

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of :
Theodore Price : AFFIDAVIT OF MAILING

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 Periods October 1, 1979 :
through December 31, 1979 and January 1, 1980 :
through January 15, 1980. :

State of New York :

ss.:

County of Albany :

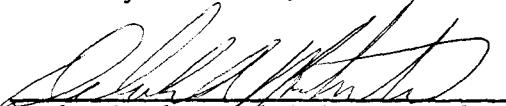
David Parchuck/Janet M. Snay, being duly sworn, deposes and says that he/she is an employee of the State Tax Commission, that he/she is over 18 years of age, and that on the 13th day of March, 1987, he/she served the within notice of Decision by certified mail upon Theodore Price the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Theodore Price
1802 Park Drive
Seaford, NY 11783

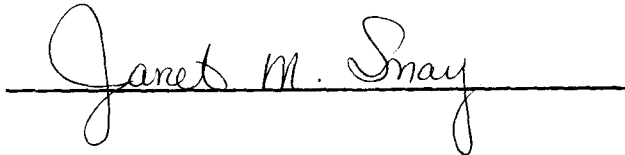
and by depositing same enclosed in a postpaid properly addressed wrapper in a post office under the exclusive care and custody of the United States Postal Service within the State of New York.

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
13th day of March, 1987.



Authorized to administer oaths
pursuant to Tax Law section 174



Janet M. Snay

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

March 13, 1987

Theodore Price
1802 Park Drive
Seaford, NY 11783

Dear Mr. Price:

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 and Chapter 46, Title T of the Administrative Code of the City of New York, 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

STATE OF NEW YORK

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In the Matter of the Petition	:	
of	:	
THEODORE PRICE	:	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 Periods October 1, 1979	:	
through December 31, 1979 and January 1, 1980	:	
through January 15, 1980.	:	

Petitioner, Theodore Price, 1802 Park Drive, Seaford, New York 11783, 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 periods October 1, 1979 through December 31, 1979 and January 1, 1980 through January 15, 1980 (File No. 47359).

A hearing was held before Frank A. Landers, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on October 21, 1986 at 1:15 P.M. Petitioner appeared pro se. The Audit Division appeared by John P. Dugan, Esq. (Irwin Levy, Esq., of counsel).

ISSUE

Whether petitioner was a person required to collect, truthfully account for and pay over the New York State and City withholding taxes of Jetway Courier & International Forwarders, Inc. and who willfully failed to do so, thus becoming liable for a penalty equal to such unpaid withholding taxes.

FINDINGS OF FACT

1. On June 27, 1983, the Audit Division issued a Statement of Deficiency ("statement") to petitioner, Theodore Price, asserting that he was a person required to collect, truthfully account for and pay over the New York State and City withholding taxes of Jetway Courier & International Forwarders, Inc. (hereinafter "the corporation") for the periods October 1, 1979 through December 31, 1979 and January 1, 1980 through January 15, 1980. The aforementioned statement further alleged that petitioner willfully failed to collect, truthfully account for and pay over said withholding taxes and that he was therefore subject to a penalty equal in amount to the unpaid withholding taxes of \$5,693.19. Accordingly, on June 27, 1983, the Audit Division issued a Notice of Deficiency to petitioner for the years 1979 and 1980 asserting a deficiency of \$5,693.19.

2. During the periods at issue, petitioner was vice-president of Jetway Courier & International Forwarders, Inc. Petitioner together with one Robert Alan Krauss, owned all of outstanding stock of said corporation (50% each).

3. The corporation was in the business of delivering small packages to domestic and foreign destinations. The corporation did not own any airplanes but used commercial airlines and commercial freight services. The petitioner was primarily responsible for soliciting sales which required that he be out of the office most of the time. The day-to-day office functions were primarily the responsibility of Mr. Krauss. The petitioner came into the corporate office about three days per week and communicated with Mr. Krauss concerning corporate matters daily, via telephone.

4. Petitioner had the authority to hire and fire employees, although he did not exercise it. The petitioner signed checks on behalf of the corporation and also withholding tax statements.

5. Petitioner left the corporation in February 1980 when, in his opinion, it was not going to be able to maintain any growth.

CONCLUSIONS OF LAW

A. That the personal income tax imposed by Chapter 46, Title T of the Administrative Code of the City of New York is by its own terms tied into and contains essentially the same provisions as Article 22 of the Tax Law. Therefore, in addressing the issues presented herein, unless otherwise specified all references to particular sections of Article 22 shall be deemed references (though uncited) to the corresponding sections of Chapter 46, Title T.

B. 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, or not collected, or not accounted for and paid over."

C. 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...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."

D. That the question of whether petitioner was a person under a duty to collect and pay over withholding taxes must be determined on the basis of the facts presented. Some of the factors to be considered include whether petitioner signed the corporation's tax returns, possessed the right to hire and discharge employees or derived a substantial portion of his income from the corporation. Other relevant factors include the amount of stock petitioner held, the actual

sphere of his duties and his authority to pay corporate obligation and/or exercise authority over the assets of the corporation. (Matter of Amengual v. State Tax Commn., 95 AD2d 949; McHugh v. State Tax Commn., 70 AD2d 987.) Finally, the test of 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." (Matter of Ragonesi v. New York State Tax Commn., 88 AD2d 707, 708 [citation omitted]).

B. That in the instant matter, petitioner was vice-president of the corporation, a 50% stockholder in said corporation and he also had authority to sign corporate checks. Accordingly, petitioner was a person under a duty to collect and pay over the corporation's withholding taxes.


F. That, under the circumstances herein, petitioner did willfully fail to collect, truthfully account for and pay over the corporation's withholding taxes.

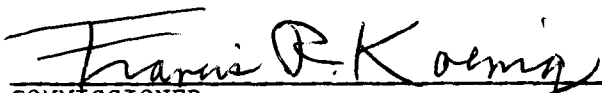
G. That the petition of Theodore Price is denied and the Notice of Deficiency dated June 27, 1983 is sustained.


DATED: Albany, New York

STATE TAX COMMISSION

MAR 13 1987


PRESIDENT


COMMISSIONER


COMMISSIONER