

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of :
Estate of Elliott Schneiderman :
Lauretta Schneiderman, Executrix :
:
for Redetermination of a Deficiency or for Refund :
of Personal Income Tax under Article 22 of the Tax :
Law for the Period 7/16/79-12/31/79 :
:

In the Matter of the Petition :
of :
Lauretta Schneiderman :
:
for Redetermination of a Deficiency or for Refund :
of Personal Income Tax under Article 22 of the Tax :
Law for the Period 7/16/79-12/31/79. :
:

AFFIDAVIT OF MAILING

In the Matter of the Petition :
of :
Joseph Waldorff :
:
for Redetermination of a Deficiency or for Refund :
of Personal Income Tax under Article 22 of the Tax :
Law for the Period 7/16/79-12/31/79. :
:

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 15th day of April, 1985, he served the within notice of Decision by certified mail upon Estate of Elliott Schneiderman, Lauretta Schneiderman, Executrix, the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Estate of Elliott Schneiderman
Lauretta Schneiderman, Executrix
30 Lincoln Plaza #15K
New York, NY 10023

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.

Page 2

Affidavit of Mailing

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
15th day of April, 1985.

David Parcheck

James McNamee
Authorized to administer oaths
pursuant to Tax Law section 174

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

April 15, 1985

Estate of Elliott Schneiderman
Lauretta Schneiderman, Executrix
30 Lincoln Plaza #15K
New York, NY 10023

Dear Mrs. Schneiderman:

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
Mitchell Greene
Sherman & Citron, P.C.
1290 Avenue of the Americas
New York, NY 10104
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

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AFFIDAVIT OF MAILING

In the Matter of the Petition :
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of Personal Income Tax under Article 22 of the Tax :
Law for the Period 7/16/79-12/31/79. :
:

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 15th day of April, 1985, he served the within notice of Decision by certified mail upon Joseph Waldorff, the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Joseph Waldorff
36 Duncan Ave. Apt. C2
Jersey City, NJ 07304

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.

Page 2

Affidavit of Mailing

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.

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15th day of April, 1985.

David Parcluck

David Parcluck
Authorized to administer oaths
pursuant to Tax Law section 174

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

April 15, 1985

Joseph Waldorff
36 Duncan Ave. Apt. C2
Jersey City, NJ 07304

Dear Mr. Waldorff:

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.

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STATE TAX COMMISSION

cc: Taxing Bureau's Representative

STATE OF NEW YORK

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of :
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AFFIDAVIT OF MAILING

In the Matter of the Petition :
of :
Joseph Waldorff :
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for Redetermination of a Deficiency or for Refund :
of Personal Income Tax under Article 22 of the Tax :
Law for the Period 7/16/79-12/31/79. :
:

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 15th day of April, 1985, he served the within notice of Decision by certified mail upon Lauretta Schneiderman, the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Lauretta Schneiderman
30 Lincoln Plaza #15K
New York, NY 10023

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.

Page 2

Affidavit of Mailing

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
15th day of April, 1985.

David Parbuck

James W. [Signature]

Authorized to administer oaths
pursuant to Tax Law section 174

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of :
Estate of Elliott Schneiderman :
Lauretta Schneiderman, Executrix :
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for Redetermination of a Deficiency or for Refund :
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In the Matter of the Petition :
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Lauretta Schneiderman :
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for Redetermination of a Deficiency or for Refund :
of Personal Income Tax under Article 22 of the Tax :
Law for the Period 7/16/79-12/31/79. :
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AFFIDAVIT OF MAILING

In the Matter of the Petition :
of :
Joseph Waldorff :
:
for Redetermination of a Deficiency or for Refund :
of Personal Income Tax under Article 22 of the Tax :
Law for the Period 7/16/79-12/31/79. :
:

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 15th day of April, 1985, he served the within notice of Decision by certified mail upon Mitchell Greene, the representative of two of the petitioners in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Mitchell Greene
Sherman & Citron, P.C.
1290 Avenue of the Americas
New York, NY 10104

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.

