

STATE TAX COMMISSION

In the Matter of the Petition :
of :
Peter Psyllos : 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 Year :
1977.

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

Peter Psyllos
566 Mt. Hope Ave.
Rochester, NY 14620

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
18th day of January, 1984.

David Parschuck

Cornie A. Haglund
pursuant to Tax Law section 174

Authorized to administer oaths

STATE OF NEW YORK

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ss.:
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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 18th day of January, 1984, he served the within notice of Decision by certified mail upon David H. Walsh, 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 H. Walsh
Pappas and Walsh
17 Main St. E.
Rochester, NY 14614

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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
18th day of January, 1984.

David Parchuck

Conrad A. Hagelund
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Authorized to administer oaths

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

January 18, 1984

Peter Psyllos
566 Mt. Hope Ave.
Rochester, NY 14620

Dear Mr. Psyllos:

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 H. Walsh
Pappas and Walsh
17 Main St. E.
Rochester, NY 14614
Taxing Bureau's Representative

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

January 18, 1984

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Rochester, NY 14620

Dear Sir:

Please take notice of the Decision of the State Tax Commission enclosed herewith.

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Very truly yours,

STATE TAX COMMISSION

cc: Petitioner's Representative
David H. Walsh
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17 Main Street East
Rochester, NY 14614
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of :
Peter Psyllos : AFFIDAVIT OF MAILING
for Redetermination of a Deficiency or Revision :
of a Determination or Refund of Sales & Use Tax :
under Article 28 & 29 of the Tax Law for the :
Period 6/1/78 - 8/31/78 & 9/1/79 - 5/31/80. :

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 18th day of January, 1984, he served the within notice of Decision by certified mail upon Peter Psyllos, the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

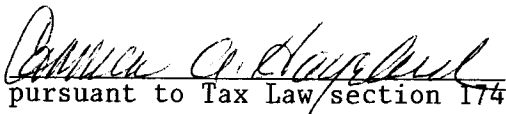
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STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petitions	:	
of	:	
PETER PSYLLOS	:	DECISION
for Revision of a Determination or for Refund	:	
of Sales and Use Taxes under Articles 28 and	:	
29 of the Tax Law for the Periods June 1, 1978	:	
Through August 31, 1978 and September 1, 1979	:	
Through May 31, 1980 and for a Redetermination	:	
of a Deficiency or for Refund of Personal Income	:	
Tax under Article 22 of the Tax Law for the	:	
Year 1977.	:	

Petitioner, Peter Psyllos, 566 Mt. Hope Avenue, Rochester, New York 14620, filed a petition for revision of a determination or for refund of sales and use taxes under Articles 28 and 29 of the Tax Law for the periods June 1, 1978 through August 31, 1978 and September 1, 1979 through May 31, 1980 (File No. 36176) and also filed a petition for a redetermination of a deficiency or for refund of personal income tax under Article 22 of the Tax Law for the year 1977 (File No. 35977).

A small claims hearing was held before John F. Koagel, Hearing Officer, at the offices of the State Tax Commission, 1 Marine Midland Plaza, Room 1300, Rochester, New York 14604 on March 8, 1983 at 9:15 A.M. Final briefs were due no later than May 22, 1983. Petitioner appeared by Jordon E. Pappas, Esq. The Audit Division appeared by John P. Dugan, Esq. (Thomas C. Sacca, Esq., of counsel).

ISSUE

Whether petitioner is personally liable for the sales tax liability of Ontario Three Peters Restaurant, Inc. and also a penalty in the amount of the unpaid withholding tax of that corporation.

FINDINGS OF FACT

1. On March 20, 1981 petitioner was issued a Notice and Demand for Payment of Sales and Use Taxes Due. Petitioner was deemed, by the Audit Division, to be personally liable as an officer of Ontario Three Peters Restaurant, Inc. d/b/a Shanangans (hereinafter "Ontario") for unpaid sales taxes, penalty and interest as follows:

<u>QUARTERLY PERIOD ENDED</u>	<u>TAX DUE</u>	<u>PENALTY DUE</u>	<u>INTEREST DUE</u>
8/31/78	\$ -	\$ 103.00	\$ 104.49
11/30/79	5,493.86	684.69	367.79
2/29/80	5,374.04	856.14	598.11
5/31/80	<u>6,054.16</u>	<u>240.00</u>	<u>79.88</u>
TOTALS	\$16,922.06	\$1,883.83	\$1,150.27

Total Tax, Penalty and Interest = \$19,956.16

Ontario timely filed sales and use tax returns for the above four periods, however each was filed either without remittance or with partial remittance.

