

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of
William H. Nutt, Sr. :

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 Period :
6/1/80-7/31/80 & 10/1/80-12/9/80. :
_____ :

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 21st day of August, 1985, he served the within notice of Decision by certified mail upon William H. Nutt, Sr., the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

William H. Nutt, Sr.
7121 Ridgewood Dr.
Lockport, NY 14094

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
21st day of August, 1985.

David Parchuck

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

STATE OF NEW YORK

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for Redetermination of a Deficiency or Revision :
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Tax under Article 22 of the Tax Law for the :
Periods 6/1/80-7/31/80 & 10/1/80-12/9/80. :
:

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 21st day of August, 1985, he served the within notice of Decision by certified mail upon R. Joseph Foltz, the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

R. Joseph Foltz
Smith, Speranza, Pusateri, Tilney, Fitzgerald, Foltz & May
131 East Ave.
Lockport, NY 14094

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
21st day of August, 1985.

David Parchuck

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

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

August 21, 1985

William H. Nutt, Sr.
7121 Ridgewood Dr.
Lockport, NY 14094

Dear Mr. Nutt:

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
R. Joseph Foltz
Smith, Speranza, Pusateri, Tilney, Fitzgerald, Foltz & May
131 East Ave.
Lockport, NY 14094
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition	:	
	:	
of	:	
	:	
WILLIAM H. NUTT, SR.	:	DECISION
	:	
for Redetermination of a Deficiency or for	:	
Refund of Personal Income Tax under Article 22	:	
of the Tax Law for the Periods June 1, 1980	:	
through July 31, 1980 and October 1, 1980	:	
through December 9, 1980.	:	

Petitioner, William H. Nutt, Sr., 7121 Ridgeway Drive, Lockport, New York 14094 filed a petition for redetermination of a deficiency or for refund of personal income tax under Article 22 of the Tax Law for the periods June 1, 1980 through July 31, 1980 and October 1, 1980 through December 9, 1980 (File No. 36659).

A formal hearing was held before Arthur Bray, Hearing Officer, at the offices of the State Tax Commission, 65 Court Street, Buffalo, New York, on June 28, 1984 with all briefs to be submitted by December 28, 1984. Petitioner appeared by Smith, Speranza, Pusateri, Tilney, Fitzgerald, Foltz & May (R. Joseph Foltz, Esq., of counsel). The Audit Division appeared by John P. Dugan, Esq. (Deborah J. Dwyer, Esq., of counsel).

ISSUE

Whether petitioner is liable for the penalty asserted against him pursuant to section 685(g) of the Tax Law with respect to New York State withholding taxes due from Lockport Paperboard Corp.

FINDINGS OF FACT

1. On January 25, 1982 the Audit Division issued a Notice of Deficiency accompanied by a Statement of Deficiency to petitioner, William H. Nutt, Sr.,

asserting a penalty equal to the amount of unpaid withholding tax which the Audit Division determined was due from Lockport Paperboard Corp. ("the corporation"). Said documents asserted that \$4,142.43 was due for the period June 1, 1980 through July 31, 1980 and \$89.00 was due for the period October 1, 1980 through December 9, 1980.

2. After the Notice of Deficiency was issued, the Audit Division reduced the amount of the asserted penalty to \$3,316.60.

3. The corporation, which began operating in January, 1979, engaged in manufacturing boxboard which petitioner sold to box manufacturers.

4. Petitioner was Chairman of the Board of Directors of the corporation and owned sixty percent of the outstanding stock. He maintained an office at the corporation and spent approximately ten hours a week at this office.

Petitioner was not an officer of the corporation.

5. Petitioner had the authority to sign checks and tax returns. He also had the authority to hire and fire employees. However, petitioner was not responsible for the daily operations of the corporation and did not hire or fire employees or sign tax returns.

6. When petitioner went to his office at the corporation, he would discuss the problems of the corporation with the corporation's president, Mr. Roger Hahn. He would also utilize the office to do work concerning his investments in other corporations.

7. Petitioner received a salary of \$15,000.00 per year from the corporation. This represented approximately one-third to one-half of petitioner's yearly income.

8. The corporation retained the services of an accountant who drafted the payroll checks and checks for taxes pursuant to the authority granted to him by

Mr. Hahn. The withholding tax reports were prepared by the accountant and reviewed by Mr. Hahn.

9. The corporation's banking services were performed by Marine Midland Bank ("Marine Midland"). The corporation had an agreement with Marine Midland whereby Marine Midland agreed to provide a line of credit to the corporation to the extent of eighty percent of the corporation's accounts receivable.

10. The corporation maintained three checking accounts with Marine Midland: a cash collateral account financed by the line of credit, an operating account and a payroll account.

11. As funds were needed, it was Mr. Hahn's practice to place telephone calls to individuals associated with Marine Midland. Mr. Hahn and Marine Midland personnel would discuss the financial needs of the corporation and the amount of the corporation's accounts receivable. Thereafter, Marine Midland would make a commitment to loan the funds. The commitment would subsequently be confirmed by letter.

12. During June, 1980, Mr. Hahn and other representatives of the corporation had a series of discussions with representatives of Marine Midland. During a meeting which occurred on or about the third week of June, 1980, Marine Midland advised the corporation that the support for the line of credit was being withdrawn. That is, the corporation would not be permitted to borrow any more money. However, Marine Midland did not request repayment of any outstanding loans.

13. In the course of a discussion which occurred during either the third or fourth week of June, 1980, Marine Midland agreed to finance checks drawn to satisfy the payroll for the payroll period ended June 30, 1980. This discussion included what the amount of the payroll was, what the associated taxes were and

whether the accounts receivable were sufficient to provide the requisite line of credit.

