

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of :
Thomas Wolfstich :
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 :
1970-1972. :

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 Daniel J. Smitas the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Daniel J. Smitas
56 Fuller Rd.
Albany, NY 12203

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.



AUTHORIZED TO ADMINISTER
OATHS PURSUANT TO TAX LAW
SECTION 174

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David Parchuck

Annice A. Heyland

**AUTHORIZED TO ADMINISTER
OATHS PURSUANT TO TAX LAW
SECTION 174**

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

May 27, 1983

Thomas Wolfstich
P.O. Box 64
Jerrico, VT

Dear Mr. Wolfstich:

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
Daniel J. Smitas
56 Fuller Rd.
Albany, NY 12203
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition	:	
of	:	
THOMAS WOLFSTICH	:	DECISION
for Redetermination of a Deficiency or for	:	
Refund of Personal Income Tax under Article 22	:	
of the Tax Law for the Years 1970 through 1972.	:	

Petitioner, Thomas Wolfstich, P.O. Box 64, Jerrico, Vermont, 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 1970 through 1972 (File No. 21557).

A formal hearing was commenced before Frank W. Barrie, Hearing Officer, at the offices of the State Tax Commission, State Campus, Building #9, Albany, New York on July 22, 1982 at 10:45 A.M. and continued to conclusion on October 12, 1982 at 9:30 A.M. with all briefs to be submitted by January 14, 1983. Petitioner appeared by Daniel J. Smitas, Esq. The Audit Division appeared by Paul B. Coburn, Esq. (Harry Kadish, Esq., of counsel).

ISSUES

I. Whether the satisfaction of tax warrants against Thomas J. Wolfstich, Inc. discharges Thomas Wolfstich, individually, from any liability under Tax Law §685(g) when the Department of Taxation and Finance subsequently transferred monies of Thomas J. Wolfstich, Inc. used to satisfy the tax warrants to a third party who had a priority over such monies.

II. Whether petitioner may amend his petition to raise additional defenses of (i) equitable estoppel, (ii) statute of limitation, (iii) res judicata and (iv) that petitioner was not a responsible officer required to collect, truthfully

account for, and pay over withholding taxes, and if he may so amend, whether such defenses prevail.

FINDINGS OF FACT

1. On December 19, 1977, the Audit Division issued a Notice of Deficiency against petitioner, Thomas Wolfstich, showing deficiencies for the 1970, 1971 and 1972 taxable years of \$9,674.75, \$941.07 and \$359.20, respectively.

A Statement of Deficiency also issued on December 19, 1977 was attached to the Notice of Deficiency and explained that the deficiencies resulted from the imposition of penalties under Tax Law §685(g) for the years at issue on the basis that petitioner was a "person required to collect, truthfully account for, and pay over the tax imposed by the Income Tax Law 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...".

2. Petitioner in his petition dated March, 1978 alleged the following as his defense to the Notice of Deficiency:

"The New York State Tax Commission placed a levy on funds which were to become due and owing to Thomas J. Wolfstich, Inc. on a claim before the Office of General Services. This case was settled in the amount of \$350,000.00. An assignment was made of the funds to the insurance carrier, who was the bonding company for Wolfstich. Upon information and belief, the Department of Audit and Control paid the Aetna Insurance Company (sic) under the assignment when there was an outstanding tax levy and attachment by the New York State Tax Commission."

3. Petitioner in his perfected petition dated August 2, 1979 alleged the following as his defense to the Notice of Deficiency:

"The NYS Department of Taxation and Finance, by notice dated September 15, 1975 advised petitioner that the warrants (in the amounts described in Finding of Fact "1", supra) were satisfied and that Satisfaction of Judgment was filed with the Albany County Clerk as required by the CPLR §5020...".

4. At the hearing, herein, on July 22, 1982, petitioner raised the statute of limitations as a defense against the alleged deficiencies. He also argued that equitable estoppel bars the Audit Division from assessing deficiencies against petitioner as an individual since "he would not have settled that case (a case brought by petitioner in the Court of Claims against the State of New York) without some type of an understanding or payment of that money due to the warrants." In addition, petitioner argued that the satisfaction of tax warrants against Thomas J. Wolfstich, Inc. discharged Thomas Wolfstich, individually, from any liability and as a final defense, stare decisis.

5. On August 20, 1982, petitioner filed an amendment to his perfected petition and raised the additional defenses described in Finding of Fact "4", supra.

