

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of
Thomas L. LaMere : 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 :
1978 & 1979.

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 5th day of October, 1984, he served the within notice of Decision by certified mail upon Thomas L. LaMere, the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Thomas L. LaMere
39 Downer St.
Baldwinsville, NY 13027

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 petitioner herein and that the address set forth on said wrapper is the last known address of the petitioner.

Sworn to before me this
5th day of October, 1984.

David Parchuck

James A. Blaylock
Authorized to administer oaths
pursuant to Tax Law section 174

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition
of

Thomas L. LaMere

:

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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 :
1978 & 1979.

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 5th day of October, 1984, he served the within notice of Decision by certified mail upon Robert H. Marble, the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Robert H. Marble
Evans & Bennett
135 DeWitt St.
Syracuse, NY 13203

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
5th day of October, 1984.

David Parchuck

James A. Hupel

Authorized to administer oaths
pursuant to Tax Law section 174

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

October 5, 1984

Thomas L. LaMere
39 Downer St.
Baldwinsville, NY 13027

Dear Mr. LaMere:

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
Robert H. Marble
Evans & Bennett
135 DeWitt St.
Syracuse, NY 13203
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition	:	
	:	
of	:	
	:	
THOMAS L. LaMERE	:	DECISION
	:	
for Redetermination of a Deficiency or for	:	
Refund of Personal Income Tax under Article 22	:	
of the Tax Law for the Years 1978 and 1979.	:	

Petitioner, Thomas L. LaMere, 39 Downer Street, Baldwinsville, New York 13027, 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 1978 and 1979 (File No. 33326).

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 January 30, 1984 at 1:15 P.M., with all briefs to be submitted on or before April 23, 1984. Petitioner appeared by Evans and Bennett (Robert H. Marble, C.P.A.). The Audit Division appeared by John P. Dugan, 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 Arsearch Associates, Inc.

FINDINGS OF FACT

1. Arsearch Associates, Inc. ("Arsearch") a/k/a The Eastlake Corporation ("Eastlake"), failed to pay New York State personal income tax withheld from the wages of its employees during the years 1978 and 1979.

2. On December 29, 1980, the Audit Division issued a Notice of Deficiency and Statement of Deficiency to petitioner asserting a penalty in the amount of \$12,675.14 which was deemed to be the amount of unpaid withholding tax due from Arsearch.

3. In the course of a pre-hearing conference, it was determined that the actual amount of withholding tax which Arsearch failed to remit to New York State was \$2,015.87 for 1978 and \$6,684.19 for 1979 for a total of \$8,700.06. It was also discovered that Arsearch remitted tax of \$4,139.34. Accordingly, the Audit Division agreed to reduce the amount of tax allegedly due to \$4,560.72.

4. Arsearch was a Maryland corporation which operated from an office in Syracuse, New York. During the periods in issue, Arsearch was involved in restoration construction. In May, 1978, petitioner, who is an architect, began working for Arsearch as a project manager. His duties consisted of supervising a construction crew.

5. On July 15, 1978, the board of directors of Arsearch appointed petitioner as vice president of design and construction, with such duties as might be given to him by the president or the board of directors. In practice, petitioner's duties did not change substantially when he became a vice president.

6. On the same day petitioner was appointed a vice president, petitioner was elected to the board of directors of Arsearch. He was also given 33 shares of the 1,000 outstanding shares of stock. The remaining shares of stock were equally divided between the remaining principals of the corporation -- Donald Ellis, president; Stuart Williams, secretary-treasurer; and David Schultz, who was a director.

7. In July, 1979, petitioner's title was changed to that of vice president of design. As the vice president of design, petitioner worked in the office as

an architect and supervised a group of six individuals who were engaged in architectural work.

8. During the periods in issue, Arsearch maintained three checking accounts. One checking account was considered the "field account". This account was established at the Marine Midland Bank in Syracuse and could be drawn upon by petitioner. Generally, this account was used to pay for relatively minor purchases of approximately \$15.00 to \$20.00. The two remaining checking accounts were located in Syracuse, New York and Beltsville, Maryland. Petitioner was not an authorized signatory on these accounts. However, in unusual circumstances, petitioner drew checks on the Syracuse bank account and these checks were honored. Before petitioner drew a check on this account, he attempted to obtain permission.

9. Arsearch's withholding tax reports were prepared by Stuart Williams. The checks for withholding tax payments were drawn by Stuart Williams and Donald Ellis. Petitioner never signed checks for withholding tax.

10. On at least two occasions, petitioner drew checks to pay the wages of a temporary secretary. Generally, however, payroll checks were signed by either Donald Ellis or Stuart Williams.

11. The corporation tax returns were prepared by Donald Ellis and Stuart Williams.

12. The responsibility for hiring and firing employees of Arsearch rested with Donald Ellis.

13. In the summer of 1979, Arsearch changed its name to The Eastlake Corporation ("Eastlake"). The activities of the corporation did not change.

14. Petitioner left the employment of Eastlake in December, 1979. Shortly before petitioner left his employment, he became aware that taxes withheld from

the wages of Arsearch employees were not being paid over to New York State. Petitioner complained about this situation, but was unable to rectify it.

CONCLUSIONS OF LAW

A. That where a person is required to collect, truthfully account for and pay over withholding taxes and willfully fails to collect and pay over such taxes, section 685(g) of the Tax Law imposes on such person "...a penalty equal to the total amount of tax evaded, or not collected, or not accounted for and paid over".

B. That section 685(n) of the Tax Law defines a person, for purposes of section 685(g) of the Tax Law, to include:

"...an individual, corporation or partnership or an officer or employee of any corporation...who as such officer, employee or member is under a duty to perform the act in respect of which the violation occurs."

C. That whether petitioner was 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 MacLean v. State Tax Comm., 69 A.D.2d 951, aff'd 49 N.Y.2d 920). Factors which are relevant to this determination include whether the individual signed the company's tax returns and possessed the right to hire and fire employees (Matter of Amengual v. State Tax Comm., 95 A.D.2d 949,950; Matter of Malkin v. Tully, 65 A.D.2d 228). Other factors considered are the amount of stock owned, the authority to pay corporate obligations and the individual's official duties (Matter of Amengual v. State Tax Commission, supra).

D. That in view of the fact that petitioner did not have any involvement with the preparation of tax returns, did not have any authority to either hire or fire employees, and had limited involvement with the payroll of the corporation, petitioner was not a person required to collect, truthfully account for


and pay over withholding taxes within the meaning of section 685(g) of the Tax Law.

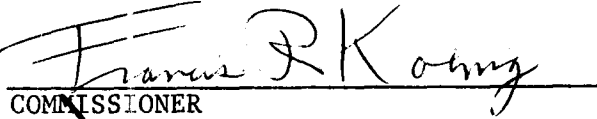
E. That the petition of Thomas LaMere is granted and the Notice of Deficiency issued December 29, 1980 is cancelled.

DATED: Albany, New York

STATE TAX COMMISSION

OCT 05 1984


PRESIDENT


COMMISSIONER


COMMISSIONER