

POOR
QUALITY
THE FOLLOWING
DOCUMENT (S)
ARE
FADED & BLURRED

PHOTO MICROGRAPHICS INC.

BUREAU OF LAW

MEMORANDUM

*Smith, Charles A.**A-2*

TO: Commissioners Murphy, Palestin & Macduff
FROM: Solomon Sies, Hearing Officer
SUBJECT: CHARLES A. SMITH

Petition for Redetermination of a Deficiency
or for Refund of Personal Income Taxes Under
Article 22 of the Tax Law for the Years 1962
and 1963

File #11-1993-197

On March 21, 1966 a notice of formal hearing was mailed to the taxpayer scheduling a formal hearing in the above matter to be held at 80 Centre Street, New York City, on April 11, 1966 at 9:30 a.m. The taxpayer defaulted in appearance at said hearing.

The issue involves the personal liability of the taxpayer for wilful failure as president of Acme Tool Products Corp. to pay withholding taxes withheld.

I phoned Mr. Joseph Pelcher of the Withholding Tax Section and was informed that the only available information disclosed that Charles A. Smith signed and filed withholding tax returns as president of Acme Tool Products Corp. for the quarters ending December 31, 1962, March 31, 1963 and June 30, 1963 and that the withholding taxes were not paid. The taxpayer has not claimed that he did not have a duty as officer of the aforementioned corporation to withhold and pay the withholding taxes due on behalf of said corporation nor has he presented any reasonable cause for his failure to pay over said withholding taxes. It appears that the taxpayer is not disputing the fact that he is liable for the withholding taxes, but claims, however, that he is without funds and therefore unable to pay the aforementioned taxes.

In the case of U.S. v. Graham, 309 F. 2d 210 the Court held that the term "person" within the provision respecting penalties for failure to collect and pay over taxes includes an officer and employee but does not exclude all others and must be construed to include all those so connected with a corporation as to be responsible for the performance of the act in respect of which the violation occurred.

In the case of Horwitz v. U.S. 236 F. Supp 812, affirmed 339 F. 2d 877 it was held that neither fraud nor bad motives are necessary to the imposition of liability for penalties upon a corporate officer for willfully failing to pay, collect, or truthfully account for and pay over certain taxes imposed by the Internal Revenue Code.

TO: Commissioners Murphy, Palestin & Macduff

Page 2

RE: CHARLES A. SMITH

In the case of U.S. v. Molitar, 337 F. 2d 917 it was held that there need not be present an intent to defraud or deprive United States of taxes collected or withheld for its account, nor need bad motives be present in order to invoke the sanctions of the statute imposing liability on a corporate officer who has the duty or is responsible for collection and payment of tax and who willfully fails either to collect the tax or to pay it over.

In the case of Slattery 224 F. Supp. 214, affirmed 333 F. 2d 844 it was held that the word "willfully" within this section imposing civil penalty for willfully failing to pay over taxes does not involve moral wrong but includes conscious act or omission.

In the case of Paisner v. O'Connell, 208 F. Supp. 397 it was held that "without reasonable cause" is part of the test to be used in determining whether failure to pay taxes was "willful" within meaning of this section declaring any person willfully failing to pay, collect or account for and pay over tax imposed thereby liable to penalty of amount of such tax.

In the case of Levy v. U.S. 140 F. Supp. 834 it was stated that as used in this section (Section 6672 Internal Revenue Code 1954) imposing penalty upon any person "willfully" failing to pay, collect or truthfully account for and pay over taxes, the quoted words mean "consciously", "intentionally", "deliberately", or "voluntarily", as distinguished from "accidently", and mere negligence is not enough to render one liable for penalty.

In the case of Schweitzer v. U.S., 193 F. Supp. 309, it was held that a president, who brought action against United States to recover penalties alleged to have been illegally assessed and collected from him because of failure of corporation to pay over to United States withheld income and taxes withheld under section 3101 et seq. of this title from employees, had burden to prove by fair preponderance of evidence that his conduct was not willful.

Subdivision (e), Section 689 of the Tax Law provides that in any case before the Tax Commission under Article 22 of the Tax Law, the burden of proof shall be upon the petitioner except for the issues of (1) whether the petitioner has been guilty of fraud with intent to evade the tax; (2) whether the petitioner is liable as transferee of the property of the taxpayer; and (3) whether petitioner is liable for any increase in a deficiency where such income is asserted initially after notice of deficiency was mailed and a petition filed unless it is the result of a change or correction of Federal taxable income required to be reported.

