

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition

of

Joseph Reyers

:

:

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 :
through 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 Joseph Reyers, the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Joseph Reyers
145 East 27th Street
New York, NY 10016

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

William J. Haysdum
Authorized to administer oaths
pursuant to Tax Law section 174

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of :
Joseph Reyers : 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 - 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 Manning Begler, the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Manning Begler
570 7th Avenue
New York, NY 10018

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

William J. McGowan
Authorized to administer oaths
pursuant to Tax Law section 174

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

October 5, 1984

Joseph Reyers
145 East 27th Street
New York, NY 10016

Dear Mr. Reyers:

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
Manning Begler
570 7th Avenue
New York, NY 10018
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of
Otto Luthi : 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 - 1979.

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

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 Otto Luthi, the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Otto Luthi
49 West 55th St.
New York, NY 10019

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

Commie P. Haglund
Authorized to administer oaths
pursuant to Tax Law section 174

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition

of

Otto Luthi

:

:

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 - 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 Manning Begler the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Manning Begler
570 7th Ave.
New York, NY 10018

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

William P. Haggard
Authorized to administer oaths
pursuant to Tax Law section 174

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

October 5, 1984

Otto Luthi
49 West 55th St.
New York, NY 10019

Dear Mr. Luthi:

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
Manning Begler
570 7th Ave.
New York, NY 10018
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition
of
OTTO LUTHI
for Redetermination of a Deficiency or for
Refund of Personal Income Tax under Article 22
of the Tax Law for the Years 1977, 1978 and
1979.

DECISION

In the Matter of the Petition
of
JOSEPH REYERS
for Redetermination of a Deficiency or for
Refund of Personal Income Tax under Article 22
of the Tax Law for the Years 1977, 1978 and
1979.

Petitioner Otto Luthi, 49 West 55th Street, New York, New York 10019,
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, 1978 and 1979
(File No. 32357).

Petitioner Joseph Reyers, 145 East 27th Street, New York, New York 10016,
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, 1978 and 1979
(File No. 32358).

A consolidated formal hearing was held before Doris E. Steinhardt, Hearing
Officer, at the offices of the State Tax Commission, Two World Trade Center,
New York, New York, on April 27, 1984 at 9:00 A.M. Petitioners appeared by

Manning Begler, Esq. The Audit Division appeared by John P. Dugan, Esq.
(Patricia L. Brumbaugh, Esq., of counsel).

ISSUE

Whether each petitioner is properly subject to the penalty imposed by Tax Law section 685(g), as a person required to collect, truthfully account for and pay over the withholding taxes of Hermitage Restaurant, Inc. who willfully failed to fulfill such responsibilities.

FINDINGS OF FACT

1. On January 28, 1980, the Audit Division issued to petitioner Otto Luthi a Statement of Deficiency and a Notice of Deficiency, asserting a penalty equal to the New York State withholding tax of Hermitage Restaurant, Inc. which was due and unpaid for the years 1977, 1978 and 1979 in the respective amounts of \$519.25, \$13,243.08 and \$11,957.54.

On January 28, 1980, the Audit Division issued to petitioner Joseph Reyers a Statement of Deficiency and a Notice of Deficiency, asserting a penalty equal to the New York State withholding tax of Hermitage Restaurant, Inc. which was due and unpaid for the years 1977, 1978 and 1979 in the respective amounts of \$519.25, \$13,243.08 and \$11,957.54.

The statements of deficiency specified the withholding tax periods for which the penalties were asserted as follows: January 1 through December 31, 1977; June 1 through June 30, 1978; August 1 through December 31, 1978; and January 1 through June 14, 1979.

2. Otto Luthi, Joseph Reyers and one Paul Decelle were the shareholders and officers of Hermitage Restaurant, Inc. (the restaurant), which had its principal place of business at 251 East 53rd Street, New York, New York. Mr. Reyers was the maitre d'hotel, and Mr. Luthi tended bar. Mr. Decelle, who

had prior experience as a bookkeeper in the restaurant business, maintained the financial records, deposited the receipts and paid creditors.

3. The restaurant engaged the accounting firm of Cohen, Keller and Loffmin to establish its bookkeeping system, to review the records periodically thereafter and to prepare the withholding tax returns. Whenever Mr. Keller, the partner assigned to the restaurant, visited the business premises, he met with Mr. Decelle.

4. Approximately nine months after the restaurant commenced doing business,¹ it ceased paying its accountant, and the duties formerly performed by the firm were presumably taken over by Mr. Decelle.

5. All three officers were authorized to sign checks on the restaurant's corporate account.

6. The only evidence offered on petitioners' behalf was the testimony of Mr. Keller. With respect to the period during which his firm served as the restaurant's accountant, he stated, "To the best of my knowledge, they [petitioners] didn't take any interest in the running of the office at all."

