

STATE OF NEW YORK

STATE TAX COMMISSION

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In the Matter of the Petition :  
of  
Arthur C. Stewart :

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 :  
Period 7/16/81 - 1/12/84.  
\_\_\_\_\_ :

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 27th day of August, 1987, he/she served the within notice of Decision by certified mail upon Arthur C. Stewart the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Arthur C. Stewart  
RFD #2, Box 352  
Laconia, NH 03246

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  
27th day of August, 1987.

David Parchuck  
Authorized to administer oaths  
pursuant to Tax Law section 174

Janet M. Snay

STATE OF NEW YORK

STATE TAX COMMISSION

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In the Matter of the Petition :  
of  
Arthur C. Stewart :

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 :  
Period 7/16/81 - 1/12/84.  
\_\_\_\_\_ :

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 27th day of August, 1987, he served the within notice of Decision by certified mail upon Charles R. Tropp, the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Charles R. Tropp  
30 Bay St.  
Staten Island, NY 10301

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  
27th day of August, 1987.

David Parchuck  
Authorized to administer oaths  
pursuant to Tax Law section 174

Janet M. Snay

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

August 27, 1987

Arthur C. Stewart  
RFD #2, Box 352  
Laconia, NH 03246

Dear Mr. Stewart:

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) 453-4301

Very truly yours,

STATE TAX COMMISSION

cc: Taxing Bureau's Representative

Petitioner's Representative:  
Charles R. Tropp  
30 Bay St.  
Staten Island, NY 10301

STATE OF NEW YORK

STATE TAX COMMISSION

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In the Matter of the Petition

of

ARTHUR C. STEWART

DECISION

for Redetermination of a Deficiency or for  
Refund of Personal Income Tax under Article 22 :  
of the Tax Law for the Period July 16, 1981 :  
through January 12, 1984. :

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Petitioner, Arthur C. Stewart, RFD #2, Box 352, Laconia, New Hampshire 03246, filed a petition for redetermination of a deficiency or for refund of personal income tax under Article 22 of the Tax Law for the period July 16, 1981 through January 12, 1984 (File No. 65743).

A hearing was held before Arthur Johnson, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on April 28, 1987 at 10:45 A.M. Petitioner appeared by Charles R. Tropp, Esq. The Audit Division appeared by John P. Dugan, Esq. (Gary Palmer, Esq. of counsel).

#### ISSUE

Whether petitioner was a person required to collect, truthfully account for and pay over withholding tax and willfully failed to do so, thus becoming liable for the penalty imposed under Tax Law § 685(g).

#### FINDINGS OF FACT

1. On September 30, 1985, the Audit Division issued a Notice of Deficiency, asserting a penalty under section 685(g) of the Tax Law against petitioner, Arthur C. Stewart, as a person required to collect, truthfully account for and pay over withholding taxes of Control Molding Corporation ("Control"), in the amount of \$42,356.17 for the following withholding tax periods:

<u>Period</u>	<u>Amount</u>
July 16, 1981 - October 31, 1981	\$15,857.12
June 1, 1983 - December 15, 1983	25,260.19
January 1, 1984 - January 12, 1984	1,238.86

2. As a result of evidence presented at a Tax Appeals Bureau conference, the Audit Division conceded that petitioner was not a responsible officer in 1981 and that the corporate liability for 1983 had been reduced to \$12,978.65. Thus, the penalty asserted against petitioner is now \$14,217.51.

3. Petitioner was the president and chief executive officer of Control throughout 1983 and 1984. During this period, he was deeply involved in all of the financial affairs of Control. He hired and fired employees, determined which creditors were paid and which were not and had general control over all corporate assets.

4. Control's board of directors decided to file a petition in bankruptcy sometime in September 1983. From that time until the date that the petition was actually filed on January 12, 1984, Control made no withholding tax payments; however, withholding tax returns were prepared and filed on a timely basis. Petitioner's testimony regarding the reason these taxes were not paid over was equivocal and unclear. Apparently, the tax was collected and used for other corporate purposes.

5. Petitioner concedes that he was a person required to collect, truthfully account for and pay over withholding tax during the relevant periods. However, he maintains that his failure to pay over the tax was not willful in that the taxes were collected and would have been paid over but for the filing of the bankruptcy petition which prohibited Control from paying pre-petition liabilities without order of the bankruptcy court.

CONCLUSIONS OF LAW

A. That Tax Law § 685(g) provides as follows:

"Any person required to collect, truthfully account for, and pay over the tax imposed by [Article 22] 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 in any case before the State Tax Commission under Article 22, the burden of proof is upon the petitioner, except in three specifically enumerated instances, none of which apply here (Tax Law § 689[e]).

C. That petitioner has conceded that he was a "person" within the meaning and intent of Tax Law § 685(g). He has not established that his failure to pay over withholding taxes was not willful conduct within the meaning of that statute. The term "willful" as used in section 685(g) means an act, default or conduct voluntarily done with knowledge that, as a result, trust funds belonging to the government will be used for other purposes (Matter of Levin v. Gallman, 42 NY2d 32). An 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). Petitioner gave no credible explanation for his failure to pay over withholding taxes collected during the period at issue. Furthermore, the penalty asserted under section 685(g) is separate and independent of the corporation's liability for the unpaid taxes. As a consequence, the bankruptcy proceedings initiated by Control cannot bar the State Tax Commission from asserting a penalty against petitioner for his willful failure to account for and pay over withholding taxes collected (see Matter of Yellin v. New York State Tax Commn., 81 AD2d 196).


D. That the Audit Division has conceded that the penalty asserted against petitioner should be reduced to \$14,217.51. (See Finding of Fact "2".)

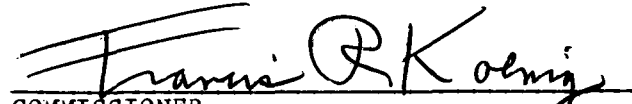
E. That the petition of Arthur C. Stewart is granted to the extent indicated in Conclusion of Law "D"; that the Notice of Deficiency issued on September 30, 1985 shall be modified accordingly; and that in all other respects, the petition is denied.


DATED: Albany, New York

STATE TAX COMMISSION

AUG 27 1987

  
PRESIDENT

  
COMMISSIONER

  
COMMISSIONER