

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of :
Holland Vose :
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. :
:

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 4th day of April, 1985, he served the within notice of Decision by certified mail upon Holland Vose, the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Holland Vose
235 W. 76th St.
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.

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
4th day of April, 1985.

David Parchuck

Bennie A. Hagedorn

Authorized to administer oaths
pursuant to Tax Law section 174

STATE OF NEW YORK

STATE TAX COMMISSION

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of :
Holland Vose :
for Redetermination of a Deficiency or Revision :
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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 4th day of April, 1985, he served the within notice of Decision by certified mail upon Mark Denbeaux, the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Mark Denbeaux
Dickstein & Fabricant
24 East 21st Street
New York, NY 10010

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
4th day of April, 1985.

David Parchuck

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

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

April 4, 1985

Holland Vose
235 W. 76th St.
New York, NY 10023

Dear Mr. Vose:

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
Mark Denbeaux
Dickstein & Fabricant
24 East 21st Street
New York, NY 10010
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition	:	
of	:	
HOLLAND VOSE	:	DECISION
for Redetermination of a Deficiency or for	:	
Refund of Personal Income Tax under Article 22	:	
of the Tax Law for the Years 1977, 1978 and	:	
1979.	:	

Petitioner, Holland Vose, 235 West 76th Street, New York, New York 10023, 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, 1978 and 1979 (File No. 35274).

A formal hearing was held before Thomas E. Drake, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on November 2, 1984 at 9:15 A.M. Petitioner appeared by Dickstein & Fabricant, Esqs. (Mark Denbeaux, Esq., of counsel). 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 taxes, who willfully failed to do so and is thus liable to a penalty under section 685(g) of the Tax Law.

FINDINGS OF FACT

1. On April 27, 1981, the Audit Division issued a Notice of Deficiency, together with a Statement of Deficiency, asserting a penalty pursuant to section 685(g) of the Tax Law against petitioner, Holland Vose ("petitioner"), as a person required to collect, truthfully account for and pay over withholding

taxes of Artspeak, Inc. ("Artspeak") in the amount of \$9,827.20 for the years 1977, 1978 and 1979. The total amount was calculated as follows:

<u>Withholding Tax Period</u>	<u>Amount</u>
October 1 to December 31, 1977	\$1,465.30
January 1 to December 31, 1978	7,461.10
October 1 to December 31, 1979	900.80
TOTAL DUE	<u>\$9,827.20</u>

2. At a pre-hearing conference, petitioner established that she had resigned her position at Artspeak effective June 7, 1979. The Audit Division agreed that petitioner was not liable for the withholding tax period after said date and cancelled the penalty for the period October 1 to December 31, 1979.

3. Artspeak was formed in 1976 by petitioner, Holland Vose, Marvin Sylvor, Marvin's brother Robert Sylvor and two other individuals. Artspeak was engaged in the business of creating visual displays of merchandise in the department stores of its respective clients and it also manufactured items used in the displays, such as store banners and display tools.

4. Petitioner met Marvin Sylvor while seeking employment in the display advertising field. Marvin Sylvor, who was employed by a company named Decorative Plant, agreed to hire petitioner for one project on a trial basis. While working on the project Marvin Sylvor told petitioner that Decorative Plant was in financial trouble and since they worked well together, they could save the company if petitioner knew of anyone willing to invest money in the company. The people petitioner brought in were unwilling to invest in Decorative Plant, but they were willing to back petitioner in a new corporation. Thereafter, Artspeak was formed as noted in Finding of Fact "3". In addition to their business relationship, petitioner also became romantically involved with Marvin Sylvor.

5. Petitioner had no experience in corporate finance, accounting or running a company. In spite of this, she was appointed president of Artspeak and held the title until she resigned on June 7, 1979. Her salary was set at \$250.00 a week. Marvin Sylvor, who had several years experience in the visual display industry, was appointed Director of Product Development with a salary of \$500.00 a week.¹ Robert Sylvor was secretary of Artspeak. Marvin Sylvor and Robert Sylvor had controlling interest. Initially, petitioner was to receive a 15% interest in Artspeak, but because Robert Sylvor refused to invest in the company unless he and his brother had a controlling interest, she agreed to accept 10%.

6. Petitioner signed checks for the corporation and signed the withholding tax returns. Marvin Sylvor, however, was the person who decided which bills were to be paid, exercised the control over the hiring and firing of employees and set their salaries. Petitioner made recommendations to Marvin Sylvor concerning the hiring and firing of employees, but he made the final decision. Petitioner played no role in the normal procedure respecting payment of employees other than formally signing the payroll checks. Artspeak's withholding tax returns were presented to petitioner, together with checks drawn in payment thereof, for her signature. She would sign the returns and checks and give them to Marvin Sylvor or Artspeak's bookkeeper. Petitioner was not aware that the checks were not being sent to New York State until she received the Notice

1 Petitioner was led to believe by Marvin Sylvor that it was better for the company for her to act as the "front person" because he had unfairly gotten a bad reputation in the industry. This would allow the company time to establish itself.

of Deficiency referred to in Finding of Fact "1".² Petitioner's duties involved contact with Artspeak's clients and developing new clients. Although petitioner held the title of president it was Marvin Sylvor, in concert with Robert Sylvor, who actually ran the company. Petitioner was directed by Marvin Sylvor and followed his direction without question.

7. In January of 1979, a representative of the Internal Revenue Service came to the offices of Artspeak and spoke with petitioner concerning unpaid federal withholding taxes.³ Petitioner immediately confronted Marvin Sylvor and learned that such taxes had in fact not been paid over to the Internal Revenue Service. An agreement was worked out between Artspeak and the Internal Revenue Service whereby Artspeak agreed to pay the past due federal withholding taxes on a monthly basis.⁴ After the visit from the Internal Revenue Service, petitioner tried to verify that the federal and state taxes were being paid, but was denied access to the books and records of Artspeak. Marvin Sylvor, however, assured her all taxes were being paid.

8. Petitioner resigned as president of Artspeak effective June 7, 1979.

9. In the fall of 1979, the Internal Revenue Service contacted petitioner again about the federal withholding taxes of Artspeak. It appears that, after petitioner left Artspeak, the agreement between Artspeak and the Internal Revenue Service was violated by Artspeak. The Internal Revenue Service did not proceed against petitioner.

2 It is not clear whether the withholding tax returns during the years in issue were actually filed with New York State.

3 Petitioner could not recall the dates of the withholding periods in question; however, it is clear that petitioner was president of Artspeak during the periods involved since she held the title of president from the date Artspeak was organized until she resigned.

4 It appears that petitioner and Marvin Sylvor signed said agreement.

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 person 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). The holding of a corporate office is alone insufficient to deem someone a "person" under section 685(n) of the Tax Law (see Amengual v. State Tax Commission, 95 A.D.2d 949).

D. That petitioner had no authority to decide which corporate obligation to pay, no authority to hire and fire employees except in an advisory capacity and was denied the authority to examine the books and records of Artspeak. The record indicates that petitioner was manipulated by Marvin Sylvor and used as the "front person" while he actually ran Artspeak without the necessity of being a corporate officer. In short, petitioner was president in name only.

Accordingly, petitioner cannot be considered a person required to collect, truthfully account for and pay over withholding taxes within the meaning and intent of section 685(g) and 685(n) of the Tax Law.


E. That the petition of Holland Vose is granted and the Notice of Deficiency dated April 27, 1981 is cancelled.


DATED: Albany, New York

STATE TAX COMMISSION

APR 04 1985


PRESIDENT


COMMISSIONER


COMMISSIONER