

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of :
Max M. Miller :
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 :
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 4th day of December, 1981, he served the within notice of Decision by certified mail upon Max M. Miller, the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

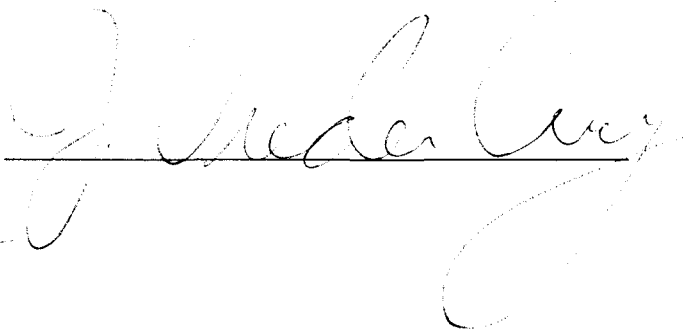
Max M. Miller
18 Strawberry Ln.
Roslyn Heights, NY 11577

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
4th day of December, 1981.


Annie R. Hayland


Jay Vredenburg

STATE OF NEW YORK
STATE TAX COMMISSION

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AFFIDAVIT OF MAILING

for Redetermination of a Deficiency or a Revision :
of a Determination or a Refund of Personal Income
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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 4th day of December, 1981, he served the within notice of Decision by certified mail upon Justin W. D'Atri the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

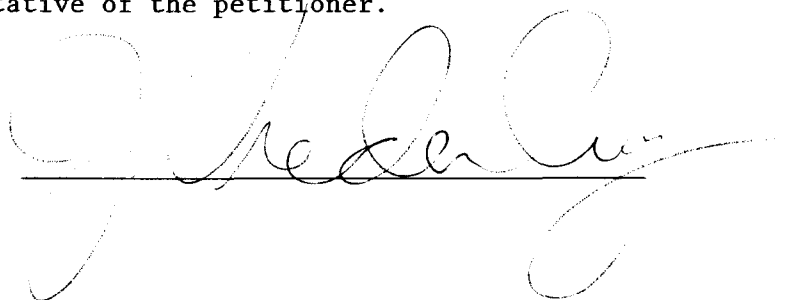
Justin W. D'Atri
Baskin & Sears
122 E. 42nd St.
New York, NY 10017

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
4th day of December, 1981.





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

December 4, 1981

Max M. Miller
18 Strawberry Ln.
Roslyn Heights, NY 11577

Dear Mr. Miller:

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
Justin W. D'Atri
Baskin & Sears
122 E. 42nd St.
New York, NY 10017
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition	:	
	:	
of	:	
	:	
MAX MILLER	:	DECISION
	:	
for Redetermination of a Deficiency or for	:	
Refund of Personal Income Tax under Article 22	:	
of the Tax Law for the Year 1974.	:	

Petitioner, Max Miller, 18 Strawberry Lane, Roslyn Heights, New York 11577, filed a petition for redetermination of a deficiency or for refund of personal income tax under Article 22 of the Tax Law for the year 1974 (File No. 26130).

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 October 10, 1980 and June 1, 1981. Petitioner Max Miller appeared with Justin N. D'Atri, Esq. The Audit Division appeared by Ralph J. Vecchio, Esq. (Irwin Levy, Esq., of counsel).

ISSUE

Whether personal income taxes withheld from the employees of House of Louis Feder, Inc. during the year 1974 were paid, and therefore, nullifying the basis for the imposition of a penalty against petitioner under section 685(g) of the Tax Law.

FINDINGS OF FACT

1. The House of Louis Feder, Inc. failed to timely remit to the Department of Taxation and Finance \$5,153.49 in personal income taxes withheld from its employees during the year 1974. On January 12, 1976 the Audit Division issued

a Notice and Demand For Unpaid Withholding Tax Due against the House of Louis Feder, Inc. assessing \$7,037.44 as follows:

Tax Withheld	\$5,153.49
Total Penalty	1,468.75
Interest	415.20
Amount Due	<u>\$7,037.44</u>

2. On January 29, 1979 the Audit Division issued a Notice of Deficiency for \$3,503.49 along with a Statement of Deficiency, on which a penalty under section 685(g) of the Tax Law was imposed against petitioner Max Miller, as a person who willfully failed to collect, truthfully account for and pay over personal income taxes withheld from the employees of the House of Louis Feder, Inc. during the year 1974.

3. On September 20, 1974, petitioner met with a representative from the Tax Compliance Bureau (formerly, the Warrant and Collection Section) and acknowledged that personal income taxes were withheld from the employees of the House of Louis Feder, Inc. for the years 1972, 1973 and 1974, but not totally remitted. Accordingly, an installment payment agreement was arranged where petitioner agreed to remit weekly corporate payments of \$300.00 until the entire amount due was satisfied. Subsequently, twenty-eight corporate checks for \$300.00 each, payable to the "N.Y.S. Income Tax Bureau" were remitted in accordance with the aforementioned agreement. The records of the Tax Compliance Bureau indicate that 13 checks were applied to withholding tax liabilities for the years 1972 and 1973, 11 checks were applied to a sales tax liability outstanding for the year 1974, and 4 checks could not be traced as to where they were applied to, although they were each stamped with a deposit number by the Department of Taxation and Finance.