6. At the reconvening of the hearing, herein, on October 12, 1982, petitioner's representative stated that the defense of stare decisis should be termed res judicata, and also raised a final defense that petitioner was not a responsible officer required to collect, truthfully account for, and pay over withholding taxes.

7. Petitioner testified that Thomas J. Wolfstich, Inc., a plumbing and heating contractor, was in business for approximately 12 years starting in 1962. On May 6, 1968, it entered into, what petitioner termed, "the biggest undertaking that we had ever taken on", which was a contract with the New York State Department of Social Services to perform certain work on the heating system of the Tryon School for Boys, West Perth, New York (hereinafter, "Tryon School for Boys Contract"). As part of the agreement, the company furnished a performance bond guaranteed by Aetna Casualty and Surety Company (hereinafter, "Aetna"). The work was begun, but in January, 1971, Thomas J. Wolfstich, Inc.

was no longer able to continue the performance of the contract since it was insolvent and in default of its obligations to pay for labor and material expended in connection with the contract. Aetna, pursuant to its bond obligation, saw to the performance and completion of the contract. On February 8, 1971, New York State acknowledged the default of Thomas J. Wolfstich, Inc. and agreed to pay all remaining contract funds to Aetna.

Aetna expended more than \$325,000 to ensure performance of the contract and sustained a loss pursuant to the payment and performance bond in excess of \$293,000 in completing the project.

8. On May 10, 1972, the Department of Taxation and Finance asserted a tax lien against Thomas J. Wolfstich, Inc. for withholding taxes in the amounts noted in Finding of Fact "1", supra. Subsequently, tax warrants were obtained against Thomas J. Wolfstich, Inc. as follows:

(1) Warrant No. 14401 dated August 30, 1972 in the amount of \$9,674.75 plus penalty and interest for the 1970 taxable period,

(2) Warrant No. 16966 dated August 2, 1973 in the amount of \$941.07 plus penalty and/or interest for the 1971 taxable period and

(3) Warrant No. 19044 dated July 12, 1974 in the amount of \$359.20 plus penalty and/or interest for the 1972 taxable period.

9. On October 26, 1973, Thomas J. Wolfstich, Inc. filed a claim in the State of New York Court of Claims in the amount of \$836,371.78 against the State of New York concerning the Tryon School for Boys Contract. On April 11, 1974, Thomas J. Wolfstich, Inc. obtained an order in the Court of Claims for \$86,371.78,¹ a portion of the claim which represented the amount certified by the State of New York as the amount that was due and owing as final payment on

¹ Aetna later sued the State of New York and Thomas J. Wolfstich, Inc. concerning this sum as noted in Finding of Fact "10", infra.

the Tryon School for Boys Contract. This sum was never paid over to Thomas J. Wolfstich, Inc. but rather was used to satisfy United States and New York tax levies. The State of New York Controller's Office paid over to the Department of Taxation and Finance a sum equal to the amount of the warrants described in Finding of Fact "8", supra, and such warrants were treated as satisfied.

10. On September 30, 1974, Aetna sued Thomas J. Wolfstich, Inc., the State of New York and United States of America in New York State Supreme Court claiming that money which was due under the Tryon School for Boys Contract was improperly used to satisfy tax warrants issued against Thomas J. Wolfstich, Inc.² In its complaint, Aetna alleged that it had a superior and prior claim to "all monies now in the hands of the State of New York, applicable and payable on account of the aforesaid contract (Tryon School for Boys Contract) between the defendant, Thomas J. Wolfstich, Incorporated, and the Department of Social Services, State of New York..."

11. On November 15, 1976, Judge George L. Cobb of the New York State Supreme Court granted Aetna's motion for summary judgment and held that New York State could not collect its claim for withholding taxes against Thomas J. Wolfstich, Inc. "by offsetting that claim against sums the State owed to the contractor (Thomas J. Wolfstich, Inc.) on the contract because the latter sums were then owed directly to plaintiff (Aetna) rather than to the contractor." Subsequently, an order was entered requiring the State of New York to pay over to Aetna, the monies that it had retained due to the filing of New York tax

² According to the answer dated November 7, 1974 of the State of New York to Aetna's lawsuit, the amount of the Tryon School for Boys Contract was \$573,062.63, of which \$486,690.85 had been paid with the balance amounting to \$86,371.78 being retained due to the filing of tax liens.

