

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of :
Dorothy J. Turner :
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 :
1978 - 1980. :
_____ :

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 21st day of September, 1984, he served the within notice of Decision by certified mail upon Michael P. Daumen, the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Michael P. Daumen
DiFilippo, Davison, Henfling & Daumen
681 Main St.
E. Aurora, NY 14052

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
21st day of September, 1984.

David Parchuck

James R. Haggart
Authorized to administer oaths
pursuant to Tax Law section 174

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of :
Dorothy J. Turner :
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 1978 :
- 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 21st day of September, 1984, he served the within notice of Decision by certified mail upon Dorothy J. Turner, the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Dorothy J. Turner
79 Lein Rd.
West Seneca, NY 14224

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
21st day of September, 1984.

David Parchuck

James A. Hays
Authorized to administer oaths
pursuant to Tax Law section 174

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

September 21, 1984

Dorothy J. Turner
79 Lein Rd.
West Seneca, NY 14224

Dear Ms. Turner:

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
Michael P. Daumen
DiFilippo, Davison, Henfling & Daumen
681 Main St.
E. Aurora, NY 14052
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition
of
DOROTHY J. TURNER
for Redetermination of a Deficiency or for
Refund of Personal Income Tax under Article 22
of the Tax Law for the Years 1978, 1979 and
1980.

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DECISION

Petitioner, Dorothy J. Turner, 79 Lein Road, West Seneca, New York 14224, 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 1978, 1979 and 1980 (File Nos. 35766 and 41747).

A small claims hearing was held before James Hoefer, Hearing Officer, at the offices of the State Tax Commission, State Office Building, 65 Court Street, Buffalo, New York, on March 21, 1984 at 10:45 A.M., with all briefs to be submitted by May 21, 1984. Petitioner appeared by DiFilippo, Davison, Henfling & Daumen (Michael P. Daumen, Esq., of counsel). The Audit Division appeared by John P. Dugan, Esq. (Deborah Dwyer, Esq., of counsel).

ISSUE

Whether petitioner was a person, as defined in section 685(n) of the Tax Law, under a duty to collect, truthfully account for and pay over the New York State withholding taxes of Jim Turner Auto Sales, Inc. and, if such a person, whether her failure to collect, truthfully account for and pay over said withholding taxes was willful.

FINDINGS OF FACT

1. The Audit Division, on August 31, 1981, issued a Statement of Deficiency to petitioner, Dorothy J. Turner, imposing a penalty, pursuant to section 685(g) of the Tax Law, equal in amount to the unpaid New York State withholding taxes due and owing from Jim Turner Auto Sales, Inc. (hereinafter "the corporation"). The Statement of Deficiency indicated the withholding tax period in question as October 1, 1978 through December 31, 1978 and further indicated that \$435.30 of withholding tax had not been paid for said period. Said Statement of Deficiency was issued to petitioner on the grounds that she was a person required to collect, truthfully account for and pay over the withholding taxes due and owing from the corporation and that she willfully failed to do so. Based on the Statement of Deficiency, the Audit Division, on August 31, 1981, issued a Notice of Deficiency to petitioner for the year 1978 in the sum of \$435.30.

2. On September 30, 1982, the Audit Division issued a Notice of Claim against petitioner claiming a deficiency greater than that asserted in the Notice of Deficiency dated August 31, 1981. The greater deficiency pertained to the period June 1, 1978 through August 31, 1978 and amounted to \$1,123.30.

3. The Audit Division, in the answer to the perfected petition, asserted a second claim against petitioner for a greater deficiency for the following periods¹ and amounts:

¹ It is noted that the greater deficiency asserted in the answer encompassed years (1979 and 1980) not included in the Notice of Deficiency (1978). Since the propriety of asserting a greater deficiency for years other than the year shown on the Notice of Deficiency was not raised as an issue, and in view of the conclusion reached herein, this point will not be addressed hereinafter.

<u>PERIOD</u>	<u>AMOUNT</u>
1/1/79 - 1/31/79	\$ 132.50
2/1/79 - 2/28/79	172.60
3/1/79 - 3/31/79	168.30
12/1/79 - 12/31/79	136.10
4/1/80 - 4/30/80	185.20
5/1/80 - 5/31/80	236.50
6/1/80 - 6/30/80	173.80
7/1/80 - 7/31/80	138.60
8/1/80 - 8/31/80	261.60
Total	<u>\$1,605.20</u>

4. Jim Turner Auto Sales, Inc. was incorporated by James E. Turner, petitioner's former spouse, on or about January 22, 1974. James E. Turner was president of the corporation and owner of 65 percent of its stock, while petitioner was secretary and treasurer of the corporation and owner of the remaining 35 percent of its stock.

5. From approximately October of 1974 to February 14, 1978, petitioner was active in the day-to-day management of the corporation. In addition to being the secretary and treasurer of the corporation, petitioner was also its bookkeeper. Up until February 14, 1978, petitioner signed corporate checks, prepared the payroll and withholding tax reports, signed tax returns and authorized payment to creditors.

6. Petitioner and James E. Turner were experiencing severe marital problems which resulted in Mr. Turner's abandonment of the marital residence sometime prior to February 14, 1978. Said marital problems were carried over into the operation of the corporation, creating an emotionally charged atmosphere in the corporate office. In order to avoid additional emotional strain, petitioner, on February 14, 1978, ceased her relationship with the corporation by tendering her resignation orally to James E. Turner. A written resignation was submitted on December 17, 1978.

7. After giving her resignation to the corporation, petitioner immediately began an action to obtain a judgment of divorce. As the result of said action, petitioner and James E. Turner entered into a property settlement agreement dated May 11, 1979 which provided, inter alia, that petitioner "...sign over all her shares in Jim Turner Auto Sales, Inc.". Petitioner was granted a judgment of divorce sometime in 1981.

8. Petitioner, after her resignation from the corporation on February 14, 1978, never again entered the corporation's office. Petitioner, after February 14, 1978, was not active in the day-to-day management of the corporation, was no longer authorized to sign corporate checks, did not prepare the payroll and withholding tax reports, did not sign tax returns and was no longer authorized to direct payment to creditors.

CONCLUSIONS OF LAW

A. That after February 14, 1978, petitioner was not a person, as defined in section 685(n) of the Tax Law, under a duty to collect, truthfully account for and pay over the New York State withholding taxes of Jim Turner Auto Sales, Inc. Petitioner, after February 14, 1978, did not participate in the corporation's daily operations or decision-making processes, did not sign corporate checks, did not direct payment to creditors and did not sign corporate tax returns.


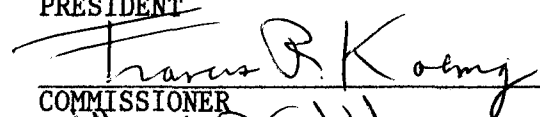
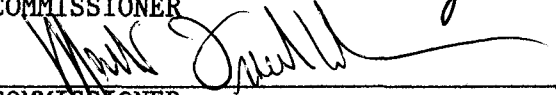
B. That the Notice of Deficiency dated August 31, 1981 and the two assertions of a greater deficiency all encompass periods after February 14, 1978. Accordingly, said Notice of Deficiency and said assertions of a greater deficiency are cancelled since petitioner was not a responsible person for periods after February 14, 1978.

C. That the petition of Dorothy J. Turner is hereby granted and the Notice of Deficiency dated August 31, 1981 and the two assertions of a greater deficiency are cancelled in full.

DATED: Albany, New York

SEP 21 1984

STATE TAX COMMISSION


PRESIDENT

COMMISSIONER

COMMISSIONER