Page 2

Affidavit of Mailing

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
15th day of April, 1985.

David Perchuck

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

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

April 15, 1985

Lauretta Schneiderman
30 Lincoln Plaza #15K
New York, NY 10023

Dear Mrs. Schneiderman:

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
Mitchell Greene
Sherman & Citron, P.C.
1290 Avenue of the Americas
New York, NY 10104
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition
of
ESTATE OF ELLIOTT SCHNEIDERMAN
LAURETTA SCHNEIDERMAN, EXECUTRIX
for Redetermination of a Deficiency or for
Refund of Personal Income Tax under Article 22
of the Tax Law for the Period July 16, 1979
through December 31, 1979.

In the Matter of the Petition
of
LAURETTA SCHNEIDERMAN
for Redetermination of a Deficiency or for
Refund of Personal Income Tax under Article 22
of the Tax Law for the Period July 16, 1979
through December 31, 1979.

DECISION

In the Matter of the Petition
of
JOSEPH WALDORFF
for Redetermination of a Deficiency or for
Refund of Personal Income Tax under Article 22
of the Tax Law for the Period July 16, 1979
through December 31, 1979.

Petitioners, Estate of Elliott Schneiderman, Lauretta Schneiderman,
Excutrix and Lauretta Schneiderman, 30 Lincoln Plaza #15K, New York, New York
10023 and Joseph Waldorff, 36 Duncan Avenue, Apt. C2, Jersey City, New Jersey
07304, filed petitions for redetermination of deficiencies or for refunds of
personal income tax under Article 22 of the Tax Law for the period July 16,
1979 through December 31, 1979 (File Nos. 41088, 41093 and 41096).

A formal hearing was held before Daniel J. Ranalli, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on September 20, 1984 at 9:45 A.M. Petitioners Estate of Elliott Schneiderman and Laretta Schneiderman appeared by Mitchell Green, Esq. Petitioner Joseph Waldorff appeared pro se. The Audit Division appeared by John P. Dugan, Esq. (Angelo A. Scopellito, Esq., of counsel).

ISSUE

Whether petitioners were persons required to collect, truthfully account for and pay over withholding taxes of Taylor Sportswear, Inc., who willfully failed to do so and are thus liable to a penalty under section 685(g) of the Tax Law.

FINDINGS OF FACT

1. On September 27, 1982, the Audit Division issued a Notice of Deficiency, along with a Statement of Deficiency, asserting a penalty pursuant to section 685(g) of the Tax Law against Elliot Schneiderman as a person required to collect, truthfully account for and pay over withholding taxes of Taylor Sportswear, Inc. ("Taylor") in the amount of \$15,740.50 for the period July 16, 1979 through December 31, 1979.¹ On the same date, similar notices were issued against petitioners Laretta Schneiderman and Joseph Waldorff in the same amount and for the same period.

2. Elliott Schneiderman was the president of Taylor, Laretta Schneiderman was the vice president and Joseph Waldorff was the secretary - treasurer. It

1 Petitioner Elliott Schneiderman died on or about October 31, 1982 and, by decree of the Surrogate's Court of New York County dated December 8, 1982, Letters Testamentary were granted to petitioner Laretta Schneiderman, the Executrix named in the decedent's will.

was undisputed that Elliott Schneiderman was a person required to collect, account for and pay over the withholding taxes of Taylor. Mr. Schneiderman, along with petitioner Joseph Waldorff, signed all Taylor checks and tax returns and was generally in charge of the operations of Taylor. Mr. Waldorff acknowledged that he controlled Taylor's cash until sometime in December, 1979 when Mr. Schneiderman assumed full control of the cash and made all decisions concerning which bills were to be paid.

