

STATE OF NEW YORK  
STATE TAX COMMISSION

In the Matter of the Petition :

of

Michael Colaprete :

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 Years 1969 through 1973. :

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 19th day of September, 1980, he served the within notice of Decision by certified mail upon Michael Colaprete, the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:


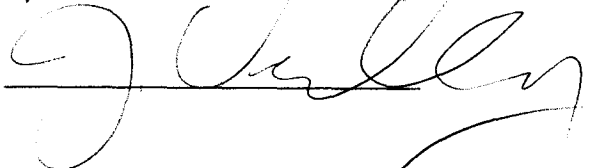
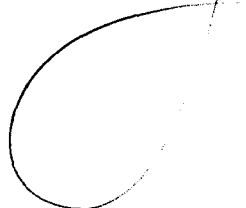
Michael Colaprete  
123 Babylon Tpk.  
Merrick, NY

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

19th day of September, 1980.

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

September 19, 1980

Michael Colaprete  
123 Babylon Tpk.  
Merrick, NY

Dear Mr. Colaprete:

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:

NYS Dept. Taxation and Finance  
Deputy Commissioner and Counsel  
Albany, New York 12227  
Phone # (518) 457-6240

Very truly yours,

STATE TAX COMMISSION

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	:	
	:	
MICHAEL COLAPRETE	:	DECISION
	:	
for Redetermination of a Deficiency or	:	
for Refund of Personal Income Tax under	:	
Article 22 of the Tax Law for the Years	:	
1969 through 1973.	:	

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Petitioner, Michael Colaprete, 123 Babylon Turnpike, Merrick, 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 1969 through 1973 (File No. 11289).

A formal hearing was held before James T. Prendergast, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York on June 21, 1979 at 3:20 P.M. Petitioner appeared pro se. The Audit Division appeared by Peter Crotty, Esq. (Paul A. Lefebvre, Esq., of counsel).

ISSUE

Whether petitioner was a person responsible for remitting withholding taxes.

FINDINGS OF FACT

1. S & R Electronics and Barstan Elec. Corp. was assessed for New York State personal income tax withheld and not remitted for the following periods and amounts:

10/1 - 12/31/69	\$ 737.00
7/1 - 9/30/70	1,330.20
10/1 - 12/31/70	1,351.00
10/1 - 12/31/71	1,207.00
1/1 - 9/22/72	1,820.10
9/23 - 12/31/72	681.00
1/1 - 5/8/73	<u>889.20</u>

Total	\$8,015.50
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2. On March 25, 1974, a Statement of Deficiency and a Notice of Deficiency were issued against petitioner, Michael Colaprete, for the years 1969 through 1973 for withholding taxes due from S & R Electronics and Barstan Elec. Corp. in the amount of \$8,015.50.

3. Petitioner subsequently filed a timely petition for redetermination of the deficiency.

4. The \$8,015.50 in withholding taxes assessed against S & R Electronics and Barstan Elec. Corp. is still due and owing.

5. During the years in question, petitioner was neither an officer nor a director of either S & R Electronics or Barstan Elec. Corp. He had no financial responsibilities in either company during the period in question. He could not sign checks. He took no part in deciding which bills were to be paid except for small cash remittances.

#### CONCLUSIONS OF LAW

A. This is a proceeding involving a penalty imposed under section 685(g) of the Tax Law. The section provides that any person required to collect, truthfully account for and pay over withholding taxes, who wilfully fails to do so, may be penalized an amount equivalent to the taxes due.

B. That section 685(n) of the Tax Law provides that "person", for purposes of section 685(g), includes any officer or employee of a corporation who "...is under a duty to perform the act in respect of which the violation occurs."

C. These subsections are modeled on sections 6671 and 6672 of the Internal Revenue Code. See Levin v. Gallman, 42 N.Y.2d 32 (1977), 396 N.Y.S.2d 623.

D. Federal courts have interpreted similar language in section 6671 of the Internal Revenue Code to mean a person who at least shared some of the responsibility for the financial decisions of the company. Such a person

decide about creditors, who got paid first, for example. Often his duties would include the power to sign checks, especially in small corporations. (See the note, "Withholding Taxes - Penalties", 22 A.L.R.3d 8, especially at p. 66 ff. and the cases cited therein.)

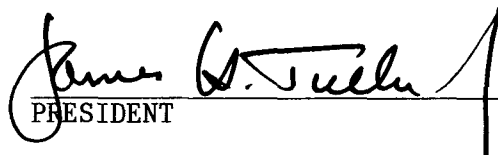
E. The petitioner had no share in these decisions and is not liable to a penalty under section 685(g) of the Tax Law.

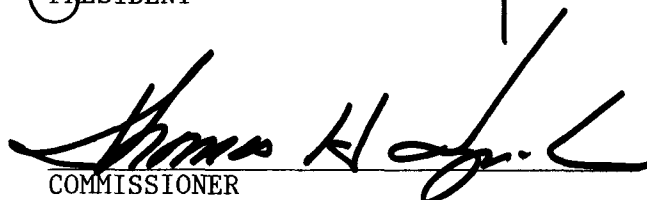
F. The petition of Michael Colaprete is granted and the Notice of Deficiency issued March 25, 1974, is cancelled.


DATED: Albany, New York

STATE TAX COMMISSION

SEP 19 1980

  
PRESIDENT

  
COMMISSIONER

  
COMMISSIONER