

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of :
Edward Spano, Jr. :
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 :
1973-1975.

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 11th day of December, 1981, he served the within notice of Decision by certified mail upon Edward Spano, Jr., the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Edward Spano, Jr.
5730 N. Federal Hwy.
Ft. Lauderdale, FL

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
11th day of December, 1981.

Bernie A. Hagedorn

Jay Vredenburg

STATE OF NEW YORK
STATE TAX COMMISSION

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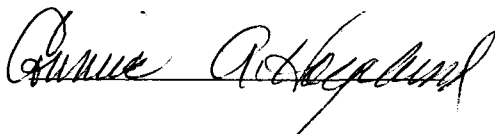
Jay Vredenburg, being duly sworn, deposes and says that he is an employee of the Department of Taxation and Finance, over 18 years of age, and that on the 11th day of December, 1981, he served the within notice of Decision by certified mail upon Allen Michelson the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

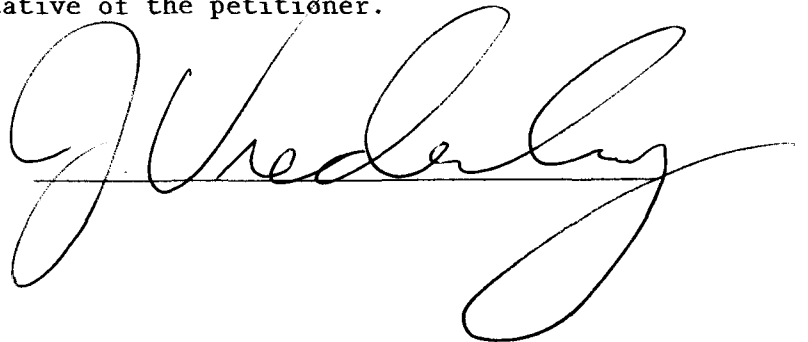
Allen Michelson
210 Old Country Rd.
Mineola, NY 11501

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
11th day of December, 1981.





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

December 11, 1981

Edward Spano, Jr.
5730 N. Federal Hwy.
Ft. Lauderdale, FL

Dear Mr. Spano:

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
Allen Michelson
210 Old Country Rd.
Mineola, NY 11501
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition
of
EDWARD SPANO, JR.
for Redetermination of a Deficiency or
for Refund of Personal Income Tax under
Article 22 of the Tax Law for the Years
1973 through 1975.

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DECISION
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Petitioner, Edward Spano, Jr., 5730 North Federal Highway, Fort Lauderdale, Florida, 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 1973 through 1975 (File No. 19006).

A formal hearing was held before Doris Steinhardt, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on December 9, 1980 at 9:15 A.M. Petitioner appeared by Allen Michelson, Esq. The Audit Division appeared by Ralph J. Vecchio, Esq. (Frank Levitt, Esq., of counsel).

ISSUE

Whether petitioner was a person required to collect, truthfully account for and pay over New York State withholding taxes of Retail Marine Corporation during the periods at issue, who willfully failed to do so, thereby becoming liable for the penalty imposed under section 685(g) of the Tax Law.

FINDINGS OF FACT

1. On February 28, 1977, the Audit Division issued to petitioner, Edward Spano, Jr., a Statement of Deficiency and a Notice of Deficiency asserting penalties equal to the amount of New York State withholding taxes of Retail

Marine Corporation ("Retail New York") which were due and unpaid for the periods at issue, as follows:

<u>WITHHOLDING TAX PERIOD</u>	<u>AMOUNT</u>
12/16/73 - 12/31/73	\$ 5,265.11
10/1/74 - 12/31/74	1,855.82
1/1/75 - 3/31/75	1,371.85
4/1/75 - 6/30/75	2,493.80
TOTAL	<u>\$10,986.58</u>

At the formal hearing, petitioner conceded his liability for the last three periods, in the total amount \$5,721.47.

2. Winner Boats, Inc. ("Winner") was a Tennessee corporation, which was engaged in the manufacture of boats and in the late 1960's, elected to form marine dealerships in various states, including New York, under the name Retail Marine Corporation (hereinafter referred to as "Retail Tennessee"), an entity distinct from that involved in this proceeding.

3. Petitioner held the title Chairman of the Board of Retail Tennessee and owned a minority interest in Winner. He supervised Retail Tennessee's sales directors. His sole decision-making capacity was as to the purchase of inventory; he had no control over the finances of the dealerships nor any signatory authority on Retail Tennessee accounts.

4. At the end of the fiscal year for the boat model year 1973, petitioner purchased the Retail Tennessee dealership in Lindenhurst, New York and incorporated it under the name "Retail Marine Corporation" (the entity herein involved). He held the title Chairman of the Board and assumed all functions of that office. Retail New York employed eight to ten persons at the Lindenhurst facility.

5. Retail Marine Corporation, Box 449, Dickson, Tennessee 37055, filed a Reconciliation of Personal Income Tax Withheld (Form IT-2103), which indicated

that the total tax withheld for 1973 was \$19,256.06 and further that it was filed together with 174 individual wage and tax statements. The total amounts paid or assessed for 1973 amounted to \$13,990.95. On November 1, 1974, the Audit Division issued to Retail Marine Corporation at the Tennessee address a Notice and Demand for Unpaid Withholding Tax Due, asserting a balance of tax due in the sum \$5,265.11, based upon the aforementioned Reconciliation.

CONCLUSIONS OF LAW

A. That subdivision g of section 685 of the Tax Law states that any person required to collect, truthfully account for and pay over taxes imposed under Article 22, who willfully fails to do so, is liable for a penalty equal in amount to the taxes not collected or paid over.

B. That subdivision n of section 685 defines "person", for purposes of the aforementioned subdivision, to include "an officer or employee of any corporation...who...is under a duty to perform the act in respect of which the violation occurs."

C. That the question of whether petitioner is a "person" required to collect and pay over withholding taxes is a factual one. Factors relevant to the determination are whether petitioner owned stock, signed tax returns or exercised authority over the employees and assets of the corporation. Malkin v. Tully, 65 A.D.2d 228; MacLean v. State Tax Comm., 69 A.D.2d 951; McHugh v. State Tax Comm., 70 A.D.2d 987.

D. That it was the Tennessee entity, Retail Marine Corporation, which failed to remit to the State Tax Commission taxes withheld from the wages of employees for the first withholding tax period at issue.

E. That petitioner Edward Spano, Jr. was not a "person" within the intendment of subdivision n of section 685, under a duty to collect and remit

taxes on behalf of Retail Marine Corporation of Tennessee, for the period December 16 through December 31, 1973. Petitioner owned no stock in said corporation, had no signatory authority on the corporate account and had no direction over the corporation's financial affairs.

F. That the petition of Edward Spano, Jr. is granted to the extent indicated in Conclusion of Law "E"; that the Notice of Deficiency issued February 28, 1977 is to be modified accordingly; and that except as so modified, the deficiency is in all other respects sustained.

DATED: Albany, New York

DEC 11 1981

STATE TAX COMMISSION


PRESIDENT


COMMISSIONER


COMMISSIONER