4. Petitioner Max Miller objected to the fact that 11 checks, totalling \$3,300.00, were applied to a sales tax liability, since these checks were not

payable, or intended to be payable for sales tax. In addition, petitioner pointed out that he had entered into another installment agreement with the Tax Compliance Bureau to satisfy a sales tax liability owed by the House of Louis Feder, Inc. In support thereof, petitioner submitted six corporate checks for \$250.00 each, payable to the "N.Y. State Sales Tax Bureau". However, the records of the Tax Compliance Bureau indicate that the aforementioned six checks, totalling \$1,500.00 were applied to withholding tax assessments for various periods in 1972 and 1973, except for \$134.00, the application of which is unknown.

5. Petitioner submitted an additional 13 checks totalling \$1,928.00, of which \$1,800.00 was applied to withholding tax assessments for the year 1974. The balance of \$128.00 was applied to a withholding tax assessment for 1973.

6. An analysis conducted by the Tax Compliance Bureau based on its application of payments indicates that withholding tax assessments for the year 1972 and 1973 have been satisfied, and that withholding taxes due for the year 1974 of \$5,153.49 have been reduced by payments of \$2,550.00, which left a balance due of \$2,603.49. However, the analysis is conceded by the Tax Compliance Bureau to be incomplete, and stated that;

"There are many additional assessments issued for sales and withholding taxes. This schedule shows application only checks submitted into evidence. This schedule fails to show additional assessments issued nor additional monies paid."

In addition, payments without application, in the sum of \$1,200.00 (Finding of Fact "3") and \$134.00 (Finding of Fact "4") were not included or applied to the contended balance due of \$2,603.49 for the year 1974.

7. Petitioner contended that if the \$3,300.00 erroneously applied to sales tax assessments (Finding of Fact "3") were properly applied to the corporate withholding tax assessment for the year 1974, as intended, no withholding

tax would be due and no penalty under section 685(g) of the Tax Law could be imposed.

CONCLUSIONS OF LAW

A. That the application of payments in the sum of \$3,300.00 to sales tax assessments, which were specifically and expressly remitted for the payment of income tax withholding assessments is arbitrary, capricious and contrary to established procedural policy followed by the Department of Taxation and Finance. Payments clearly and specifically remitted for a particular assessment (or group of assessments) cannot be diverted and applied to other outstanding assessments until the specific assessments the payments were intended for were satisfied in full.

B. That petitioner Max Miller has sustained the burden of proof as required by section 689(e) of the Tax Law in establishing that a sufficient sum of payments were remitted to equal and/or exceed the \$5,153.49 in personal income taxes withheld from the employees of the House of Louis Feder, Inc. during the year 1974.

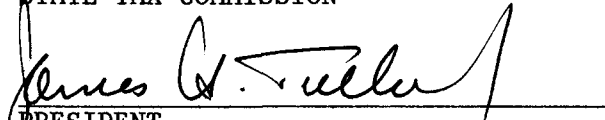
C. That petitioner Max Miller is not subject to a penalty within the meaning and intent of section 685(g) of the Tax Law.

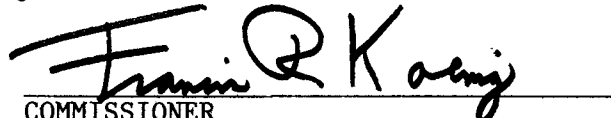
D. That the petition of Max Miller is granted and the Notice of Deficiency issued January 29, 1979 is cancelled.

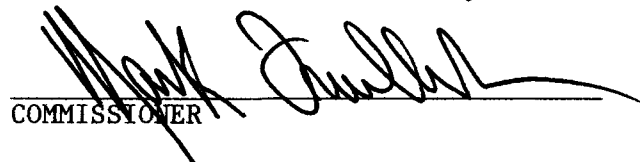
DATED: Albany, New York

DEC 04 1981

STATE TAX COMMISSION


PRESIDENT


COMMISSIONER


COMMISSIONER

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

December 4, 1981

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STATE TAX COMMISSION

cc: Petitioner's Representative
Justin W. D'Atri
Baskin & Sears
122 E. 42nd St.
New York, NY 10017
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

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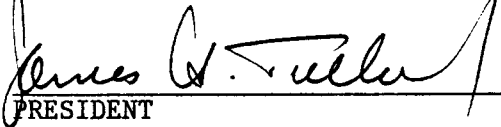
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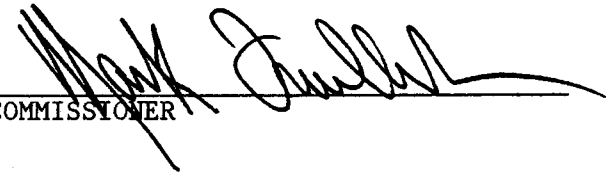
DATED: Albany, New York

DEC 04 1981

STATE TAX COMMISSION


PRESIDENT


COMMISSIONER


COMMISSIONER

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STATE OF NEW YORK

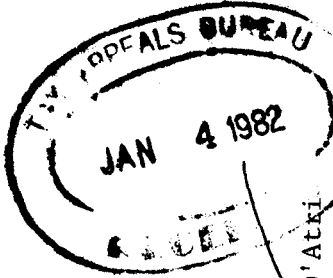
State Tax Commission

TAX APPEALS BUREAU

STATE CAMPUS

ALBANY, N. Y. 12227

REP



Justin W. D'Atki
Baskin & Sears
122 E. 42nd St.
New York, NY 10017

RECEIVED
WRITER
NEW YORK, N.Y. 10017
220 642

