

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of
Sheldon D. Basch :

: 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 :
1976 & 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 28th day of June, 1985, he served the within notice of Decision by certified mail upon Sheldon D. Basch, the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Sheldon D. Basch
840 Wenwood Drive
East Meadow, NY 11554

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
28th day of June, 1985.

David Parchuck

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

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of
Sheldon D. Basch :

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for Redetermination of a Deficiency or Revision :
of a Determination or Refund of Personal Income
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1976 & 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 28th day of June, 1985, he served the within notice of Decision by certified mail upon Leonard A. Rubin, the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Leonard A. Rubin
Choate, Moore, Hahn & McGarry
420 Lexington Ave.
New York, NY 10170

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
28th day of June, 1985.

David Parchuck

Donald A. Highland
Authorized to administer oaths
pursuant to Tax Law section 174

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

June 28, 1985

Sheldon D. Basch
840 Wenwood Drive
East Meadow, NY 11554

Dear Mr. Basch:

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
Leonard A. Rubin
Choate, Moore, Hahn & McGarry
420 Lexington Ave.
New York, NY 10170
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition	:	
	:	
of	:	
	:	
SHELDON D. BASCH	:	DECISION
	:	
for Redetermination of a Deficiency or for	:	
Refund of Personal Income Tax under Article 22	:	
of the Tax Law for the Years 1976, 1977 and	:	
1978.	:	

Petitioner, Sheldon D. Basch, 840 Wenwood Drive, East Meadow, New York 11554, 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 1976, 1977 and 1978 (File No. 44742).

A formal 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 November 1, 1984 at 1:15 P.M., with all briefs to be submitted by January 18, 1985. Petitioners appeared by Choate, Moore, Hahn & McGarry (Leonard A. Rubin, Esq., of counsel). The Audit Division appeared by John P. Dugan, Esq. (Angelo A. Scopellito, Esq., of counsel).

ISSUE

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

FINDINGS OF FACT

1. On January 31, 1983, the Audit Division issued a Notice of Deficiency, together with a Statement of Deficiency, asserting a penalty pursuant to section 685(g) of the Tax Law against petitioner, Sheldon D. Basch

("petitioner"), as a person required to collect, truthfully account for and pay over withholding taxes of Basch Advertising, Inc. ("Basch Advertising") in the amount of \$23,326.55 for the years 1976, 1977 and 1978. The total amount was calculated as follows:

<u>Withholding Tax Period</u>	<u>Amount</u>
December 16, 1976 to December 31, 1976	\$ 4,126.80
July 1, 1977 to December 31, 1977	7,964.20
January 1, 1978 to December 31, 1978	<u>11,235.55</u>
Total Due	<u>\$23,326.55</u>

2. Basch Advertising, a commercial advertising company, was founded by petitioner in 1961. He and his wife each held 50 percent of the stock of the corporation until approximately December of 1964. At that time, an employee of Basch Advertising named Maxwell J. Proujanski ("Proujanski") brought in a very large account for Basch Advertising and, as a result, petitioner made Proujanski a 50 percent shareholder in Basch Advertising.¹

3. Prior to and during the years in issue, petitioner was president of Basch Advertising and Proujanski was its vice-president. The account which Proujanski acquired in 1964, plus other accounts secured by him through the years, accounted for approximately 85 percent of the total billings of Basch Advertising by 1976.

4. Petitioner was inexperienced in corporate financial matters and had no interest in such affairs. Proujanski, from the time he became a 50 percent shareholder, began handling more and more of the financial and administrative affairs of Basch Advertising while petitioner concerned himself with the

¹ Proujanski held the stock in his wife's name.

creative side of the business. Several years prior to the years in issue, Proujanski was handling most of the administrative and financial affairs of the corporation. In 1976, Proujanski started to interfere with petitioner's handling of the creative work of Basch Advertising. Petitioner objected to such interference. Thereafter, the respective duties of petitioner and Proujanski were formally set forth in the minutes of a meeting of the Board of Directors of Basch Advertising held on August 18, 1976.² Said minutes provided, in relevant part, as follows:

"The Chairman stated that the meeting had been called for the purpose of eliminating certain conflicts that had arisen between the principals of the corporation as to the delegation of respective areas of responsibility in connection with the functioning and operating of the business of the corporation.

After discussion, it was, upon motion duly made and seconded, unanimously

RESOLVED, that Sheldon D. Basch be and he hereby is appointed Creative Director of the Agency charged with the primary responsibility for the preparation of copy and art work by the Agency for its customers; and it was further

RESOLVED, that P. J. Maxwell be and he hereby is appointed Executive Director charged with the primary responsibility with respect to the financial affairs of the corporation and with respect to the supervision of personnel employed by the Agency other than creative personnel."³

5. During the years in issue, Proujanski generally decided which corporate obligation to pay, oversaw the preparation of the tax returns and

2 Petitioner and Proujanski were the only directors of Basch Advertising.

3 Proujanski sometimes used the name P. J. Maxwell in his business dealings at Basch Advertising.

signed most of the corporate checks and tax returns.⁴ Petitioner had the authority to sign corporate checks, but signed only a limited number. He limited his check writing to making payments for things that were connected with his duties as Creative Director, such as paying artists who had not been paid for their work through normal channels and occasionally purchasing copy and art supplies. Petitioner signed checks which were drawn by the bookkeeper at Proujanski's direction when Proujanski was out of the office. Petitioner had the authority to sign corporate tax returns and, on at least one occasion, signed the New York State and City Reconciliation of Tax Withheld (Form IT-2103) for the year 1977.

