

In the Matter of the Petition

of  
IRVING MALKIN

AFFIDAVIT OF MAILING

For a Redetermination of a Deficiency or :  
a Revision of a Determination or a Refund :  
of Personal Income :  
Taxes under Article (X) 22 of the :  
Tax Law for the Year(s) ~~or Period(s)~~ :  
1969 & 1970

State of New York  
County of Albany

John Huhn , being duly sworn, deposes and says that  
he is an employee of the Department of Taxation and Finance, over 18 years of  
age, and that on the 29th day of September , 1977 , he served the within

Notice of Decision by (certified) mail upon Irving Malkin

~~REPRESENTATIVE OF~~ the petitioner in the within proceeding,

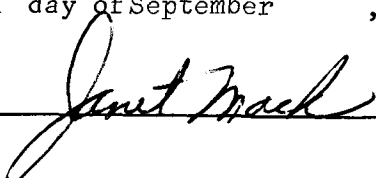
by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed  
as follows: Irving Malkin  
196-60 67th Avenue  
Flushing, New York 11165

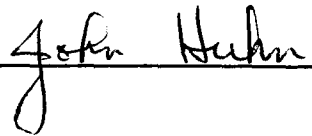
and by depositing same enclosed in a postpaid properly addressed wrapper in a  
(post office or official depository) under the exclusive care and custody of  
the United States Postal Service within the State of New York.

That deponent further says that the said addressee is the ~~REPRESENTATIVE~~  
~~of the~~ petitioner herein and that the address set forth on said wrapper is the  
last known address of the ~~REPRESENTATIVE OF THE~~ petitioner.

Sworn to before me this

29th day of September , 1977.

  
\_\_\_\_\_

  
\_\_\_\_\_



STATE OF NEW YORK  
STATE TAX COMMISSION  
TAX APPEALS BUREAU  
ALBANY, NEW YORK 12227

September 29, 1977

JAMES H. TULLY JR., PRESIDENT  
MILTON KOERNER  
THOMAS H. LYNCH

Irving Malkin  
196-60 67th Avenue  
Flushing, New York 11165

Dear Mr. Malkin:

Please take notice of the **Decision**  
of the State Tax Commission enclosed herewith.

You have now exhausted your right of review at the administrative level. Pursuant to section (X) **690** of the Tax Law, any proceeding in court to review an adverse decision by the State Tax Commission can only be instituted under Article 78 of the Civil Practice Laws and Rules, and must be commenced in the Supreme Court of the State of New York, Albany County, within **4 Months** from the date of this notice.

Inquiries concerning the computation of tax due or refund allowed in accordance with this decision may be addressed to the Deputy Commissioner and Counsel to the New York State Department of Taxation and Finance, Albany, New York 12227. Said inquiries will be referred to the proper authority for reply.

Sincerely,

**JOHN J. SOLLECITO**  
**DIRECTOR**

~~XXXXXXXXXXXXXXXXXXXX~~

Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

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In the Matter of the Petition :

of :

IRVING MALKIN : DECISION

for Redetermination of a Deficiency or for  
Refund of Personal Income Tax under Article :  
22 of the Tax Law for the Years 1969 and 1970  
:

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Petitioner, Irving Malkin, 196-60 67th Avenue, Flushing,  
New York 11165, filed a petition for redetermination of a de-  
ficiency or for refund of personal income tax under Article 22  
of the Tax Law for the years 1969 and 1970. (File No. 13897).

A formal hearing was held before William J. Dean, Hearing  
Officer, at the offices of the State Tax Commission, Two World  
Trade Center, New York, New York, on June 13, 1977 at 1:15 P.M.  
Petitioner, Irving Malkin, appeared pro se. The Income Tax  
Bureau appeared by Peter Crotty, Esq. (Frank Levitt, Esq., of  
counsel).

#### ISSUES

I. Whether the assessment for 1969 withholding taxes said  
to be due was made within three years after the return was filed,  
as required by section 683(a) of the Tax Law?

II. Whether petitioner was a "person", as defined under section 685(n) of the Tax Law, required to collect, account for, and pay over withholding taxes?

III. Whether petitioner's conduct in not paying over such withholding taxes to the Income Tax Bureau was willful, within the meaning and intent of section 685(g) of the Tax Law?

FINDINGS OF FACT

1. On April 13, 1973, the Income Tax Bureau issued a Statement of Deficiency to petitioner, indicating a deficiency for the withholding tax period July 1 to December 31, 1969 of \$6,012.82, and a deficiency for the withholding tax period January 15 to April 30, 1970 of \$3,063.89. The total stated to be due amounted to \$9,076.71. In accordance with the aforesaid statement of deficiency a Notice of Deficiency was issued in said amount.

2. Sometime in 1969, petitioner was persuaded by Harold Lane and Edgar Bartolucci, principals of Instore Advertising, Inc. to leave Jet Lithographic, a company which petitioner headed, to work for a newly formed company, LBM Lithographers, Inc. (The company name, LBM, was formed from the first letter of the surnames, Lane, Bartolucci and Malkin.

3. Messrs. Lane and Bartolucci told petitioner that they would provide him with various national accounts, such as Revlon,

21 Brands, Yardley and Bulova. Petitioner was to supply the printing know-how and Messrs. Lane and Bartolucci would furnish the customers. Petitioner brought with him to the new business a printing machine worth some \$50,000.00 and camera equipment.

