

STATE TAX COMMISSION

In the Matter of the Petition
of
Rose Schwartz

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
1978.

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

Rose Schwartz
4 Herkimer Ave.
Jericho, NY 11753

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 Paruch

pursuant to Tax Law section 174

Authorized to administer oaths

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of :
Rose Schwartz :
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 :
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 18th day of January, 1984, he served the within notice of Decision by certified mail upon David B. Gilbert, 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 B. Gilbert
277 Broadway, Suite 1200
New York, NY 10007

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
18th day of January, 1984.

David Parchuck

William A. Day
pursuant to Tax Law section 174

Authorized to administer oaths

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

January 18, 1984

Rose Schwartz
4 Herkimer Ave.
Jericho, NY 11753

Dear Ms. Schwartz:

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 B. Gilbert
277 Broadway, Suite 1200
New York, NY 10007
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

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| In the Matter of the Petition | : | |
| of | : | |
| ROSE SCHWARTZ | : | DECISION |
| for Redetermination of a Deficiency or for | : | |
| Refund of Personal Income Tax under Article 22 | : | |
| of the Tax Law for the Year 1978. | : | |

Petitioner, Rose Schwartz, 4 Herkimer Avenue, Jericho, New York 11753, filed a petition for redetermination of a deficiency or for refund of personal income tax under Article 22 of the Tax Law for the year 1978 (File No. 33334).

A 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 May 25, 1983 at 1:15 P.M., with all briefs to be submitted by July 13, 1983. Petitioner appeared by David B. Gilbert, Esq. The Audit Division appeared by John P. Dugan, Esq. (William Fox, Esq., of counsel).

ISSUE

Whether petitioner was a person required to collect, truthfully account for and pay over withholding taxes under Tax Law §685(g).

FINDINGS OF FACT

1. On December 29, 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, Rose Schwartz, as a person required to collect, truthfully account for and pay over withholding taxes of Donald Richard Transportation Company, Inc. (hereinafter "Donald Richard") in the amount of \$29,353.27 for the period January 1, 1978 through November 30, 1978.

2. Petitioner's husband, Leonard Schwartz, was the president of Donald Richard and, at the advice of Morris Lipson, the corporation's attorney, he made petitioner the secretary of Donald Richard. Petitioner also owned a minority interest in the corporation during the period at issue.

3. As secretary of Donald Richard, petitioner had the authority to sign corporate checks. However, she never did so and, in fact, never performed any duties or services for the corporation. She never prepared the payroll, never hired or fired employees, never prepared any tax returns on behalf of the corporation, never discriminated among corporate creditors, and never received any compensation from the corporation. In sum, petitioner was not involved in any of the financial affairs of the corporation.

4. During the period at issue, petitioner was employed as a school secretary by the New York City Board of Education.

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, shall be liable 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, (or) employee...is under a duty to perform the act in respect of which the violation occurs". Tax Law §685(n).

B. That relevant factors to be considered in deciding whether petitioner, as a corporate officer, is a "person" required to collect and pay over withholding taxes include whether she signed the corporation's tax returns, possessed the right to hire and fire employees and derived a substantial portion of her income from the corporation. Other areas of inquiry include petitioner's official duties for the corporation, the amount of corporation stock she owned,

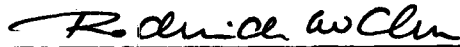
and her authority to pay corporate obligations. Amengual v. State Tax Com'n, 464 N.Y.S.2d 272, 273. Judged by these criteria and pursuant to Finding of Fact "3", supra, petitioner was not responsible for the collection and payment of withholding taxes due from the corporation and may not be saddled with liability under Tax Law §685(g).

C. That the petition of Rose Schwartz is granted and the Notice of Deficiency dated December 29, 1980 is cancelled.

DATED: Albany, New York

STATE TAX COMMISSION

JAN 18 1984


PRESIDENT


COMMISSIONER


COMMISSIONER