

STATE OF NEW YORK

STATE TAX COMMISSION

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In the Matter of the Petition :  
of :  
Frank J. Franco :  
  
for Redetermination of a Deficiency or for Refund :  
of Personal Income Tax under Article 22 of the Tax :  
Law and New York City Personal Income Tax under :  
Chapter 46, Title T of the Administrative Code of :  
the City of New York for the Year 1977. :

AFFIDAVIT OF MAILING

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In the Matter of the Petition :  
of :  
Manuel Kempner :  
  
for Redetermination of a Deficiency or for Refund :  
of Personal Income Tax under Article 22 of the Tax :  
Law and New York City Personal Income Tax under :  
Chapter 46, Title T of the Administrative Code of :  
the City of New York for the Year 1977. :

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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 21st day of September, 1984, he served the within notice of Decision by certified mail upon Manuel Kempner, the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Manuel Kempner  
3534 Willett Avenue  
Bronx, NY 10467

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.

Page 2

Affidavit of Mailing

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  
21st day of September, 1984.

David Parachuck

Carrie J. Hagelund  
Authorized to administer oaths  
pursuant to Tax Law section 174

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

September 21, 1984

Manuel Kempner  
3534 Willett Avenue  
Bronx, NY 10467

Dear Mr. Kempner:

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 & 1312 of the Tax Law and Chapter 46, Title T of the Administrative Code of the City of New York, 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: Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

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In the Matter of the Petition :  
of :  
Frank J. Franco :  
  
for Redetermination of a Deficiency or for Refund :  
of Personal Income Tax under Article 22 of the Tax :  
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the City of New York for the Year 1977. :

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In the Matter of the Petition :  
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Manuel Kempner :  
  
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Law and New York City Personal Income Tax under :  
Chapter 46, Title T of the Administrative Code of :  
the City of New York for the Year 1977. :

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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 21st day of September, 1984, he served the within notice of Decision by certified mail upon Stephen R. Buschel, 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 R. Buschel  
Seidman & Seidman  
One North Broadway  
White Plains, NY 10601

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.

Page 2

Affidavit of Mailing

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  
21st day of September, 1984.

David Partridge

Connie R. Hapwood  
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 :  
Frank J. Franco :  
for Redetermination of a Deficiency or for Refund :  
of Personal Income Tax under Article 22 of the Tax :  
Law and New York City Personal Income Tax under :  
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AFFIDAVIT OF MAILING

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In the Matter of the Petition :  
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Chapter 46, Title T of the Administrative Code of :  
the City of New York for the Year 1977. :

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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 21st day of September, 1984, he served the within notice of Decision by certified mail upon Frank J. Franco, the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Frank J. Franco  
44 High Street  
White Plains, NY 10604

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.

Page 2

Affidavit of Mailing

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  
21st day of September, 1984.

David Parshuck

Bennie A. Haglund

Authorized to administer oaths  
pursuant to Tax Law section 174

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

September 21, 1984

Frank J. Franco  
44 High Street  
White Plains, NY 10604

Dear Mr. Franco:

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 & 1312 of the Tax Law and Chapter 46, Title T of the Administrative Code of the City of New York, 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  
Stephen R. Buschel  
Seidman & Seidman  
One North Broadway  
White Plains, NY 10601  
Taxing Bureau's Representative



STATE OF NEW YORK

STATE TAX COMMISSION

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In the Matter of the Petition :  
of :  
FRANK J. FRANCO :  
for Redetermination of a Deficiency or for :  
Refund of Personal Income Tax under Article 22 :  
of the Tax Law and New York City Personal :  
Income Tax under Chapter 46, Title T of the :  
Administrative Code of the City of New York for :  
the Year 1977. :

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DECISION

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In the Matter of the Petition :  
of :  
MANUEL KEMPNER :  
for Redetermination of a Deficiency or for :  
Refund of Personal Income Tax under Article 22 :  
of the Tax Law and New York City Personal :  
Income Tax under Chapter 46, Title T of the :  
Administrative Code of the City of New York for :  
the Year 1977. :

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Petitioners, Frank J. Franco, 44 High Street, White Plains, New York 10604 and Manuel Kempner, 3534 Willett Avenue, Bronx, New York 10467, filed petitions for redetermination of deficiencies or for refunds of personal income tax under Article 22 of the Tax Law and New York City personal income tax under Chapter 46, Title T of the Administrative Code of the City of New York for the year 1977 (File Nos. 38728 and 38729).