4. Petitioner became president of LBM Lithographers and a 50% stockholder. Petitioner testified that the accountant for Instore Advertising handled the bookkeeping and payment of bills. Petitioner was a signatory on checks. Company checks required two signatures.

5. New York State Income Tax Bureau, Form IT-2101-S(2) for the second semi-annual period due January 31, 1970 for taxes withheld for the period July 1 to December 31, 1969 was signed by petitioner in his capacity as president of LBM Lithographers. The statement indicates that a remittance of \$6,012.82 was made. No remittance was received by the Income Tax Bureau.

6. New York State Income Tax Bureau Form IT-2101-SM for 1970 (Employers semi-monthly return of New York State personal income tax withheld) was signed by petitioner, also in his capacity as president. The statement indicates that a remittance of \$3,063.89 was made. No remittance was received by the Income Tax Bureau.

7. Concerning the tax liability, petitioner testified as follows:

They [Messrs. Lane and Bartolucci] put something in front of me and they were my partners. I would have to sign. Sometimes you sign a tax thing, you don't send money away, you have to sign it. The eventually you do send money. That is the position I was in really. I didn't have the say that I should have had. (Tr., p. 16)

\* \* \*

Q. Mr. Malkin, when did you first become aware that the tax liability was not paid?

A. Well, I got to assume and I am going to go by what I think, I assume there may have been a problem with the tax liability while I was there. I didn't know what disposition was being taken with paying that thing. (Tr., p. 23)

\* \* \*

Q. Do you know if any payment was made by the corporation and/or its officers to any creditors, after the withholding tax was due to the State of New York?

A. Was any monies paid to creditors?

Q. Creditors after the withholding tax was due to the State of New York.

A. I would imagine they would have to, if they were going to purchase more paper or ink, they would hold --

Q. While you were there, sir, while you were in the corporation.

A. Did they pay any other creditors?

Q. Were any other creditors paid after the withholding tax was due to the State of New York?

A. I would say it would be logical that it would be. (Tr., p. 25)

8. Petitioner left LBM Lithographers sometime in the middle of 1970, after the national accounts promised by Messrs. Lane and Bartolucci failed to materialize. The company later went out of business.

9. The Internal Revenue Service subsequently issued a personal assessment against petitioner for withholding taxes. The Federal tax claim of \$20,000.00 was settled for \$1,215.80.

10. The three-year statutory period, section 683(a) of the Tax Law, expired prior to the Income Tax Bureau's issuing statements of deficiency to Messrs. Lane and Bartolucci.

CONCLUSIONS OF LAW

A. That the Statement of Deficiency is dated April 13, 1973. The return for the withholding period July 1 to December 31, 1969 was received by the Income Tax Bureau on February 10, 1970. However, the return is deemed to have been filed as of April 15, 1970 as stated in section 683(b) (2) of the Tax Law. Thus the Statement of Deficiency was issued within the three-year limitations on assessment. (Tax Law, section 683(a)).

B. That petitioner was president of LBM Lithographers. He was also an authorized signatory of corporate checks and signed corporate tax forms in his capacity as president; that petitioner is a "person" within the meaning of section 685(n) of the Tax Law.

C. That section 685(g) of the Tax Law provides: "Any person required to collect, truthfully account for and pay over the tax imposed by this article who willfully fails to ... truthfully account for and pay over such tax...shall...be liable to a penalty equal to the total amount of the tax..." Under this provision, a person responsible for collecting any paying taxes withheld from employees' wages is liable for a one hundred percent civil penalty if he willfully fails to collect and pay over the tax.

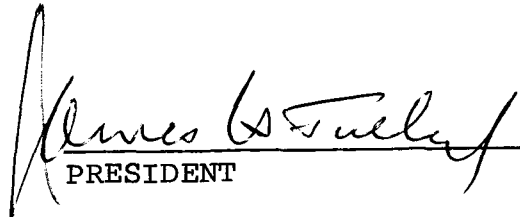
D. That LBM Lithographers was obligated to withhold employee income taxes within the intent and meaning of section 671 of the Tax Law. Petitioner, as president of LBM Lithographers, and an authorized signatory of corporate checks, who signed corporate tax forms in his capacity as president, had a responsibility to ensure that any money deducted was held as a "special fund in trust for the tax commission" (Tax Law, section 675); that petitioner willfully failed to pay the tax within the meaning of section 685(g) of the Tax Law, in that he knowingly, deliberately and voluntarily disregarded his obligations under the statute. Mtr. of Levin v. Gallman, Court of Appeals (Memorandum decision dated June 19, 1977).

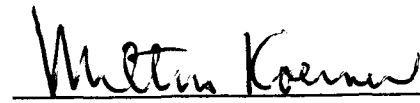


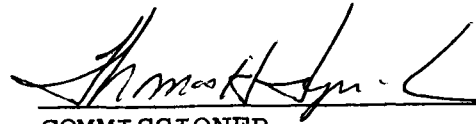
E. That the petition of Irving Malkin is denied and the Notice of Deficiency dated April 13, 1973 is sustained.

DATED: Albany, New York  
September 29, 1977

STATE TAX COMMISSION

  
PRESIDENT

  
COMMISSIONER

  
COMMISSIONER