

STATE OF NEW YORK
STATE TAX COMMISSION

In the Matter of the Petition
of

American Offset Corp. & Wickersham Press Inc.

Herbert Moscow & Oscar Schleiff, as Officers
for Redetermination of a Deficiency or a Revision
of a Determination or a Refund of
Sales & Use Tax
under Article 28 & 29 of the Tax Law
for the Periods 3/1/68-8/31/70 & 3/1/68-3/4/71.

AFFIDAVIT OF MAILING

State of New York
County of Albany

Jay Vredenburg, being duly sworn, deposes and says that he is an employee of the Department of Taxation and Finance, over 18 years of age, and that on the 11th day of January, 1980, he served the within notice of Decision by mail upon American Offset Corp. & Wickersham Press Inc., Herbert Moscow & Oscar Schleiff, as Officers, the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

American Offset Corp. & Wickersham Press Inc.
Herbert Moscow & Oscar Schleiff, as Officers
45 Sutton Pl. S.
New York, NY

and by depositing same enclosed in a postpaid properly addressed wrapper in a (post office or official depository) 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
11th day of January, 1980.

Joanne Knapp

J. Vredenburg

STATE OF NEW YORK
STATE TAX COMMISSION

In the Matter of the Petition :
of

American Offset Corp. & Wickersham Press Inc.

Herbert Moscow & Oscar Schleiff, as Officers : AFFIDAVIT OF MAILING
for Redetermination of a Deficiency or a Revision :
of a Determination or a Refund of
Sales & Use Tax :
under Article 28 & 29 of the Tax Law
for the Periods 3/1/68-8/31/70 & 3/1/68-3/4/71. :

State of New York
County of Albany

Jay Vredenburg, being duly sworn, deposes and says that he is an employee of the Department of Taxation and Finance, over 18 years of age, and that on the 11th day of January, 1980, he served the within notice of Decision by mail upon Lewis Rappoport the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Mr. Lewis Rappoport
160 Broadway
New York, NY

and by depositing same enclosed in a postpaid properly addressed wrapper in a (post office or official depository) 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
11th day of January, 1980.

Joanne Knapp

J. Vredenburg

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

January 11, 1980

American Offset Corp. & Wickersham Press Inc.
Herbert Moscow & Oscar Schleiff, as Officers
45 Sutton Pl. S.
New York, NY

Gentlemen:

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) 1138 & 1243 of the Tax Law, any proceeding in court to review an adverse decision by the State Tax Commission can only be instituted under Article 78 of the Civil Practice Laws 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
Deputy Commissioner and Counsel
Albany, New York 12227
Phone # (518) 457-6240

Very truly yours,

STATE TAX COMMISSION

cc: Petitioner's Representative
Lewis Rappoport
160 Broadway
New York, NY
Taxing Bureau's Representative

STATE OF NEW YORK
STATE TAX COMMISSION

In the Matter of the Petition
of

Oscar Schleiff

AFFIDAVIT OF MAILING

for Redetermination of a Deficiency or a Revision :
of a Determination or a Refund of
Personal Income Tax :
under Article 22 of the Tax Law
for the Years 1968 - 1971. :

State of New York
County of Albany

Jay Vredenburg, being duly sworn, deposes and says that he is an employee of the Department of Taxation and Finance, over 18 years of age, and that on the 11th day of January, 1980, he served the within notice of Decision by certified mail upon Oscar Schleiff, the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Oscar Schleiff
45 Sutton Pl. S.
New York, NY

and by depositing same enclosed in a postpaid properly addressed wrapper in a (post office or official depository) 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
11th day of January, 1980.

Joanne Knapp

J. Chubb

STATE OF NEW YORK
STATE TAX COMMISSION

In the Matter of the Petition
of

Oscar Schleiff

AFFIDAVIT OF MAILING

for Redetermination of a Deficiency or a Revision :
of a Determination or a Refund of
Personal Income Tax :
under Article 22 of the Tax Law
for the Years 1968 - 1971. :

State of New York
County of Albany

Jay Vredenburg, being duly sworn, deposes and says that he is an employee of the Department of Taxation and Finance, over 18 years of age, and that on the 11th day of January, 1980, he served the within notice of Decision by certified mail upon the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Sirs
Gettinger & Gettinger
1407 Broadway
New York, NY

and by depositing same enclosed in a postpaid properly addressed wrapper in a (post office or official depository) 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
11th day of January, 1980.