A consolidated 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 January 11, 1984 at 1:15 P.M., with all briefs to be submitted by February 11, 1984. Petitioner Frank J. Franco appeared with

Stephen R. Buschel, C.P.A. Petitioner Manuel Kempner appeared pro se. The Audit Division appeared by John P. Dugan, Esq. (Anne Murphy, Esq., of counsel).

### ISSUES

I. Whether petitioner Frank J. Franco is subject to a penalty pursuant to section 685(g) of the Tax Law and section T46-185.0(g) of the Administrative Code of the City of New York, as a person who willfully failed to collect, truthfully account for and pay over the New York State and City withholding taxes due from International Maritime Planning and Commercial Technology, Inc. for the year 1977.

II. Whether petitioner Manuel Kempner is subject to a penalty pursuant to section 685(g) of the Tax Law and section T46-185.0(g) of the Administrative Code of the City of New York, as a person who willfully failed to collect, truthfully account for and pay over the New York State and City withholding taxes due from International Maritime Planning and Commercial Technology, Inc. for the year 1977.

III. Whether the notices of deficiency were barred by the three-year statute of limitations.

### FINDINGS OF FACT

1. The Audit Division claimed that International Maritime Planning and Commercial Technology, Inc. (hereinafter "IMPACT"), 99 Park Avenue, Room 2600, c/o Edelman, New York, New York 10016, failed to pay over \$2,094.67 in New York State personal income taxes withheld and \$268.28 in New York City personal income taxes withheld from the wages of its employees for the period January 1, 1977 through February 28, 1977.

2. On February 22, 1982, the Audit Division issued a Statement of Deficiency in conjunction with a Notice of Deficiency against petitioner Frank J. Franco

wherein penalties were asserted pursuant to sections 685(g) of the Tax Law and T46-185.0(g) of the Administrative Code of the City of New York for an amount equal to the New York State and City withholding taxes due from IMPACT for said period. Such penalty was asserted on the grounds that petitioner was a person required to collect, truthfully account for and pay over said taxes, and that he willfully failed to do so. A similar set of documents was issued against petitioner Manuel Kempner under the same date. The deficiency asserted therein and the Audit Division's grounds for asserting such deficiency were identical to those of petitioner Frank J. Franco.

3. IMPACT was a "steamship agency - broker". As such, it entered into contracts with foreign steamship owners wherein, through its agents and sub-agents, it arranged for its clients' vessels to be berthed in the United States, and unloaded and reloaded for foreign export.

4. Petitioner Frank J. Franco was Vice President of IMPACT. He alleged that his responsibilities encompassed stevedoring contracts, the chartering of vessels and the obtaining of new business. He claimed that his primary duties were with respect to IMPACT's agency business and that he was not involved with the preparation of IMPACT's payroll or the payment of withholding taxes. In his petition, Mr. Franco stated that "the company had a treasurer, namely, Mr. Manuel Kempner...and his sole responsibility encompassed agency accounting, transfer of funds, bookkeeping, payroll and payment of payroll taxes."

5. Petitioner Manuel Kempner was Treasurer of IMPACT. In his petition he stated that he "was Treasurer of the company in name only. He was not a stockholder. He worked under the direction and control of the company Vice-President in Charge of Finance, Mr. Frank Franco. Petitioner had no independent

authority within the company." He testified that his primary duty as Treasurer was to take care of the day-to-day operation, mainly in the agency aspect.

6. Petitioner Frank J. Franco testified that he was authorized to co-sign all corporate checks. Petitioner Manuel Kempner testified that he was authorized to co-sign checks, while the other officers (inclusive of Mr. Franco) were authorized to sign checks singularly.

7. Both petitioners claimed that IMPACT's bookkeeper was responsible for the withholding and payment of payroll taxes during the period at issue. Mr. Kempner was the bookkeeper's direct supervisor.

8. Petitioners testified that they were neither stockholders nor directors of IMPACT.

9. Petitioners alleged that the withholding taxes at issue were paid by Boulder Shipping Agency Ltd. (Boulder). They explained that Boulder was a related corporation which was used to do business at international locations other than those where IMPACT operated. Both IMPACT and Boulder had the same employees and corporate officers. Petitioners alleged that the corporate payroll was paid by Boulder until approximately March, 1977, when IMPACT commenced disbursing the payroll funds. Accordingly, they believe that Boulder paid the withholding taxes at issue for the period January 1, 1977 to February 28, 1977 since IMPACT had no payroll prior to March, 1977.

