

STATE OF NEW YORK  
STATE TAX COMMISSION

In the Matter of the Petition :

of

Stanley Yellin :

AFFIDAVIT OF MAILING

for Redetermination of a Deficiency or a Revision :  
of a Determination or a Refund of  
Personal Income Tax :  
under Article 22 of the Tax Law  
for the Year 1967 & 1969. :

State of New York

County of Albany

Jay Vredenburg, 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 22nd day of June, 1979, he served the within Notice of Decision by certified mail upon Stanley Yellin, the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

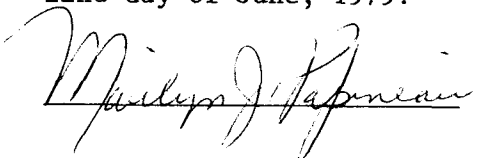
Stanley Yellin  
3447 Carey La.  
Baldwin, NY

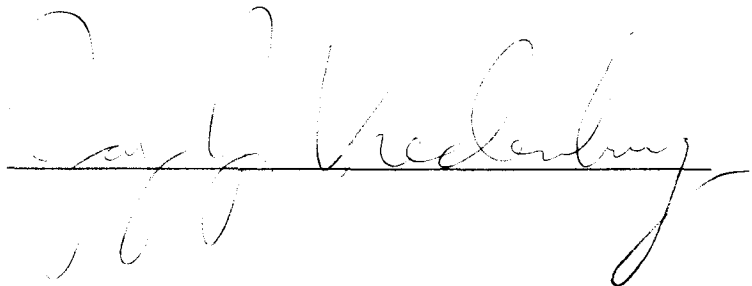
and by depositing same enclosed in a postpaid properly addressed wrapper in a (post office or official depository) under the exclusive care and custody of the United States Postal Service within the State of New York.

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

Sworn to before me this

22nd day of June, 1979.

  
Michael J. Capone

  
Jay Vredenburg



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

STATE TAX COMMISSION

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

JOHN J. SOLLECITO  
DIRECTOR

Telephone: (518) 457-1723

June 22, 1979

Stanley Yellin  
3447 Carey La.  
Baldwin, NY

Gentlemen:

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(s) 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,

A handwritten signature in black ink, appearing to read "John J. Sollecito", written in a cursive style.

cc: Petitioner's Representative

Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

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In the Matter of the Petition	:	
of	:	
STANLEY YELLIN	:	DECISION
for Redetermination of a Deficiency	:	
or for Refund of Personal Income Tax	:	
under Article 22 of the Tax Law, for	:	
the Years 1967 and 1969.	:	

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Petitioner, Stanley Yellin, 3447 Carey Lane, Baldwin, New York, 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 1967 and 1969 (File No. 01709).

A small claims hearing was held before William Valcarcel, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on May 15, 1978 at 2:45 P.M. Petitioner appeared by Michael Goldsmith, Esq. The Income Tax Bureau appeared by Peter Crotty, Esq. (Robert Felix, Esq., of counsel).

ISSUE

Whether petitioner was a person required to collect, truthfully account for and pay over New York State withholding taxes of Kim Walker, Inc. for 1967 and 1969.

FINDINGS OF FACT

1. Kim Walker, Inc. failed to pay over to the Income Tax Bureau \$4,770.02 in New York State personal income taxes withheld from its employees during 1967, and during the period June 1, 1969 through August 19, 1969.

2. On June 29, 1970, the Income Tax Bureau issued a Notice of Deficiency to petitioner, asserting a penalty (under section 685(g) of the Tax Law) against him as a person who willfully failed to collect and pay over New York withholding taxes.

3. Petitioner was president and majority stockholder of Kim Walker, Inc. He was responsible for the coordination of styling and selling activities. As majority stockholder, petitioner had the ultimate responsibility; however, the financial and record keeping responsibilities were those of the comptroller.

4. Kim Walker, Inc. was operating as a "debtor in possession," and on June 18, 1969, bankruptcy proceedings were instituted.

5. Petitioner contended that he was not liable for the penalty because the Income Tax Bureau failed to proceed on a priority claim in the corporate bankruptcy proceedings. The Income Tax Bureau's failure to proceed on its claim resulted in an "expunged order" being issued on September 16, 1975 by the United States District Court, Southern District of New York.

6. Kim Walker, Inc. filed a refund claim with the Corporation Tax Bureau for \$8,341.68. Upon approval of the refund claim in January of 1976 by the Corporation Tax Bureau, \$1,518.54 was withheld and credited to the withholding tax section of the Income Tax Bureau. The balance of \$6,823.14 was paid to the New York Credit Men's Adjustment Bureau, Inc., the trustee in bankruptcy. Petitioner contends that he is not liable for the penalty at issue because the Department of Taxation and Finance had the money in its possession (which was in excess of the corporation's withholding tax liability) and that it failed to deduct the total amount of taxes owed by Kim Walker, Inc.

CONCLUSIONS OF LAW

A. That petitioner, Stanley Yellin, was a person required to collect, truthfully account for and pay over New York State income tax withheld by Kim Walker, Inc. in the sum of \$4,770.02, and that he willfully failed to do so, within the meaning of subdivisions (g) and (n) of section 685 of the Tax Law. Accordingly, petitioner is subject to penalty equal to said sum under subsection (g) of section 685 of the Tax Law.

B. That the failure of the Income Tax Bureau to proceed in the Chapter XI proceedings of Kim Walker, Inc., although it had knowledge of the proceedings, did not discharge the liability of the corporation or of its responsible officers for said taxes, since withholding tax obligations cannot be discharged in bankruptcy (11 U.S.C. section 35 (a)(1)(e)). The Income Tax Bureau was not required to make an attempt to collect unpaid withholding taxes from a corporation before imposing and collecting the penalty provided for by section 685(g) of the Tax Law from responsible officers. The fact that another Bureau within the Department of Taxation and Finance had possession of money in excess of the corporate liability was immaterial.

C. That the petition of Stanley Yellin is granted to the extent that the penalty imposed pursuant to section 685(g) of the Tax Law is reduced by \$1,518.54. The Income Tax Bureau is hereby directed to accordingly modify the Notice of Deficiency issued on June 29, 1970 and that, except as so granted, the petition is in all other respects denied.

DATED: Albany, New York  
June 22, 1979

STATE TAX COMMISSION

  
PRESIDENT

  
COMMISSIONER

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COMMISSIONER