

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of :
Irwin Frankel :
AFFIDAVIT OF MAILING
for Redetermination of a Deficiency or for Refund :
of New York State Personal Income Tax under Article :
22 of the Tax Law and New York City Personal :
Income Tax under Chapter 46, Title T of the :
Administrative Code of the City of New York for :
the Years 1980 and 1981. :
:

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 Irwin Frankel, the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Irwin Frankel
12 Hidden Valley Dr.
Suffern, NY 10901

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

Emmie D. Hagelund
Authorized to administer oaths
pursuant to Tax Law section 174

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

March 14, 1985

Irwin Frankel
12 Hidden Valley Dr.
Suffern, NY 10901

Dear Mr. Frankel:

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 & 1312 of the Tax Law and Chapter 46, Title T of the Administrative Code of the City of New York, 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	:	
	:	
IRWIN FRANKEL	:	DECISION
	:	
for Redetermination of a Deficiency or for	:	
Refund of New York State Personal Income Tax	:	
under Article 22 of the Tax Law and New York	:	
City Personal Income Tax under Chapter 46,	:	
Title T of the Administrative Code of the	:	
City of New York for the Years 1980 and 1981.	:	

Petitioner, Irwin Frankel, 12 Hidden Valley Drive, Suffern, New York 10901, filed a petition for redetermination of a deficiency or for refund of New York State personal income tax under Article 22 of the Tax Law and New York City personal income tax under Chapter 46, Title T of the Administrative Code of the City of New York for the years 1980 and 1981 (File No. 44739).

A small claims hearing was held before James Hoefer, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on October 15, 1984 at 2:45 P.M. Petitioner appeared pro se. The Audit Division appeared by John P. Dugan, Esq. (Thomas Sacca, Esq., of counsel).

ISSUE

Whether petitioner was a person, as defined in section 685(n) of the Tax Law and section T46-185.0(n) of the Administrative Code of the City of New York, under a duty to collect, truthfully account for and pay over the New York State and City withholding taxes of Bowman, Foster, Inc. and, if such a person, was his failure to collect, truthfully account for and pay over said withholding taxes willful.

FINDINGS OF FACT

1. On January 31, 1983, the Audit Division issued a Statement of Deficiency to petitioner, Irwin Frankel, imposing a penalty, pursuant to section 685(g) of the Tax Law and section T46-185.0(g) of the Administrative Code of the City of New York, equal in amount to the unpaid New York State and City withholding taxes due and owing from Bowman, Foster, Inc. (hereinafter "Bowman"). The aforementioned Statement of Deficiency was issued on the grounds that petitioner was a person required to collect, truthfully account for and pay over the withholding taxes due and owing from Bowman and that he willfully failed to do so. The withholding tax periods and amounts at issue, as set forth in the Statement of Deficiency, were as follows:

<u>Period</u>	<u>Amount</u>
9/1/80-12/31/80	\$2,793.34
2/1/81-2/15/81	361.80
8/1/81-12/31/81	2,570.00
1/1/82-2/17/82	900.00
Total	<u>\$6,625.14</u>

Based on the Statement of Deficiency, the Audit Division, on January 31, 1983, issued a Notice of Deficiency to petitioner for the years 1980, 1981 and 1982 in the total sum of \$6,625.14.

2. In its Answer to the Perfected Petition, the Law Bureau conceded that "...petitioner was not a responsible officer of the corporation (Bowman) after August 1, 1981..." and that "...petitioner is required to remit to the Department of Taxation and Finance the sum of \$3,155.14" (\$2,793.34 plus \$361.80).

3. During the periods at issue (9/1/80-12/31/80 and 2/1/81-2/15/81), petitioner was vice president and treasurer of Bowman and also the owner of 40 percent of the outstanding shares of said corporation. Mr. Marc Weinstein was

president of Bowman and owner of the remaining 60 percent of the outstanding shares of the corporation.

4. Bowman's business activity consisted of the sale of costume jewelry. Petitioner, during the periods at issue, was employed on a full-time basis by Bowman and his duties and responsibilities were concentrated mainly in the area of sales. The administrative portion of the business was left to Mr. Weinstein.

5. Petitioner had authority to sign checks drawn on Bowman's checking account and he also, on occasion, signed payroll checks. Petitioner also participated in the hiring and/or firing of employees. The determination as to payment of creditors was generally left to Mr. Weinstein. It was petitioner's election not to concern himself with administrative affairs of the corporation.

6. Petitioner maintains that since he was only a 40 percent shareholder in Bowman, his liability should be limited to 40 percent of the amount at issue (40 percent of \$3,155.14 or \$1,262.06).

CONCLUSIONS OF LAW

A. That petitioner, during the periods in question, was vice president and treasurer of Bowman and owner of 40 percent of its stock. Petitioner was employed full time by Bowman, had authority to sign corporate checks and hire and/or fire employees. Accordingly, petitioner was a person under a duty to collect, truthfully account for and pay over the New York State and City withholding taxes of Bowman (Tax Law section 685(n) and section T46-185.0(n) of the Administrative Code of the City of New York).

B. That petitioner's failure to collect, truthfully account for and pay over Bowman's withholding taxes for the periods at issue was willful. The fact that petitioner chose not to extensively participate in the administrative end of Bowman's affairs does not relieve him of his duty to collect and pay over

withholding taxes. Finally, there is no provision in the Tax Law which would limit petitioner's liability to 40 percent of the amount of withholding taxes not collected or paid over based on the fact that petitioner owned only 40 percent of Bowman's stock.


C. That pursuant to Finding of Fact "2", supra, the Notice of Deficiency dated January 31, 1983 is reduced from \$6,625.14 to \$3,155.14.

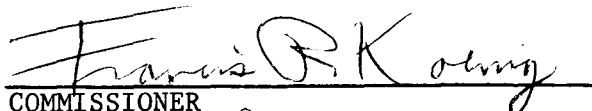
D. That the petition of Irwin Frankel is granted to the extent indicated in Conclusion of Law "C", supra; and that, except as so granted, the petition is in all other respects denied.


DATED: Albany, New York

STATE TAX COMMISSION

MAR 14 1985


PRESIDENT


COMMISSIONER


COMMISSIONER