N.Y. 2d 32, 34). Since petitioner withheld taxes and used the money withheld for other purposes starting in July, 1973, petitioner's conduct was willful within the meaning of subdivision (g) of section 685 of the Tax Law.

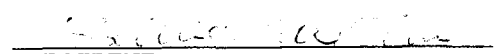
E. That the petition of Frank Wolfe is granted to the extent of Conclusion of Law "B" and the Audit Division is directed to accordingly modify the Notice


of Deficiency based upon the number of days in the withholding tax period (June 1, 1973 through September 30, 1973); the petition of Frank Wolfe is in all other respects denied.

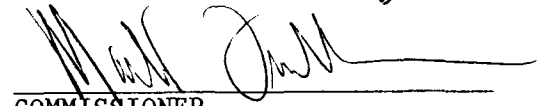
DATED: Albany, New York

STATE TAX COMMISSION

MAR 18 1983


PRESIDENT


COMMISSIONER


COMMISSIONER