3. Petitioner Laurretta Schneiderman worked as a receptionist for Taylor for seven or eight years at a salary of \$150.00 to \$160.00 per week. Although listed as vice president of Taylor on corporate tax returns, Mrs. Schneiderman had no knowledge that she held this position until after her husband's death in 1982. Mr. Schneiderman and Mr. Waldorff never informed Mrs. Schneiderman that she was listed as vice president on corporate documents. Other than her work as a receptionist, Mrs. Schneiderman was not involved in any operations of Taylor. She had signed a bank signature card as an authorized signatory of Taylor checks but she never actually signed any corporate checks. She was not involved in any of Taylor's finances and did not assist in the preparation of, nor sign, any of Taylor's tax returns. Mrs. Schneiderman, moreover, had no knowledge of any unpaid withholding taxes or any other unpaid bills of Taylor.

4. On May 30, 1980, Taylor filed a petition in bankruptcy under Chapter 11 of the United States Code. Thereafter, on or about August 18, 1980, the matter was converted to a proceeding under Chapter 7 of the United States Code. The Audit Division apparently did not file a claim for the withholding taxes due from Taylor with the Bankruptcy Court. Petitioners now maintain that the Audit Division should be precluded from imposing the 685(g) penalty, since it

failed to first attempt to obtain the taxes due from Taylor by filing a claim in bankruptcy.

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 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).

D. That it was conceded that Elliott Schneiderman was a person required to collect and pay over withholding taxes. Petitioner Joseph Waldorff was the secretary - treasurer of Taylor; he signed checks and tax returns and admitted to having controlled the cash of Taylor until sometime in December, 1979. Petitioner Joseph Waldorff is, therefore, a person required to collect, truthfully

account for and pay over withholding taxes within the meaning and intent of sections 685(g) and 685(n) of the Tax Law.

E. That petitioner Laretta Schneiderman did not sign corporate checks or tax returns, exercised no authority over the assets of the corporation, and was not involved in the day-to-day operations of Taylor other than in her capacity as a receptionist. She did not discover that she was listed as a vice president until after her husband's death and it is unclear from the record whether she was legally appointed to that office. It is apparent that she held such office in name only. Petitioner Laretta Schneiderman accordingly cannot be considered a person required to collect, truthfully account for and pay over withholding taxes within the meaning and intent of sections 685(g) and 685(n) of the Tax Law.

F. That the penalty imposed under section 685(g) of the Tax Law is separate and independent of the corporation's liability for the unpaid taxes and the fact that no claim was filed in the Bankruptcy Court for the unpaid withholding taxes does not preclude the Audit Division from imposing a 685(g) penalty equal to such taxes against petitioners, individually (see Yellin v. New York State Tax Commission, 81 A.D.2d 196).


G. That the petitions of the Estate of Elliott Schneiderman and Joseph Waldorff are denied and the notices of deficiency issued against them on September 27, 1982 are sustained.


H. That the petition of Laurretta Schneiderman is granted and the Notice of Deficiency issued against her on September 27, 1982 is cancelled.

DATED: Albany, New York

STATE TAX COMMISSION

APR 15 1985


President


Commissioner


Commissioner

TA 26 (9-79)

STANDARD MAIL

STANDARD MAIL

STANDARD MAIL

975 380 71-17

□ HOLD

DATE

1ST NOTICE

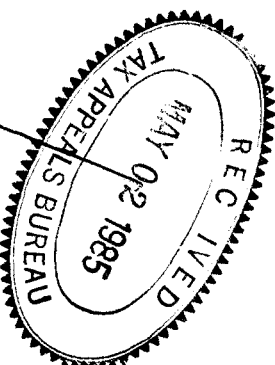
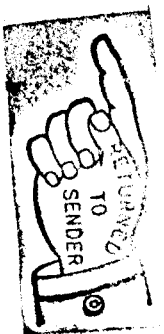
2ND NOTICE

Delivered from
Post Office
at New York

3 169 740

MAIL

RTIFIED



Mitchell Greene
Sherman & Citron, P.C.
1290 Avenue of the Americas
New York, NY 10104

Should be paid.

