

STATE TAX COMMISSION

# AFFIDAVIT OF MAILING

State of New York }

County of Albany }

Clyde Collins  
102 Wesley Ave.  
Buffalo, NY 14215

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.

David Paruchuk

*James C. Hayward*  
Authorized to administer oaths  
pursuant to Tax Law section 174

STATE OF NEW YORK

STATE TAX COMMISSION

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In the Matter of the Petition :  
of :  
Clyde Collins :  
AFFIDAVIT OF MAILING  
for Redetermination of a Deficiency or Revision :  
of a Determination or Refund of Personal Income :  
Tax under Article 22 of the Tax Law for the Years :  
1971 & 1972. :  
\_\_\_\_\_

State of New York }  
ss.:  
County of Albany }

David Parchuck, being duly sworn, deposes and says that he is an employee of the State Tax Commission, that he is over 18 years of age, and that on the 1st day of June, 1984, he served the within notice of Decision by certified mail upon David J. Mahoney, the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

David J. Mahoney  
Offermann, Fallon, Mahoney & Cassano  
1776 Statler Hilton  
Buffalo, NY 14202

and by depositing same enclosed in a postpaid properly addressed wrapper in a post office 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  
1st day of June, 1984.

David Parchuck

Annunzio A. Vignola  
Authorized to administer oaths  
pursuant to Tax Law section 174

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

June 1, 1984

Clyde Collins  
102 Wesley Ave.  
Buffalo, NY 14215

Dear Mr. Collins:

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, a proceeding in court to review an adverse decision by the State Tax Commission may be instituted only 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  
David J. Mahoney  
Offermann, Fallon, Mahoney & Cassano  
1776 Statler Hilton  
Buffalo, NY 14202  
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

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In the Matter of the Petition	:	
	:	
of	:	
	:	
CLYDE COLLINS	:	DECISION
	:	
for Redetermination of a Deficiency or for	:	
Refund of Personal Income Tax under Article 22	:	
of the Tax Law for the Years 1971 and 1972.	:	

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Petitioner, Clyde Collins, 102 Wesley Avenue, Buffalo, New York 14215, 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 1971 and 1972 (File No. 10760).

A formal hearing was held before Frank W. Barrie, Hearing Officer, at the offices of the State Tax Commission, State Office Building, Buffalo, New York, on October 19, 1983 at 9:15 A.M., with additional evidence to be submitted by November 18, 1983. Petitioner appeared by Offermann, Fallon, Mahoney & Cassano, Esqs. (David J. Mahoney, Esq., of counsel). The Audit Division appeared by John P. Dugan, Esq. (Deborah Dwyer, Esq., of counsel).

ISSUE

Whether petitioner was a person required to collect, truthfully account for and pay over withholding taxes under Tax Law §685(g).

FINDINGS OF FACT

1. On November 27, 1972, the Audit Division issued a Notice of Deficiency and a Statement of Deficiency asserting a penalty under Tax Law §685(g) against petitioner, Clyde Collins, as a person required to collect, truthfully account for and pay over withholding taxes of Paper Tubes, Inc. (hereinafter, "Paper

Tubes") in the amount of \$15,021.03 for the period January 1, 1971 through February 4, 1972. This total amount was calculated as follows:

<u>Withholding Tax Period</u>	<u>Amount</u>
January 1 to September 30, 1971	\$10,779.66 (AW278511)
November 1 to November 30, 1971	1,415.92 (BU805782)
December 1 to December 15, 1971	501.51 (BU805850)
1971 balance due	891.55
January 1 to February 4, 1972	1,432.39 (AW991093)
Total Due	<u>\$15,021.03</u>

2. On November 25, 1974, the Audit Division also issued a Notice of Deficiency and a Statement of Deficiency asserting a penalty under Tax Law §685(g) against petitioner, Clyde Collins, as a person required to collect, truthfully account for and pay over withholding taxes of Fiber Containers, Inc. (hereinafter, "Fiber Containers") in the amount of \$839.60 for the period January 1, 1971 through December 31, 1971.

