

STATE TAX COMMISSION

AFFIDAVIT OF MAILING

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

Cecil Phillips
422 N. Central Dr.
N. Massapequa, NY 11758

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.

Page 2

Affidavit of Mailing

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
31st day of December, 1984.

Nicola J. Williams

Authorized to administer oaths
pursuant to Tax Law section 174

David Parschuck

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

December 31, 1984

Cecil Phillips
422 N. Central Dr.
N. Massapequa, NY 11758

Dear Mr. Phillips:

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
Gerald Frank
Frank Zimmerman & Co.
444 Madison Ave.
New York, NY 10022
Taxing Bureau's Representative

STATE TAX COMMISSION

AFFIDAVIT OF MAILING

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

Lester Steinberg
169 Piccadilly Downs
Lynbrook, NY 11563

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.

Page 2

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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
31st day of December, 1984.

David Parbuck

Nicola J. Williams

Authorized to administer oaths
pursuant to Tax Law section 174

STATE TAX COMMISSION

AFFIDAVIT OF MAILING

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Page 2
Affidavit of Mailing

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
31st day of December, 1984.

David Parhusip

Authorized to administer oaths
pursuant to Tax Law section 174

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

December 31, 1984

Lester Steinberg
169 Piccadilly Downs
Lynbrook, NY 11563

Dear Mr. Steinberg:

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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Very truly yours,

STATE TAX COMMISSION

cc: Petitioner's Representative
Gerald Frank
Frank Zimmerman & Co.
444 Madison Ave.
New York, NY 10022
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition	:	
	:	
of	:	
	:	
LESTER STEINBERG	:	
	:	
for Redetermination of a Deficiency or for	:	
Refund of Personal Income Tax under Article 22	:	
of the Tax Law for the Year 1978.	:	

DECISION

In the Matter of the Petition	:
	:
of	:
	:
CECIL PHILLIPS	:
	:
for Redetermination of a Deficiency or for	:
Refund of Personal Income Tax under Article 22	:
of the Tax Law for the Year 1978.	:

Petitioners, Lester Steinberg, 169 Piccadilly Downs, Lynbrook, New York 11563 and Cecil Phillips, 422 East Central Drive, North Massapequa, New York 11758, filed petitions for redetermination of deficiencies or for refunds of personal income tax under Article 22 of the Tax Law for the year 1978 (File Nos. 40671 and 43113).

A formal hearing was held before Daniel J. Ranalli, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on September 19, 1984 at 3:00 P.M. Petitioners appeared by Frank, Zimmerman & Company, P.C. (Gerald Frank, C.P.A.). The Audit Division appeared by John P. Dugan, Esq. (Angelo A. Scopellito, Esq., of counsel).

ISSUE

Whether petitioners were persons required to collect, truthfully account for and pay over withholding taxes, who willfully failed to do so and are thus liable to a penalty under section 685(g) of the Tax Law.

FINDINGS OF FACT

1. On September 27, 1982, the Audit Division issued a Notice of Deficiency, along with a Statement of Deficiency, asserting a penalty pursuant to section 685(g) of the Tax Law against petitioner Lester Steinberg as a person required to collect, truthfully account for and pay over withholding taxes of Inter-City Sheet Metal Corp. ("the corporation") in the amount of \$24,752.70 for the period January 16, 1978 through November 30, 1978. On the same date, a similar notice was issued against petitioner Cecil Phillips in the same amount and for the same period.

2. At a pre-hearing conference, petitioner Lester Steinberg produced an agreement indicating that he had sold all of his interest in the corporation effective February 8, 1978. The Audit Division agreed that Mr. Steinberg was liable for withholding taxes due only up to that date and his liability was reduced to \$1,862.27. At the hearing, petitioner Cecil Phillips produced a similar agreement indicating that he also had sold all of his interest in the corporation effective February 8, 1978. The Audit Division agreed that the liability with respect to Mr. Phillips was also \$1,862.27 for the period January 16, 1978 through February 8, 1978.

3. Petitioner Lester Steinberg was the president of the corporation, petitioner Cecil Phillips was the vice president, and Heinz Meyer was the secretary-treasurer. All corporate checks required the signatures of two of the aforesaid officers. Generally, Mr. Steinberg and Mr. Meyer signed the

checks since Mr. Phillips was out of the office frequently. On rare occasions, when one of the other officers was unavailable, Mr. Phillips signed checks. Since Mr. Meyer was primarily involved with the financial operations of the corporation, he usually signed the tax returns.

4. Mr. Meyer drew a check for payment of the withholding taxes due for the period January 16, 1978 through January 31, 1978. Mr. Meyer signed the check and gave it to Mr. Steinberg to sign. Mr. Steinberg signed the check and returned it to Mr. Meyer for mailing. No payment for said withholding period has been received by the Department of Taxation and Finance. Mr. Steinberg insists that he had done all he could to insure that payment was made and that, once he gave the check to Mr. Meyer, it became Mr. Meyer's responsibility to insure payment. Mr. Phillips was not involved with the check-signing incident.

5. The withholding tax payment for the period February 1, 1978 through February 8, 1978 was not due until after petitioners had left the corporation and petitioners maintain they had no responsibility for making said payment.

CONCLUSIONS OF LAW

A. That section 685(g) of the Tax Law provides that any person required to collect, truthfully account for and pay over personal income tax, 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 685(n) of the Tax Law defines the word "person", for the purpose of section 685(g), and reads as follows:

"For purposes of subsections (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 it is undisputed that petitioners were officers of the corporation with the power to sign checks and corporate documents. The fact that petitioners left the responsibility for mailing the withholding tax payments to Mr. Meyer did not relieve them of their duty to insure that payment was made. "[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) (Ragonesi v. New York State Tax Commission, 88 A.D.2d 707). Petitioners are, therefore, liable for withholding taxes in the amount of \$1,862.27 for the period January 16, 1978 through February 8, 1978.

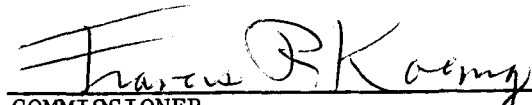
D. That the petitions of Lester Steinberg and Cecil Phillips are granted to the extent indicated in Finding of Fact "2", supra; that the Audit Division is directed to modify the notices of deficiency issued September 27, 1982 accordingly; and that, except as so granted, the petitions are in all other respects denied.


DATED: Albany, New York

STATE TAX COMMISSION

DEC 31 1984


PRESIDENT


COMMISSIONER


COMMISSIONER