

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition

of

MARVIN SAFIR

DECISION

for Redetermination of a Deficiency or for
Refund of Personal Income Tax under Article 22
of the Tax Law for the Years 1976 and 1978.

Petitioner, Marvin Safir, 28 East 73rd Street, New York, New York 10021, 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 1976 and 1978 (File No. 61596).

On July 15, 1986, petitioner advised the State Tax Commission, in writing, that he desired to waive a hearing and submit the case to the State Tax Commission upon the entire record contained in the file, with submission of additional evidence and documents by August 29, 1986. After due consideration of said record, the Commission renders the following decision.

ISSUE

Whether petitioner, Marvin Safir, 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 155 East 80th Street Restaurant, Inc. for the years 1976 and 1978.

FINDINGS OF FACT

1. 155 East 80th Street Restaurant, Inc. (hereinafter "the corporation") 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>
December 1, 1976 through December 31, 1976	\$186.30
July 1, 1978 through December 31, 1978	131.76
TOTAL	<u>\$318.06</u>

2. On April 29, 1985, the Audit Division issued a Statement of Deficiency in conjunction with a Notice of Deficiency against Marvin Safir (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** the corporation 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. The record clearly shows that petitioner was president of the corporation during the periods at issue herein.

4. Petitioner did not deny that he was the person responsible for the collection and payment of the withholding taxes at issue.

5. Petitioner's defense, according to his petition and perfected petition, is that:

a - "The deficiency assessment in question was made against Petitioner **on** or about April 29, 1985, by mailing **of** a 'Statement of Deficiency'. The attempt to assess this penalty more than three years after the withholding periods involved contravenes the general statutes **of** limitation of the State **of** New York and is unenforceable."

b - "Department of Taxation and Finance is seeking to hold Petitioner liable as an officer of a corporation for withholding taxes. The State Tax Commission has no authority to require an administrative hearing under Tax Law section 1138(a) where a return was filed and was not found to be insufficient Parsons v. State Tax Commission 34 N.Y. 2d 190 (1974)."

6. Although petitioner was granted until August 29, 1986 to submit additional evidence, he failed to do **so**.

CONCLUSIONS OF LAW

A. That the penalty for failure to pay withholding taxes under section 685(g) of the Tax Law **is** wholly distinct from any limitation on assessment under section 683. "It follows then that the penalty imposed against petitioner as a corporate officer **is** entirely distinct from an... assessment against the corporation. **As** a separate statutory liability, it need not be assessed within any particular period after the corporate assessment is made." (Wolfstitch v. New York State Tax Commission, 106 AD2d 745 [citations omitted] .) The Notice of Deficiency issued April 29, 1985 was, therefore, timely.

B. That the withholding tax penalty **is** imposed under Article 22 of the Tax Law; therefore Tax Law section 1138(a), which **is** part of Article 28, and the holding **in** Parsons v. State Tax Commission (34 NY2d 190) are both inapplicable to deprive the State Tax Commission of jurisdiction to hear this matter.

C. That section 685(3) 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."

D. 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."

E. That petitioner was a person required to collect, truthfully account for and pay over the withholding taxes of the corporation during the periods at issue herein within the meaning of section 685(g) of the Tax Law.


the Tax Law. Accordingly, the penalty asserted against him is sustained.

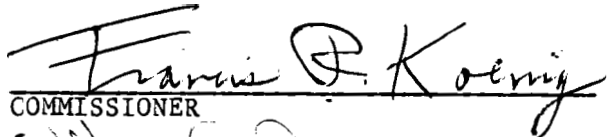
F. That the petition of Maryin Safir is denied and the Notice of Deficiency issued against him on April 29, 1985 is sustained.

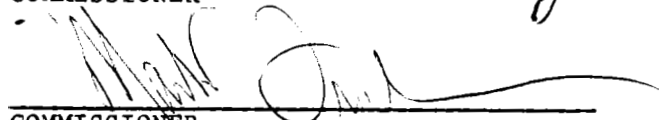
DATED: Albany, New York

STATE TAX COMMISSION

FEB 10 1982


PRESIDENT


COMMISSIONER


COMMISSIONER