

STATE OF NEW YORK

TAX APPEALS TRIBUNAL

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In the Matter of the Petition :  
of :  
**SIDNEY FRIEDMAN** : **DECISION**  
: DTA NO. 801654  
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 Year 1979. :

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Petitioner, Sidney Friedman, 1308 Avenue V, Brooklyn, New York 11229, filed an exception to the determination of the Administrative Law Judge issued on September 17, 1987 with respect to his 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 year 1979 (File No. 801654).

Neither party submitted a brief on the exception. Oral argument was held at the petitioners request on January 19, 1988.

After reviewing the entire record in this matter, the Tax Appeals Tribunal renders the following decision.

***ISSUE***

Whether petitioner is liable for a penalty equal to unpaid New York State and New York City withholding taxes of Darlie Holding Corp.

***FINDINGS OF FACT***

Petitioner waived a hearing and agreed to submit the case for determination based on the Division of Taxation's file and additional information to be submitted by petitioner by March 1, 1987.

We find the facts of this matter as stated in the determination of the Administrative Law Judge and such facts are incorporated herein by this reference.

To summarize these facts, on September 15, 1980, the Division of Taxation issued a Notice of Unbalanced Account to Darlie Holding Corp., 539 48th Avenue, Long Island City, New York 11101, for the tax year 1979. The notice stated, in pertinent part, as follows:

**"NOTICE OF UNBALANCED ACCOUNT**

The amount of either New York State and/or City of New York tax withheld as shown on the Forms and annual statements filed with this office do not agree with each other.

	City	State
Reconciliation shows amount withheld	<u>\$ 2,660.42</u>	<u>\$ 5,997.87</u>
Total Tax Paid or assessed on returns filed	<u>\$ .00</u>	<u>\$ .00</u>
Imbalance	<u>\$-2,660.42</u>	<u>\$-5,997.87</u>

Please explain the discrepancy in the above totals. If your records show any other payments made under the above Employer Identification Number, please furnish the date of payment, amount, and serial number stamped on the face of your cancelled remittance. In most cases the number will be preceded by a 'W', 'H' or 'J'. If the number is not preceded by a 'W', 'H' or 'J', copy the serial number as shown and give the name of the endorser on the back of the check.

**TOTAL OR NET SHORTAGE - \$8,658.29**

If you find that the discrepancy is due to errors on the Forms IT-2102 submitted, please correct the information, and list: employee name, social security number, total wages and

the corrected amount of either New York State and/or City of New York Tax Withheld. If you filed returns under a different name or identification number, please furnish details."

On June 4, 1981, the Division issued a Notice and Demand for Unpaid Withholding Tax Due to Darlie Holding Corp. for 1979 in the amount of \$8,658.29 in tax withheld, penalty of \$2,813.96 and interest of \$1,171.57, for a total of \$12,643.82.

On November 26, 1984, the Division issued a Statement of Deficiency and Notice of Deficiency to petitioner, Sidney Friedman, in the amount of \$8,658.29, for the unpaid withholding taxes of Darlie Holding Corp. for the period January 1, 1979 through December 31, 1979.

Petitioner was secretary-treasurer of Darlie Holding Corp. His son, Lance Friedman, was president. (A Statement of Deficiency and Notice of Deficiency were also apparently issued against Lance Friedman. This deficiency, however, is not at issue.)

### ***OPINION***

The Administrative Law Judge concluded that petitioner did not sustain his burden of proof under Tax Law section 689(e) and Administrative Code of the City of New York, section T46-189.0(e) to show that he was not a person required to collect, truthfully account for and pay over withholding tax on behalf of Darlie Holding Corp. Nor did the petitioner introduce evidence to prove that his conduct was not willful within the meaning of both of the above cited sections.

Based on Wolfstich v. State Tax Commn., 106 AD2d 745, the Administrative Law Judge concluded that the action by the Division was not barred by the statute of limitations.

We affirm the Administration Law Judge's determination in its entirety. Petitioner has introduced no evidence at all to, in any way, substantiate the allegations in support of his plea for relief.

With regard to the statute of limitations question, Tax Law section 683(a) provides generally that personal income taxes must be assessed within three years after a return was filed, whether or not such return was filed on or after the prescribed date.

Tax Law section 683(c) provides exceptions to this general rule where no return is filed and where a false or fraudulent return is filed with intent to evade tax. In these cases, the tax may be assessed at any time. Here, the corporation, of which petitioner was a responsible officer, filed returns without remittance of the tax. These circumstances do not fall within either of the two exceptions noted. (Compare Internal Revenue Code section 6501(c)(2) upon which section 683(c) is based which provides a third exception "[i]n the case of a willful attempt in any manner to defeat or evade tax".) Thus, it would appear at first blush, that the issuance of the Statement of Deficiency and Notice of Deficiency against petitioner on November 26, 1984, which was more than three years after the return was filed, would be barred by the general three year period of limitation set forth in section 683(a). However, under similar circumstances in *Wolfstich*, the Appellate Division concluded that "the penalty imposed against petitioner as a corporate officer is entirely distinct from an earlier assessment against the corporation. As a separate statutory liability, it need not be assessed within any particular period after the corporate assessment is made." (*Wolfstich v. State Tax Commn.*, *supra*, at 747.) We find *Wolfstich* dispositive of the issue.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of the petitioner, Sidney Friedman, is in all respects denied;
2. The determination of the Administrative Law Judge is affirmed;

3. The petition of Sidney Friedman is denied and the Notice of Deficiency issued on November 26, 1984 is sustained.

DATED: Albany, New York  
July 08, 1988

/s/ John P. Dugan  
President

/s/ Francis R. Koenig  
Commissioner