

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :  
of :  
Blanche Rosenberg (Reiman) and Ronald W. Rubin :  
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. :

AFFIDAVIT OF MAILING

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 25th day of May, 1984, he served the within notice of Decision by certified mail upon Blanche Rosenberg (Reiman), the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Blanche Rosenberg (Reiman)  
3135 Johnson Ave.  
New York, NY 10463

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  
25th day of May, 1984.

David Parchuck

Authorized to administer oaths  
pursuant to Tax Law section 174

## STATE TAX COMMISSION

# AFFIDAVIT OF MAILING

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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 25th day of May, 1984, he served the within notice of Decision by certified mail upon Ronald W. Rubin, the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Ronald W. Rubin  
58 Buena Vista St.  
Stamford, CT 06907

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.

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

May 25, 1984

Blanche Rosenberg (Reiman)  
3135 Johnson Ave.  
New York, NY 10463

Dear Mrs. Rosenberg:

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  
William Bagliebter  
Parker, Duryee, Zunino, Malone & Carter  
529 Fifth Ave.  
New York, NY 10017  
Taxing Bureau's Representative

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

May 25, 1984

Ronald W. Rubin  
58 Buena Vista St.  
Stamford, CT 06907

Dear Mr. Rubin:

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.

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cc: Petitioner's Representative  
William Bagliebter  
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529 Fifth Ave.  
New York, NY 10017  
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

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In the Matter of the Petitions  
of  
BLANCHE ROSENBERG (REIMAN) AND RONALD W. RUBIN  
for Redetermination of a Deficiency or for  
Refund of Personal Income Tax under Article 22  
of the Tax Law for the Years 1977 and 1979.

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DECISION

Petitioner, Blanche Rosenberg (Reiman), 3135 Johnson Avenue, New York, New York 10463, and petitioner Ronald W. Rubin, 58 Buena Vista Street, Stamford, Connecticut 06907, each 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 1979 (File Nos. 33176 and 33177).

A consolidated formal hearing was held before Frank W. Barrie, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on June 23, 1983 at 9:30 A.M., with all briefs to be submitted by September 21, 1983. Petitioners appeared by Parker, Duryee, Zunino, Malone & Carter, Esqs. (William Bagliebter, Esq., of counsel). The Audit Division appeared by John P. Dugan, Esq. (Irwin Levy, Esq., of counsel).

#### ISSUE

Whether, under Tax Law §685(g), petitioners were persons required to collect, truthfully account for and pay over withholding taxes and willfully failed to do so.

#### FINDINGS OF FACT

1. On February 25, 1980, the Audit Division issued a Notice of Deficiency along with a Statement of Deficiency asserting a penalty under Tax Law §685(g)

against petitioner Blanche Rosenberg<sup>1</sup> as a person required to collect, truthfully account for and pay over withholding taxes of The Valtronic Corporation ("Valtronic") in the amount of \$6,279.77<sup>2</sup> for the withholding tax period of December 16, 1977 through December 31, 1977 and of \$11,001.00<sup>3</sup> for the period of January 1, 1979 through February 9, 1979.

2. On February 25, 1980, the Audit Division also issued a Notice of Deficiency along with a Statement of Deficiency asserting a penalty under Tax Law §685(g) against petitioner Ronald W. Rubin as a person required to collect, truthfully account for and pay over withholding taxes of Valtronic in the amount of \$6,279.77<sup>4</sup> for the withholding tax period of December 16, 1977 through December 31, 1977 and of \$11,001.00<sup>5</sup> for the period of January 1, 1979 through February 9, 1979.

3. Petitioners submitted into evidence photocopies of four cancelled checks and a bank checking account statement which show that the taxes withheld from its employees during the period of December 16, 1977 through December 31, 1977 were paid over to the state.

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<sup>1</sup> Subsequent to the periods at issue, petitioner Blanche Rosenberg remarried and is now known as Blanche Reiman.