liens. In a letter dated November 17, 1977 from Peter Crotty, Deputy Commissioner and Counsel of the Department of Taxation and Finance, to Jack Haimowitz, Assistant Counsel of the Department of Audit and Control, Mr. Crotty wrote as follows:

"There would appear to be some technical difficulty in satisfying the liability which the order based on Judge Cobb's decision imposes on the State. The funds which had been received by the Department would have been deposited into the General Fund. I propose to ... request that it (Sales and Income Tax Bureaus) treat the payment which will need to be made as a refund. It will also be necessary for this Department to reinstate warrants which had been satisfied on the basis of the payment made pursuant to the amounts set off."

12. On May 9, 1977, Thomas J. Wolfstich, Inc. obtained a judgement in the amount of \$300,000.00 in resolution of its claim for \$836,371.78 against the State of New York as described in Finding of Fact "9", supra. However, no part of the \$300,000 judgment of Thomas J. Wolfstich, Inc. was used to satisfy the underpayment of withholding taxes during the years at issue. Apparently, all or most of the \$300,000 was paid over to Aetna. Thomas J. Wolfstich testified that he agreed to a judgment in his favor of \$300,000 because he believed that no further liability would ensue on the basis of the failure of Thomas J. Wolfstich, Inc. to pay over withholding taxes.

13. No further warrants were issued by the Audit Division against Thomas J. Wolfstich, Inc., and the Audit Division conceded that neither were any further attempts made to collect withholding taxes from Thomas J. Wolfstich, Inc. However, as described in Finding of Fact "1", supra, the Audit Division took steps to collect such taxes from Thomas J. Wolfstich, the individual.

14. The record is not clear whether Thomas J. Wolfstich, Inc. filed all of its withholding tax returns, Forms IT-2101-SM, during the years at issue. The

record does establish that Thomas J. Wolfstich, Inc. filed Forms IT-2101-SM for the following periods³ during the years at issue:

1/16 - 1/31/71
2/16 - 2/28/71
4/1 - 4/15/71
6/16 - 6/30/71
8/1 - 8/15/71

David Schaible, the head of the Withholding Tax Protest Unit of the Income Tax Bureau, testified that the withholding tax returns are normally destroyed within three years after they are filed and that the returns for the above described periods were not destroyed because "[t]hese returns resulted in the issuance of the notices of demand for penalty and interest (for late filing)."

15. Exhibit "F", herein, which is a compilation of payments of withholding taxes by Thomas J. Wolfstich, Inc. and which was prepared by the Audit Division for purposes of this hearing, shows that during the 1970 taxable period, petitioner submitted bad checks in payment of withholding taxes as follows:

<u>Transaction Number</u> ⁴	<u>Amount</u>
H3533615	\$ 495.71
H3533617	447.40
H3561118	408.70
H3561120	465.70
J3503487	<u>427.20</u>
TOTAL	\$2,244.71

The total amount noted above was separately assessed by the Audit Division and was not a basis for the deficiency for the 1970 taxable year noted in Finding of Fact "1", herein.

³ The actual forms filed for such periods were introduced into evidence.

⁴ At the time a withholding tax return is received, a deposit number is stamped upon the return, the envelope it was mailed in, and the check. The transaction number is another way to refer to such deposit number.

16. According to the testimony of David Schaible, exhibit "8", herein, which is a Master File Reference Sheet, shows that \$13,794.16 was "the total amount shown on the W-2 form (of Thomas J. Wolfstich, Inc. for 1970)." He also testified that the difference between \$13,794.16 and \$4,119.41 paid on the account of Thomas J. Wolfstich, Inc. for 1970 was the amount assessed for such year. The alleged deficiency for 1971 in withholding taxes resulted from the failure of Thomas J. Wolfstich, Inc. to remit withholding taxes for the following periods:

	<u>Period Ending</u>	<u>Amount</u>
	3/15/71	\$313.69
	3/31/71	313.69
	12/31/71	313.69
TOTAL		<u>\$941.07</u>

The record is not clear concerning which semi-monthly periods in 1972 resulted in the alleged deficiency of \$359.20 for such year. However, petitioner testified that he agreed that in 1972 the corporation failed to turn over to the State of New York the sum of \$359.20, which was the amount of withholding taxes due noted on the warrant for such year.