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

April 15, 1985

Estate of Elliott Schneiderman
Lauretta Schneiderman, Executrix
30 Lincoln Plaza #15K
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Very truly yours,

STATE TAX COMMISSION

cc: Petitioner's Representative
Mitchell Greene
Sherman & Citron, P.C.
1290 Avenue of the Americas
New York, NY 10104
Taxing Bureau's Representative

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

April 15, 1985

Joseph Waldorff
36 Duncan Ave. Apt. C2
Jersey City, NJ 07304

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Very truly yours,

STATE TAX COMMISSION

cc: Taxing Bureau's Representative

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

April 15, 1985

Lauretta Schneiderman
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STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition

of

ESTATE OF ELLIOTT SCHNEIDERMAN
LAURETTA SCHNEIDERMAN, EXECUTRIX

for Redetermination of a Deficiency or for
Refund of Personal Income Tax under Article 22
of the Tax Law for the Period July 16, 1979
through December 31, 1979.

In the Matter of the Petition

of

LAURETTA SCHNEIDERMAN

for Redetermination of a Deficiency or for
Refund of Personal Income Tax under Article 22
of the Tax Law for the Period July 16, 1979
through December 31, 1979.

In the Matter of the Petition

of

JOSEPH WALDORFF

for Redetermination of a Deficiency or for
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DECISION

Petitioners, Estate of Elliott Schneiderman, Lauretta Schneiderman,
Excutrix and Lauretta Schneiderman, 30 Lincoln Plaza #15K, New York, New York
10023 and Joseph Waldorff, 36 Duncan Avenue, Apt. C2, Jersey City, New Jersey
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ISSUE

Whether petitioners were persons required to collect, truthfully account for and pay over withholding taxes of Taylor Sportswear, Inc., who willfully failed to do so and are thus liable to a penalty under section 685(g) of the Tax Law.

FINDINGS OF FACT

1. On September 27, 1982, the Audit Division issued a Notice of Deficiency, along with a Statement of Deficiency, asserting a penalty pursuant to section 685(g) of the Tax Law against Elliot Schneiderman as a person required to collect, truthfully account for and pay over withholding taxes of Taylor Sportswear, Inc. ("Taylor") in the amount of \$15,740.50 for the period July 16, 1979 through December 31, 1979.¹ On the same date, similar notices were issued against petitioners Laretta Schneiderman and Joseph Waldorff in the same amount and for the same period.

2. Elliott Schneiderman was the president of Taylor, Laretta Schneiderman was the vice president and Joseph Waldorff was the secretary - treasurer. It

¹ Petitioner Elliott Schneiderman died on or about October 31, 1982 and, by decree of the Surrogate's Court of New York County dated December 8, 1982, Letters Testamentary were granted to petitioner Laretta Schneiderman, the Executrix named in the decedent's will.

was undisputed that Elliott Schneiderman was a person required to collect, account for and pay over the withholding taxes of Taylor. Mr. Schneiderman, along with petitioner Joseph Waldorff, signed all Taylor checks and tax returns and was generally in charge of the operations of Taylor. Mr. Waldorff acknowledged that he controlled Taylor's cash until sometime in December, 1979 when Mr. Schneiderman assumed full control of the cash and made all decisions concerning which bills were to be paid.

3. Petitioner Laretta Schneiderman worked as a receptionist for Taylor for seven or eight years at a salary of \$150.00 to \$160.00 per week. Although listed as vice president of Taylor on corporate tax returns, Mrs. Schneiderman had no knowledge that she held this position until after her husband's death in 1982. Mr. Schneiderman and Mr. Waldorff never informed Mrs. Schneiderman that she was listed as vice president on corporate documents. Other than her work as a receptionist, Mrs. Schneiderman was not involved in any operations of Taylor. She had signed a bank signature card as an authorized signatory of Taylor checks but she never actually signed any corporate checks. She was not involved in any of Taylor's finances and did not assist in the preparation of, nor sign, any of Taylor's tax returns. Mrs. Schneiderman, moreover, had no knowledge of any unpaid withholding taxes or any other unpaid bills of Taylor.

