

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of :
George Bartunek :
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 4th day of April, 1985, he served the within notice of Decision by certified mail upon George Bartunek, the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

George Bartunek
14 Trapper Lane
Centereach, NY 11720

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
4th day of April, 1985.

David Parchuck

Ernie P. Vogelund
Authorized to administer oaths
pursuant to Tax Law section 174

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

April 4, 1985

George Bartunek
14 Trapper Lane
Centereach, NY 11720

Dear Mr. Bartunek:

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: Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition	:	
of	:	
GEORGE BARTUNEK	:	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, George Bartunek, 14 Trapper Lane, Centereach, New York 11720, 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. 42420).

A small claims hearing was held before Thomas E. Drake, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on October 31, 1984 at 2:45 P.M. Petitioner appeared pro se. The Audit Division appeared by John P. Dugan, Esq. (Irwin A. Levy, Esq., of counsel).

ISSUE

Whether petitioner is liable for a penalty pursuant to section 685(g) of the Tax Law equal in amount of the unpaid New York State tax withheld from employees of T & G Colonial Deli, Inc. for the period July 1, 1978 through December 31, 1978.

FINDINGS OF FACT

1. On February 28 1983, the Audit Division issued a Notice of Deficiency against petitioner, Geroge Bartunek, as a person required to collect, truthfully account for and pay over the withholding taxes of T & G Colonial Deli, Inc. ("Colonial") in the amount of \$502.56 for the period July 1, 1978 through December 31, 1978.

2. Colonial filed a New York State Form IT-2103, Reconciliation of Tax Withheld, showing tax withheld from its employees' wages during 1978 in the amount of \$502.56.¹ No payment was made with the filing. On August 20, 1980, the Audit Division issued a Notice and Demand for Unpaid Withholding Tax Due against Colonial in the amount of \$502.56 plus penalty and interest for the year 1978.

3. In approximately April of 1978, petitioner and another individual, Thomas J. Gibbons ("Gibbons"), organized Colonial for the purpose of operating a delicatessen located in Mount Sinai, New York. Each individual had a 50% ownership interest in the corporation. Prior to organizing Colonial, Gibbons operated the delicatessen as a sole proprietorship. Petitioner purchased his interest in the delicatessen from Gibbons for \$15,000.00 down and a series of promissory notes totaling \$27,000.00, to be paid over a period of eleven years.

4. Colonial was open on a twenty-four hour a day basis, with petitioner and Gibbons working separate twelve hour shifts. Each owner was responsible for the operation of Colonial during their respective shifts.

5. During the period in issue, petitioner held the position of president and treasurer of Colonial. He had the authority to sign corporate checks, shared the responsibility of maintaining the books and records of Colonial with Gibbons and made purchases for the corporation.

6. The arrangement between petitioner and Gibbons was not financially profitable and by March of 1979 Colonial was struggling to meet its obligations. Because of this, petitioner decided to end his business relationship with

1 A photostatic copy of the face of the Reconciliation was introduced into evidence at the hearing. Said copy does not show the date it was filed or the signature, if any, of the person filing the form.

Gibbons. On March 30, 1979, petitioner and Gibbons entered into an agreement which provided that petitioner would assign his interest in Colonial to Gibbons in return for \$15,000.00, and cancellation of the notes referred to in Finding of Fact "3" which had not yet been paid, less one-half of the existing corporate indebtedness. The agreement further provided that upon payment and the exchange of general releases, the obligations of Colonial would be the sole responsibility of Colonial and insofar as applicable, the sole shareholder, Thomas Gibbons.

7. For the purposes of the agreement, the total indebtedness of Colonial was determined to be approximately \$22,000.00. Said amount included the State income tax withheld by Colonial during the period in issue, but not paid over to New York State. After the subtraction of one-half of Colonial's obligations from the \$15,000.00, petitioner received the balance of \$4,000.00.

8. Petitioner testified that he became aware that withholding taxes were due New York State when he was totaling the obligations of Colonial in order to determine his share pursuant to the agreement.

9. On December 21, 1979, Thomas Gibbons executed a general release wherein he agreed to hold petitioner, George Bartunek, "...harmless for the claims of any creditors arising out of the debts incurred at any time by T & G Colonial Deli, Inc. and billed to Bartunek... including all State and Federal taxes of all kinds".

10. Petitioner maintains that since he has, in effect, paid one-half of the withholding taxes due from Colonial by reducing the amount received for his interest in Colonial (see Finding of Fact "6") and since Gibbons released him from the debts of Colonial, the Audit Division should seek the full amount of the penalty from Gibbons.

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 withholding taxes, who willfully fails to collect, account for and pay over such taxes, will be liable to a penalty equal to the total amount of such tax not collected, accounted for and paid over to New York State.

B. That petitioner, George Bartunek, was a person required to collect, truthfully account for and pay over the withholding taxes of Colonial who willfully failed to do so during the period at issue herein; therefore, he is liable for the penalty imposed pursuant to section 685(g) of the Tax Law. The penalty under said section is personal in nature and accrues to petitioner when the violation occurs. Petitioner is not relieved from the liability by the assignment of Colonial's tax liability to Gibbons or by the reduction of the amount received for his interest in Colonial by one-half of Colonial's obligations.

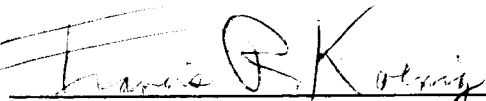
C. That the petition of George Bartunek is denied and the Notice of Deficiency dated February 28, 1983 is sustained.

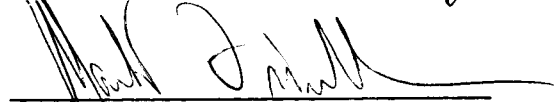
DATED: Albany, New York

STATE TAX COMMISSION

APR 04 1985


PRESIDENT


COMMISSIONER


COMMISSIONER