

STATE OF NEW YORK

STATE TAX COMMISSION

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In the Matter of the Petition :  
of :  
Myron Exelbert : 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 :  
1967 & 1968. :  
\_\_\_\_\_:

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 October, 1982, he served the within notice of Decision by certified mail upon Myron Exelbert, the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

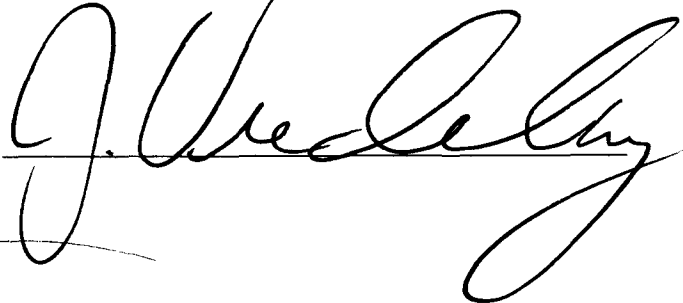
Myron Exelbert  
165 West 66th St.  
New York, NY 10023

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 October, 1982.





AUTHORIZED TO ADMINISTER  
OATHS PURSUANT TO TAX LAW  
SECTION 174

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition  
of  
Myron Exelbert

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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 :  
1967 & 1968.

:

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 October, 1982, he served the within notice of Decision by certified mail upon Alexander H. Rockmore the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

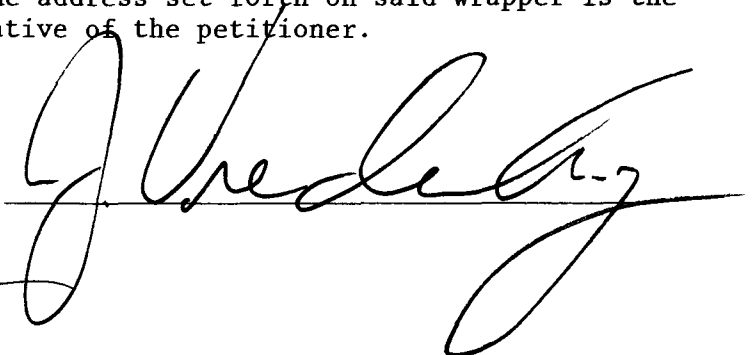
Alexander H. Rockmore  
#2 Tudor Pl.  
New York, NY 10017

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  
12th day of October, 1982.





AUTHORIZED TO ADMINISTER  
OATHS PURSUANT TO TAX LAW  
SECRETARY

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

October 12, 1982

Myron Exelbert  
165 West 66th St.  
New York, NY 10023

Dear Mr. Exelbert:

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  
Law Bureau - Litigation Unit  
Albany, New York 12227  
Phone # (518) 457-2070

Very truly yours,

STATE TAX COMMISSION

cc: Petitioner's Representative  
Alexander H. Rockmore  
#2 Tudor Pl.  
New York, NY 10017  
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

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In the Matter of the Petition  
of  
MYRON EXELBERT  
for Redetermination of a Deficiency or for  
Refund of Personal Income Tax under Article 22  
of the Tax Law for the Years 1967 and 1968.

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DECISION

Petitioner, Myron Exelbert, 165 West 66th Street, New York, New York 10023, 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 1967 and 1968 (File No. 20092).

A small claims hearing was held before James Hoefer, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on April 28, 1981 at 9:15 A.M. and continued to a conclusion at the same location on November 20, 1981 at 9:15 A.M. Petitioner appeared pro se at the hearing held on April 28, 1981 and with Alexander H. Rockmore, Esq., at the hearing held on November 20, 1981. The Audit Division appeared by Ralph J. Vecchio, Esq. (William Fox, Esq., of counsel).

ISSUES

I. Whether petitioner, Myron Exelbert, is liable for a penalty equal in amount to the unpaid New York State withholding taxes due from Newspix, Inc.

II. Whether the Audit Division has properly determined the amount of unpaid withholding taxes due and owing from Newspix, Inc. for the period January 1, 1968 to April 17, 1968.

III. Whether the lapse of thirteen years from the end of the period in question until the time an evidentiary hearing was held constitutes laches, thereby barring the Audit Division from further action on the Notice of Deficiency.