2. In the answer to petitioner's perfected petition, the Audit Division acknowledged that when the return was filed for the period ended May 31, 1980 that a partial payment of \$3,054.16 was made. It also acknowledged that subsequent to the filing of the four returns that a payment was made sufficient to cover the tax, penalty and interest due for the period ended August 31, 1978 with \$653.12 left over which was applied to the tax as computed on the return filed for the period ended November 30, 1979 of \$5,917.00 (the record is void as to how the Audit Division arrived at the tax figure of \$5,493.86 shown above; the other two tax amounts listed conform to the total tax as computed on the returns filed).

Thus, the sales tax liability hereinafter at issue is as follows:

Quarterly
Period Ended

11/30/79	\$ 5,264.68 plus applicable penalty and interest
2/29/80	5,374.04 plus applicable penalty and interest
5/31/80	<u>3,000.00</u> plus applicable penalty and interest
TOTAL	<u>\$13,638.72</u> plus applicable penalty and interest

3. On August 31, 1981 petitioner was issued both a Statement of Deficiency and a Notice of Deficiency which covered calendar year 1977 and imposed a penalty upon petitioner under section 685(g) of the Tax Law in the amount of \$1,123.00 which represented the unpaid withholding taxes of Ontario. This penalty was imposed as petitioner was deemed to be a person, as defined in section 685(n) of the Tax Law, required to collect, truthfully account for and pay over the withholding taxes of Ontario.

4. Ontario was an eating establishment, open 7 days per week, which could be classified as a truckstop diner with a cocktail lounge. Approximately 70 percent of the sales were food sales and 30 percent were bar sales. Ontario's corporate officers were: petitioner, president, Pandelis Giamos, secretary-treasurer and Peter Mardas, vice president. Ontario began business on or about January 1, 1977 and operated continuously until December 31, 1980.

5. On April 18, 1977, petitioner signed, as president, Ontario's sales tax registration application which indicated that Ontario began operations on January 1, 1977. Petitioner also signed New York State corporation franchise tax reports, New York State sales and use tax returns and checks; he specifically signed the four sales tax returns referred to in Finding of Fact "1", supra.

6. Prior to the existence of Ontario, Peter Mardas, who had 10 to 15 years in the restaurant business, was a 50 percent partner in the same restaurant with two other people who had a combined 50 percent interest. Petitioner and

Mr. Giamos, after Mr. Mardas and his partner agreed to terminate their partnership, purchased Mr. Mardas' partners' 50 percent of the business and enough of Mr. Mardas' share so that all three of the officers of Ontario owned one-third of the stock of Ontario. The portion of the business purchased by Mr. Giamos and petitioner from Mr. Mardas was secured by a two year \$8,000.00 non-interest bearing promissory note; to date, this note has never been fully paid. The lease of the business premises was made prior to Ontario's existence on October 7, 1975 between Mr. Mardas, his partners and the lessor. On August 18, 1976 the right, title and interest in the lease not held by Mr. Mardas was assigned to him, the terms and obligations of which he guaranteed the lessor to perform and be bound by. At this same time, Mr. Giamos and petitioner individually guaranteed to the lessor to fully perform and be bound by all the terms and obligations of said lease. On January 10, 1977, Mr. Mardas assigned the right, title and interest in the lease to Ontario which also guaranteed to assume all of the obligations and terms of the lease.

7. During the period Ontario was operating petitioner had no other job. Ontario's 1977 Corporation Franchise Tax Report showed salary and all other compensation received from the corporation in the amounts of \$7,950.00 for petitioner, \$7,950.00 for Mr. Mardas and \$2,575.00 for Mr. Giamos.

8. Mr. Giamos was basically an investor in Ontario. He was at the restaurant only occasionally to either "fill in" due to a personnel shortage or attend a meeting with Mr. Mardas and petitioner concerning the operational aspects of the business; financial matters concerning the business were not discussed at these meetings.

9. Mr. Mardas spoke very little English and could not read or write it; however, he was apparently able to sign payroll checks as he did so after they

were prepared by a payroll service. He worked during the day at the restaurant and in addition to the routine functions of restaurant management was solely responsible for the hiring, firing and purchasing.

