

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of

Bernard H. Wilker : AFFIDAVIT OF MAILING

for Redetermination of a Deficiency or Revision :
of a Determination or Refund of NYS Personal Income :
Tax under Article 22 of the Tax Law and New York :
City Personal Income Tax under Chapter 46, Title T :
of the Administrative Code of the City of New York :
for the Years 1978, 1979, 1981 & 1982.

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 3rd day of January, 1986, he served the within notice of Decision by certified mail upon Bernard H. Wilker, the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

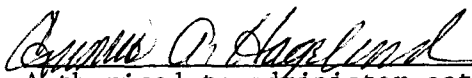
Bernard H. Wilker
554 Bernita Dr.
Riverdale, NJ 07675

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
3rd day of January, 1986.




Authorized to administer oaths
pursuant to Tax Law section 174

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition
of

Bernard H. Wilker

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AFFIDAVIT OF MAILING

for Redetermination of a Deficiency or Revision :
of a Determination or Refund of NYS Personal Income :
Tax under Article 22 of the Tax Law and New York :
City Personal Income Tax under Chapter 46, Title T :
of the Administrative Code of the City of New York:
for the Years 1978, 1979, 1981 and 1982.

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 3rd day of January, 1986, he served the within notice of Decision by certified mail upon Robert A. Fee, the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Robert A. Fee
623 Ridge Rd.
Lyndhurst, NJ 07071

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
3rd day of January, 1986.

David Parchuck

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

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

January 3, 1986

Bernard H. Wilker
554 Bernita Dr.
Riverdale, NJ 07675

Dear Mr. Wilker:

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 & 1312 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
Robert A. Fee
623 Ridge Rd.
Lyndhurst, NJ 07071
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition	:	
of	:	
BERNARD H. WILKER	:	DECISION
for Redetermination of a Deficiency or for	:	
Refund of New York State Personal Income Tax	:	
under Article 22 of the Tax Law and New York	:	
City Personal Income Tax under Chapter 46,	:	
Title T of the Administrative Code of the City	:	
of New York for the Years 1978, 1979, 1981 and	:	
1982.	:	

Petitioner, Bernard H. Wilker, 554 Bernita Drive, Riverdale, New Jersey 07675, filed a petition for redetermination of a deficiency or for refund of New York State personal income tax under Article 22 of the Tax Law and New York City personal income tax under Chapter 46, Title T of the Administrative Code of the City of New York for the years 1978, 1979, 1981 and 1982 (File No. 46303).

A hearing was held before Allen Caplowaith, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on June 19, 1985 at 2:45 P.M. Petitioner appeared by Robert A. Fee, Esq. The Audit Division appeared by John P. Dugan, Esq. (Herbert Kamrass, Esq., of counsel).

ISSUE

Whether petitioner, Bernard H. Wilker, is subject to penalties pursuant to section 685(g) of the Tax Law and section T46-185.0(g) of the Administrative Code of the City of New York, as a person who willfully failed to collect, truthfully account for and pay over the New York State and City withholding

taxes due from Independent Metal Fabricators, Inc. for the years 1978, 1979, 1981 and 1982.

FINDINGS OF FACT

1. Independent Metal Fabricators, Inc. (hereinafter "IMF"), 320 Casanova Street, Bronx, New York 10474, failed to pay over the New York State and New York City personal income taxes withheld from the wages of its employees for the following periods:

December 16, 1978 through December 31, 1978	\$ 391.67
January 1, 1979 through May 31, 1979	14,484.93
March 1, 1981 through September 15, 1981	
and October 15, 1981 through December 31, 1981	18,700.00
January 1, 1982 through April 20, 1982	5,950.00
Total	<u>\$39,526.60</u>

2. The aforestated amounts due of \$18,700.00 and \$5,950.00 were estimates determined by the Audit Division for the periods as specified above.

