

STATE OF NEW YORK

STATE TAX COMMISSION

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In the Matter of the Petition :  
of :  
Leo Hershkowitz :  
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 :  
1979. :  
:

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

Leo Hershkowitz  
29 Fox Hollow Drive  
Cherry Hill, NJ 08872

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. Hupstund  
Authorized to administer oaths  
pursuant to Tax Law section 174

STATE OF NEW YORK

STATE TAX COMMISSION

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In the Matter of the Petition :  
of :  
Leo Hershkowitz :  
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Tax under Article 22 of the Tax Law for the Year :  
1979. :  
:

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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 Nathan Stein, the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Nathan Stein  
1940 Ocean Avenue  
Brooklyn, NY 11230

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  
14th day of March, 1985.

David Parchuck

Conrad A. [Signature]  
Authorized to administer oaths  
pursuant to Tax Law section 174

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

March 14, 1985

Leo Hershkowitz  
29 Fox Hollow Drive  
Cherry Hill, NJ 08872

Dear Mr. Hershkowitz:

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  
Nathan Stein  
1940 Ocean Avenue  
Brooklyn, NY 11230  
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

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In the Matter of the Petition	:	
	:	
of	:	
	:	
LEO HERSHKOWITZ	:	DECISION
	:	
for Redetermination of a Deficiency or for	:	
Refund of Personal Income Tax under Article 22	:	
of the Tax Law for the Year 1979.	:	

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Petitioner, Leo Hershkowitz, 29 Fox Hollow Drive, Cherry Hill, New Jersey 08872, 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 1979 (File No. 38882).

A formal hearing was held before Frank W. Barrie, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on April 26, 1984 at 9:30 A.M., with all briefs to be submitted by July 6, 1984. Petitioner appeared by Nathan Stein, C.P.A. The Audit Division appeared by John P. Dugan, Esq. (Anna D. Colello, Esq., of counsel).

ISSUE

Whether petitioner was a person required to collect, truthfully account for and pay over withholding taxes under Tax Law §685(g).

FINDINGS OF FACT

1. On July 26, 1982, the Audit Division issued a Notice of Deficiency along with a Statement of Deficiency asserting a penalty under Tax Law §685(g) against petitioner, Leo Hershkowitz, as a person required to collect, truthfully account for and pay over withholding taxes of Peyton Watch Co., Inc. (hereinafter, "Peyton Watch") in the total amount of \$7,001.67 which was broken down as follows:

<u>Withholding Tax Period</u>	<u>Amount</u>
July 1, 1979 through July 31, 1979	\$ 252.80
December 1, 1979 through December 31, 1979	6,748.87
	<u>\$7,001.67</u>

2. Petitioner did not challenge the amount of the withholding taxes which, according to the Audit Division, were not paid over by Peyton Watch. In his petition, Leo Hershkowitz asserted the defense that although he was an officer of Peyton Watch, his duties were limited to the production phase of the business and that he "had no knowledge of the administrative or financial affairs of the corporation...." His position is that Samuel Dansky, the president of Peyton Watch, was solely responsible for the filing of the corporation's tax returns.

3. Petitioner and Samuel Dansky were the incorporators of Peyton Watch and each owned fifty percent of the corporation's shares of stock. They both had the right to sign business checks, including payroll checks and both men were officers of the corporation. Petitioner also had the right to hire and fire employees of Peyton Watch. However, according to the testimony of Nathan Stein, petitioner "at no time signed checks while Mr. Dansky was there and the only time he had to sign checks, like I told you, was when Mr. Dansky was not around." In addition, Mr. Stein claims that petitioner never signed tax returns on behalf of the corporation and that during 1979 petitioner "did not go into the premises (of Peyton Watch) to work."

4. During 1979, petitioner received no salary from Peyton Watch. In 1978, petitioner received wages of \$31,200.00 from Peyton Watch, a substantial portion of the income reported by him and his wife for 1978 of \$42,084.00.

5. Peyton Watch also failed to pay over federal withholding taxes of approximately \$133,000. According to Mr. Stein, the Internal Revenue Service

did not press their case against petitioner after petitioner appeared for an interview held on December 3, 1981. On the Internal Revenue Service "Report of Interview Held with Persons Relative to Recommendation of 100-Percent Penalty Assessments", it was noted that petitioner's net worth was zero.

