

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition
of
Solomon Storozum

:

: 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 Years :
1977 & 1979.

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 February, 1985, he served the within notice of Decision by certified mail upon Solomon Storozum, the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Solomon Storozum
2679 Riverside Dr.
Wantagh, NY 11793

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
15th day of February, 1985.

David Parchuck

Anna A. DeGard
Authorized to administer oaths
pursuant to Tax Law section 174

STATE OF NEW YORK

STATE TAX COMMISSION

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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 February, 1985, he served the within notice of Decision by certified mail upon Irving L. Gartenberg, the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Irving L. Gartenberg
122 E. 42nd St.
New York, NY 10168

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
15th day of February, 1985.

David Parchuck

Ann R. Hagelund

Authorized to administer oaths
pursuant to Tax Law section 174

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

February 15, 1985

Solomon Storozum
2679 Riverside Dr.
Wantagh, NY 11793

Dear Mr. Storozum:

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
Irving L. Gartenberg
122 E. 42nd St.
New York, NY 10168
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

| | | |
|--|---|----------|
| In the Matter of the Petition | : | |
| of | : | |
| SOLOMON STOROZUM | : | 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, Solomon Storozum, 2679 Riverside Drive, Wantagh, New York 11793, 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 No. 35759).

A formal hearing was held before Doris E. Steinhardt, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on June 27, 1984 at 1:15 P.M., with all briefs submitted by October 12, 1984. Petitioner appeared by Irving L. Gartenberg, Esq. The Audit Division appeared by John P. Dugan, Esq. (William Fox, Esq., of counsel).

ISSUE

Whether petitioner was a person responsible for collecting and paying over taxes withheld from the wages of employees of Sunflower Novelty Bags, Inc., who willfully failed to fulfill this responsibility, and is therefore liable for the penalty imposed under section 685(g) of the Tax Law.

FINDINGS OF FACT

1. On July 27, 1981, the Audit Division issued to petitioner, Solomon Storozum, a Statement of Deficiency and a Notice of Deficiency, asserting penalties equal to the New York State withholding tax of Sunflower Novelty Bags, Inc. ("Sunflower") 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. In 1974, petitioner and his long-time friend, Angelo Molinari, formed Sunflower for the purpose of manufacturing night deposit and coin bags. Only petitioner made an investment in the corporation, with funds loaned him by his mother. Petitioner was named president and held fifty percent of the issued shares of Sunflower. Rose Molinari, wife of Angelo Molinari, was the only other corporate officer, holding the remaining fifty percent of the shares issued; she functioned merely as a figurehead and did not perform any of the duties usually associated with the position of corporate officer. Sometime in 1978, at the time the Molinaris were divorced, Mrs. Molinari relinquished her position and her shares, and Mr. Molinari became an officer and fifty-percent shareholder.

3. When Sunflower first commenced business, petitioner was employed elsewhere on a full-time basis; he and Mr. Molinari believed that the level of business was insufficient to pay salaries to both of them. Approximately eight months later, petitioner devoted himself full-time to Sunflower's business, supervising the manufacturing operations, especially silkscreening, and shipping. Petitioner did not involve himself in the management or financial affairs of Sunflower, leaving these matters to Mr. Molinari who had prior experience in a similar manufacturing business. Petitioner was an authorized signatory on the

corporate account and did in fact sign checks, e.g., to pay suppliers, in Mr. Molinari's absence.

4. In June or July, 1976, Sunflower entered into a financing arrangement with Meritum Corporation ("Meritum"), whereby Meritum advanced funds to Sunflower for its working capital needs. Petitioner could not recollect the amount of the initial advance but did remember that two liens of \$25,000.00 each were placed on his residence and the Molinaris' residence as security therefor. During the early part of the Sunflower - Meritum arrangement, Sunflower altered its operations to manufacture children's school bags at Meritum's direction, and a Meritum officer visited Sunflower's premises on two or three occasions each month.

5. In early 1979, Sunflower began to experience difficulties in timely fulfilling orders because of problems in obtaining raw materials. Consequently, many customers cancelled their orders. Thereafter, Meritum's involvement in Sunflower's affairs increased: Meritum selected a foreman (who was remunerated by Sunflower) to supervise the manufacturing operations, and Mr. Molinari reviewed all customer contracts with Meritum principals, who made the ultimate determination whether Sunflower would enter into any particular contract.

