

STATE OF NEW YORK
STATE TAX COMMISSION

In the Matter of the Petition
of

Michael A. Niro

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 1972 - 1974. :

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 23rd day of May, 1980, he served the within notice of Decision by certified mail upon Michael A. Niro, the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Michael A. Niro
951 Niagara St.
Buffalo, NY 14213

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
23rd day of May, 1980.

Joanne Knapp

J. Vredenburg

STATE OF NEW YORK
STATE TAX COMMISSION

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of a Determination or a Refund of
Personal Income Tax :
under Article 22 of the Tax Law
for the Years 1972 - 1974. :

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 23rd day of May, 1980, he served the within notice of Decision by certified mail upon Joseph B. Mintz the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Mr. Joseph B. Mintz
605 Brisbane Bldg.
Buffalo, NY 14203

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
23rd day of May, 1980.

Joanne Krapp

J. Vredenburg

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

May 23, 1980

Michael A. Niro
951 Niagara St.
Buffalo, NY 14213

Dear Mr. Niro:

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
Joseph B. Mintz
605 Brisbane Bldg.
Buffalo, NY 14203
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition	:	
	:	
of	:	
	:	
MICHAEL A. NIRO	:	DECISION
	:	
for Redetermination of a Deficiency or	:	
for Refund of Personal Income Tax under	:	
Article 22 of the Tax Law for the Years	:	
1972, 1973 and 1974.	:	

Petitioner, Michael A. Niro, 951 Niagara Street, Buffalo, New York 14213, 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 1972, 1973 and 1974 (File No. 10202).

A formal hearing was held before Alan R. Golkin, Hearing Officer, at the offices of the State Tax Commission, State Office Building, 65 Court Street, Buffalo, New York, on May 17, 1978 at 9:00 A.M. and was continued on June 5, 1978 at 1:00 P.M. Petitioner appeared by Joseph B. Mintz, Esq. The Income Tax Bureau appeared by Peter Crotty, Esq. (Alexander Weiss, Esq., of counsel).

ISSUE

Whether petitioner was a responsible person required to collect, truthfully account for and pay over withholding taxes of Pyramid Erection Corp. for 1972, 1973 and 1974.

FINDINGS OF FACT

1. On September 29, 1975, the Income Tax Bureau issued a Statement of Deficiency and Notice of Deficiency for \$37,984.82 against petitioner, Michael A. Niro, imposing penalties (under subsection (g) of section 685 of the Tax Law) for his failure to collect, truthfully account for and pay over income taxes withheld from wages paid to the employees of Pyramid Erection Corp. ("Pyramid") for the period October 1, 1972 through October 25, 1974. Said

deficiency was made based on petitioner's alleged position as a responsible officer of said corporation.

2. Petitioner timely filed a petition for redetermination of the deficiency with the Income Tax Bureau.

3. During 1972, 1973 and 1974, Pyramid was operated by one Patrick J. Galla, free of any control or management by petitioner, in that said corporation ran its day-to-day affairs and all other functions without consulting him.

4. Pyramid dealt primarily in supplying skilled laborers to job-sites for the erection of pre-cast concrete.

5. During the entire period involved herein, petitioner suffered from ill health. He originally became involved in Pyramid in the hope of generating a source of substantial income which did not demand his time or labor.

6. There are two periods to examine, namely, the period 1972 through October, 1973 and the period from October, 1973 to April, 1974.

7. During the period 1972 through October, 1973, petitioner was not authorized to sign payroll checks and, in fact, never did so. Although he was one of the two required signatories on the general business account, petitioner generally signed many blank checks for future use by Mr. Galla or signed dozens of checks at one sitting, when so presented by Mr. Galla. At all times herein mentioned, all checks, checkbooks and business books and records were in the sole and exclusive possession of Mr. Galla and were never made available to petitioner. Petitioner did nothing more than make referrals for said corporation, based on his personal contacts developed over many years in the construction industry.

8. Petitioner relied on the accountant, a long-time personal advisor, for information about and proper operation of said corporation; however, Mr. Galla replaced said accountant when he so chose.

9. Mr. Galla changed all bank accounts and even moved the offices of the corporation unilaterally without even consulting petitioner, even though the office vacated by said corporation was rented from the father of petitioner herein, who was powerless to prevent such a relocation.

