

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of :
Angelo Molinari :
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 :
1977 & 1979. :
:

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 6th day of March, 1985, he served the within notice of Decision by certified mail upon Angelo Molinari, the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Angelo Molinari
32 Greentree Court
Fort Salonga, NY 11768

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
6th day of March, 1985.

David Parchuck

Annunzio P. Capompoli

Authorized to administer oaths
pursuant to Tax Law section 174

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

March 6, 1985

Angelo Molinari
32 Greentree Court
Fort Salonga, NY 11768

Dear Mr. Molinari:

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	:	
	:	
ANGELO MOLINARI	:	DECISION
	:	
for Redetermination of a Deficiency or for	:	
Refund of Personal Income Tax under Article 22	:	
of the Tax Law for the Years 1977 and 1979.	:	

Petitioner, Angelo Molinari, 32 Greentree Court, Fort Salonga, New York 11768, 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 1977 and 1979 (File Nos. 35757 and 35758).

A formal hearing was held before Dennis M. Galliher, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on September 19, 1984 at 2:45 P.M., with all documents to be submitted by November 7, 1984. Petitioner appeared pro se. The Audit Division appeared by John P. Dugan, Esq. (Anna Colello, Esq., of counsel).

ISSUE

Whether petitioner was a person required to collect, truthfully account for and pay over withholding tax with respect to Sunflower Novelty Bags, Inc., and Sunflower Originals, Ltd. and willfully failed to do so, thus becoming liable for a penalty under section 685(g) of the Tax Law.

FINDINGS OF FACT

1. On July 27, 1981, the Audit Division issued to petitioner, Angelo Molinari, a Statement of Deficiency and a Notice of Deficiency, asserting penalties equal to the New York State withholding tax of Sunflower Novelty Bags, Inc. ("Novelty Bags") which was due and unpaid for the taxable years 1977

and 1979 in the respective amounts of \$9,007.75 and \$8,192.80. The specific periods at issue and the withholding tax attributable thereto, as set forth in the Statement of Deficiency, are shown below.

<u>PERIOD</u>	<u>AMOUNT</u>
1/01/77 - 9/30/77	\$ 9,007.75
1/01/79 - 1/15/79	662.10
3/16/79 - 3/31/79	1,731.70
5/16/79 - 5/31/79	1,322.10
6/16/79 - 7/31/79	4,476.90
	<u>\$17,200.55</u>

2. On July 27, 1981, the Audit Division issued to petitioner a Statement of Deficiency and a Notice of Deficiency, asserting penalties equal to the New York State withholding tax of Sunflower Originals, Ltd. ("Originals"), which was due and unpaid for the period January 1, 1979 through June 30, 1979 in the amount of \$1,506.90.

3. In or about October of 1973, petitioner and his long-time friend, Solomon Storozum, formed Novelty Bags, a corporation which was to manufacture luggage, tote bags, children's novelty school bags, and other similar items. The initial funding for Novelty Bags was provided by Mr. Storozum and by petitioner's wife, Rose Marie Molinari (petitioner and Rose Marie Molinari have since been divorced). Novelty Bags' two hundred shares of capital stock were divided equally between Mr. Storozum and Rose Marie Molinari, which two individuals were also the incorporators of Novelty Bags.

4. Petitioner made no capital contribution to Novelty Bags, nor did he receive any stock in Novelty Bags but he was, due to his extensive experience in the industry, completely involved in operating the business from its inception.

5. Petitioner used the title General Manager and/or Designer, and was in charge of designing the products, preparing patterns, purchasing necessary materials and setting up production and manufacturing methods. Mr. Storozum

handled production and shipping schedules, and orders and deliveries. During the latter part of the period at issue, Rose Marie Molinari worked at a small facility maintained by Novelty Bags for packing and shipping its finished products.

6. Petitioner had authority to sign corporate checks and to receive documents, and he did so on many occasions. Petitioner was never formally made an officer of Novelty Bags, but he admitted that he was a part of its management and acted in a managerial capacity. Petitioner had the right to hire and fire employees, and he exercised this authority within the purchasing, design and production areas of the business.

7. Petitioner spent approximately fifty to sixty percent of his working time at and derived approximately seventy percent of his income from Novelty Bags. Petitioner was aware that some of the withholding taxes due for the periods in question were not being remitted.

8. Novelty Bag's payroll was handled by the bookkeeping department, which was under the supervision of Mr. Storozum's wife, Eva Storozum, and petitioner never physically prepared the payroll.

9. Novelty Bags' tax returns were prepared by its independent accountants, on the basis of a fiscal year spanning October 1 through September 30. Corporation Franchise Tax reports filed by Novelty Bags for the fiscal years ended September 30, 1976 through September 30, 1979 were signed by petitioner under the titles of vice-president or president, and petitioner was listed as an officer (on the schedule of officers) on each of such returns filed for the fiscal years ended September 30, 1977 through September 30, 1979.

10. Novelty Bags ceased operations during the early part of 1980.

11. Sunflower was incorporated in March of 1977, as a selling arm for Novelty Bags. Originals had a showroom on Fifth Avenue in New York City, and petitioner was Original's president. Petitioner conceded and does not contest his liability for the unpaid withholding taxes due from Originals. However, petitioner asserts that since he was never formally appointed as an officer of Novelty Bags, he was not a person responsible for its unpaid withholding taxes.

CONCLUSIONS OF LAW

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

C. That the question of whether petitioner was a person under a duty to collect and pay over withholding taxes must be determined on the basis of the facts presented. Some of the factors to be considered include whether petitioner signed the corporation's tax returns, possessed the right to hire and discharge employees or derived a substantial portion of his income from the corporation. Other relevant factors include the amount of stock petitioner held, the actual sphere of his duties and his authority to pay corporate obligations and/or exercise authority over the assets of the corporation. Matter of Amenguel v. State Tax Comm., 95 A.D.2d 949 (Third Dep't., 1983); McHugh v. State Tax Comm., 70 A.D.2d 987. Finally, the test of willfulness is whether the act, default or

conduct was "voluntarily done with knowledge that, as a result, trust funds of the government will not be paid over; intent to deprive the government of its money need not be shown, merely something more than accidental nonpayment [citation omitted]." Matter of Ragonesi v. N.Y.S. Tax Comm., 88 A.D.2d 707, 708 (Third Dep't., 1982).


D. That petitioner who, inter alia, signed corporate checks and tax returns, acted as a part of management and exercised significant authority within the corporation, was a person required to collect and remit withholding tax during the periods in question. Petitioner had knowledge that withholding tax was not being remitted. The fact that he may not have been formally appointed as an officer neither relieves petitioner of the duty imposed under the Tax Law nor negates his willful failure to carry out such duty. Accordingly, petitioner remains liable for the penalty asserted.

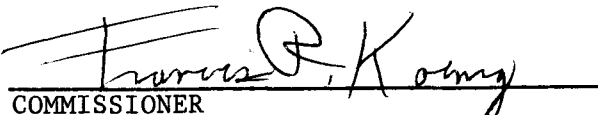
E. That the petition of Angelo Molinari is hereby denied and the notices of deficiency dated July 27, 1981 are sustained.


DATED: Albany, New York

STATE TAX COMMISSION

MAR 06 1985


PRESIDENT


COMMISSIONER


COMMISSIONER