Joanne Krapp

J. Vredenburg

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

January 11, 1980

Oscar Schleiff
45 Sutton Pl. S.
New York, NY

Dear Mr. Schleiff:

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, any proceeding in court to review an adverse decision by the State Tax Commission can only be instituted under Article 78 of the Civil Practice Laws 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
Deputy Commissioner and Counsel
Albany, New York 12227
Phone # (518) 457-6240

Very truly yours,

STATE TAX COMMISSION

cc: Petitioner's Representative
Gettinger & Gettinger
1407 Broadway
New York, NY
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of :
OSCAR SCHLEIFF :
for Redetermination of a Deficiency or for :
Refund of Personal Income Tax under Article :
22 of the Tax Law for the Years 1968, 1969, :
1970 and 1971. :

DECISION

In the Matter of the Petition :
of :
HERBERT MOSCOW and OSCAR SCHLEIFF, :
Officers of :
WICKERSHAM PRESS, INC. and :
AMERICAN OFFSET CORPORATION :
for Revision of a Determination or for :
Refund of Sales and Use Taxes under Articles :
28 and 29 of the Tax Law for the Period :
3/1/68 through 8/31/70 and 3/1/68 through :
3/4/71. :

Petitioner Oscar Schleiff, 45 Sutton Place South, New York, New York, 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 1968, 1969, 1970 and 1971 (File No. 01376). He also filed a petition for redetermination of a deficiency in sales and use taxes under Articles 28 and 29 of the Tax Law for the periods ended 5/31/68 through 8/31/70 (File No. 01338).

Petitioner Herbert Moscow filed a petition for redetermination of a deficiency or for refund of sales and use taxes under Articles 28 and 29 of the Tax Law for the periods ended 5/31/68 through 3/4/71 (File No. 01337).

A formal hearing was held before Paul B. Coburn, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on January 23, 1975 at 9:15 A.M. and was continued before Edward L. Johnson, Hearing Officer, at the same location on May 19, 1978 at 9:15 A.M. Petitioner Oscar Schleiff appeared by Gettinger & Gettinger (Martin A. Gettinger, Esq., of counsel). Petitioner Herbert Moscow appeared by Lewis J. Rappaport, Esq. The Income Tax Bureau appeared by Peter Crotty, Esq. (James A. Scott and Frank Levitt, Esqs., of counsel).

ISSUES

I. Whether petitioner Oscar Schleiff is liable for a penalty equal to the unpaid income tax withheld by two corporations of which he was, respectively, chairman of the board and president.

II. Whether petitioners, Oscar Schleiff and Herbert Moscow, are individually liable for unpaid sales and use taxes collected by two corporations, for which both were officers, for the periods ended 5/31/68 through 1/27/71.

III. Whether New York State is required to seek payment of taxes from the assignee for the benefit of creditors, before proceeding against officers of a corporate taxpayer.

FINDINGS OF FACT

1. Petitioner Oscar Schleiff was president of the Wickersham Press, Inc. (hereinafter "Wickersham") and chairman of the board of American Offset Corp. (hereinafter "American"), during the period January 1, 1968 through January 27, 1971. Petitioner was a director of both corporations and was authorized to sign corporate checks. Withholding tax returns were signed by the comptroller of the corporations.

2. Except for the periods ended August 31, 1968 and January 25, 1971, withholding tax returns were timely filed by Wickersham and American.

3. On or about January 25, 1971, Wickersham ceased doing business and made a general assignment for the benefit of creditors, filed in New York State Supreme Court, in and for the County of Queens.

4. On July 26, 1971, the Income Tax Bureau issued a Statement of Deficiency to petitioner Oscar Schleiff, advising him that under section 685(g) of the Tax Law, he was liable for a penalty equal to unpaid withholding taxes due from Wickersham of \$109,218.85 for the period 1/1/68 through 1/27/71. On the same date, a Notice of Deficiency was issued against petitioner Oscar Schleiff, assessing him for an income tax deficiency itemized as follows:

<u>YEAR</u>	<u>AMOUNT</u>
1968	\$ 23,801.60
1969	58,106.70
1970	26,015.55
1971	<u>1,295.00</u>
 TOTAL	 <u><u>\$109,218.85</u></u>

These income taxes were withheld by Wickersham.

