

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of :
Franklin E. Bean :
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 Period :
6/1/78-8/15/79. :
:

AFFIDAVIT OF MAILING

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 14th day of March, 1985, he served the within notice of Decision by certified mail upon Franklin E. Bean, the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Franklin E. Bean
4223 Barker Hill Rd.
Jamesville, NY 13078

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
14th day of March, 1985.

David Parchuck

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

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

March 14, 1985

Franklin E. Bean
4223 Barker Hill Rd.
Jamesville, NY 13078

Dear Mr. Bean:

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	:	
	:	
FRANKLIN E. BEAN	:	DECISION
	:	
for Redetermination of a Deficiency or for	:	
Refund of Personal Income Tax under Article	:	
22 of the Tax Law for the Period June 1, 1978	:	
through August 15, 1979.	:	

Petitioner, Franklin E. Bean, 4223 Barker Hill Road, Jamesville, New York 13078, filed a petition for revision of a determination or for refund of personal income tax under Article 22 of the Tax Law for the period June 1, 1978 through August 15, 1979 (File No. 32452).

A formal hearing was held before Arthur Bray, Hearing Officer, at the offices of the State Tax Commission, 333 East Washington Street, Syracuse, New York on September 18, 1984 at 9:15 A.M. Petitioner appeared pro se. The Audit Division appeared by John P. Dugan, Esq. (Paul A. Lefebvre, Esq., of counsel).

ISSUE

Whether petitioner is liable for the penalty asserted against him pursuant to section 685(g) of the Tax Law with respect to New York State withholding taxes due from U.S. Air Duct Corporation.

FINDINGS OF FACT

1. U.S. Air Duct Corporation failed to pay New York State personal income tax withheld from the wages of its employees for the periods June 1, 1978 through December 31, 1978 and January 1, 1979 through August 15, 1979.

2. On June 30, 1980 the Audit Division issued a Notice of Deficiency and Statement of Deficiency to petitioner asserting a penalty in the amount of

\$19,577.94 representing the amount of unpaid withholding tax due from U.S. Air Duct Corporation.

3. On January 18, 1982 the amount of the unpaid withholding sought from petitioner was reduced by \$5,976.72 as a result of a franchise tax refund claimed by and granted to U.S. Air Duct Corporation. Accordingly, the total amount of withholding tax presently sought by the Audit Division is \$13,601.22.

4. At the hearing, petitioner conceded that as president of U.S. Air Duct Corporation he was a responsible officer. In addition, petitioner acknowledged that the amount of the penalty currently sought by the Audit Division was not in dispute.

5. On August 14, 1979, petitioner drew two checks payable to "U.S. Air Duct Corporation/and/New York State Income Tax Bureau" on the bank account of H.H. & F.E. Bean, Inc. The first check was numbered 1945 and was drawn in the amount of \$13,819.64. The second check was numbered 1946 and was in the amount of \$5,758.30. At the time the checks were drawn there were sufficient funds in the bank account to pay the amount of the checks. Petitioner was unaware that, in fact, the bank was not honoring checks and letting the funds accumulate to a point where the funds would be seized by the bank to offset amounts owed under a line of credit. He became aware that these checks were not honored approximately sixty to ninety days after they were drawn.

6. At some point in time, U.S. Air Duct Corporation was forced into bankruptcy. At the time of hearing the bankruptcy proceeding was still in progress. Petitioner argued at the hearing that the estate of U.S. Air Duct Corporation has sufficient funds to pay the withholding tax due to New York State.

CONCLUSION OF LAW

A. That where a person is required to collect, truthfully account for and pay over withholding taxes and willfully fails to collect and pay over such taxes, section 685(g) of the Tax Law imposes on such person "...a penalty equal to the total amount of tax evaded, or not collected, or not account for and paid over".

B. That section 685(n) of the Tax Law defines a person, for purposes of section 685(g) of the Tax Law, to include:

"...an individual, corporation or partnership or an officer or employee of any corporation...who as such officer, employee or member is under a duty to perform the act in respect to which the violation occurs."

C. That since petitioner has admitted that he is a responsible officer, the only decision to be rendered is whether his failure to pay over the tax withheld from the employees of U.S. Air Duct Corporation was willful.

D. That the test of whether conduct is "willful" as that term used in subdivision (g) of section 685 of the Tax Law is "...whether the act, default, or conduct is consciously done with knowledge that as a result, trust funds belonging to the Government will not be paid over but will be used for other purposes (citations omitted)" (Matter of Levin v. Gallman, 42 N.Y.2d 32, 34).

E. That in view of the amount of the asserted deficiency, it may be reasonably inferred that, during the periods in issue, U.S. Air Duct Corporation was required to file returns and pay the amounts shown due semimonthly [Tax Law §674(a)(3)].¹ Therefore, even assuming that there were sufficient funds in the account to satisfy the checks drawn August 14, 1979, petitioner obviously

¹ It is recognized that Tax Law §674(a)(3) was amended by Chapter 103 of the Laws of 1981 by changing the amounts of withholding used to determine filing requirements.

chose (with the exception of the last semimonthly period) to improperly delay remitting the withholding tax due. Such conduct is willful within the meaning of section 685(g) of the Tax Law. It is noted that it is not possible, upon the record presented, to establish the amount of the withholding tax liability that pertains expressly to the last semimonthly period.


F. That the penalty imposed by section 685(g) of the Tax Law is separate and independent of the corporate liability of unpaid withholding taxes (Matter of Yellen v. New York State Tax Commission, 81 A.D.2d 196, 198). Accordingly, it is irrelevant whether or not there are sufficient funds in the estate of U.S. Air Duct Corporation to pay the New York State withholding tax due (Matter of Yellen v. New York State Tax Commission, supra).

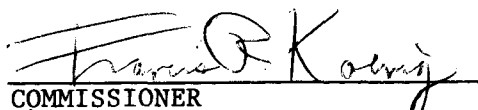
G. That the petition of Franklin E. Bean is denied and the Notice of Deficiency as reduced to \$13,601.22 (Finding of Fact "3", supra) is sustained.


DATED: Albany, New York

STATE TAX COMMISSION

MAR 14 1985


PRESIDENT


COMMISSIONER


COMMISSIONER