<sup>2</sup> The Audit Division introduced into evidence as part of its Exhibit "D", herein, four Forms IT-2101, Employers Return of Tax Withheld, which show a total tax withheld of \$5,839.52 for the period December 16, 1977 through December 31, 1977 and not \$6,279.77. The difference of \$440.25 is unexplained.

<sup>3</sup> The Audit Division in its Answer, Exhibit "C", herein, concedes that Valtronic's payroll records for the period of January 1, 1979 through February 9, 1979 show withholding taxes of \$7,783.23 and not \$11,001.00.

<sup>4</sup> See Footnote "2", supra.

<sup>5</sup> See Footnote "3", supra.

4. Petitioner Blanche Rosenberg resigned as secretary of Valtronic on March 31, 1978.<sup>6</sup> During the latter period at issue, she was employed as a bookkeeper/clerk by Valtronic and performed only clerical functions.

5. Petitioner Ronald W. Rubin was the founder and chief executive officer of Valtronic from its inception in 1955 until it was adjudicated bankrupt in February, 1979. He testified that even while Blanche Rosenberg was secretary of the corporation, she had no authority to pay or not to pay taxes and had no control or responsibility for the day-to-day operations of the corporation. Rather, she performed all duties at his direction.

6. Valtronic pioneered the concept of modular dental cabinets, and by 1968, it was manufacturing sixty to seventy percent of the dental cabinets sold through the major dental stores. Its dental cabinets could be used in various configurations which appealed to dental stores which also provided design services to dentists. The company eventually ventured into the manufacture of wall systems.

7. Valtronic grew rapidly into a successful enterprise. It had been started by Mr. Rubin in 1955 with \$100,000 in working capital. By 1978, it was receiving financing from Chase Manhattan Bank and from various insurance companies which had secured private offerings and public offerings with respect to a number of Valtronic's subsidiary corporations. By 1978, it was leasing 100,000 square feet in The Bronx and employing over two hundred members of minority groups.

8. In 1978, Valtronic was a victim of the general economic malaise of that year. It developed cash flow problems resulting from delays in the

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<sup>6</sup> Petitioner Blanche Rosenberg submitted her resignation in October or early November, 1977. However, the board of directors of Valtronic did not accept her resignation as secretary until March 31, 1978.



collection of its accounts receivable. Its customers were stretching out the time for paying their bills. In May, 1978, the corporation went into bankruptcy court for Chapter XI protection from its creditors and from May, 1978 to February, 1979, the corporation was deemed a debtor in possession. It appeared that the corporation would get out of Chapter XI and remain in operation after a viable financial plan was developed.

At the time Valtronic went into Chapter XI, its accounts receivable of approximately \$1,000,000 were being financed by Commercial Trading Company, and although there were collection delays, one hundred percent of its receivables were being collected. In addition, the company maintained quality control over its manufactured goods which was important for its continued viability. In order to try to secure cash, petitioner Ronald Rubin, who was working doggedly to save his company, retained a collection agency to collect receivables that were aged more than ninety days pursuant to lists provided to such agency by Commercial Trading Company. This was an important aspect of the financial plan which would enable Valtronic to come out of the Chapter XI proceeding as a viable entity, and it appeared as late as January, 1979 that Valtronic would survive.

From May, 1978, the time it went into Chapter XI, Valtronic was required to report its operating and financial results on a bi-weekly basis to the bankruptcy court, and in January 1979, payments of withholding taxes were up to date. Unfortunately, the company's survival plan suddenly unravelled

despite the commendable<sup>7</sup> efforts of petitioner Ronald W. Rubin to save his company.

9. The collection agency which had been retained to collect aged accounts receivable was embezzling money due Valtronic. In addition to collecting money and not remitting it to Valtronic, it was also collecting from the company's account debtors whose accounts were not aged more than ninety days. In other words, it was also collecting monies that were due and owing to Commercial Trading Company. Commercial Trading Company, as a result of the embezzlement, would no longer advance money at the same rate: advances on accounts receivables went from eighty percent to twenty percent. Commercial Trading Company eventually backed out of the financial plan to keep Valtronic alive. As a result, a company willing to enter into a joint venture with Valtronic backed out, and Valtronic was adjudicated bankrupt.