4. On May 30, 1980, Taylor filed a petition in bankruptcy under Chapter 11 of the United States Code. Thereafter, on or about August 18, 1980, the matter was converted to a proceeding under Chapter 7 of the United States Code. The Audit Division apparently did not file a claim for the withholding taxes due from Taylor with the Bankruptcy Court. Petitioners now maintain that the Audit Division should be precluded from imposing the 685(g) penalty, since it

failed to first attempt to obtain the taxes due from Taylor by filing a claim in bankruptcy.

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 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).

D. That it was conceded that Elliott Schneiderman was a person required to collect and pay over withholding taxes. Petitioner Joseph Waldorff was the secretary - treasurer of Taylor; he signed checks and tax returns and admitted to having controlled the cash of Taylor until sometime in December, 1979. Petitioner Joseph Waldorff is, therefore, a person required to collect, truthfully

account for and pay over withholding taxes within the meaning and intent of sections 685(g) and 685(n) of the Tax Law.

E. That petitioner Laretta Schneiderman did not sign corporate checks or tax returns, exercised no authority over the assets of the corporation, and was not involved in the day-to-day operations of Taylor other than in her capacity as a receptionist. She did not discover that she was listed as a vice president until after her husband's death and it is unclear from the record whether she was legally appointed to that office. It is apparent that she held such office in name only. Petitioner Laretta Schneiderman accordingly cannot be considered a person required to collect, truthfully account for and pay over withholding taxes within the meaning and intent of sections 685(g) and 685(n) of the Tax Law.

F. That the penalty imposed under section 685(g) of the Tax Law is separate and independent of the corporation's liability for the unpaid taxes and the fact that no claim was filed in the Bankruptcy Court for the unpaid withholding taxes does not preclude the Audit Division from imposing a 685(g) penalty equal to such taxes against petitioners, individually (see Yellin v. New York State Tax Commission, 81 A.D.2d 196).

G. That the petitions of the Estate of Elliott Schneiderman and Joseph Waldorff are denied and the notices of deficiency issued against them on September 27, 1982 are sustained.

H. That the petition of Laretta Schneiderman is granted and the Notice of Deficiency issued against her on September 27, 1982 is cancelled.

DATED: Albany, New York

STATE TAX COMMISSION

APR 15 1985

Rodwick Allen
President

Francis P. Koenig
Commissioner

Mark J. Jind
Commissioner

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition

of

ESTATE OF ELLIOTT SCHNEIDERMAN
LAURETTA SCHNEIDERMAN, EXECUTRIX

for Redetermination of a Deficiency or for
Refund of Personal Income Tax under Article 22
of the Tax Law for the Period July 16, 1979
through December 31, 1979.

In the Matter of the Petition

of

LAURETTA SCHNEIDERMAN

for Redetermination of a Deficiency or for
Refund of Personal Income Tax under Article 22
of the Tax Law for the Period July 16, 1979
through December 31, 1979.

In the Matter of the Petition

of

JOSEPH WALDORFF

for Redetermination of a Deficiency or for
Refund of Personal Income Tax under Article 22
of the Tax Law for the Period July 16, 1979
through December 31, 1979.

DECISION

Petitioners, Estate of Elliott Schneiderman, Lauretta Schneiderman,
Excutrix and Lauretta Schneiderman, 30 Lincoln Plaza #15K, New York, New York
10023 and Joseph Waldorff, 36 Duncan Avenue, Apt. C2, Jersey City, New Jersey
07304, filed petitions for redetermination of deficiencies or for refunds of
personal income tax under Article 22 of the Tax Law for the period July 16,
1979 through December 31, 1979 (File Nos. 41088, 41093 and 41096).