3. On March 28, 1983, the Audit Division issued a Statement of Deficiency in conjunction with a Notice of Deficiency against Bernard H. Wilker (hereinafter "petitioner") wherein penalties were asserted pursuant to section 685(g) of the Tax Law and section T46-185.0(g) of the Administrative Code of the City of New York for amounts equal to the total New York State and New York City withholding taxes due from IMF for the aforestated periods. Said penalties were asserted on the grounds that petitioner was a person required to collect, truthfully account for and pay over the withholding taxes at issue, and that he willfully failed to do so.

4. During the entire period at issue, petitioner was President of IMF. He held 23 percent of the non-voting stock in IMF. His family and his father's estate held the balance of the non-voting and all of the voting stock.

5. In early 1979, IMF was experiencing financial difficulties. In order to remedy the situation, outside financing was sought in order to obtain

working capital. In mid-1979, accounts receivable financing was obtained from United Credit Corporation, 10 East 40th Street, New York, New York, and Samuel H. Breiter and Company, Inc., 570 Seventh Avenue, New York, New York.

6. The aforestated financing of IMF was obtained through the efforts of Creative Capital Corporation ("Creative"), a financial management organization. As a condition of such financing, IMF was required to install one Brian Lea of Creative as general manager of IMF. Creative and Brian Lea, individually, executed a "Limited Guaranty" covering certain stipulated procedures as to IMF's handling of accounts and receivables.

7. Commencing in mid-1979, Brian Lea worked on the premises of IMF on a full-time basis.

8. Petitioner alleged, but failed to establish that as of mid-1979, Brian Lea was solely responsible for the financial affairs of IMF, including the preparation of withholding tax returns and the collection and payment of such taxes.

9. Brian Lea was never an officer of IMF.

10. As of mid-1979, all IMF checks required the signature of both Brian Lea and petitioner.

11. Petitioner was aware that the withholding taxes at issue were not being paid.

12. Petitioner signed withholding tax returns during the periods at issue herein.

13. Petitioner was responsible for hiring and firing production and engineering employees of IMF.

14. Petitioner executed an Assignment for the Benefit of Creditors on April 20, 1982, at which time IMF ceased doing business.

15. Petitioner contended that should he be held as a person responsible for the payment of the taxes at issue, he should not be held personally liable since the failure to pay such taxes was not willful on his part.

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 the tax imposed by this article 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."

For New York City purposes, section T46-185.0(g) of the Administrative Code of the City of New York contains a similar provision.

B. That sections 685(n) of the Tax Law and T46-185.0(n) of the Administrative Code of the City of New York provide that, for purposes of subdivision (g), the term person:

"[I]ncludes 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 petitioner Bernard H. Wilker has failed to sustain his burden of proof, imposed pursuant to sections 689(e) of the Tax Law and T46-189.0(e) of the Administrative Code of the City of New York, to show that he was not a person responsible for the collection and payment of the New York State and City withholding taxes of IMF for the periods at issue herein.

D. That turning next to the question whether petitioner's failure to collect, account for and pay over the taxes was willful, the test for determining willfulness is "whether the act, default, or conduct is consciously and voluntarily done with knowledge that as a result, trust funds belonging to the


Government will not be paid over but will be used for other purposes [citations omitted]." Matter of Levin v. Gallman, 42 N.Y.2d 32, 34 (1977). A finding of willfulness does not require an intent to deprive the Government of its funds. "[K]nowledge that withholding taxes have not been remitted and a failure to investigate or correct this mismanagement of corporate funds is enough to constitute willful conduct [citation omitted]." Matter of MacLean v. State Tax Commission, 69 A.D.2d 951, 952, aff'd (on opinion below), 49 N.Y.2d 920. The evidence presented is insufficient to show that petitioner's failure to collect account for and pay over the taxes due was other than willful.


E. That the petition of Bernard H. Wilker is denied and the Notice of Deficiency issued against him on March 28, 1983 is sustained.


DATED: Albany, New York

STATE TAX COMMISSION

JAN 03 1986


PRESIDENT


COMMISSIONER


COMMISSIONER