

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition

of

MONROE STUDELL

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 Years 1979 and 1980.

DECISION

In the Matter of the Petition

of

FRED STUPELMAN

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 Years 1979 and 1980.

Petitioners, Monroe Studell, 95 Christopher Street, New York, New York
10014, and Fred Stupelman, 246 Surrey Drive, New Rochelle, New York 10804,
filed petitions for redetermination of deficiencies or for refunds 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 years 1979 and 1980 (File Nos. 40685 and 40678).

A consolidated 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 July 24, 1985 at 10:45 A.M., with all briefs to be submitted by

September 10, 1985. Petitioners appeared pro se. The Audit Division appeared by John P. Dugan, **Esq.** (Angelo Scopellito, Esq., of counsel).

ISSUES

I. Whether petitioner Monroe Studell **is** subject to penalties, pursuant to section 685(g) of the Tax Law and section T46-185.0(g) of the Administrative Code of the City of New York, as a person who willfully failed to collect, truthfully account for and pay over the New York State and New York City withholding taxes due from Bronx Metal Fabricators Inc. for the years 1979 and 1980.

II. Whether petitioner Fred Stupelman **is** subject to penalties, pursuant to section 685(g) of the Tax Law and section T46-185.0(g) of the Administrative Code of the City of New York, as a person who willfully failed to collect, truthfully account for and pay over the New York State and New York City withholding taxes due from Bronx Metal Fabricators Inc. for the years 1979 and 1980.

FINDINGS OF FACT

1. Bronx Metal Fabricators Inc. (hereinafter "BMF"), 12 Weyman Avenue, New Rochelle, New York 10805, failed to pay over the New York State and New York City personal income taxes withheld from the wages of its employees for the following periods:

<u>Withholding Tax Period</u>	<u>Amount</u>
February 1, 1979 through December 31, 1979	\$17,387.19
April 1, 1980 through December 31, 1980	<u>52,414.33</u>
TOTAL	<u><u>\$69,801.52</u></u>

2. On November 29, 1982, the Audit Division issued a Statement of Deficiency in conjunction with a Notice of Deficiency against petitioner Monroe Studell

section T46-185.0(g) of the Administrative Code of the City of New York for amounts equal to the total New York State and New York City withholding taxes due from BMF for the aforestated periods. Said penalties were 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. A similar set of documents was issued under the same date against petitioner Fred Stupelman. The deficiency asserted therein and the Audit Division's grounds for asserting such deficiency were identical to those with respect to petitioner Monroe Studell.

3. During the years at issue petitioner Fred Stupelman was President and Treasurer of BMF. Petitioner Monroe Studell was Vice President and Secretary. Mr. Stupelman held 55 percent of BMF's outstanding stock. Mr. Studell held 45 percent of such stock. Both petitioners devoted their full time to the business, signed the corporation's tax returns and were authorized signatories on BMF's bank accounts.

4. Petitioners did not deny that they were persons responsible for withholding and paying over the New York State and City personal income taxes withheld from the employees of BMF during the periods at issue herein. However, they argued that the amounts asserted may well be overstated due to criminal misappropriation of BMF's funds by its bookkeeper, whose acts they alleged included the creation of fictitious employees for the purpose of converting the funds to her own use.

5. On February 26, 1982, BMF filed a voluntary petition under Chapter 11 of the Bankruptcy Reform Act of 1978 with the United States Bankruptcy Court, Southern District of New York, seeking reorganization pursuant to such chapter.

6. The estate of BMF has filed suit against **BMF's** former accountants for malpractice wherein damages were asserted in the amount of \$1,000,000.00 to \$2,000,000.00. Petitioners contended that payment of the withholding taxes at issue should come from the bankrupt estate rather than from them personally. They argued that the estate expects a substantial recovery from the aforesaid suit which would result in sufficient funds being available for payment in full of the withholding taxes at issue.

7. Petitioners were granted seven weeks subsequent to the hearing within which to submit documentation evidencing an overstatement in the deficiency due to the illegal actions of BMF's former bookkeeper, however, **no** such documentation was forthcoming.

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."

For New York City purposes, section T46-185.0(g) of the Administrative Code of the City of New York contains a similar provision.

B. That sections 685(n) of the Tax Law and T46-185.0(n) of the Administrative Code of the City of New York provide that, for purposes of the aforementioned subdivisions (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 petitioners were persons who willfully failed to collect, truthfully account for and pay over the withholding taxes of BMF during the years at issue herein. **BMF's** subsequent bankruptcy had no effect on their duties and responsibilities during the years 1979 and 1980.

D. That petitioners have failed to sustain their burden of proof, imposed pursuant to section 689(e) of the Tax Law and section T46-189.0(e) of the Administrative Code of the City of New **York**, to show that the deficiencies asserted against them were erroneous or improper.


E. That the petition of Monroe Studell is denied and the Notice of Deficiency issued against him on November 29, 1982 is sustained.

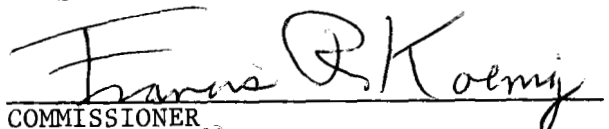
F. That the petition of Fred Stupelman is denied and the Notice of Deficiency issued against him on November 29, 1982 is sustained.

DATED: Albany, New York

STATE TAX COMMISSION

JAN 17 1986


PRESIDENT


COMMISSIONER


COMMISSIONER