

STATE OF NEW YORK
STATE TAX COMMISSION

In the Matter of the Petition :

of

Dolores Sullivan :

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 1975,1976. :

State of New York

County of Albany

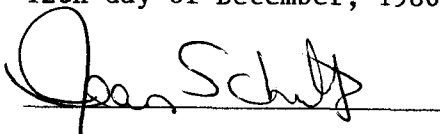
Jay Vredenburg, being duly sworn, deposes and says that he is an employee of the Department of Taxation and Finance, over 18 years of age, and that on the 12th day of December, 1980, he served the within notice of Decision by certified mail upon Dolores Sullivan, the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

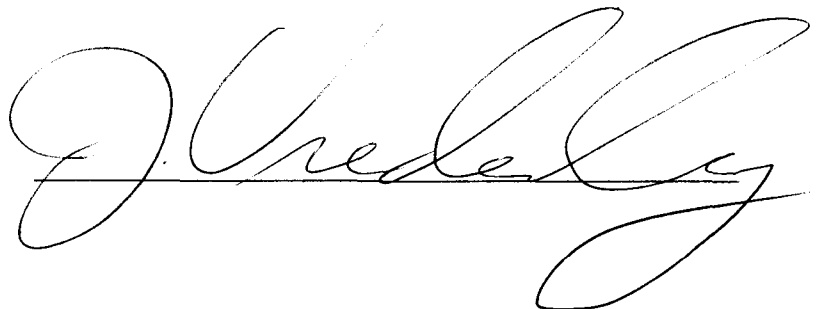
Dolores Sullivan
c/o Dee Jays
4014 Lake Ave.
Lockport, NY 14094

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
12th day of December, 1980.


John Schult


Jay Vredenburg

STATE OF NEW YORK
STATE TAX COMMISSION

In the Matter of the Petition
of

Dolores Sullivan

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 1975,1976. :

State of New York
County of Albany

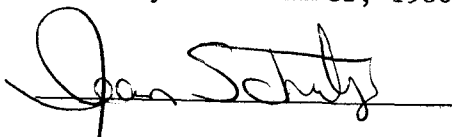
Jay Vredenburg, being duly sworn, deposes and says that he is an employee of the Department of Taxation and Finance, over 18 years of age, and that on the 12th day of December, 1980, he served the within notice of Decision by certified mail upon Peter P. Corrallo the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

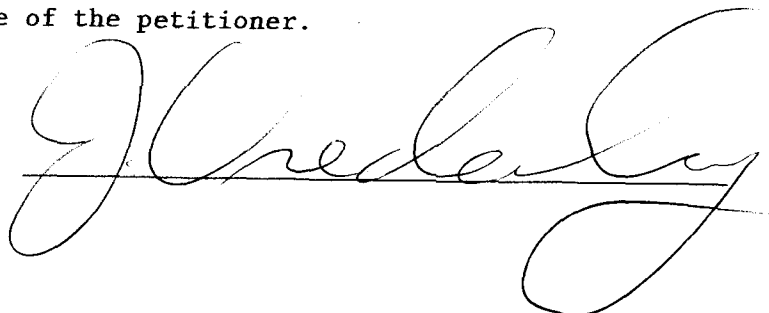
Mr. Peter P. Corrallo
150 Washburn St.
Lockport, NY 14094

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
12th day of December, 1980.





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

December 12, 1980

Dolores Sullivan
c/o Dee Jays
4014 Lake Ave.
Lockport, NY 14094

Dear Ms. Sullivan:

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
Peter P. Corrallo
150 Washburn St.
Lockport, NY 14094
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition	:	
	:	
of	:	
	:	
DOLORES SULLIVAN	:	DECISION
	:	
for Redetermination of a Deficiency or	:	
for Refund of Personal Income Tax under	:	
Article 22 of the Tax Law for the Years	:	
1975 and 1976.	:	

Petitioner, Dolores Sullivan, c/o Dee Jays, 4014 Lake Avenue, Lockport, New York 14094, 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 1975 and 1976 (File No. 23943).

