

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :

of

Robert S. LeBeau :

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 :
1977 & 1978. :

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 31st day of December, 1984, he served the within notice of Decision by certified mail upon Robert S. LeBeau, the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Robert S. LeBeau
864 Park Avenue
Manhasset, NY 11030

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
31st day of December, 1984.

David Parchuck

Michael J. Williams
Authorized to administer oaths
pursuant to Tax Law section 174

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

December 31, 1984

Robert S. LeBeau
864 Park Avenue
Manhasset, NY 11030

Dear Mr. LeBeau:

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: Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition	:	
of	:	
ROBERT S. LEBEAU	:	DECISION
for Redetermination of a Deficiency or for	:	
Refund of Personal Income Tax under Article 22	:	
of the Tax Law for the Years 1977 and 1978.	:	

Petitioner, Robert S. LeBeau, 864 Park Avenue, Manhasset, New York 11030, 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 1977 and 1978 (File No. 27129).

A formal hearing was held before Daniel J. Ranalli, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on April 27, 1984 at 11:00 A.M., with all briefs to be submitted by July 18, 1984. Petitioner appeared pro se. The Audit Division appeared by John P. Dugan, Esq. (Paul Lefebvre, Esq., of counsel).

ISSUE

Whether petitioner was a person required to collect, truthfully account for and pay over withholding taxes on behalf of Lebeau Tours, Inc. who willfully failed to do so and is thus liable to a penalty under section 685(g) of the Tax Law.

FINDINGS OF FACT

1. On March 26, 1979, the Audit Division issued a Notice of Deficiency, along with a Statement of Deficiency, asserting a penalty pursuant to section 685(g) of the Tax Law against petitioner, Robert S. LeBeau, as a person required to collect, truthfully account for and pay over withholding taxes of LeBeau

Tours, Inc. ("the company") in the amount of \$13,640.23 for the period August 15, 1977 through April 5, 1978.

2. The company was a wholesale tour operator in the travel industry. It put together tour packages and printed brochures for retail travel agents who sold the tours to the public. The company dealt primarily with travel agents rather than the general public. Petitioner would assemble the tour packages and was involved in marketing, advertising and promoting them.

3. On March 11, 1977, petitioner and his parents sold all of the capital stock of the company and a related corporation, LeBeau Inter-America, Inc., to Universal Tours, Inc. ("Universal"). In accordance with employment agreements entered into in conjunction with the sale, petitioner was to be employed by the company as president and petitioner's parents were to be employed as regional sales managers. Petitioner's employment agreement did not specify his duties with the new owners, however, petitioner assumed he would continue the same activities he had performed prior to the sale. Petitioner had not wanted to stay with the company but the new owners insisted that he stay and assume the title of President as a condition of the sales agreement. Following the sale, petitioner took a one week vacation. Upon his return he found that the company checkbooks, payroll data and other pertinent financial records had been removed from his office. When petitioner questioned the new owners they explained that petitioner no longer had authority to sign checks, only the new owners were signatories. Petitioner also inquired whether withholding taxes were being properly remitted. The new chief financial officer informed petitioner that such payments were being made. Moreover, petitioner's parents were no longer welcome at the office and were eventually released from employment.

4. It soon became apparent to petitioner that he had been retained merely as a figurehead. The new owners reduced his duties until he had virtually nothing to do; all policy decisions were made without consulting him and he no longer had any access to the company's books and records. Petitioner was a director of the new company, however, he was never invited to a board of directors meeting. All meetings of the new owners were held privately without petitioner's presence. Petitioner supervised no employees and had no authority to hire or fire.

5. The company bookkeeper had worked for petitioner and his parents for a number of years and was kept on by the new owners at her old duties, except that she could no longer sign checks and send them out. She made out the checks and submitted them to the new owners who were supposed to sign and mail them. Within a few months, creditors began calling looking for payments on bills for which the bookkeeper had already prepared checks. At this point she realized that the checks she prepared were not being mailed. She also discovered from the bank statements that large amounts of money were being spent on personal items rather than business expenses. The bookkeeper informed petitioner of the creditor situation, however, neither was aware that withholding taxes were not being paid.

6. In September or October, 1977, payroll checks were being returned by the bank for insufficient funds. Local banks refused to cash employee paychecks and eventually the company was forced to pay the employees in cash. Petitioner had two paychecks returned by the bank and decided he had had enough and, in February, 1978, he resigned. On April 5, 1978, an involuntary petition in bankruptcy was filed against the company. In May, 1978, petitioner had a

conversation with one of the new owners and it was at this time that he first became aware that federal and state withholding taxes were not being paid.

7. The trustee in bankruptcy brought an action against petitioner among others in the United States District Court for the Southern District of New York. The court ruled that petitioner could not be held responsible for the conduct of the company during the time he served as president following the sale to Universal because he was treated as a "'virtual figurehead', he had no access to the company's books and records, he had no knowledge of the financial workings of the company..." (see Berman v. LeBeau Inter-America, Inc., No. 79 Civ. 5886 [S.D. N.Y. February 27, 1981], aff'd, No. 81-7204 [2nd Cir., November 17, 1981]).

CONCLUSIONS OF LAW

A. That section 685(g) of the Tax Law provides that any person required to collect, truthfully account for and pay over personal income tax, 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.

B. That section 685(n) of the Tax Law defines the word "person", for the purpose of section 685(g), and reads as follows:

"For purposes of subsections (g)...the term person includes 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."

C. That "the question of whether or not someone is a 'person' required to collect and pay over withholding taxes is a factual one. Factors determinative of the issue can include whether petitioner owned stock, signed the tax returns, or exercised authority over employees and the assets of the corporation"

(McHugh v. State Tax Commission, 70 A.D.2d 987, 988). Although petitioner held corporate office, his position was, essentially, a nominal one. Petitioner had no authority over the payroll or withholding of taxes, no authority to pay corporate obligations and no authority to hire and fire employees. He had no authority to sign checks or tax returns, had no access to the books and records of the company and was kept completely removed from all policymaking decisions. Petitioner, accordingly, cannot be considered a person required to collect, truthfully account for and pay over withholding taxes within the meaning and intent of sections 685(g) and 685(n) of the Tax Law.

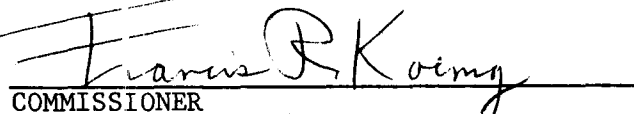
D. That the petition of Robert S. LeBeau is granted and the Notice of Deficiency issued March 26, 1979 is cancelled.


DATED: Albany, New York

STATE TAX COMMISSION

DEC 31 1984


PRESIDENT


COMMISSIONER


COMMISSIONER