10. During the period October, 1973 through April, 1974, said corporation operated out of a location some 20 or 30 miles from petitioner's home and office, with bank accounts about which petitioner lacked knowledge regarding even the names of the banks or account numbers.

11. Petitioner never met with Mr. Galla after the move, nor could he reach the latter by phone during this period. Petitioner was physically present at the new corporate offices on only one occasion for the purposes of vacating the premises and gathering up any remnants of the books and records abandoned by Mr. Galla.

12. On repeated instances, petitioner made follow-up loans to said corporation for the stated purpose of easing cash-flow problems, relying on assurances from Mr. Galla that payroll and tax obligations would be met and satisfied with the proceeds of said loans.

CONCLUSIONS OF LAW

A. That subsection (g) of section 685 of the Tax Law provides, in part, as follows:

"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."

Subsection (n) of section 685 of the Tax Law provides that for the purposes of subsection (g) "...the term person includes an individual, corporation or partnership or an officer or employee of any corporation...who as such

officer, employee...is under a duty to perform the act in respect of which the violation occurs".

B. That petitioner was not a person required to collect, truthfully account for and pay over the withholding taxes of Pyramid Erection Corp. from and after October, 1973. He had no contact with Mr. Galla, much less control over said corporation, never visited the office location and was not a signatory on the corporate bank accounts.

C. That petitioner was not a person required to collect, truthfully account for and pay over the withholding taxes of Pyramid Erection Corp. for the period leading up to October, 1973, since he only made referrals and/or leads for the corporation, had no control over the business operations, could not and did not sign any payroll checks, only signed checks when presented by Mr. Galla requiring counter-signatures, and stood helpless when bank accounts and the office itself were changed unilaterally by Mr. Galla.

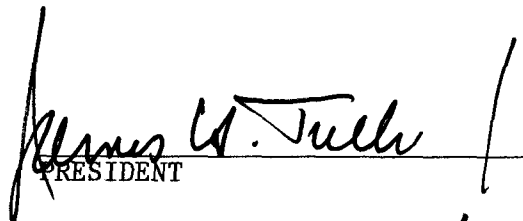
D. That petitioner is not liable to penalties under subsection (g) of section 685 of the Tax Law.

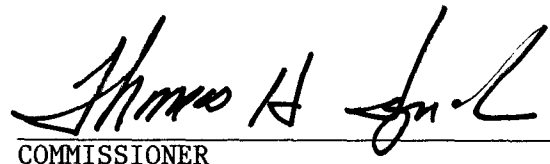
E. That the petition of Michael A. Niro is granted and the Notice of Deficiency issued against petitioner on September 29, 1975 is cancelled.

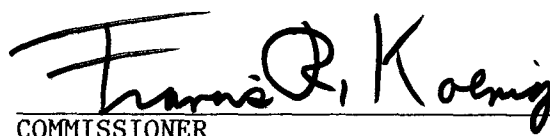
DATED: Albany, New York

MAY 23 1980

STATE TAX COMMISSION


PRESIDENT


COMMISSIONER


COMMISSIONER

STATE OF NEW YORK

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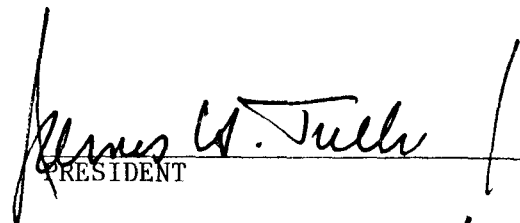
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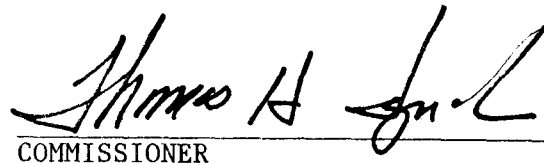
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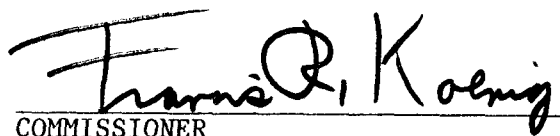
DATED: Albany, New York

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STATE TAX COMMISSION


PRESIDENT


COMMISSIONER


COMMISSIONER