

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of :
Harold H. Roberts :
AFFIDAVIT OF MAILING
for Redetermination of a Deficiency or for Refund :
of Personal Income Tax under Article 22 of the Tax :
Law and Chapter 46, Title T of the Administrative :
Code of the City of New York for the Year 1980. :

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 20th day of January, 1984, he served the within notice of Decision by certified mail upon Harold H. Roberts, the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Harold H. Roberts
45 MacDougal St.
New York, NY 10012

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
20th day of January, 1984.

David Parchuck

James A. H. H. H.
pursuant to Tax Law section 174

Authorized to administer oaths

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of
Harold H. Roberts :

AFFIDAVIT OF MAILING

for Redetermination of a Deficiency or for Refund :
of Personal Income Tax under Article 22 of the Tax
Law and Chapter 46, Title T of the Administrative :
Code of the City of New York for the Year 1980.
:

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 20th day of January, 1984, he served the within notice of Decision by certified mail upon Ruth J. Witztum, the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

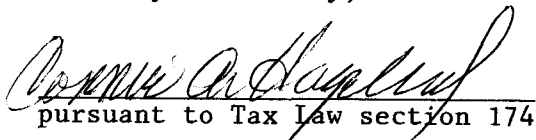
Ruth J. Witztum
Phillips, Nizer, Benjamin, Krim & Ballon
40 W. 57th St.
New York, NY 10019

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 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
20th day of January, 1984.




pursuant to Tax Law section 174

Authorized to administer oaths

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

January 20, 1984

Harold H. Roberts
45 MacDougal St.
New York, NY 10012

Dear Mr. Roberts:

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
Ruth J. Witztum
Phillips, Nizer, Benjamin, Krim & Ballon
40 W. 57th St.
New York, NY 10019
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition	:	
of	:	
HAROLD H. ROBERTS	:	DECISION
for Redetermination of a Deficiency or for	:	
Refund of Personal Income Tax under Article 22	:	
of the Tax Law and Chapter 46, Title T of the	:	
Administrative Code of the City of New York for	:	
the Year 1980.	:	

Petitioner, Harold H. Roberts, 45 MacDougal Street, New York, New York 10012, filed a petition for redetermination of a deficiency or for refund of New York State 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 1980 (File No. 34366).

A small claims hearing was held before Anthony J. Ciarlone, Jr., Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on July 14, 1983 at 10:45 A.M. Petitioner appeared with Phillips, Nizer, Benjamin, Krim & Ballon (Ruth J. Witztum, Esq., of counsel). The Audit Division appeared by John P. Dugan, Esq. (Thomas C. Sacca, Esq., of counsel).

ISSUE

Whether petitioner, Harold H. Roberts, is subject to a penalty under section 685(g) of the Tax Law as a person who willfully failed to collect, truthfully account for and pay over withholding taxes.

FINDINGS OF FACT

1. West Side Tobacco & Confectionery Corporation ("West Side") withheld New York State and New York City personal income taxes of \$1,005.20 and \$349.59,

respectively, from its employees during the period June 1, 1980 through June 15, 1980.

2. On March 30, 1981, the Audit Division issued a Notice of Deficiency for \$1,354.79, along with an explanatory Statement of Deficiency, on which a penalty pursuant to section 685(g) of the Tax Law was imposed against petitioner, Harold H. Roberts, as a person who willfully failed to collect, truthfully account for and pay over withholding taxes.

3. At the hearing, petitioner conceded that he was a responsible officer of West Side. However, he argued that he did not willfully fail to pay the tax because, on Friday, June 13, 1980, he mailed Form IT-2101, New York State and City of New York Employer's Return of Tax Withheld, with a check for \$1,354.79 drawn on West Side's checking account at the Chase Manhattan Bank, N.A. ("The Chase"). Said checking account had a balance in excess of \$30,000.00 on June 13, 1980. At the hearing petitioner testified that he had no reason to believe that the above mentioned check would not clear.

4. On June 16, 1980, The Chase was served with two Tax Collector's levies by the State of New York for \$415,000.00 and \$233,723.66. On June 16, 1980, the City of New York filed a warrant for \$346,000.00 against petitioner and served a levy upon The Chase on June 19, 1980 for the same amount. The warrants were issued against West Side for unpaid cigarette taxes. As a result, the balance in West Side's account (\$230,437.13) was immediately transferred to "sundry". All checks were returned, including the withholding tax check for \$1,354.79. The account was closed on July 2, 1980.

5. As a result of the tax levies and warrants, on June 16 or 17, 1980, the business was padlocked. On June 23, 1980, an involuntary petition for

bankruptcy was filed against West Side. As of June 16 or 17, 1980, petitioner had no access to West Side's offices. On July 2, 1980, the trustee in bankruptcy was in possession of West Side.

6. On July 14, 1980, the Withholding Tax Unit of the Income Tax Bureau sent a letter to West Side stating that:

"A photocopy of your original check has been dishonored by the bank for the reason: Refer to maker (see enclosed photo).

A replacement check should be sent to this office within ten days to avoid additional penalty and interest charges."

Petitioner did not receive the letter since the trustee in bankruptcy was in possession of West Side. Further, he was unaware the withholding tax check was dishonored until a pre-hearing conference held on February 2, 1982.

7. A copy of Form IT-2101, New York State and City of New York Employer's Return of Tax Withheld submitted at the hearing contained the following notations: NO REMIT and under the space captioned Total Remittance, -0-. The Audit Division did not know when these notations were put on the form. Also stamped on the form were notations: Non-Payment Credit and Bankrupt.

CONCLUSIONS OF LAW

A. That the personal income tax imposed by Chapter 46, Title T of the Administrative Code of the City of New York is by its own terms tied into and contains essentially the same provisions as Article 22 of the Tax Law. Therefore, in addressing the issue presented herein, unless otherwise specified, all references to particular sections of Article 22 shall be deemed references (though uncited) to the corresponding sections of Chapter 46, Title T of the Administrative Code of the City of New York.

B. That, pursuant to section 685(g) of the Tax Law, any person required to collect, truthfully account for and pay over the tax imposed by this article 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.

C. That petitioner, Harold H. Roberts, admitted that he was the responsible officer of West Side. Thus, the only decision to be rendered is whether petitioner's actions were willful in failing to pay over the tax withheld from the employees of West Side.

D. That no prior New York authorities have defined "willful" as used in this statute. Federal opinion appears to hold that the test of 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. No showing of intent to deprive the Government of its money is necessary, but only something more than accidental non-payment is required. (Matter of Levin v. Gallman, 42 N.Y.2d 32, 34, and cases cited therein.)

E. That petitioner, Harold H. Roberts, did not willfully fail to pay over the taxes withheld from the employees of West Side. At the time he filed the employer's return for withholding tax and submitted a check in payment for the taxes, there were sufficient funds in West Side's checking account to cover the check. Therefore, petitioner is not liable for the penalty imposed pursuant to section 685(g) of the Tax Law.

F. That the petition of Harold H. Roberts is granted and the Notice of Deficiency dated March 30, 1981 is cancelled.

DATED: Albany, New York

STATE TAX COMMISSION

JAN 20 1984

Roderick W. Chin
PRESIDENT

Francis R. Kolmij
COMMISSIONER

W. M. J. J. J.
COMMISSIONER