FINDINGS OF FACT

1. On January 27, 1969 the Audit Division issued a Notice of Deficiency to petitioner, Myron Exelbert, imposing a penalty, pursuant to section 685(g) of the Tax Law, in an amount equal to the alleged unpaid withholding taxes due from Newspix, Inc. (hereinafter "Newspix") for the period September 1, 1967 through April 17, 1968. Said notice was issued on the grounds that petitioner was a person required to collect, truthfully account for and pay over the New York State withholding taxes of Newspix and that he willfully failed to do so. The total penalty assessed in the Notice of Deficiency came to \$2,715.57, said amount broken down in the following manner:

<u>PERIOD</u>	<u>AMOUNT</u>
9/1/67 - 12/31/67	\$1,475.57
1/1/68 - 3/4/68	740.00
3/4/68 - 4/17/68	500.00
TOTAL	<u>\$2,715.57</u>

The amounts assessed for the periods January 1, 1968 to March 4, 1968 and March 4, 1968 to April 17, 1968 were estimated by the Audit Division.

2. Petitioner first became associated with Newspix via an agreement dated October 11, 1967. Pursuant to said agreement, petitioner obtained control of 50 percent of the voting shares of Newspix and was also elected Vice-President. The agreement further provided that petitioner was to be elected President of Newspix within nine months of the date of the agreement.

3. Concurrent with his association with Newspix, petitioner and a partner loaned to the corporation the sum of \$17,500.00. From October 11, 1967 to approximately the end of November, 1967, petitioner's primary duty to Newspix

was to raise new sources of capital. During this period, petitioner attended meetings with the other principals of Newspix and was fully aware of the corporation's financial position.

4. Approximately December 1, 1967, the financial institution with which Newspix did business refused to make further loans to the corporation unless said loans were personally guaranteed by petitioner. Petitioner agreed to guarantee the loans, however, with said agreement, he took a more active role in Newspix's day-to-day operations. Petitioner also obtained authority to sign checks and, in fact, did sign corporate checks after December 1, 1967.

5. Effective January 1, 1968, Newspix closed its doors and ceased to function as an operating business. The lease on the office from which Newspix conducted its business expired at the end of 1967 and was not renewed. Newspix had no employees after December 31, 1967 and there was no New York State tax withheld from employees' wages after this date.

#### CONCLUSIONS OF LAW

A. That petitioner, Myron Exelbert, was a person required to collect, truthfully account for and pay over the New York State withholding taxes due from Newspix for the period October 11, 1967 to April 17, 1968, within the meaning and intent of subsection (n) of section 685 of the Tax Law. That petitioner was not a responsible person prior to October 11, 1967.

B. That for the period October 11, 1967 to December 31, 1967, petitioner is liable for a penalty under section 685(g) of the Tax Law in the amount of \$991.78, said amount computed as follows:

$$\frac{82 \text{ (days from 10/11/67 to 12/31/67)}}{122 \text{ (days from 9/1/67 to 12/31/67)}} \times \$1,475.57$$

C. That for the period January 1, 1968 to April 17, 1968, Newspix did not have any employees and, therefore, did not withhold any New York State income

taxes. Accordingly, the amounts estimated by the Audit Division as being due from Newspix for the periods January 1, 1968 to March 4, 1968 of \$740.00 and for March 4, 1968 to April 17, 1968 of \$500.00 are erroneous. That the penalty asserted against petitioner in the amount of \$1,240.00 for the period January 1, 1968 to April 17, 1968 is cancelled.

D. That the argument to dismiss on the ground of laches is denied. "Laches, waiver or estoppel may not be imputed to the State in the absence of statutory authority" and that "This rule is generally applied in connection with tax matters" (Matter of Jamestown Lodge 1681 Loyal Order of Moose, Inc., (Catherwood) 31 A.D.2d 981). Also see (G. H. Walker & Co., et al., v. State Tax Commission, 62 A.D.2d 77).

Said argument is also denied for the further reason that the record does not establish that petitioner has been damaged or prejudiced by delay.

E. That the petition of Myron Exelbert is granted to the extent that the penalty asserted due in the Notice of Deficiency dated January 27, 1969 is reduced from \$2,715.57 to \$991.78 in accordance with Conclusions of Law "B" and "C", supra; and that, except as so granted, the petition is in all other respects denied.

DATED: Albany, New York

OCT 12 1982

STATE TAX COMMISSION

ACTING

PRESIDENT

COMMISSIONER

COMMISSIONER