10. Petitioner Frank J. Franco traveled abroad frequently during 1977 to solicit new clients and to maintain the corporation's then current clients. He was overseas on business during most of the period at issue herein. Accordingly, he contended that a failure to pay withholding taxes during such period cannot be deemed willful on his part since he was not physically present at the corporation's offices. Petitioner Manuel Kempner also claimed that should he

be held as a person responsible for the payment of the taxes at issue, he should not be held personally liable since the failure to pay such taxes was not willful on his part. No grounds were given as to why such failure to pay the taxes was not a willful failure by petitioner Manuel Kempner.

11. Petitioners alleged that the deficiencies asserted against them were time barred.

12. Pursuant to a computer printout, dated January 30, 1984, from the withholding tax accounts receivable system, the account of IMPACT shows a balance due of \$2,362.95, the amount at issue herein. Such balance due was for the period "01-01-77 to 02-28-77" pursuant to such printout, and the return filed for said period was so filed on May 22, 1979.

13. Review of both a computer printout on the account of Boulder, and a copy of its 1977 Reconciliation of Tax Withheld, shows petitioners' claim that the taxes at issue were paid by Boulder to be unfounded.

#### CONCLUSIONS OF LAW

A. That sections 683(a) of the Tax Law and T46-183.0(a) of the Administrative Code of the City of New York provide that:

"Except as otherwise provided in this section, any tax under this (article/part) shall be assessed within three years after the return was filed (whether or not such return was filed on or after the date prescribed)."

B. That the withholding tax return filed by IMPACT for the period January 1, 1977 through February 28, 1977 was late filed on May 22, 1979. Accordingly, the notices of deficiency issued against each petitioner herein on February 22, 1982 were not time barred.

C. That sections 685(g) of the Tax Law and T46-185.0(g) of the Administrative Code of the City of New York provide that:

"Any person required to collect, truthfully account for, and pay over the tax imposed by this (article/part) 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, shall, in addition to other penalties provided by law, be liable to a penalty equal to the total amount of the tax evaded, or not collected, or not accounted for and paid over."

D. That sections 685(n) of the Tax Law and T46-185.0(n) of the Administrative Code of the City of New York provide that, for purposes of subdivision (g), the term person:

"[I]ncludes an individual, corporation or partnership or an officer or employee of any corporation (including a dissolved corporation), or a member or employee of any partnership, who as such officer, employee, or member is under a duty to perform the act in respect of which the violation occurs."

E. That petitioner Frank J. Franco has failed to sustain his burden of proof, imposed pursuant to sections 689(e) of the Tax Law and T46-189.0(e) of the Administrative Code of the City of New York, to show that he was not a person responsible for the collection and payment of the New York State and City withholding taxes of IMPACT for the period at issue herein.

F. That petitioner Manuel Kempner has failed to sustain his burden of proof, imposed pursuant to sections 689(e) of the Tax Law and T46-189.0(e) of the Administrative Code of the City of New York, to show that he was not a person responsible for the collection and payment of the New York State and City withholding taxes of IMPACT for the period at issue herein.

G. That turning next to the question whether petitioners' failure to collect, account for and pay over the taxes was willfull, the test for determining willfulness is "whether the act, default, or conduct is consciously and voluntarily 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 (1977). A finding of willfulness does not require an intent to deprive the Government of its funds. "[K]nowledge that withholding taxes have not been remitted and a failure to investigate or correct this mismanagement of corporate funds is enough to constitute willful conduct [citation omitted]." Matter of MacLean v. State Tax Commission, 69 A.D.2d 951, 952, aff'd (on opinion below) (80), 49 N.Y.2d 920. The evidence presented through petitioners' testimony is insufficient to show that their failure to collect, account for and pay over the taxes due was other than willfull.

H. That the petition of Frank J. Franco is denied and the Notice of Deficiency issued against him on February 22, 1982 is sustained.

I. That the petition of Manuel Kempner is denied and the Notice of Deficiency issued against him on February 22, 1982 is sustained.

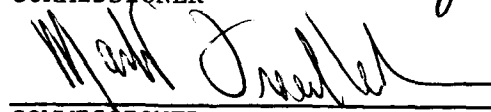
DATED: Albany, New York

STATE TAX COMMISSION

SEP 21 1984

  
PRESIDENT

  
COMMISSIONER

  
COMMISSIONER