

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of
David Beaumont :

AFFIDAVIT OF MAILING

for Redetermination of a Deficiency or Revision :
of a Determination or Refund of Personal Income :
Tax under Article(s) 22 of the Tax Law :
for the Year 1978.

State of New York :

ss.:

County of Albany :

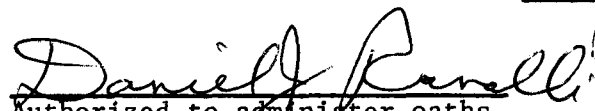
David Parchuck/Janet M. Snay, being duly sworn, deposes and says that he/she is an employee of the State Tax Commission, that he/she is over 18 years of age, and that on the 19th day of June, 1986, he/she served the within notice of Decision by certified mail upon David Beaumont the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

David Beaumont
114 Clinton Street
Brooklyn, New York 11201

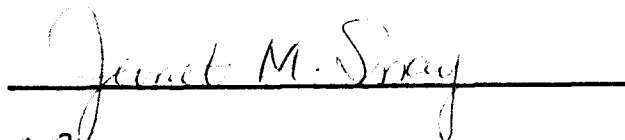
and by depositing same enclosed in a postpaid properly addressed wrapper in a post office under the exclusive care and custody of the United States Postal Service within the State of New York.

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
19th day of June, 1986.



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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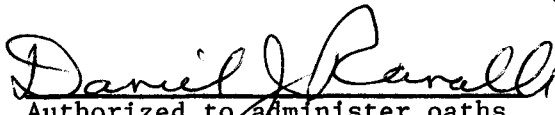
David Parchuck/Janet M. Snay, being duly sworn, deposes and says that he/she is an employee of the State Tax Commission, that he/she is over 18 years of age, and that on the 19th day of June, 1986, he served the within notice of Decision by certified mail upon Jack M. Portney, the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

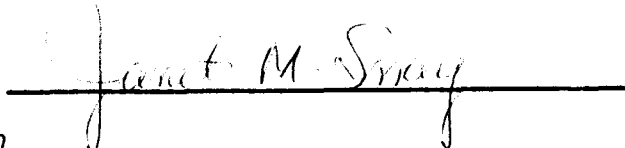
Jack M. Portney
207 Main Street, Box 346
Fort Lee, NJ 07024

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
19th day of June, 1986.


Authorized to administer oaths
pursuant to Tax Law section 174



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

June 19, 1986

David Beaumont
114 Clinton Street
Brooklyn, New York 11201

Dear Mr. Beaumont:

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
Audit Evaluation Bureau
Assessment Review Unit
Building #9, State Campus
Albany, New York 12227
Phone # (518) 457-2086

Very truly yours,

STATE TAX COMMISSION

cc: Taxing Bureau's Representative

Petitioner's Representative:
Jack M. Portney
207 Main Street, Box 346
Fort Lee, NJ 07024

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition	:	
	:	
of	:	
	:	
DAVID BEAUMONT	:	DECISION
	:	
for Redetermination of a Deficiency or for	:	
Refund of Personal Income Tax under Article 22	:	
of the Tax Law for the Year 1978.	:	

Petitioner, David Beaumont, 114 Clinton Street, Brooklyn, New York 11201, filed a petition for redetermination of a deficiency or for refund of personal income tax under Article 22 of the Tax Law for the year 1978 (File No. 49951).

A hearing was held before Brian L. Friedman, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on January 15, 1986 at 9:15 A.M. Petitioner appeared by Jack M. Portney, CPA. The Audit Division appeared by John P. Dugan, Esq. (Angelo Scopellito, Esq., of counsel).

ISSUE

Whether petitioner was a person required to collect, truthfully account for and pay over withholding taxes under section 685(g) of the Tax Law.

FINDINGS OF FACT

1. On October 24, 1983, 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 David Beaumont (hereinafter "petitioner") as a person required to collect, truthfully account for and pay over withholding taxes of Frames Unlimited in the amount of \$19,494.92 for the year 1978.