6. Petitioner supervised the creative personnel employed by Basch Advertising. He had the authority to hire and fire such personnel and would set their salary. Proujanski, however, had to agree with the salary amount.

7. On November 9, 1978, petitioner resigned as president and director of Basch Advertising and entered into an agreement with Basch Advertising to sell his shares to the corporation for \$205,000.00.⁵ Petitioner received only

4 At the hearing, petitioner characterized Proujanski as "the boss" and the ultimate authority at Basch Advertising by virtue of the fact that Proujanski's clients were responsible for 85 percent of Basch Advertising's business.

5 The selling price represented approximately five times petitioner's annual salary of \$40,000.00.

\$75,000.00 of the total sales price, as Basch Advertising ceased doing business sometime in 1979.⁶

8. On September 6, 1979, the Internal Revenue Service issued petitioner a proposed assessment for a penalty equal to 100 percent of the federal withholding taxes due from Basch Advertising for the period ending June 30, 1978. Petitioner was not aware that federal withholding taxes were due prior to receiving the federal notice. Proujanski told petitioner that he would assume responsibility for and pay the federal taxes. The Internal Revenue Service interviewed petitioner, but did not proceed against him. Petitioner did not know if Proujanski paid the federal withholding taxes in question.

9. Petitioner became aware that there was a claim for New York State withholding taxes against Basch Advertising in or about 1981. He became aware that he was being held personally responsible when he received the Notice of Deficiency referred to in Finding of Fact "1".

10. Petitioner maintains that he could not have known that the withholding taxes in question were not being paid to New York State since, from time to time during such period, he noted, while writing checks on the corporation's checking account, check stubs which showed checks had been written to New York State in payment of withholding taxes. In support of this, petitioner submitted eight Basch Advertising checks payable to the New York State Income Tax Bureau, together with corresponding New York withholding tax returns for the periods January 1, 1977 through March 31, 1977 and July 1, 1977 through

6 It appears that the closing of Basch Advertising was caused by the loss of its large account.

July 31, 1977. The checks, which were unsigned, and the withholding tax returns were not sent to the Income Tax Bureau.⁷

There are six checks for the periods from January 1, 1977 through March 31, 1977. All are consecutively numbered and all are dated July 13, 1977. Two checks are for the periods from July 1, 1977 through July 31, 1977. They are consecutively numbered and both are dated August 8, 1977.

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 "the question of whether or not someone is a 'person' required to collect and pay over withholding taxes is a factual one. Factors determinative of the issue can include whether petitioner owned stock, signed the tax

7 During the first part of 1984, Basch Advertising's former accountant discovered a box which contained papers and miscellaneous records of Basch Advertising. The checks and returns were among the items in the box. Petitioner did not know such checks existed prior to this.

returns, or exercised authority over employees and the assets of the corporation" (McHugh v. State Tax Commission, 70 A.D.2d 987, 988). Petitioner, as corporate president and fifty percent shareholder in Basch Advertising, who was an authorized signatory on the corporate checking account, was a person required to collect and pay over the withholding taxes of Basch Advertising within the meaning and intent of sections 685(g) and (n) of the Tax Law.

D. That, turning to the question of whether petitioner's failure to collect, account for and pay over the tax was willful, the test for determining willfulness is whether the act, default or conduct was "voluntarily done with the knowledge that, as a result, trust funds of the government will not be paid over; intent to deprive the government of its money need not be shown, merely something more than accidental nonpayment [citation omitted]."

(Matter of Ragonesi v. N.Y.S. Tax Comm., 88 A.D.2d 707, 707-08 [3d Dept. 1982]). Petitioner was not relieved of his obligations and responsibilities with respect to the collection and payment of withholding tax by leaving the management and financial decisions to Proujanski. "[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]." Id. at 708.


E. That since petitioner resigned as president and director of Basch Advertising on November 9, 1978, he is not liable for the penalty amount equal to the unpaid withholding taxes after said date. The Audit Division is directed to adjust the Notice of Deficiency accordingly.


F. That the petition of Sheldon D. Basch is granted to the extent indicated in Conclusion of Law "E", supra; and that, except as so granted, is in all other respects denied.


DATED: Albany, New York

JUN 28 1985

STATE TAX COMMISSION


PRESIDENT


COMMISSIONER


COMMISSIONER