

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition

of

JOHN MERMELSTEIN

:

DECISION

for Redetermination of a Deficiency or for
Refund of Personal Income Tax under Article 22
of the Tax Law for the Years 1980 and 1981.

Petitioner, John Mermelstein, 25 Central Park West, New York, New York 10023, 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 1980 and 1981 (File No. 43111).

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 August 21, 1985 at 9:15 A.M. Petitioner appeared by Arnold B. Panzer, Esq. The Audit Division appeared by John P. Dugan, Esq. (Angelo Scopellito, Esq., of counsel).

ISSUE

Whether petitioner, John Mermelstein, 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 Modesty Design, Inc., American Climax for the years 1980 and 1981.

FINDINGS OF FACT

1. Modesty Design, Inc., American Climax (hereinafter "Modesty"), 543 Bay Street, Staten Island, New York 10304, 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>
September 1, 1980 through September 30, 1980	\$ 1,407.81
April 1, 1981 through December 22, 1981	<u>15,300.00</u>
TOTAL	<u>\$16,707.81</u>

2. On November 29, 1982, the Audit Division issued a Statement of Deficiency in conjunction with a Notice of Deficiency against John Mermelstein (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 Modesty for the aforestated periods. Such penalty was asserted on the grounds that petitioner was a person required **to** collect, truthfully account for and pay over said taxes, and that he willfully failed to do **so**.

3. For several years prior to the years at issue herein petitioner was engaged in business as an independent sales representative. As such, he sold apparel for several principals including Modesty. He conducted such business from a showroom located at 1411 Broadway, New York City. Said showroom was leased to petitioner personally from approximately 1976 to October 31, 1982 or sometime thereafter.

4. Petitioner terminated his relationship with Modesty in 1977 because Modesty failed to pay him a substantial amount of commissions due him from the sale of its product line.

5. Subsequently, in 1978 petitioner filed suit against Modesty and its officers for recovery of the commissions and other amounts due him.

6. The aforestated litigation was resolved by a Settlement Agreement entered into on January 22, 1980 between petitioner and Modesty. Said agreement provided, in pertinent part, that:

"1. MDI (Modesty) shall pay to Mermelstein and Mermelstein shall accept from MDI the sum of \$120,000.00 as full and final settlement of all claims and demands of Mermelstein and Mermelstein against MDI and its officers and agents, past and present, in connection with the foregoing litigation."

(a) \$15,000 by February 3, 1980;

(b) \$115,000, without interest, in seven (7) payments, without interest, a payment of \$15,000 on June 3, 1980 and the balance of \$100,000 in six (6) equal installments of \$16,667 each on the first days of each of March and June in each of the years 1981, 1982 and 1983...

2. As part of this settlement, the parties are executing and delivering a certain option agreement dated this date."

7. Petitioner resumed his previous relationship with Modesty at the time said Settlement Agreement was executed.

8. The aforestated Option Agreement granted petitioner the personal, non-assignable option to purchase from Modesty such number of shares of capital stock of Modesty **as** would equal fifty (50%) percent of the shares of capital stock of Modesty then outstanding. The option price was \$100,000, payable by petitioner's surrender of the aforementioned six (6) payments due him each in the amount of \$16,667, due on March 1 and June 1, in 1981, 1982 and 1983. The expiration date for exercise of said option was March 4, 1981. Said agreement was executed by the President of Modesty, Jacob Perlmutter, and the petitioner.

9. Petitioner exercised the option prior to the stated expiration date; however, he was not issued a stock certificate until December 1, 1981. Said certificate was for forty (40) shares of Modesty stock.

10. On December 22, 1981, Modesty filed a petition for Chapter **XI** bankruptcy. Petitioner was not advised of Modesty's plan to file for bankruptcy until after he exercised his option to purchase stock in Modesty.

11. Subsequent to petitioner resuming his relationship with Modesty he was given the title of Secretary. However, he performed no duties relative to said title.

12. During the periods at issue herein petitioner's activities on behalf of Modesty related solely to the sale of its product line from his Manhattan showroom. He neither had an office nor conducted business at Modesty's offices located in Staten Island, New York.

13. During the periods at issue Jacob Perlmutter, President of Modesty, was responsible for the management of the company on a day-to-day basis.

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."

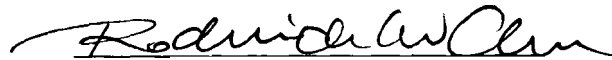
C. That petitioner was not a person required to collect, truthfully account for, and pay over the New York State withholding taxes of Modesty for the periods at issue herein. Accordingly, the penalty asserted against him pursuant to section 685(g) of the Tax Law is hereby cancelled.

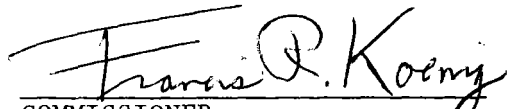
D. That the petition of John Mermelstein is granted and the Notice of Deficiency dated November 29, 1982 is cancelled.


DATED: Albany, New York

JAN 28 1986

STATE TAX COMMISSION


PRESIDENT


COMMISSIONER


COMMISSIONER