

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of
James V. Cox

: 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 3rd day of October, 1985, he served the within notice of Decision by certified mail upon James V. Cox, the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

James V. Cox
205 Main St.
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
3rd day of October, 1985.

David Parchuck

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

STATE OF NEW YORK

STATE TAX COMMISSION

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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 3rd day of October, 1985, he served the within notice of Decision by certified mail upon John R. Hamlett, the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

John R. Hamlett
1900 Main Place Towers
Buffalo, NY 14202

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
3rd day of October, 1985.

David Parchuck

James V. Cox
Authorized to administer oaths
pursuant to Tax Law section 174

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

October 3, 1985

James V. Cox
205 Main St.
West Seneca, NY 14224

Dear Mr. Cox:

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
John R. Hamlett
1900 Main Place Towers
Buffalo, NY 14202
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition	:	
of	:	
JAMES V. COX	:	DECISION
for Redetermination of a Deficiency or for	:	
Refund of Personal Income Tax under Article 22	:	
of the Tax Law for the Years 1976 and 1978.	:	

Petitioner, James V. Cox, 205 Main Street, 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 1976 and 1978 (File No. 32380).

A formal hearing was held before James J. Morris, Jr., Hearing Officer, at the offices of the State Tax Commission, State Office Building, 65 Court Street, Buffalo, New York, on February 7, 1985 at 1:15 P.M. Petitioner appeared by John R. Hamlett, Esq. The Audit Division appeared by John P. Dugan, Esq. (Deborah Dwyer, 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 June 30, 1980, 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, James V. Cox, as a person required to collect, truthfully account for and pay over withholding taxes of

Javco Industries, Inc. ("Javco") in the amount of \$3,178.43 for the years 1976 and 1978.

The total amount was calculated as follows:

<u>Withholding Tax Period</u>	<u>Amount</u>
October 1 to December 31, 1976	\$2,392.94
August 1 to August 31, 1978	785.49
TOTAL DUE	<u>\$3,178.43</u>

2. James V. Cox ("petitioner") was the founder of Javco. Prior to March 1976, petitioner was president of Javco and was the owner of approximately 90 percent of the outstanding shares in the corporation.

3. For several years prior to March 1976, Javco experienced financial difficulties. Petitioner secured several investors willing to make loans to Javco.

The loan agreement provided that petitioner would pledge his stock in Javco as security for such loans as the investors would make to Javco. Said agreement also provided that petitioner would resign his positions as President, Treasurer and Chairman of the Board of Directors but that Javco would continue to employ petitioner as its production manager. The agreement also provided that in the event the agreement was executed, Amile Addy would be employed by Javco as its President and Chief Operating Officer.

4. On or about March 19, 1976, petitioner executed the loan agreement with the investors. As required by the agreement, he resigned his positions as President, Treasurer and Chairman of the Board of Directors of Javco. Petitioner likewise, as required by the agreement, endorsed in blank and placed into escrow as security for the loans, 750,000 of his shares of capital stock of Javco.

On or about March 19, 1976, Amile Addy became Chairman of the Board, President and Chief Operating Officer of Javco.

Petitioner resigned his positions as Chairman of the Board, President and Treasurer of Javcon Products, Inc., a wholly-owned subsidiary of Javco, on or about March 19, 1976.

5. Pursuant to his employment agreement, petitioner, as manufacturing manager, was to:

"a) have full responsibility for product engineering, technical research and market development;

b) subject to the instructions of the President of the Employer, direct and superintend the work of all persons employed in and about the Employer's manufacturing plant, exclusive of office personnel;

c) observe and enforce such rules and regulations as the President of the Employer may from time to time, in his sole discretion, prescribe or adopt concerning the operation of the Employer's plant;

d) keep such records, books and accounts as may be prescribed from time to time by the President of the Employer."

