

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :  
of  
David J. Jacobson :

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 1977 & 1980.

State of New York :

ss.:

County of Albany :

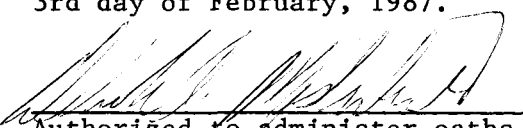
David Parchuck/Janet M. Snay, being duly sworn, deposes and says that he/she is an employee of the State Tax Commission, that he/she is over 18 years of age, and that on the 3rd day of February, 1987, he/she served the within notice of Decision by certified mail upon David J. Jacobson the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

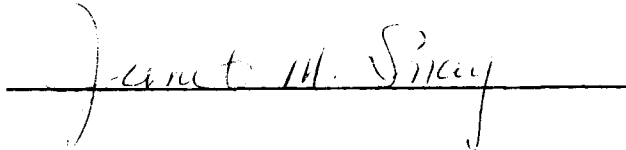
David J. Jacobson  
811 The Parkway  
Mamaroneck, NY 10543

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 February, 1987.

  
Authorized to administer oaths  
pursuant to Tax Law section 174



STATE OF NEW YORK

STATE TAX COMMISSION

\_\_\_\_\_  
In the Matter of the Petition :  
of  
David J. Jacobson :

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 1977 & 1980.  
\_\_\_\_\_

State of New York :  
ss.:  
County of Albany :

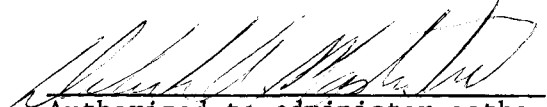
David Parchuck/Janet M. Snay, being duly sworn, deposes and says that he/she is an employee of the State Tax Commission, that he/she is over 18 years of age, and that on the 3rd day of February, 1987, he served the within notice of Decision by certified mail upon John M. Voetsch, the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

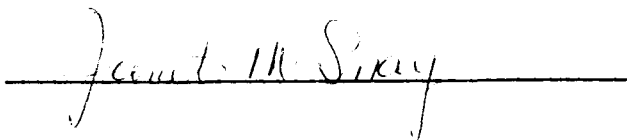
John M. Voetsch  
185 Halstead Ave.  
Harrison, NY 10528

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 February, 1987.

  
\_\_\_\_\_  
Authorized to administer oaths  
pursuant to Tax Law section 174

  
\_\_\_\_\_

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

February 3, 1987

David J. Jacobson  
811 The Parkway  
Mamaroneck, NY 10543

Dear Mr. Jacobson:

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:  
John M. Voetsch  
185 Halstead Ave.  
Harrison, NY 10528

STATE OF NEW YORK

STATE TAX COMMISSION

---

In the Matter of the Petition	:	
of	:	
DAVID J. JACOBSON	:	DECISION
for Redetermination of a Deficiency or for	:	
Refund of Personal Income Tax under Article 22	:	
of the Tax Law for the Years 1977 and 1980 .	:	

---

Petitioner, David J. Jacobson, 811 The Parkway, Mamaroneck, New York 10543, 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 1977 and 1980 (File No. 44147).

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 September 10, 1986 at 11:00 A.M. Petitioner appeared by John M. Voetsch, Esq. The Audit Division appeared by John P. Dugan, Esq. (Angelo Scopellito, Esq., of counsel).

ISSUE

Whether petitioner, David J. Jacobson, 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 Oberly & Newell, Inc. for the years 1977 and 1980.

FINDINGS OF FACT

1. Oberly & Newell, Inc. (hereinafter "O & N") 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>
December 16, 1977 through December 31, 1977	\$7,997.77
July 1, 1980 through December 31, 1980	<u>739.46</u>
TOTAL	<u>\$8,737.23</u>

2. On April 25, 1983, the Audit Division issued a Statement of Deficiency in conjunction with a Notice of Deficiency against David J. Jacobson (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 O & N for the aforesated periods. Said penalty was 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.

3. Prior to 1977, petitioner personally worked for O & N as an employee for a brief time. He alleged that in early 1977 he advised O & N that if it still desired his services, he would continue to render such services only if O & N became a client of his corporation, Gamma Merchandising & Marketing Corp. ("Gamma"), which he claims it did.

4. Gamma was engaged in business as a marketing and merchandising consulting firm. Petitioner was president of Gamma. He and his wife were the sole shareholders of Gamma.

5. Petitioner alleged that from 1977 to mid-July 1979 his services were rendered to O & N solely in his capacity as an employee of Gamma and that all fees for his services were paid to Gamma.

6. In mid-July 1979, petitioner and Gamma ceased rendering services for O & N.

7. Petitioner alleged that the services he rendered to O & N consisted of securing new business, dealing with O & N's creditors for the purpose of obtaining time agreements for the payment of O & N's debts, and rendering consulting services respecting proper organization.

8. Petitioner claimed that he was neither an officer, director or stockholder of O & N. However, the record shows that O & N provided him with the title of vice president and business cards listing him as vice president. Petitioner claims this was a fictitious title used solely in dealing with O & N's clients.

9. Petitioner claimed that O & N was owned and operated solely by three individuals: one Edward K. Whitmore, one Edward K. Whitmore, Jr. and one Joy Israel.

10. A written contract was not entered into between O & N and Gamma.

11. Petitioner, at times, signed corporate tax returns of O & N.

12. Petitioner was an authorized signatory to the bank accounts of O & N.

13. O & N provided petitioner with an office, which he personally furnished with valuable antique furniture.

14. For 1979, O & N reported the consulting fees paid to Gamma on a Federal Form 1099-Misc. Gamma's address was listed on said form as 811 The Parkway, Mamaroneck, New York, 10543. Said address is that of petitioner's personal residence.

15. No documentation was provided to show the nature of payments to petitioner or Gamma in 1977.

#### 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 with respect to the deficiency asserted for 1977, petitioner has failed to sustain his burden of proof, imposed pursuant to section 689(e) of the Tax Law, to show that he was not a person who was responsible for the collection and payment of the withholding taxes of O & N for said year. Accordingly, he is properly subject to the penalty imposed for said year of \$7,997.77 within the meaning and intent to sections 685(g) and 685(n) of the Tax Law.

D. That since petitioner ceased rendering services for O & N in 1979, he is not subject to the penalty imposed for 1980 of \$739.46. Accordingly, such penalty is hereby cancelled.

E. That the petition of David J. Jacobson is granted to the extent provided in Conclusion of Law "D", supra, and except as so granted, said petition is in all other respects denied.

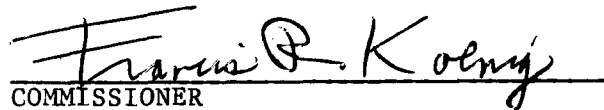
F. That the Notice of Deficiency issued April 25, 1983 is to be modified so as to be consistent with the decision rendered herein.

DATED: Albany, New York

STATE TAX COMMISSION

FEB 03 1987

  
PRESIDENT

  
COMMISSIONER

  
COMMISSIONER