A small claims hearing was held before Carl P. Wright, Hearing Officer, at the offices of the State Tax Commission, Genesee Building, One West Genesee Street, Buffalo, New York, on July 11, 1980 at 9:15 A.M. Petitioner, Dolores Sullivan, appeared with Peter P. Corrallo, Esq. The Audit Division appeared by Ralph J. Vecchio, Esq. (Patricia L. Brumbaugh, Esq., of counsel).

ISSUE

Whether petitioner was subject to a penalty under section 685(g) of the Tax Law, as a person who failed to collect, truthfully account for and pay over New York State withholding taxes due from Jescor, Inc., for the period July 1, 1975 to June 30, 1976.

FINDINGS OF FACT

1. Jescor, Inc. failed to remit personal income taxes withheld of \$472.94 for the period July 1, 1975 to June 30, 1976.

2. On July 31, 1978, the Audit Division issued a Notice of Deficiency in the sum of \$472.94, imposing a penalty in accordance with section 685(g) of the Tax Law against petitioner, Dolores Sullivan.

3. Petitioner was president and treasurer of Jescor, Inc. However, petitioner argued that she took no part in the operation and managerial functions of the corporation. She contended that the corporation was operated by her husband and during the period at issue, she was the sole proprietor of Dee Jays Tavern.

4. Petitioner contended that due to internal difficulties, Jescor, Inc. became insolvent. Petitioner made the numerous following contentions; Jescor, Inc. presently has no assets with which to pay its outstanding debts including the taxes referred to herein. Over the past few years, her husband, John E. Sullivan, has paid some of the debts of Jescor, Inc. out of his own income in order to be able to obtain materials and supplies necessary to conduct his business as a building contractor. There was no willful failure on the part of Jescor, Inc. to collect and pay the tax herein. These taxes were not paid because of the financial inability of the corporation to pay these taxes. Accordingly, petitioner does not consent to the assessment and the collection of these deficiencies pursuant to section 685(g) of the Tax Law. Petitioner cites as her authority the case of Levin v. Gallman, 49 A.D.2d 434, 375 N.Y.2d 185, which holds as follows:

"Legislature, in imposing penalty for failure to pay withholding taxes on the person obligated to collect and pay over such taxes where the failure to do so is "Willful", did not intend that the state be required to prove evil motive in order to establish willful conduct, but intended voluntary and intentional acts, with knowledge of the consequences, to suffice; but mere nonpayment, in and of itself, is not sufficient to establish a "willful" failure to pay over."

5. Petitioner, Dolores Sullivan, could not explain why the records of Jescor, Inc. showed that the corporation had paid out to Dee Jays Tavern the sum of \$2,892.11 during the period at issue.

CONCLUSIONS OF LAW

A. That petitioner, Dolores Sullivan, as president and treasurer of Jescor, Inc., was a person required to collect, truthfully account for and pay over New York State withholding taxes due from said corporation during 1975 and 1976.

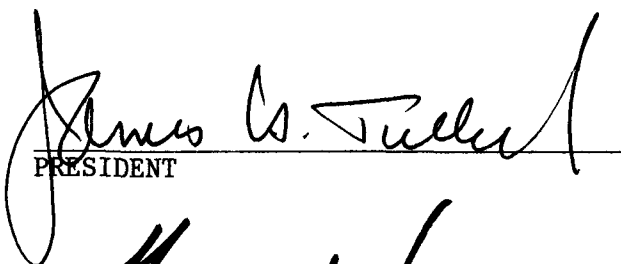
B. That petitioner, Dolores Sullivan, willfully failed or caused Jescor, Inc. to willfully fail to collect, truthfully account for and pay over New York State withholding taxes due from said corporation for the period July 1, 1975 to June 30, 1976. The penalty equal to the total of the unpaid withholding taxes was properly assessed against her in accordance with the meaning and intent of section 685(g) of the Tax Law.

C. That the petition of Dolores Sullivan is denied and the Notice of Deficiency issued July 31, 1978 is sustained.

DATED: Albany, New York

DEC 12 1980

STATE TAX COMMISSION


PRESIDENT


COMMISSIONER


COMMISSIONER