6. Nathan Stein testified that petitioner's duties were "strictly sales and management." According to Mr. Stein, "(T)he corporation owed the Internal Revenue Service \$133,000, which when Mr. Hershkowitz found out about that, he absolutely went berserk. He had absolutely no knowledge of these taxes."

7. Leo Hershkowitz alleged in his petition that "On September 30, 1980, I resigned from the corporation." According to the "Report of Interview Held with Persons Relative to Recommendation of 100-Percent Penalty Assessments", petitioner resigned on September 30, 1980 "but remained an employee until Xmas 1980." This evidence conflicts with (i) the testimony of Mr. Stein that petitioner did not work for Peyton Watch during 1979 and (ii) the fact that petitioner received no salary from Peyton Watch during 1979.

8. The corporation's business was described only in vague terms. According to Mr. Stein, "The nature of the business was a watch casing business. They do not buy or sell watches per se, but, large companies Bulova Watch and other companies would bring their cases to them and what they do is case them and guarantee...."

9. Petitioner Leo Hershkowitz was not present at the hearing herein. His representative, Nathan Stein, stated as follows:

"As a personal friend of over thirty-five years I thought I would represent him (petitioner) herein. There is very little he can add to it. Absolutely nothing."

CONCLUSIONS OF LAW

A. That, pursuant to Tax Law §685(g), any "person" required to collect, truthfully account for and pay over withholding taxes, who willfully fails to do so, shall be liable to a penalty equalling the amount of the tax. "Person" for purposes of this section includes "any officer or employee of any corporation ...who as such officer, (or) employee...is under a duty to perform the act in respect of which the violation occurs." Tax Law §685(n).

B. That relevant factors to be considered in deciding whether petitioner, as a corporate officer, is a "person" required to collect and pay over withholding taxes include whether he signed the corporation's tax returns, possessed the right to hire and fire employees and derived a substantial portion of his income from the corporation. Other areas of inquiry include petitioner's official duties for the corporation, the amount of corporation stock he owned, and his authority to pay corporate obligations. Amengual v. State Tax Com'n., 464 N.Y.S.2d 272, 273.

C. That pursuant to Tax Law section 689(e), petitioner has the burden of proof to show that he was not a person required to collect and pay over the withholding taxes of Peyton Watch. There is evidence in the record that petitioner owned fifty percent of the corporation's stock, that he hired and fired employees, that he had the power to and did sign business checks, and that, at least prior to 1979, derived a substantial portion of his income from the corporation. The record contains conflicting evidence concerning whether petitioner was actively involved in the corporation during 1979, the year at issue. The fact that he apparently did not receive a salary from the corporation during 1979 might be explained by the fact that the corporation was in financial difficulty and not because petitioner stopped performing services on its


behalf. Only Mr. Hershkowitz could explain the inconsistency noted in Finding of Fact "7", supra, and he chose not to testify at the hearing. In short, petitioner has not sustained his burden of proving that he was not under a duty to see to it that all personal income taxes withheld by Peyton Watch were properly remitted to the State of New York. It is further noted that abdication of the responsibilities of an office will not overcome this burden. Matter of Robert Bambino, Arthur Braude and Albert DeVivo, State Tax Commission, May 18, 1983.

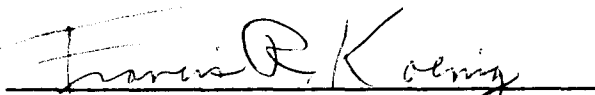
D. That the petition of Leo Hershkowitz is denied.

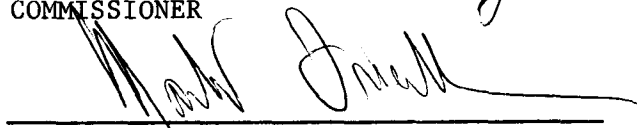
DATED: Albany, New York

STATE TAX COMMISSION

MAR 14 1985

  
PRESIDENT

  
COMMISSIONER

  
COMMISSIONER