

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of :
Sonya M. Smith :
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 :
8/1/79-12/31/79 & 5/1/80-10/31/80. :

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 Sonya M. Smith, the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Sonya M. Smith
400 Crestover Circle
Richardson, TX 75080

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

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

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

August 21, 1985

Sonya M. Smith
400 Crestover Circle
Richardson, TX 75080

Dear Mrs. Smith:

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

SONYA M. SMITH

DECISION

for Redetermination of a Deficiency or for
Refund of Personal Income Tax under Article 22
of the Tax Law for the Periods August 1, 1979
through December 31, 1979 and May 1, 1980
through October 31, 1980.

Petitioner, Sonya M. Smith, 400 Crestover Circle, Richardson, Texas 75080, 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 August 1, 1979 through December 31, 1979 and May 1, 1980 through October 31, 1980 (File No. 36169).

On October 18, 1984, petitioner advised the State Tax Commission, in writing, that petitioner desired to waive a formal hearing and to submit the case to the State Tax Commission, with all briefs and documents to be submitted by February 8, 1985. After due consideration of the entire file, the State Tax Commission renders the following decision.

ISSUE

Whether petitioner is liable for the penalty asserted against her pursuant to section 685(g) of the Tax Law with respect to New York State withholding taxes due from Smidel, Inc.

FINDINGS OF FACT

1. Smidel, Inc. ("Smidel") failed to pay New York State personal income tax withheld from the wages of its employees in the amount of \$7,406.84 for the

period August 1, 1979 through December 31, 1979 and \$5,925.32 for the period May 1, 1980 through October 31, 1980.

2. On September 28, 1981, the Audit Division issued a Notice of Deficiency and Statement of Deficiency to Sonya M. Smith asserting a penalty equal to the amount of unpaid withholding tax due from Smidel.

3. On January 16, 1978, petitioner was elected as secretary and treasurer of Smidel. At the same meeting, petitioner's husband, Alfred Smith, was elected president of the corporation. Petitioner was not present at this meeting.

4. As secretary and treasurer, petitioner's duties consisted of setting up files, typing correspondence and maintaining the books and records for the business. Petitioner also served in the capacity of "Administrative Assistant" and, as such, supervised an office staff consisting of two or three individuals.

5. Petitioner had the authority to sign checks and tax returns and, on several occasions during the periods in issue signed withholding tax returns. However, petitioner did not prepare or sign checks unless instructed to do so by either the president or vice-president of Smidel.

6. In 1979 and 1980, petitioner received wages of, respectively, \$11,475.00 and \$13,000.00 from Smidel.

7. The Internal Revenue Service determined that petitioner was liable for withholding taxes due from Smidel. She appealed this determination. No evidence was submitted with regard to whether there has been a resolution of the appeal.

8. Petitioner's husband, Alfred Smith, was also issued a Notice of Deficiency asserting a penalty equal to the amount of unpaid withholding taxes due from Smidel. On March 17, 1983, Alfred Smith withdrew his petition to the New York State Tax Commission.

CONCLUSIONS 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 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...who as such officer, employee or member is under a duty to perform the act in respect of which the violation occurs."

C. That factors relevant to the determination of whether petitioner was a person required to collect, truthfully account for and pay over withholding taxes during the period in issue 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 Comm., supra).


D. That in view of the fact that petitioner had only ministerial duties for Smidel and did not have the authority to direct the payment of corporate obligations, petitioner was not a person required to collect, truthfully account for and pay over withholding taxes within the meaning of section 685(g) of the Tax Law.


E. That the petition of Sonya M. Smith is granted and the Notice of Deficiency, issued September 28, 1981, is cancelled.


DATED: Albany, New York

STATE TAX COMMISSION

AUG 21 1985


PRESIDENT


COMMISSIONER


COMMISSIONER