A formal hearing was held before Daniel J. Ranalli, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on September 20, 1984 at 9:45 A.M. Petitioners Estate of Elliott Schneiderman and Lauretta Schneiderman appeared by Mitchell Green, Esq. Petitioner Joseph Waldorff appeared pro se. The Audit Division appeared by John P. Dugan, Esq. (Angelo A. Scopellito, Esq., of counsel).

ISSUE

Whether petitioners were persons required to collect, truthfully account for and pay over withholding taxes of Taylor Sportswear, Inc., who willfully failed to do so and are thus liable to a penalty under section 685(g) of the Tax Law.

FINDINGS OF FACT

1. On September 27, 1982, the Audit Division issued a Notice of Deficiency, along with a Statement of Deficiency, asserting a penalty pursuant to section 685(g) of the Tax Law against Elliot Schneiderman as a person required to collect, truthfully account for and pay over withholding taxes of Taylor Sportswear, Inc. ("Taylor") in the amount of \$15,740.50 for the period July 16, 1979 through December 31, 1979.¹ On the same date, similar notices were issued against petitioners Lauretta Schneiderman and Joseph Waldorff in the same amount and for the same period.

2. Elliott Schneiderman was the president of Taylor, Lauretta Schneiderman was the vice president and Joseph Waldorff was the secretary - treasurer. It

1 Petitioner Elliott Schneiderman died on or about October 31, 1982 and, by decree of the Surrogate's Court of New York County dated December 8, 1982, Letters Testamentary were granted to petitioner Lauretta Schneiderman, the Executrix named in the decedent's will.

was undisputed that Elliott Schneiderman was a person required to collect, account for and pay over the withholding taxes of Taylor. Mr. Schneiderman, along with petitioner Joseph Waldorff, signed all Taylor checks and tax returns and was generally in charge of the operations of Taylor. Mr. Waldorff acknowledged that he controlled Taylor's cash until sometime in December, 1979 when Mr. Schneiderman assumed full control of the cash and made all decisions concerning which bills were to be paid.

3. Petitioner Lauretta Schneiderman worked as a receptionist for Taylor for seven or eight years at a salary of \$150.00 to \$160.00 per week. Although listed as vice president of Taylor on corporate tax returns, Mrs. Schneiderman had no knowledge that she held this position until after her husband's death in 1982. Mr. Schneiderman and Mr. Waldorff never informed Mrs. Schneiderman that she was listed as vice president on corporate documents. Other than her work as a receptionist, Mrs. Schneiderman was not involved in any operations of Taylor. She had signed a bank signature card as an authorized signatory of Taylor checks but she never actually signed any corporate checks. She was not involved in any of Taylor's finances and did not assist in the preparation of, nor sign, any of Taylor's tax returns. Mrs. Schneiderman, moreover, had no knowledge of any unpaid withholding taxes or any other unpaid bills of Taylor.

4. On May 30, 1980, Taylor filed a petition in bankruptcy under Chapter 11 of the United States Code. Thereafter, on or about August 18, 1980, the matter was converted to a proceeding under Chapter 7 of the United States Code. The Audit Division apparently did not file a claim for the withholding taxes due from Taylor with the Bankruptcy Court. Petitioners now maintain that the Audit Division should be precluded from imposing the 685(g) penalty, since it

failed to first attempt to obtain the taxes due from Taylor by filing a claim in bankruptcy.

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 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).

D. That it was conceded that Elliott Schneiderman was a person required to collect and pay over withholding taxes. Petitioner Joseph Waldorff was the secretary - treasurer of Taylor; he signed checks and tax returns and admitted to having controlled the cash of Taylor until sometime in December, 1979. Petitioner Joseph Waldorff is, therefore, a person required to collect, truthfully

account for and pay over withholding taxes within the meaning and intent of sections 685(g) and 685(n) of the Tax Law.