CONCLUSIONS OF LAW

A. That in determining whether petitioners are liable for the penalties asserted against them pursuant to subdivision (g) of section 685 of the Tax Law, the threshold question is whether they were persons required to collect, truthfully account for and pay over taxes withheld from the wages of employees of Hermitage Restaurant, Inc. Section 685(n). Relevant factors include whether petitioners signed the corporation's tax returns, possessed the right

¹ The date Hermitage Restaurant, Inc. was incorporated, the date it began doing business and the date it ceased operations are not disclosed by the evidence.

to hire and discharge employees or derived a substantial part of their income from the corporation; other pertinent areas of inquiry include the amount of stock petitioners held, the sphere of their duties and their authority to pay corporate obligations. Matter of Amengual v. State Tax Comm., 95 A.D.2d 949 (3d Dept. 1983).

B. That the evidence presented is simply inadequate to show that petitioners, as two of three corporate shareholders and officers with authority to draw checks on the corporate account, were not persons required to collect and remit withholding taxes.


C. That turning to the question whether petitioners' failure to collect, account for and pay over the taxes was willful, the test for determining willfulness is whether the act, default or conduct was "voluntarily done with knowledge that, as a result, trust funds of the government will not be paid over; intent to deprive the government of its money need not be shown, merely something more than accidental nonpayment [citation omitted]." Matter of Ragonesi v. N.Y.S. Tax Comm., 88 A.D.2d 707, 707-708 (3d Dept. 1982). Again, the evidence is insufficient to show that petitioners' failure to collect and remit the taxes was other than willful. Even assuming that petitioners delegated responsibility for all financial and tax matters to Mr. Decelle, they would not have been thereby relieved of their own obligations. "[C]orporate officials responsible as fiduciaries for tax revenues cannot absolve themselves merely by disregarding their duty and leaving it to someone else to discharge [citation omitted]." Id. at 708.


D. That the petition of Otto Luthi is denied, and the Notice of Deficiency issued to him on January 28, 1980 is sustained. The petition of Joseph Reyers is also denied, and the Notice of Deficiency issued to him on January 28, 1980 is sustained.


DATED: Albany, New York

OCT 05 1984

STATE TAX COMMISSION


PRESIDENT


COMMISSIONER



COMMISSIONER

REQUEST FOR BETTER ADDRESS

Requested by Tax Appeals Bureau Room 107 - Bldg. #9 State Campus Albany, New York 12227	Unit Tax Appeals Bureau Room 107 - Bldg. #9 State Campus Albany, New York 12227	Date of Request 11/2/84
---	---	--------------------------------

Please find most recent address of taxpayer described below; return to person named above.

Social Security Number	Date of Petition Apr. - Dec. - 10/5/84
Name Otto Luthi	
Address 49 West 55 th St. New York, N.Y. 10019	

Results of search by Files

<input type="checkbox"/> New address:	
<input type="checkbox"/> Same as above, no better address	
<input checked="" type="checkbox"/> Other:	Unclaimed

Searched by DP	Section	Date of Search 11/2/84
-----------------------	---------	-------------------------------

PERMANENT RECORDFOR INSERTION IN TAXPAYER'S FOLDER

TA 26 (9-79)

STATE OF NEW YORK
State Tax Commission
TAX APPEALS BUREAU

STATE CAMPUS
ALBANY, N. Y. 12227



Otto Luthi
49 West 55th St.
New York, NY 10019

CERTIFIED

P 693 168 818

MAIL

CLAIM CHECK
NO.

450095

☐ HOLD

DATE

10-11-84

1ST NOTICE

2ND NOTICE

10/16

RETURN

OCT 29 1984

Detached from
PS Form 3849-A
Oct. 1980



MAILED

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

October 5, 1984

Otto Luthi
49 West 55th St.
New York, NY 10019

Dear Mr. Luthi:

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
Manning Begler
570 7th Ave.
New York, NY 10018
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition
of
OTTO LUTHI
for Redetermination of a Deficiency or for
Refund of Personal Income Tax under Article 22
of the Tax Law for the Years 1977, 1978 and
1979.

DECISION

In the Matter of the Petition
of
JOSEPH REYERS
for Redetermination of a Deficiency or for
Refund of Personal Income Tax under Article 22
of the Tax Law for the Years 1977, 1978 and
1979.

Petitioner Otto Luthi, 49 West 55th Street, New York, New York 10019,
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, 1978 and 1979
(File No. 32357).

Petitioner Joseph Reyers, 145 East 27th Street, New York, New York 10016,
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, 1978 and 1979
(File No. 32358).

A consolidated formal hearing was held before Doris E. Steinhardt, Hearing
Officer, at the offices of the State Tax Commission, Two World Trade Center,
New York, New York, on April 27, 1984 at 9:00 A.M. Petitioners appeared by

Manning Begler, Esq. The Audit Division appeared by John P. Dugan, Esq. (Patricia L. Brumbaugh, Esq., of counsel).