2. Frames Unlimited was in the business of manufacturing picture frames for the framing industry. Petitioner and Sigmund Schatz each owned 50 percent

of the stock of Frames Unlimited. For the year at issue, Mr. Schatz was the president, petitioner was the secretary and Salvatore Pepe was the vice-president of Frames Unlimited. Each of the officers was a signatory on the bank resolutions of Frames Unlimited.

3. The accounting firm of Jack M. Portney, CPA, petitioner's representative, became the accountants for Frames Unlimited in 1976. This accounting firm, retained by Frames Unlimited to check bank reconciliations, prepare corporation tax returns, review sales tax returns and furnish other financial advice, hired Salvatore Pepe in 1977 as chief financial officer and comptroller of Frames Unlimited, which positions he held until his death in 1982. Mr. Pepe, in his role as chief financial officer and comptroller, was charged with the duties of signing checks, paying bills, preparing payroll records and payroll tax returns, keeping corporate books and hiring and firing employees. Neither petitioner nor Mr. Schatz signed checks or tax returns unless Mr. Pepe, after he had prepared the same, was unavailable to sign the checks or returns.

4. Petitioner was the outside sales representative for Frames Unlimited. He spent approximately 75 percent of his time procuring gallery framing jobs and bidding on commercial framing jobs. The remaining 25 percent of petitioner's time was spent setting up orders for production in the factory. Petitioner had no office duties or dealings with office affairs except on a cursory basis. Mr. Pepe supervised office personnel, while Mr. Schatz was in charge of factory personnel. Petitioner had no employees who worked directly under his control or supervision.

5. Petitioner had no knowledge of the withholding and sales tax liabilities of Frames Unlimited until 1983 when he was so advised by the then comptroller, Melvin Schumer. During the year at issue and for years both prior and subsequent

thereto, Jack M. Portney, CPA, in his position as accountant for Frames Unlimited, frequently met with petitioner concerning such matters as production, credit with suppliers and increasing working capital, but Mr. Portney did not discuss those functions which were within the purview of Mr. Pepe, with whom Mr. Portney met separately to discuss the same.

CONCLUSIONS OF LAW

A. That where a person is required to collect, truthfully account for and pay over withholding tax and willfully fails to collect and pay over such tax, section 685(g) of the Tax Law imposes on such person "...a penalty equal to the total amount of tax evaded, 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 the question of who is a "person" required to collect and pay over withholding taxes is to be determined on the basis of the facts presented. Some of the factors to be considered include whether petitioner owned stock, signed tax returns, or exercised authority over the employees and the assets of the corporation. McHugh v. State Tax Comm., (70 A.D.2d 987). Other factors to be considered are whether the person derived a substantial part of his income from the corporation or had the right to hire and fire employees. MacLean v. State Tax Comm., (69 A.D.2d 951, aff'd 49 N.Y.2d 920). See also Malkin v. Tully, (65 A.D.2d 228).

D. That petitioner was not a person under a duty to collect, truthfully account for and pay over withholding taxes on behalf of Frames Unlimited. He had no authority to hire and fire employees and he had no authority to nor did

he prepare payroll checks, tax returns or corporate books and records. Although he was authorized to sign corporate checks, he rarely did so since such authority was granted for the purpose of convenience only. Petitioner had no authority nor was he ever involved in the internal accounting procedures of the corporation. His duties were primarily limited to those normally associated with an outside sales representative and, although he set up production orders with factory personnel, such personnel were supervised by the president, Mr. Schatz.

E. That the petition of David Beaumont is granted and the Notice of Deficiency issued October 24, 1983 is cancelled.

DATED: Albany, New York

STATE TAX COMMISSION

JUN 19 1986

Rodrich W. Allen
PRESIDENT

Francis R. Kosmij
COMMISSIONER

Mark J. [Signature]
COMMISSIONER