

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition

of

SIDNEY FRIEDMAN

DETERMINATION

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.

Petitioner, Sidney Friedman, 1308 Avenue V, Brooklyn, New York 11229, filed a 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. 57517).

On December 11, 1986, petitioner, through his duly authorized representative, waived a hearing in the Division of Tax Appeals and agreed to submit the case for determination based on the Division of Taxation file and additional information to be submitted by petitioner by March 1, 1987. After due consideration of the record, Robert Mulligan, Administrative Law Judge, hereby renders the following determination.

ISSUE

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

FINDINGS OF FACT

1. On September 15, 1980, the Audit Division 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:

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."

2. On June 4, 1981, the Audit 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.

3. On November 26, 1984, the Audit 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.

4. petitioner was secretary-treasurer of Darlie Holding Corp. His son, Lance Friedman, was president.¹

5. The petition filed herein states that the grounds for the relief claimed are as follows:

- "1) Beyond Statute of Limitations
 - 2) The finding of the auditor does not agree with the taxpayer's books & records."
- b. Petitioner offered no evidence in support of his position.

CONCLUSIONS OF LAW

A. That **Tax** Law § 685(g) provides, in pertinent part, as follows:

"Willful failure to collect and pay over tax. -- 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."

(Administrative Code § T46-185.0(g) provides similarly with respect to New York City income tax.)

B. That Tax Law § 685(n) provides, in pertinent part, as follows:

"Person defined. -- For purposes of subsections (g) ...the term person includes 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."

(Administrative Code § T46-185.0(n) provides similarly with respect to New York City income tax.)

1 A Statement of Deficiency and Notice of Deficiency were also apparently issued against Lance Friedman. This deficiency, however, is not at issue herein.

C. That petitioner has not sustained his burden of proof under Tax Law § 689(e) and Administrative Code § 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., who willfully failed to do so.

D. That the penalty imposed against petitioner as a corporate officer is entirely distinct from the earlier assessment against Darlie Holding Corp. "As a separate statutory liability, it need not be assessed within any particular period after the corporate assessment is made" (Wolfstich v. State Tax Commission, 106 AD2d 745). Accordingly, the deficiency issued to petitioner is not barred by the statute of limitations.

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

DATED: Albany, New York

SEP 17 1987



ADMINISTRATIVE LAW JUDGE