TO: Commissioners Murphy, Palestin & Macduff

Page 3

RE: CHARLES A. SMITH

I am therefore of the opinion that the taxpayer was under a duty to collect and pay over the withholding taxes and that he willfully failed to do so in accordance with Sections 685 (g) and 685 (1) of the Tax Law.

For the reasons stated above, I recommend that the decision of the Tax Commission in the above matter be substantially in the form submitted herewith.

JUN 21 1966

Solomon Liss
Hearing Officer

Marcus Shapiro
Approved

Saul Hochman
Approved

(June 30, 1966)

SS:hm

XERO
COPY

XERO
COPY

XERO
COPY

STATE OF NEW YORK
STATE TAX COMMISSION

IN THE MATTER OF THE PETITION

OF

CHARLES A. SMITH

FOR A REDETERMINATION OF A DEFICIENCY OR
FOR REFUND OF PERSONAL INCOME TAXES UNDER
ARTICLE 22 OF THE TAX LAW FOR THE YEARS
1962 and 1963.

The taxpayer, Charles A. Smith, having filed a petition for redetermination of a deficiency or for refund of personal income taxes under Article 22 of the Tax Law for the years 1962 and 1963 (File #11-1973-197) and a notice of hearing dated March 21, 1966 having been mailed on said date to the taxpayer scheduling a formal hearing at the office of the State Tax Commission at 80 Centre Street, New York, N.Y., for April 11, 1966 at 9:30 A.M., before Solomon Sles, Hearing Officer of the Department of Taxation and Finance, and the taxpayer having defaulted in the appearance thereof, said default having been duly noted, and the matter having been duly examined and considered,

The State Tax Commission hereby finds:

(1) That during the years 1962 and 1963, the taxpayer, Charles A. Smith, was president of Acme Tool Products Corp., a domestic corporation organized under the laws of the State of New York; that for the quarter ending December 31, 1962, the aforementioned employer, Acme Tool Products Corp., withheld from wages paid to its employees the sum of \$142.70; that for the quarter ending March 30, 1963, the aforementioned employer, Acme Tool Products Corp., withheld from wages paid to its employees the sum of \$142.10; that for quarter ending December 31, 1963, the aforementioned employer, Acme Tool Products Corp., withheld from wages paid to its employees the sum of \$39.90; that the taxpayer Charles A. Smith filed and signed the

withholding tax returns for the periods above mentioned as president of Acme Tool Products Corp.

(2) That on December 18, 1964 the Department of Taxation and Finance issued a notice and demand to the taxpayer for payment of the withholding tax due in the sum of \$324.70 pursuant to Sections 692 and 694 of the Tax Law; that on December 18, 1964 the Department of Taxation and Finance issued a jeopardy assessment against the taxpayer, Charles A. Smith, in the sum of \$324.70 pursuant to Section 694 (a) of the Tax Law; that on January 18, 1965, the Department of Taxation and Finance issued a notice of deficiency against the taxpayer Charles A. Smith in the sum of \$324.70 for the years 1962 and 1963 in accordance with the provisions of Article 22 of the Tax Law.

(3) That the taxpayer Charles A. Smith as president of Acme Tool Products Corp. was under a duty and required to collect, truthfully account for, and pay over the withholding taxes more fully described and set forth in Finding (1) above.

(4) That the taxpayer Charles A. Smith wilfully failed to truthfully account and pay over such withholding taxes and was therefore liable for the total amount of said withholding taxes.

Based upon the foregoing findings and all of the evidence presented herein, the State Tax Commission hereby

DECIDES:

That the notice and demand and the jeopardy assessment and notice of deficiency issued against the taxpayer Charles A. Smith for wilful failure to pay over to the Department of Taxation and Finance the withholding taxes more fully described and set forth in Finding (1) above were properly issued within the intent and meaning of subdivisions (g) and (1) of Section 685 of the Tax Law; that the tax so imposed does not include any amounts not lawfully due and owing, and that

the taxpayer's petition for redetermination of a deficiency be and the same is hereby dismissed.

DATED: Albany, New York, on the 8th day of July, 1966.

STATE TAX COMMISSION

/s/

JOSEPH H. MURPHY

President

/s/

IRA J. PALESTIN

Commissioner

/s/

JAMES R. MACDUFF

Commissioner