10. Petitioner basically worked late afternoons and at night, his main duties encompassing the supervision of the employees. He would also work at other times, on short notice, when needed. Petitioner contended that he was not a financially responsible officer. He testified that Mr. Mardas had always been in charge of the business and that he (petitioner) was only an assistant. Petitioner testified that he was "appointed" as president of the corporation by Mr. Mardas, that the three officers discussed it and that petitioner agreed to accept the title. Petitioner testified that he assisted with the business decisions and that he signed tax returns and other financially related documents only as a convenience in order to expedite their filing mainly due to Mr. Mardas' weakness with the English language. Petitioner testified that he had no knowledge of the contents of the returns, as these were prepared by Ontario's accountant, or of the consequences facing him if the tax monies were not paid by Ontario. Petitioner testified that although he had discussions with Mr. Mardas as to what creditors were to be paid it was Mr. Mardas who had the final say and told petitioner who to pay. It is petitioner's contention that Mr. Mardas always had the bulk of the equity in the business and was in control of the lease. Because of this, both he and Mr. Giamos felt that they were subordinate to Mr. Mardas. In summary, petitioner contended that Mr. Mardas ran the business, created a poor financial position for Ontario which ultimately led to its cessation of operations, and in effect, simply "used" petitioner.

CONCLUSIONS OF LAW

A. That section 1133(a) of the Tax Law provides that every person required to collect any tax imposed by the sales and use tax law shall be personally liable for the tax imposed, collected or required to be collected under the sales and use tax law.

That section 685(g) of the Tax Law provides that any person required to collect, truthfully account for and pay over the personal income tax imposed by the 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, 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 1131(1) of the Tax Law covering sales and use tax states, in pertinent part:

"'Person required to collect tax' or 'persons required to collect any tax imposed by this article' shall include: every vendor of tangible personal property or services;... Said terms shall also include any officer or employee of a corporation or of a dissolved corporation who as such officer or employee is under a duty to act for such corporation in complying with any requirement of this article and any member of a partnership."

Similarly, section 685(n) of the Tax Law concerning personal income tax states, in pertinent part:

"For purpose of subsection (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 whether an individual is a "person" required to collect and pay over withholding taxes and sales taxes is a factual one (Matter of Malkin v.

Tully, 65 A.D.2d 228) (Matter of Vogel v. New York State Department of Taxation and Finance, 98 Misc. 2d 222) (Matter of Chevlowe v. Koerner, 95 Misc. 2d 388).

That a "person" responsible for the payment of tax is an individual who had the final word as to what bills should or should not be paid and when (Wilson v. United States, 250 F2d 312) and that a "responsible person" is one who has or shares final word as to what bills or creditors should or should not be paid, the word "final" meaning significant rather than exclusive control (Dudley v. United States, 428 F2d 1196).

That the term "willful" as used in section 685(g) of the Tax Law means an "...act, default or conduct is consciously and voluntarily done with knowledge that as a result, trust funds belonging to Government will not be paid over but will be used for other purposes. No showing of intent to deprive the Government of its money is necessary but only something more than accidental nonpayment is required" (Matter of Levin v. Gallman, 42 N.Y.2d 32).

D. That petitioner is a person required to collect sales tax within the meaning and intent of section 1133(a) of the Tax Law and a person required to collect, truthfully account for and pay over personal income tax who willfully failed to do so within the meaning and intent of section 685(g) of the Tax Law. Petitioner signed checks, tax returns and other financially related documents. Petitioner knew or certainly should have known that other creditors were being preferred over New York State, the liability to which represented trust monies collected on its behalf. Petitioner was president of Ontario and a shareholder of Ontario. Petitioner participated in discussions concerning which creditors to pay. The fact that Mr. Mardas was recognized by petitioner to have more equity in Ontario and that petitioner allowed Mr. Mardas to make the final

decisions concerning payments to creditors does not relieve petitioner of his responsibility.

E. That the Notice and Demand for Payment of Sales and Use Taxes Due issued March 20, 1981 is to be reduced so as to conform to the tax amounts reflected in Finding of Fact "2", supra plus applicable penalty and interest.

F. That the petition filed for redetermination of sales and use taxes due is granted to the extent indicated in Conclusion of Law "E"; that the Audit Division is hereby directed to modify the Notice and Demand for Payment of Sales and Use Taxes Due issued March 20, 1981; and that, except as so granted, the petition is in all other respects denied.

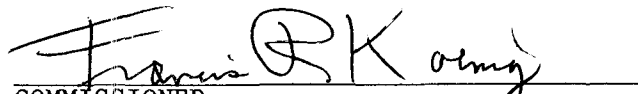
G. That the petition filed for redetermination of a deficiency of personal income tax due is denied and the Notice of Deficiency issued August 31, 1981 is sustained.

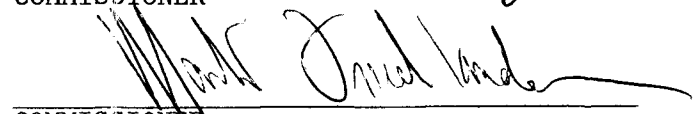
DATED: Albany, New York

STATE TAX COMMISSION

JAN 18 1984


PRESIDENT


COMMISSIONER


COMMISSIONER