

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :  
of  
Michael L. Polka :

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 Years 1981 & 1982.

State of New York :

ss.:

County of Albany :

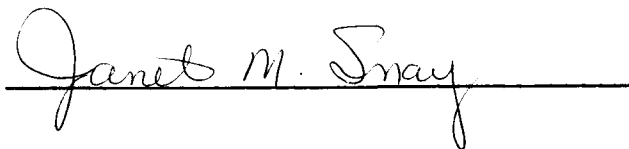
David Parchuck/Janet M. Snay, being duly sworn, deposes and says that he/she is an employee of the State Tax Commission, that he/she is over 18 years of age, and that on the 30th day of January, 1987, he/she served the within notice of decision by certified mail upon Michael L. Polka the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

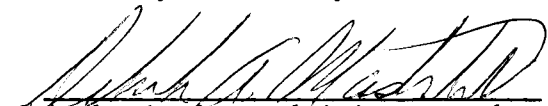
Michael L. Polka  
2001 Earl Road  
P.O. Box 2123  
Oshkosh, WI 54903

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  
30th day of January, 1987.

  
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Authorized to administer oaths  
pursuant to Tax Law section 174

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :  
of  
Michael L. Polka :

AFFIDAVIT OF MAILING

for Redetermination of a Deficiency or Revision :  
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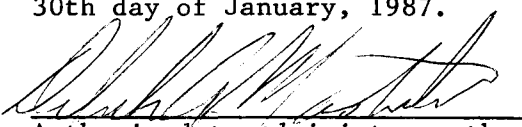
David Parchuck/Janet M. Snay, being duly sworn, deposes and says that he/she is an employee of the State Tax Commission, that he/she is over 18 years of age, and that on the 30th day of January, 1987, he served the within notice of decision by certified mail upon Douglas D. Tracy, the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

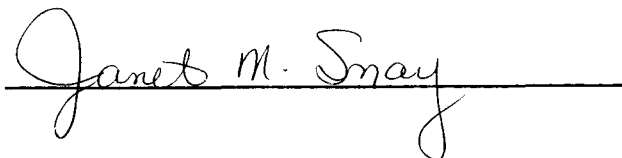
Douglas D. Tracy  
123 N. Main St., P.O. Box 328  
Cortland, NY 13045

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  
30th day of January, 1987.

  
Authorized to administer oaths  
pursuant to Tax Law section 174



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

January 30, 1987

Michael L. Polka  
2001 Earl Road  
P.O. Box 2123  
Oshkosh, WI 54903

Dear Mr. Polka:

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:  
Douglas D. Tracy  
123 N. Main St., P.O. Box 328  
Cortland, NY 13045

STATE OF NEW YORK

STATE TAX COMMISSION

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In the Matter of the Petition :  
of :  
MICHAEL L. POLKA : DECISION  
for Redetermination of a Deficiency or for :  
Refund of Personal Income Tax under Article 22 :  
of the Tax Law for the Years 1981 and 1982. :

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Petitioner, Michael L. Polka, 2001 Earl Road, P.O. Box 2123, Oshkosh, Wisconsin 54903, 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 1981 and 1982 (File No. 47370).

On July 22, 1986, petitioner advised the State Tax Commission, in writing, that he desired to waive a formal hearing and submit the case to the State Tax Commission upon the entire record contained in the file, with submission of additional evidence and documents by August 6, 1986. After due consideration of said record, the Commission renders the following decision.

ISSUE

Whether petitioner, Michael L. Polka, is subject to a penalty pursuant to section 685(g) of the Tax Law as a person who willfully failed to collect, truthfully account for and pay over the New York State withholding taxes due from Polsen Metal Recovery, Inc. for the years 1981 and 1982.

FINDINGS OF FACT

1. Polsen Metal Recovery, Inc. (hereinafter "Polsen") failed to pay over the New York State personal income taxes withheld from the wages of its employees for the following periods:

<u>Withholding Tax Period</u>	<u>Amount</u>
May 1, 1981 through August 31, 1981	\$1,373.50
February 1, 1982 through August 11, 1982	3,900.00
TOTAL	<u>\$5,273.50</u>

2. On June 27, 1983, the Audit Division issued a Notice of Deficiency against Michael L. Polka (hereinafter "petitioner") wherein a penalty was asserted pursuant to section 685(g) of the Tax Law for an amount equal to the New York State withholding taxes due from Polsen for the aforesated periods. Such penalty was asserted on the grounds that petitioner was a person required to collect, truthfully account for and pay over said taxes and that he willfully failed to do so.

3. Petitioner was president of Polsen until his resignation on September 10, 1981.

4. The portion of the deficiency asserted for 1982 of \$3,900.00 was cancelled at a pre-hearing conference. Accordingly, only the remaining \$1,373.50 asserted for 1981 remains at issue herein.

5. Petitioner held 25% of the outstanding stock in Polsen. Philip Rosen, petitioner's uncle was the Chairman of the Board of Polsen and held 25% of the stock. His wife Devorah Rosen, was secretary/treasurer of Polsen and held 25% of the stock. Philip and Devorah Rosen's son held the remaining 25% of the stock in Polsen.

6. Both Polsen and Rosen Brothers, which was located directly across the road from Polsen, were engaged in the purchase and sale of scrap metal. Philip and Devorah Rosen were the principals of Rosen Brothers.

7. Petitioner was involved in litigation respecting his responsibility for the payment of Polsen's Federal withholding taxes for 1981. In Michael Polka v. The United States of America, United States District Court, Eastern District

of Wisconsin, several in depth pre-trial depositions were taken of former employees of Polsen and Rosen Brothers.

8. The following facts have been established from the aforestated depositions:

- a. That petitioner had no control over the financial affairs of Polsen.
- b. That the Rosens kept Polsen's books and records on the premises of Rosen Brothers.
- c. That the Rosens had full control of Polsen's financial affairs and they made the decisions as to which of Polsen's creditors would be paid. This was done on many occasions over the objections of petitioner.
- d. That the Rosens were responsible for the payment of employment taxes.

#### 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."

B. That section 685(n) of the Tax Law provides 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 was not a person responsible for the collection and payment of the withholding taxes of Polsen during 1981. Accordingly, the penalty asserted against him pursuant to section 685(g) of the Tax Law is cancelled.

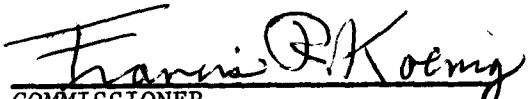
D. That the petition of Michael L. Polka is granted and the Notice of Deficiency issued against him on June 27, 1983 is cancelled.

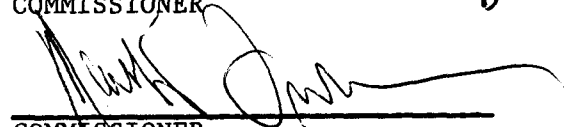
DATED: Albany, New York

STATE TAX COMMISSION

JAN 30 1987

  
PRESIDENT

  
COMMISSIONER

  
COMMISSIONER