3. Assiento Development Corporation (hereinafter, "Assiento") acquired the stock of Paper Tubes and Fiber Containers in early 1971<sup>1</sup> against the advice of its attorney, David J. Mahoney, because of the substantial debts that were being assumed from Applied Devices Corporation, the previous owner of Paper Tubes and Fiber Containers. Paper Tubes and Fiber Containers were encumbered by \$300,000 in debts including unpaid federal and state withholding taxes and \$137,257 due the Marine Midland Bank, N.A. (hereinafter, "Marine Midland"). However, the four men who were the principals of Assiento, petitioner Clyde Collins, Joseph Easley, Donald Lee and George Bishop, determined that the acquisition of Paper Tubes and Fiber Containers was apparently worth a gamble.

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<sup>1</sup> According to the testimony of Clyde Collins, he and the three other principals of Assiento took control of the operations of Paper Tubes and Fiber Containers in the second tax quarter of 1971. The affidavit of Joseph Easley, petitioner's Exhibit "1", herein, states that they took over the subject corporations on May 1, 1971.

Clyde Collins testified that the subject corporations were acquired without the investment of any capital. "In order to secure the assets", he testified, "we also had to inherit the liabilities".

Petitioner Clyde Collins, Donald Lee, Joseph Easley and George Bishop each owned twenty-five percent of the shares of Assiento and each served as a corporate officer of such corporation: Donald Lee, as president; Joseph Easley, as treasurer; George Bishop, as secretary; and petitioner, as vice president of operations. It appears that each was actively involved in the operation and management of Paper Tubes and Fiber Containers in a similar capacity.

4. Paper Tubes manufactured containers for grenades, rockets, mortar and artillery shells for the United States Department of Defense. Fiber Containers manufactured cores for plastic wrap and its business (which was minor as compared to Paper Tubes) centered on the private sector.

5. At the time Assiento acquired the subject corporations, it appeared that the new owners would be successful in obtaining a substantial set-aside contract for minority businesses through the Small Business Administration to manufacture three million containers for the Department of Defense. The new ownership had initial success in obtaining a contract to manufacture grenade containers. Employment by the subject corporations increased from 125 employees, at the time of acquisition, to 220-230 employees by June, 1971.

6. Marine Midland financed the acquisition of Paper Tubes and Fiber Containers by Assiento. The previous owner, Applied Devices Corporation, had a loan outstanding to the bank of \$137,257 (as noted in Finding of Fact "3", supra) which was assumed by the new ownership. In addition, Marine Midland granted a line of credit to Paper Tubes on a basis of ninety percent of the

accounts receivable due from the Department of Defense. For example, if Paper Tubes shipped \$10,000 worth of rocket containers to the Department of Defense, the bank would loan \$9,000 to the corporation to continue the day-to-day operations to meet labor, materials and other operating costs. Given its undercapitalization and cash poor status, the subject corporations were dependent on this financing arrangement with Marine Midland for its survival.

7. Unfortunately, the initial success of the enterprises as noted in Finding of Fact "5", supra, evaporated. The new owners failed to obtain the set-aside contract as described in Finding of Fact "5", supra, and Marine Midland reduced loan advances on Department of Defense accounts receivable from ninety percent of such accounts to fifty percent. The finances of Paper Tubes and Fiber Containers quickly worsened: two out of three checks issued to creditors were no longer honored by the bank after September, 1971.

8. In February, 1972, Paper Tubes and Fiber Containers filed for bankruptcy. After reorganization was unsuccessful, the corporations were liquidated.

9. Petitioner was in charge of the hiring and firing of employees of the subject corporations. He testified that when the set-aside contract fell through, he reduced personnel to fewer than one hundred in an attempt to sustain the lives of the corporations. He also negotiated directly with the bank in an attempt to sustain the enterprises and played a role in deciding which suppliers would be paid. He received an initial salary of \$15,000 per year from the subject corporations which was reduced to zero in the fall of 1971 when the set-aside contract fell through.

10. Petitioner did not have the authority to sign checks and did not sign tax returns.

11. Petitioner testified that, "I have always been aware that an officer of a corporation might have personal liability for unpaid withholding taxes".