ISSUE

Whether each petitioner is properly subject to the penalty imposed by Tax Law section 685(g), as a person required to collect, truthfully account for and pay over the withholding taxes of Hermitage Restaurant, Inc. who willfully failed to fulfill such responsibilities.

FINDINGS OF FACT

1. On January 28, 1980, the Audit Division issued to petitioner Otto Luthi a Statement of Deficiency and a Notice of Deficiency, asserting a penalty equal to the New York State withholding tax of Hermitage Restaurant, Inc. which was due and unpaid for the years 1977, 1978 and 1979 in the respective amounts of \$519.25, \$13,243.08 and \$11,957.54.

On January 28, 1980, the Audit Division issued to petitioner Joseph Reyers a Statement of Deficiency and a Notice of Deficiency, asserting a penalty equal to the New York State withholding tax of Hermitage Restaurant, Inc. which was due and unpaid for the years 1977, 1978 and 1979 in the respective amounts of \$519.25, \$13,243.08 and \$11,957.54.

The statements of deficiency specified the withholding tax periods for which the penalties were asserted as follows: January 1 through December 31, 1977; June 1 through June 30, 1978; August 1 through December 31, 1978; and January 1 through June 14, 1979.

2. Otto Luthi, Joseph Reyers and one Paul Decelle were the shareholders and officers of Hermitage Restaurant, Inc. (the restaurant), which had its principal place of business at 251 East 53rd Street, New York, New York. Mr. Reyers was the maitre d'hotel, and Mr. Luthi tended bar. Mr. Decelle, who

had prior experience as a bookkeeper in the restaurant business, maintained the financial records, deposited the receipts and paid creditors.

3. The restaurant engaged the accounting firm of Cohen, Keller and Loffmin to establish its bookkeeping system, to review the records periodically thereafter and to prepare the withholding tax returns. Whenever Mr. Keller, the partner assigned to the restaurant, visited the business premises, he met with Mr. Decelle.

4. Approximately nine months after the restaurant commenced doing business,¹ it ceased paying its accountant, and the duties formerly performed by the firm were presumably taken over by Mr. Decelle.

5. All three officers were authorized to sign checks on the restaurant's corporate account.

6. The only evidence offered on petitioners' behalf was the testimony of Mr. Keller. With respect to the period during which his firm served as the restaurant's accountant, he stated, "To the best of my knowledge, they [petitioners] didn't take any interest in the running of the office at all."

CONCLUSIONS OF LAW

A. That in determining whether petitioners are liable for the penalties asserted against them pursuant to subdivision (g) of section 685 of the Tax Law, the threshold question is whether they were persons required to collect, truthfully account for and pay over taxes withheld from the wages of employees of Hermitage Restaurant, Inc. Section 685(n). Relevant factors include whether petitioners signed the corporation's tax returns, possessed the right

¹ The date Hermitage Restaurant, Inc. was incorporated, the date it began doing business and the date it ceased operations are not disclosed by the evidence.

to hire and discharge employees or derived a substantial part of their income from the corporation; other pertinent areas of inquiry include the amount of stock petitioners held, the sphere of their duties and their authority to pay corporate obligations. Matter of Amengual v. State Tax Comm., 95 A.D.2d 949 (3d Dept. 1983).

B. That the evidence presented is simply inadequate to show that petitioners, as two of three corporate shareholders and officers with authority to draw checks on the corporate account, were not persons required to collect and remit withholding taxes.


C. That turning to the question whether petitioners' failure to collect, account for and pay over the taxes was willful, the test for determining willfulness is whether the act, default or conduct was "voluntarily done with knowledge that, as a result, trust funds of the government will not be paid over; intent to deprive the government of its money need not be shown, merely something more than accidental nonpayment [citation omitted]." Matter of Ragonesi v. N.Y.S. Tax Comm., 88 A.D.2d 707, 707-708 (3d Dept. 1982). Again, the evidence is insufficient to show that petitioners' failure to collect and remit the taxes was other than willful. Even assuming that petitioners delegated responsibility for all financial and tax matters to Mr. Decelle, they would not have been thereby relieved of their own obligations. "[C]orporate officials responsible as fiduciaries for tax revenues cannot absolve themselves merely by disregarding their duty and leaving it to someone else to discharge [citation omitted]." Id. at 708.

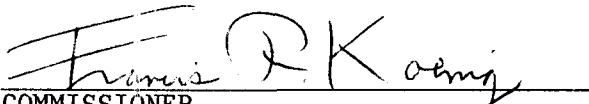
D. That the petition of Otto Luthi is denied, and the Notice of Deficiency issued to him on January 28, 1980 is sustained. The petition of Joseph Reyers is also denied, and the Notice of Deficiency issued to him on January 28, 1980 is sustained.

DATED: Albany, New York

STATE TAX COMMISSION

OCT 05 1984


PRESIDENT


COMMISSIONER

 
COMMISSIONER