5. On December 27, 1971, the Income Tax Bureau issued a Notice of Deficiency to petitioner Oscar Schleiff, assessing him for income taxes allegedly withheld by American and unpaid as follows:

<u>WITHHOLDING TAX PERIOD</u>	<u>AMOUNT</u>
2/1 to 12/31/68	\$ 31,901.56
1/1 to 12/31/69	48,696.59
1/1 to 9/30/70	26,576.56
10/1 to 12/31/70	12,000.00
1/1 to 1/27/71	<u>3,510.00</u>
 TOTAL AMOUNT	 <u><u>\$122,684.71</u></u>

6. On February 25, 1974, the Department of Taxation and Finance filed a proof of claim with the assignee for the benefit of creditors of Wickersham in the amount of \$109,309.87. On April 18, 1978, an amended claim was filed by a deputy tax commissioner superseding the proof of claim previously filed and reducing the claim to \$81,612.72.

7. The final report of the assignee for the benefit of creditors had not been filed at the time of the formal hearing. The attorney for petitioner Oscar Schleiff argued that any action against petitioner should await the outcome of the disposition of the assignee. Petitioner Oscar Schleiff is allegedly incapacitated and did not appear at the formal hearing.

8. Petitioner Oscar Schleiff was the chief fiscal officer of both Wickersham and American, and a person under a duty to withhold and pay over income taxes for both corporations to New York State.

9. Sales and use tax returns were timely filed for American for each of the periods ended May 31, 1968 through August 31, 1970.

10. Sales and use tax returns were timely filed for Wickersham for each of the periods ended August 31, 1968 through August 31, 1970.

11. On February 11, 1971, the Sales Tax Bureau issued a Notice of Determination and Demand Under Jeopardy for payment of Sales and Use Taxes Due (Notice No. 93049120A) to petitioners, Oscar Schleiff and Herbert Moscow, as officers and/or responsible employees of Wickersham, assessing sales and use taxes against each under sections 1131(1) and 1133(a) of the Tax Law as follows:

<u>PERIOD ENDED</u>	<u>TAX DUE</u>	<u>PENALTY & INTEREST</u>	<u>TOTAL</u>
8/31/68	\$ 2,000.00	\$ 660.00	\$ 2,660.00
8/31/69	5,314.72	1,116.09	6,430.81
11/30/69	6,540.18	1,177.23	7,717.41
2/28/70	6,243.64	936.55	7,180.19
5/31/70	5,113.42	613.61	5,727.03
8/31/70	<u>6,040.11</u>	<u>543.61</u>	<u>6,583.72</u>
TOTAL	<u>\$ 31,252.07</u>	<u>\$ 5,047.09</u>	<u>\$ 36,299.16</u>

12. On May 20, 1971, the Sales Tax Bureau issued a Notice of Determination and Demand for Payment of Sales and Use Taxes Due (Notice No. 90,737,014A) to petitioner Oscar Schleiff, assessing him for sales and use taxes for the periods ended 5/31/68 through 3/4/71 of \$380,944.00, plus interest of \$86,097.01, for a total due of \$467,041.01. The notice stated that said tax had also been

determined by Notice No. 90,712,687 dated 4/14/71 against Wickersham, then in assignment.

13. On June 18, 1971, the Sales Tax Bureau issued a Notice of Determination and Demand for Payment of Sales and Use Taxes Due (Notice No. 90,737,015C) to petitioner Oscar Schleiff, assessing him for taxes for the periods ended 5/31/68 through 8/31/70, of \$268,322.00, plus interest of \$68,987.54, for a total due of \$337,309.54. The notice stated that said tax had also been determined by Notice No. 90,712,680 dated 4/14/71 against American Offset Corp., then in assignment, and of which petitioner was chairman of the board.

14. On June 18, 1971, the Sales Tax Bureau issued a Notice of Determination and Demand for Payment of Sales and Use Taxes Due (Notice No. 90,737,014C) to petitioner Herbert Moscow, assessing him for taxes for the periods ended 5/31/68 through 3/4/71, of \$380,944.00 plus interest of \$89,895.86, for a total due of \$470,839.86. The notice stated that said tax had been determined by Notice No. 90,712,687 dated 4/14/71 against Wickersham, then in assignment, and of which petitioner was chairman of the board. This notice was stated to be in addition to Notice No. 93,049,120A issued on 2/11/71.

15. On March 6, 1972, petitioner Oscar Schleiff filed a petition for redetermination of the sales and use taxes assessed against him as an officer of both Wickersham and American.

16. On May 20, 1971, the Sales Tax Bureau issued a Notice of Determination and Demand for Payment of Sales and Use Taxes Due (Notice No. 90,737,015A) against petitioner Herbert Moscow as an officer of American, then in assignment, for taxes amounting to \$268,322.00, plus interest of \$66,304.32, for a total due of \$334,626.32. The notice was issued for the periods ended 5/31/68 through 8/31/70.