17. According to petitioner, in February, 1971, Aetna took custody and control of the finances of Thomas J. Wolfstich, Inc. which were associated with the Tryon School for Boys Contract and it failed to make available to him sufficient funds to pay withholding taxes. However, there is nothing in the record to show that Aetna was liable under its performance bond for withholding taxes withheld by Thomas J. Wolfstich, Inc. from wages of its employees but not paid to New York State. Neither is there any evidence in the record that Aetna was an employer of Thomas J. Wolfstich, Inc. personnel who worked on the Tryon School for Boys Contract. Rather, Thomas J. Wolfstich, Inc. remained the employer and continued to pay the salaries of its employees. Furthermore,

there is no evidence to show that Aetna directed Thomas J. Wolfstich, Inc. to pay net wages to its employees and not to remit withholding taxes to the State of New York.

18. Petitioner was the operating manager and president of Thomas J. Wolfstich, Inc. during the years at issue. He hired and fired employees and signed payroll checks and tax returns. Petitioner was the person with both the duty and responsibility to assure that withholding taxes were withheld with respect to salaries paid, and he had knowledge that such taxes were not being paid.

CONCLUSIONS OF LAW

A. That the Audit Division is not required to attempt to collect unpaid withholding taxes from a corporation before imposing on and collecting from a responsible officer the penalty imposed by Tax Law §685(g). Such penalty is separate and independent of a corporation's liability for the unpaid taxes. Stanley Yellin vs. New York State Tax Commission, 81 A.D.2d 196. Pursuant to Finding of Fact "11", supra, there are unpaid withholding taxes during the tax years at issue since the monies used to satisfy the warrants described in Finding of Fact "8", supra, were subsequently transferred to Aetna Casualty and Surety Company, and the warrants were, in effect, not truly satisfied.

The Audit Division was not required to make any further attempts to collect withholding taxes from Thomas J. Wolfstich, Inc., and it could properly proceed against Thomas J. Wolfstich, the individual, as a responsible officer.

B. That pursuant to 20 NYCRR §601.6(c), it was proper to permit petitioner to raise additional defenses to the Notice of Deficiency including the defense of the statute of limitations.

C. That petitioner's argument that the Notice of Deficiency should be cancelled on the grounds of equitable estoppel is denied. "Laches, waiver or estoppel may not be imputed to the State in the absence of statutory authority." Matter of Jamestown Lodge 1681 Loyal Order of Moose, Inc., 31 A.D.2d 981.

Moreover, the record does not establish that petitioner has been damaged or prejudiced by a false representation or a concealment of material facts by the Department of Taxation and Finance and/or any other agency or body of the State of New York.

D. That the doctrine of res judicata does not bar the resolution, herein, of whether petitioner is liable for penalty under Tax Law §685(g). There is no evidence that such question has been authoritatively and finally settled by the decision of a court.

E. That petitioner, Thomas J. Wolfstich, was a person required to collect, truthfully account for and pay over personal income taxes on behalf of Thomas J. Wolfstich, Inc. during the periods at issue and willfully failed to do so within the meaning and intent of Tax Law §685(g). See Matter of Levin v. Gallman, 42 N.Y.2d 32 and Matter of Adele Amengual, State Tax Commission, June 2, 1982.

F. That petitioner failed to sustain his burden of proof under Tax Law §689(e) to show that he did not have significant authority to direct the payment of withholding taxes of Thomas J. Wolfstich, Inc. after Aetna took over control of finances as described in Finding of Fact "17", supra. There is no evidence in the record to show that Aetna directed petitioner to pay net wages to the employees of Thomas J. Wolfstich, Inc. without remitting withholding taxes to the State of New York. In fact, only the lesser deficiencies of \$941.07 and \$359.20 in withholding taxes were incurred after Aetna took over such control of finances. Moreover, at all times during the years at issue,

petitioner, as president of Thomas J. Wolfstich, Inc., was the one who actually paid employee wages. See Totaro v. United States, 533 F. Supp. 71 (1981).


G. That pursuant to Tax Law §689(e), petitioner was unable to sustain his burden of proof to show that the statute of limitations bars assessment for any withholding periods in question. Accordingly, the Notice of Deficiency was timely issued.

H. That the petition of Thomas J. Wolfstich is denied and the Notice of Deficiency issued December 19, 1977 is sustained.

DATED: Albany, New York

STATE TAX COMMISSION

MAY 27 1983


PRESIDENT


COMMISSIONER


COMMISSIONER