6. Formal meetings of the Sunflower corporate officers were never conducted. During and after 1979, decisions regarding which of Sunflower's creditors were to be paid were made by Mr. Molinari together with Meritum principals. Mr. Molinari made telephone requests to Meritum for advances to meet Sunflower's weekly payroll, and funds were advanced net of withholding taxes.

7. Petitioner never hired or discharged employees although he assumed he had authority to do so. He could not recall whether he ever signed tax returns filed by Sunflower. Whenever petitioner inquired whether Sunflower's withholding

tax obligations were satisfied, Mr. Molinari told him, "Don't worry about it." Petitioner's efforts to examine the corporate records during the latter half of 1979 were unavailing: most, if not all, the records had been moved to Meritum's place of business.

8. In 1979, petitioner's salary was \$500.00 per week. He was later asked to consent to a salary reduction, but the record is unclear as to whether the reduction was ever instituted. Finally, in January, 1980, a Meritum representative informed petitioner that his services were no longer required. By letter dated January 21, 1980 from the president of Meritum's Commercial Finance division, petitioner was further advised as follows:

"As you have agreed to sever all your relations with Sunflower Novelty Handbags, Inc. effective as of January 31, 1980, therefore, you will not be held liable for any additional sums due us from Sunflower Novelty Handbags, Inc. after that date. We agree to extend to July 31, 1980, in which you are to comply with the terms and conditions of the guaranty dated June 2nd, 1976, after that date then we will confirm to you and your wife that you would be exempted. You hereby acknowledge that you are liable to us under said guaranty, as of this date, for the difference between the gross amount we advanced to Sunflower Novelty Handbags, Inc., plus accrued interest, less inventory at cost and less the accounts receivables at 95 percent of its face value."

Petitioner never recovered his initial investment in Sunflower.

9. In June, 1980, when Sunflower was indebted to Meritum for approximately two million dollars, Meritum foreclosed on the Sunflower business assets which secured the debt.

10. The Internal Revenue Service imposed a penalty against petitioner for federal withholding tax for the taxable year 1979. Petitioner's administrative appeal of such penalty is currently pending before a Service Appeals Division field office.

CONCLUSIONS OF LAW

A. That in determining whether petitioner is liable for the penalty asserted against him pursuant to subdivision (g) of section 685 of the Tax Law, the threshold question is whether he was a person required to collect, truthfully account for and pay over taxes withheld from the wages of employees of Sunflower. Section 685(n). Relevant factors include whether petitioner signed the corporation's tax returns, possessed the right to hire and discharge employees or derived a substantial part of his income from the corporation; other pertinent areas of inquiry include the amount of stock petitioner held, the sphere of his duties and his authority to pay corporate obligations. Matter of Amengual v. State Tax Comm., 95 A.D.2d 949 (3d Dept. 1983). As the corporate president, a fifty-percent shareholder, an authorized signatory on the corporate account, and one who looked to the corporation for his sole source of income, petitioner was clearly a person required to collect and pay over the withholding tax during the years at issue.

B. That turning to the question whether petitioner's failure to collect, account for and pay over the tax was willful, the test for determining 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, 707-08 (3d Dept. 1982). Petitioner was not relieved of his obligations and responsibilities with respect to the collection and payment of withholding tax by his choice to leave the management and financial decisions to Mr. Molinari and later, to Mr. Molinari and Meritum principals. "[C]orporate officials responsible as fiduciaries for tax revenues cannot

absolve themselves merely by disregarding their duty and leaving it to someone else to discharge [citation omitted]." Id. at 708.

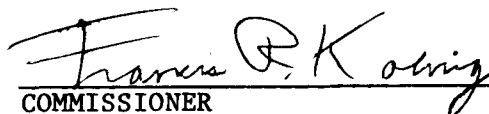
C. That the petition of Solomon Storozum is denied, and the Notice of Deficiency issued on July 27, 1981 is sustained.

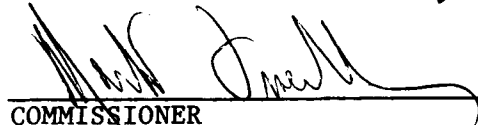
DATED: Albany, New York

STATE TAX COMMISSION

FEB 15 1985


PRESIDENT


COMMISSIONER


COMMISSIONER