12. Petitioner's main argument against the imposition of the deficiencies herein is that Marine Midland was responsible for the nonpayment of the taxes at issue. His representative argued at the hearing herein as follows:

"(T)he financial operation of this business for much of the period was actually taken over by the<sup>2</sup> Marine Midland Bank and its officers rather than the petitioners, who would attempt to try to pay suppliers and pay other creditors and pay payroll taxes, but were thwarted in that attempt, in those attempts by the bank."

However, there is no evidence in the record to show that Marine Midland directed petitioner and his fellow corporate officers to pay net wages to the employees of the subject corporations without remitting withholding taxes to the State of New York. Rather, the corporations could only pay net wages because the bank cut back on the amount of money it would loan to the subject corporations.

13. Judgment was entered in United States District Court against petitioner on the basis that he willfully failed to collect, truthfully account for or pay over federal withholding taxes (i) of Paper Tubes for the second and fourth quarters of 1971 and the first quarter of 1972 and (ii) of Fiber Containers for the fourth quarter of 1971.

#### CONCLUSIONS OF LAW

A. That, pursuant to Tax Law §685(g), any "person" required to collect, truthfully account for and pay over withholding taxes, who willfully fails to do so, shall be liable to a penalty equaling the amount of the tax. "Person"

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<sup>2</sup> The hearing herein was a consolidated hearing involving petitions of Clyde Collins and Joseph Easley.

for purposes of this section includes "any officer or employee of any corporation...who as such officer, (or) employee...is under a duty to perform the act in respect of which the violation occurs". Tax Law §685(n).

B. That petitioner is not liable for any unpaid withholding taxes of the subject corporations for the period January 1 through April 30, 1971, because, as noted in Footnote "1" of Finding of Fact "3", supra, he and his fellow principals of the Assiento Development Corporation did not take over the control and operation of Paper Tubes and Fiber Containers until May 1, 1971. Therefore, the Audit Division is directed to determine if any part of the \$10,779.66 alleged to be due from the period January 1 to September 30, 1971 includes unpaid withholding taxes from the period January 1, 1971 to April 30, 1971. If so, petitioner is not liable for such portion.

C. That relevant factors to be considered in deciding whether petitioner, as a corporate officer, is a "person" required to collect and pay over withholding taxes include whether he signed the corporation's tax returns, possessed the right to hire and fire employees and derived a substantial portion of his income from the corporation. Other areas of inquiry include petitioner's official duties for the corporation, the amount of corporation stock he owned, and his authority to pay corporate obligations. Amengual v. State Tax Com'n, 95 A.D.2d 949,950. Judged by these criteria, petitioner was responsible for the collection and payment of withholding taxes due from Paper Tubes for the period May 1, 1971 to February 4, 1972 and from Fiber Containers for the period May 1, 1971 to December 31, 1978. In particular, petitioner hired and fired employees and was actively involved in the management and operation of the subject corporations of which he owned a twenty-five percent interest.


D. That petitioner cannot shift responsibility for the unpaid withholding taxes on to Marine Midland. There is no evidence in the record to show that Marine Midland directed petitioner and his fellow corporate officers to pay net wages to the employees of Paper Tubes and Fiber Containers without remitting withholding taxes to the State of New York. See Matter of Thomas Wolfstich, State Tax Commission, May 27, 1983. Rather, the subject corporations were undercapitalized. Their owners gambled that a big contract would be won and all creditors would be paid in full, including the State of New York. When the contract fell through, their lender refused to infuse the enterprise with sufficient cash to pay all creditors. Rather, the bank cut back on its loan advances. Such refusal to lend money does not shift the responsibility for unpaid withholding taxes to the bank.

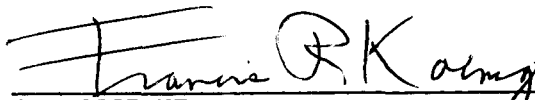
E. That the petition of Clyde Collins is granted to the extent noted in Conclusion of Law "B", supra, but, in all other respects, is denied.


DATED: Albany, New York


STATE TAX COMMISSION

JUN 01 1984

  
\_\_\_\_\_  
PRESIDENT

  
\_\_\_\_\_  
COMMISSIONER

  
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COMMISSIONER

  
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