17. On November 1, 1977, the Sales Tax Bureau issued a Notice and Demand for Payment of Sales and Use Taxes Due (Notice No. 90,712,687A), amending and superseding Notice No. 90,712,687 dated 4/14/71 against Wickersham. The notice detailed the amount demanded as follows:

<u>PERIOD ENDED</u>	<u>TAX</u>	<u>INTEREST</u>	<u>TOTAL</u>
8/31/68 (see note)	\$ 6,872.00	\$ 968.72	\$ 7,840.72
8/31/69 (unpaid ret.)	1,314.72	106.26	1,420.98
11/30/69 (dishonored check)	6,540.85	430.52	6,971.37
2/28/70 (unpaid ret.)	6,242.35	317.24	6,559.59
5/31/70 (unpaid ret.)	5,113.47	183.16	5,296.63
8/31/70 (unpaid ret.)	6,040.11	125.76	6,165.87
12/1/70 to 1/25/71 (see note)	<u>1,233.00</u>	<u>-0-</u>	<u>1,233.00</u>
TOTAL AMOUNT DUE	<u>\$33,356.50</u>	<u>\$2,131.66</u>	<u>\$33,488.16</u>

"Note: No return was filed for this period. The amount shown as due is based on the account report to the assignee as verified by our re-audit of your records."

18. On November 7, 1977, the Attorney General of the State of New York filed a second amended claim for sales taxes due with the Queens County Supreme Court, superseding its previous proof of claim dated March 5, 1976 for \$472,126.80. The amended claim against Wickersham was asserted in the amount of \$34,927.40. It relates to determination No. 90,712,687A for the periods ended 8/31/68 and 6/1/69 through 1/25/71, assessed against Wickersham.

19. On January 23, 1975, petitioner Herbert Moscow filed a petition for redetermination of a deficiency or for refund of sales and use taxes for the periods ended 8/31/68 through 1/25/71.

20. Wickersham was a printing firm organized in 1961. In 1964, it acquired American as a wholly-owned subsidiary. Both corporations occupied the premises at 45-31 Court Square, Long Island City, New York 11101. About January 25, 1971, both ceased doing business. Wickersham made a general assignment of its assets for the benefit of creditors.

21. Petitioner Herbert Moscow was chairman of the board of Wickersham and president of American. He was a stockholder and director of both corporations.

22. The activities of petitioner Herbert Moscow were primarily concerned with sales, and he did not sign tax returns. He did have authority to sign corporate checks.

23. There has not yet been a final accounting of the assignee for the benefit of creditors.

CONCLUSIONS OF LAW

A. That petitioner Oscar Schleiff is a person under a duty to collect, truthfully account for, and pay over the tax under section 685(g) of the Tax Law, and that as an officer of Wickersham Press, Inc. and American Offset Corp., his failure to pay over the income taxes withheld was willful, within the meaning and intent of the Tax Law.

B. That petitioners, Oscar Schleiff and Herbert Moscow, were officers of both Wickersham Press, Inc. and American Offset Corp. under a duty to collect and pay over sales and use taxes, and that each was personally liable for the deficiency in payment of such taxes for the periods ended May 31, 1968 through January 25, 1971.

C. That neither Oscar Schleiff nor Herbert Moscow has a right to have New York State collect tax deficiencies from the assignee for the benefit of creditors or other officers, before collecting the unpaid tax deficiency from each officer.

"It is, moreover, well settled that a taxpayer who is equally liable with another for the payment of accrued but unpaid tax, cannot avoid collection against himself on the ground that the Government should first collect from the other party. Phillips v. Commissioner of Internal Revenue, 283 U.S. 589, 51 S. Ct. 608, 75 L. Ed. 1289 (1931)." Kelly v. Lethert, 362 F. 2d 629, 632 (1966).

D. That the petitions of Oscar Schlieff are granted to the extent that the Income Tax Bureau and Sales Tax Bureau are directed to issue notices of deficiency consonant with the superseding notices of claim filed with the Queens Supreme Court and that, except as so granted, the petitions of Oscar Schlieff are in all other respects denied.

E. That the petition of Herbert Moscow is granted to the extent that the Sales Tax Bureau is directed to issue a revised Notice of Determination consonant with the superseding notice of claim filed with the Supreme Court and that, except as so granted, the petition of Herbert Moscow is in all other respects denied.

DATED: Albany, New York

JAN 11 1980

STATE TAX COMMISSION


PRESIDENT


COMMISSIONER


COMMISSIONER