

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition	:	
of		
Alva Cody	:	
		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	:	
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 16th day of July, 1985, he served the within notice of Decision by certified mail upon Alva Cody, the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Alva Cody
P.O. Box 114
Malden-on-Hudson, NY 12453

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
16th day of July, 1985.

David Parchuck

Conne A. Bagelord
Authorized to administer oaths
pursuant to Tax Law section 174

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of :
Alva Cody :
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 :
1980. :
:

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 16th day of July, 1985, he served the within notice of Decision by certified mail upon Edward E. Strohsahl, the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Edward E. Strohsahl
Schirmer & Hrdlicka
P.O. Box 240, 3 Lafayette St.
Saugerties, NY 12477

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
16th day of July, 1985.

David Parchuck

James C. [Signature]
Authorized to administer oaths
pursuant to Tax Law section 174

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

July 16, 1985

Alva Cody
P.O. Box 114
Malden-on-Hudson, NY 12453

Dear Mr. Cody:

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
Edward E. Strohsahl
Schirmer & Hrdlicka
P.O. Box 240, 3 Lafayette St.
Saugerties, NY 12477
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition	:	
of	:	
ALVA G. CODY	:	DECISION
for Redetermination of a Deficiency or for	:	
Refund of Personal Income Tax under Article 22	:	
of the Tax Law for the Year 1980.	:	

Petitioner, Alva G. Cody, P.O. Box 114, Malden-on-Hudson, New York 12453, 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 1980 (File No. 41898).

On March 8, 1985, petitioner, by its representative, Edward E. Strohsahl, Esq., filed a waiver of hearing and requested that this matter be decided by the State Tax Commission on the basis of the existing record. After due consideration, the Tax Commission renders the following decision.

ISSUE

Whether petitioner was a person required to collect, truthfully account for and pay over withholding taxes of Cody Lumber Company, Inc., who willfully failed to do so and is thus liable to a penalty under section 685(g) of the Tax Law, where said corporation had made an assignment for the benefit of creditors effective during the period in issue.

FINDINGS OF FACT

1. On November 29, 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, Alva G. Cody, as a person required to collect, truthfully account for and pay over withholding taxes of

Cody Lumber Company, Inc. ("the Company") in the amount of \$1,310.57 for the period April 1, 1980 through June 15, 1980.

2. The Company was a corporation engaged in the operation of a lumber yard and a retail home improvement facility and in the construction of pre-cut homes. The Company experienced financial difficulties and, in April, 1980, Union National Bank ("the Bank"), which held notes of the Company secured by a mortgage and security agreements, advised the Company that it intended to call in its obligations. On April 9, 1980, the Company executed an Instrument of Peaceful Possession and delivered it to the Bank and the Small Business Administration thereby delivering control and possession to the Bank of the inventory, equipment, furniture and fixtures, and accounts receivable of the Company. The Bank took physical possession of the property and the Company removed itself from the premises. Petitioner was retained to supervise the closing of the facility, to act as a watchman for the property and to conclude the construction of several projects remaining to be completed.

3. On April 21, 1980, the Company executed an Assignment for the Benefit of Creditors in favor of one Harris D. Leinwand. The assignee issued notice of such assignment to the creditors of the Company. At the time the Bank took possession, it applied all of the Company's funds on deposit in the Bank against the Company's indebtedness, leaving a zero balance in its accounts. The Company completed construction of the unfinished projects during the months of April, May and June, 1980. All expenses incurred in this work, including payroll, were paid by advances by the Bank through the Company's account. All payments to the Company after April 10, 1980 were collected by the Bank and all

payments made by the Company had to be authorized by the Bank. Several employees of the Company remained on the job to complete the work projects and assist in the closing of the business. During the period in issue, which includes the final three months of the Company's operation, no taxes were withheld from employee wages and paid over to the Department of Taxation and Finance by either petitioner, the Bank, or the assignee, although all three knew or were in the position to know that such taxes were not being withheld and paid over. It is not clear from the record whether the Bank refused to authorize Company checks in payment of withholding taxes.

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 an assignment for the benefit of creditors is defined as "a voluntary transfer by a debtor of all of his property, to a trustee of his own selection, for administration, liquidation and equitable distribution among his

creditors." (Law Revision Commission Reports [1950], p. 297). The assignor is divested of the legal and equitable estate which is vested in the assignee subject to the uses and trusts in favor of the creditors (Bernstein v. Raff, 140 Misc. 353, 355). Upon passage of title, the assigned assets are deemed to be in custodia legis and cannot be taken from that custody without the consent of the court (M. Mirzoeff, Inc. v. Foster & Chadwick Fur Co., Inc., 36 Misc.2d 860, 861). The trust created by an assignment ceases when the debts are paid or discharged (Selden v. Vermilya, 3 N.Y. 525, 532). Prior to a full administration of the assigned estate, however, the trust may be terminated by agreement with the creditors (Id.).

D. That the Company, by executing the assignment for the benefit of creditors, completely divested itself of all interest in its assets. As president of the Company, petitioner, therefore, no longer had any responsibility for the disposition of the Company's assets including bank accounts. Petitioner no longer had the power to sell any assets to obtain money to pay taxes; nor was this an agreement which petitioner could unilaterally rescind because he disapproved of the disposition of the assets. He, therefore, did not breach any duties imposed by sections 671 and 674 of the Tax Law. The cases cited by the Audit Division are inapposite because none of them involved an assignment for the benefit of creditors. In each case, the taxpayer retained some authority over the disposition of the assets. Petitioner lost all such responsibility and authority in the present case and, as a result, he ceased being a person required to collect, truthfully account for and pay over withholding taxes of the Company.

E. That the petition of Alva G. Cody is granted and the Notice of Deficiency issued November 29, 1982 is cancelled.

DATED: Albany, New York

STATE TAX COMMISSION

JUL 16 1985


PRESIDENT


COMMISSIONER


COMMISSIONER