E. That petitioner Laretta Schneiderman did not sign corporate checks or tax returns, exercised no authority over the assets of the corporation, and was not involved in the day-to-day operations of Taylor other than in her capacity as a receptionist. She did not discover that she was listed as a vice president until after her husband's death and it is unclear from the record whether she was legally appointed to that office. It is apparent that she held such office in name only. Petitioner Laretta Schneiderman accordingly cannot be considered a person required to collect, truthfully account for and pay over withholding taxes within the meaning and intent of sections 685(g) and 685(n) of the Tax Law.

F. That the penalty imposed under section 685(g) of the Tax Law is separate and independent of the corporation's liability for the unpaid taxes and the fact that no claim was filed in the Bankruptcy Court for the unpaid withholding taxes does not preclude the Audit Division from imposing a 685(g) penalty equal to such taxes against petitioners, individually (see Yellin v. New York State Tax Commission, 81 A.D.2d 196).

G. That the petitions of the Estate of Elliott Schneiderman and Joseph Waldorff are denied and the notices of deficiency issued against them on September 27, 1982 are sustained.

H. That the petition of Laretta Schneiderman is granted and the Notice of Deficiency issued against her on September 27, 1982 is cancelled.

DATED: Albany, New York

STATE TAX COMMISSION

APR 15 1985

Rodwin Allen
President

Francis P. Koenig
Commissioner

Mark J. Friedman
Commissioner

TA 26 (9-79)

STATE OF NEW YORK
State Tax Commission
TAX APPEALS BUREAU
STATE CAMPUS
ALBANY, N. Y. 12227

APR 17 1985 179

CLAIM CHECK NO. 657837

☐ HOLD

DATE 4-17-85

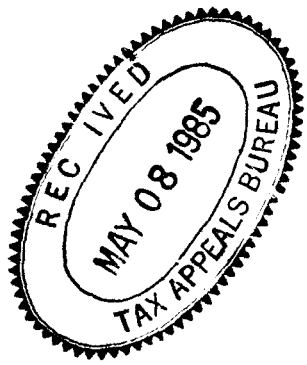
1ST NOTICE

2ND NOTICE 21

RETURN 51

Detached from
PS Form 3840-A
Oct. 1980

Joseph Waldorff
36 Duncan Ave. Apt. C2
Jersey City, NJ 07304



UNCLAIMED



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

April 15, 1985

Joseph Waldorff
36 Duncan Ave. Apt. C2
Jersey City, NJ 07304

Dear Mr. Waldorff:

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

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D. That it was conceded that Elliott Schneiderman was a person required to collect and pay over withholding taxes. Petitioner Joseph Waldorff was the secretary - treasurer of Taylor; he signed checks and tax returns and admitted to having controlled the cash of Taylor until sometime in December, 1979.

Petitioner Joseph Waldorff is, therefore, a person required to collect, truthfully

account for and pay over withholding taxes within the meaning and intent of sections 685(g) and 685(n) of the Tax Law.

E. That petitioner Laretta Schneiderman did not sign corporate checks or tax returns, exercised no authority over the assets of the corporation, and was not involved in the day-to-day operations of Taylor other than in her capacity as a receptionist. She did not discover that she was listed as a vice president until after her husband's death and it is unclear from the record whether she was legally appointed to that office. It is apparent that she held such office in name only. Petitioner Laretta Schneiderman accordingly cannot be considered a person required to collect, truthfully account for and pay over withholding taxes within the meaning and intent of sections 685(g) and 685(n) of the Tax Law.

F. That the penalty imposed under section 685(g) of the Tax Law is separate and independent of the corporation's liability for the unpaid taxes and the fact that no claim was filed in the Bankruptcy Court for the unpaid withholding taxes does not preclude the Audit Division from imposing a 685(g) penalty equal to such taxes against petitioners, individually (see Yellin v. New York State Tax Commission, 81 A.D.2d 196).

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