In furtherance of petitioner's duties as outlined in his employment agreement, petitioner was in charge of the manufacturing personnel, supervising three shifts, including hiring and firing of such personnel. Petitioner did not have access to the corporation's books, did not prepare payroll records, did not sign payroll checks and did not prepare tax returns.

6. From July 3, 1969 through September 14, 1978, Javco maintained a checking account with Marine Midland Bank ("Account #1"). As of March 23, 1976, petitioner was not authorized to draw checks upon this account.

7. On March 23, 1976, a second checking account in the name of Javco Industries was opened with Marine Midland Bank ("Account #2"). Petitioner did have authority to draw checks on this account.

The records of Marine Midland Bank with regard to Account #2 state that as of June 2, 1977, Mr. Addy requested that "no checks over \$200.00" be paid.

8. Petitioner stated that Account #2 was a "petty cash" account and that Account #1 was the general corporate account.

9. Marine Midland Bank's records reflect that Account #2 generally maintained a monthly balance of less than \$500.00 and the checks drawn thereon were generally for small amounts, although from time to time the balance was greater and checks in excess of \$200.00 were drawn upon and paid from such account.

Said bank's records also show that Account #1 generally maintained a balance of thousands of dollars and had 100 or more transactions monthly.

10. In early September 1978, the business assets of Javco which were pledged as security for several Small Business Administration loans were seized for failure to make payments on such loans. Javco ceased doing business as of said seizure. The business assets of Javco were then sold at public auctions on or about the 12th of October, 1978.

11. In December of 1978, the Department of Taxation and Finance received three checks drawn upon an account at the Alden State Bank in the name of Javco Industries, Inc. Said checks were consecutively numbered and each dated the first of December, 1978 and bearing signatures of Amile A. Addy and James Cox. Said checks were in payment of three bi-monthly withholding tax liabilities due from Javco for the period January 1, 1977 through February 15, 1977. The records of the Alden State Bank do not reflect when said account was opened; however, they do reflect that prior to the deposit of some \$14,326.47 on

December 1, 1978, said account had a balance of zero and that, as of the close of December, 1978, it had a balance of \$42.71.

Petitioner admitted that the signature on said checks appeared to be his signature but stated that he did not recall any of the circumstances surrounding the signing of said checks or even recall ever having signed said checks. Petitioner did, however, recall that although most of the business assets of Javco had been seized in September of 1978 and sold at auction in October of 1978 effectively putting Javco out of business, there may have been some "accounts receivables" which were not pledged as security for the loans which were foreclosed which receivables may later have been paid to Javco.

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 returns,

or exercised authority over employees and the assets of the corporation"

(McHugh v. State Tax Commission, 70 A.D.2d 987, 988 [citations omitted]).

Other factors considered are the amount of stock owned, the authority to pay corporate obligations and the individual's official duties.

D. That although petitioner at one time was a corporate officer and majority shareholder of Javco Industries, Inc., he had resigned such office prior to the periods at issue herein and a significant portion of his stock and the voting rights thereon had been placed in escrow prior to the periods herein.

Petitioner's duties were that of a manager of the manufacturing section. He had authority over a petty cash bank account, but otherwise had no authority to decide which corporate obligations to pay and did not have authority to draw from the company's main bank account. He was not involved in the payroll of the company and was denied access to the company's books and records.


Petitioner was not a person required to collect, truthfully account for and pay over withholding taxes within the meaning of section 685(g) of the Tax Law for the periods October 1 to December 31, 1976 and August 1 to August 31, 1978.

E. That the petition of James V. Cox is granted and the Notice of Deficiency dated June 30, 1980 is cancelled.

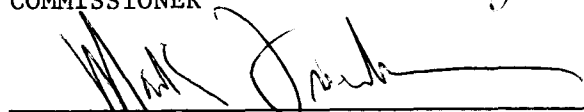
DATED: Albany, New York

STATE TAX COMMISSION

OCT 03 1985


PRESIDENT


COMMISSIONER


COMMISSIONER