10. Through no fault of Ronald W. Rubin, as of the summer of 1983, the estate of the bankrupt Valtronic has not yet been settled. Approximately \$175,000 is left in the estate to pay tax claims. It appears that some of the embezzled monies were ultimately recaptured, which apparently explains the substantial amount of money left in the estate to pay tax claims.

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<sup>7</sup> "Commendable" is used herein in its literal sense: the judge overseeing the Chapter XI proceeding and ultimate bankruptcy of Valtronic commended petitioner Ronald W. Rubin for his scrupulous determination to save his company. The judge stated on the record during the bankruptcy proceeding as follows:

"While it is true that I find that for reasons beyond your (Ronald W. Rubin's) control you cannot continue the operation and as a corporation come out as I think you could have come out of Chapter XI... However, I wish to specifically state on the record that Mr. Rubin has done everything possible...to see to the administration of this estate in accordance with...the specific instructions of this Court."

11. Petitioner Ronald W. Rubin did not know that there were unpaid withholding taxes until he received the Notice described in Finding of Fact "2", supra.

CONCLUSIONS OF LAW

A. That, pursuant to Tax Law §685(g), any "person" required to collect, truthfully account for and pay over withholding taxes, who willfully fails to do so, can be subjected to a penalty equaling the amount of the tax. "Person" for purposes of this section includes "any officer or employee of any corporation ...who as such officer...is under a duty to perform the act in respect of which the violation occurs". Tax Law §658(n).

B. That, pursuant to Finding of Fact "3", supra, since no withholding tax is due and owing for the period of December 16, 1977 through December 31, 1977, the portion of the penalty imposed against each petitioner equal to the withholding taxes alleged to be due and owing for such period must be cancelled.

C. That relevant factors to be considered in deciding whether petitioners are "persons" required to collect and pay over withholding taxes include whether they signed corporate tax returns, possessed the right to hire and fire employees and derived a substantial portion of income from the corporation. Other areas of inquiry include their official duties for the corporation, the amount of corporation stock owned, and authority to pay corporate obligations. Amengual v. State Tax Comm., 464 N.Y.S.2d 272, 273. Judged by these criteria and pursuant to Findings of Fact "4" and "5", supra, petitioner Blanche Rosenberg was not responsible for the collection and payment over of withholding taxes due from Valtronic for the latter period which remains at issue. However, pursuant to Finding of Fact "5", supra, it is clear that petitioner Ronald W.

Rubin was a responsible person for purposes of the collection and payment over of withholding taxes due from Valtronic.

D. That in order to conclude that petitioner Ronald W. Rubin may be saddled with personal liability under Tax Law §685(g) for unpaid withholding taxes, we must also determine that he willfully failed to collect and pay over withholding taxes of Valtronic for the period January 1, 1979 through February 9, 1979.

E. That the failure to collect and pay over withholding taxes is willful if such failure 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 nonpayment is required. Matter of Levin v. Gallman, 49 A.D.2d 434.

F. That the failure of petitioner Ronald W. Rubin to collect and pay over withholding taxes was not consciously and voluntarily done. Rather, such failure was the involuntary result of an embezzlement of Valtronic monies as noted in Finding of Fact "8", supra, which led to the company's demise. Furthermore, Ronald W. Rubin was not conscious of such failure to pay over withholding taxes until he received the Notice of Deficiency. Nor was such lack of awareness the result of an improper delegation of duty. Rather, his commendable efforts to save a business were thwarted by the illegal schemes of others.

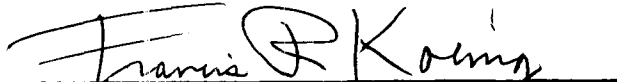
G. That the petitions of Blanche Rosenberg (Reiman) and Ronald W. Rubin are granted and the Notices of Deficiency dated February 25, 1980 are cancelled.

DATED: Albany, New York

STATE TAX COMMISSION

MAY 25 1984

  
PRESIDENT

  
COMMISSIONER

  
COMMISSIONER