14. The corporation filed withholding tax reports for the periods June 1, 1980 through June 30, 1980 and July 1, 1980 through July 31, 1980. The withholding tax report for the period ended June 30, 1980 disclosed that the total New York State tax withheld was \$2,639.93 and the withholding tax report for the period ended July 31, 1980 reported that the New York State tax withheld was \$1,502.50.

15. In conjunction with its preparation of the withholding tax reports, the corporation drafted a check number 5953 on July 3, 1980, in the amount of \$4,142.43, payable from its payroll account at Marine Midland to the order of "New York State Income Tax Bureau".

16. On June 26, 1979, the corporation made a deposit of \$14,547.29 into its payroll account. These funds, which originated from the cash collateral account, were transferred into the operating account and from there into the payroll account. On June 27, 1979, Marine Midland, without advising the corporation, reversed the prior entry taking the amount out of the payroll account.

17. On July 7, 1980, the corporation made a deposit of \$12,507.26 into its payroll account from the same source as in the preceding Finding of Fact. On July 9, 1980, this entry was also reversed without advising the corporation.

18. In spite of the foregoing deposit reversals, Marine Midland continued to honor the checks of the corporation until on or about July 9, 1980. This included a check to satisfy the federal withholding tax, as well as checks to creditors.

19. Marine Midland did not advise the corporation of the reversal of the entries on its payroll account either prior to or after they had taken place. The corporation first learned that Marine Midland was not honoring its commitment when the employees who were paid on or about July 5, 1980 for their work during the last weeks in June, 1980 advised the corporation that their payroll checks were not being honored.

20. Upon learning that the corporation's payroll checks were not being honored, the corporation contacted Marine Midland and was advised that Marine Midland's commitment was not being honored.

21. When Marine Midland withdrew its support for the corporation's line of credit, the corporation ceased production activities. Thereafter, the corporation had just three office employees until August, 1980.

22. When the check made payable to the order of the "New York State Income Tax Bureau" (Finding of Fact "15") was presented for payment, it was not honored by Marine Midland Bank.

CONCLUSION OF LAW

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

B. That section 685(n) of the Tax Law defines "person", for purposes of section 685(g) of the Tax Law as follows:

"...the term person includes an individual, corporation 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 inclusive language of section 685(n) of the Tax Law indicates that the penalty imposed by section 685(g) of the Tax Law may be imposed against a director of a corporation as well as against an officer or employee of a corporation (see generally, 22 ALR 3d 8, 52).

D. That whether petitioner was a person required to collect, truthfully account for and pay over withholding taxes during the period in issue is a question of fact (Matter of McHugh v. State Tax Comm., 70 A.D.2d 987; Matter of MacLean V. State Tax Comm., 69 A.D.2d 951, aff'd 49 N.Y.2d 920). Factors which are relevant to this determination include whether the individual signed the company's tax returns and possessed the right to hire and fire employees (Matter of Amengual v. State Tax Comm., 95 A.D.2d 949, 950; Matter of Malkin v. Tully, 65 A.D.2d 228). Other factors considered are the amount of stock owned, the authority to pay corporate obligations and the individual's official duties (Matter of Amengual v. State Tax Commission, supra).

E. That in view of the fact that petitioner, as Chairman of the Board of Directors, owned sixty percent of the outstanding stock, had the authority to hire and fire employees, had the authority to sign checks and made a practice of discussing the problems of the corporation with the corporation's president, he was a person required to collect, truthfully account for and pay over the withholding taxes of Lockport Paperboard Corp. within the meaning of section 685(g) of the Tax Law.

F. That the test of whether conduct was willful within the meaning of section 685(g) of the Tax Law is:

"...whether the act, default, or conduct is consciously and voluntarily done with knowledge that as a result, trust funds belonging to the Government will not be paid over but will be used for other purposes [citations omitted]. No showing of intent to deprive the Government of its money is necessary but only something more than accidental nonpayment is required [citations omitted]." (Matter of Levin v. Gallman, 42 N.Y.2d 32, 34).

G. That petitioner, William H. Nutt, Sr., did not willfully fail to pay over the taxes withheld from the employees of the corporation for the period June 1, 1980 through July 31, 1980. At the time the employer's return for withholding tax and check in payment of the taxes were filed, petitioner had reason to believe that the check would be honored by Marine Midland. Therefore, petitioner is not liable for the penalty imposed pursuant to section 685(g) of the Tax Law (see Matter of Harold H. Roberts, State Tax Commission, January 20, 1984). It is noted that neither Matter of Joseph Easley (State Tax Commission, June 1, 1984) nor Matter of Clyde Collins (State Tax Commission, June 1, 1984) is applicable to the situation presented herein, inasmuch as each of these proceedings presented situations wherein the petitioner chose to pay net wages to the employees without remitting withholding tax.


H. That since the corporation did not have employees for the period October 1, 1980 through December 9, 1980, petitioner is not liable for a penalty with respect to withholding taxes for this period.

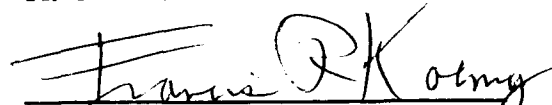
I. That the petition of William H. Nutt, Sr. is granted and the Notice of Deficiency is cancelled.

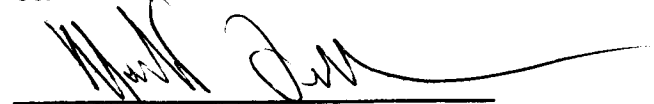
DATED: Albany, New York

STATE TAX COMMISSION

AUG 21 1985


PRESIDENT


COMMISSIONER


COMMISSIONER