

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition	:	
of	:	
Jerome Guttenberg	:	
for Redetermination of a Deficiency or a Revision	:	AFFIDAVIT OF MAILING
of a Determination or a Refund of Personal Income	:	
Tax under Article 22 of the Tax Law for the Years	:	
1972 & 1973.	:	

State of New York
County of Albany

David Parchuck, 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 17th day of June, 1983, he served the within notice of Decision by certified mail upon Jerome Guttenberg, the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:


Jerome Guttenberg
2 Fifth Ave.
New York, NY 10011

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
17th day of June, 1983.

David Parchuck
Kathy Pfaffenbach


AUTHORISED TO ADMINISTER
OATHS PURSUANT TO TAX LAW
SECTION 174

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of :
Jerome Guttenberg :
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 & 1973. :

State of New York
County of Albany

David Parchuck, 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 17th day of June, 1983, he served the within notice of Decision by certified mail upon Theodore Mate the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Theodore Mate
570 Seventh Ave.
New York, NY 10018

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
17th day of June, 1983.

David Parchuck
Kathy Pfaffenbach

Ann O'Hegher
AUTHENTICATED BY MINISTER
CAPTIONED TO TAX LAW
SECTION 174

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

June 17, 1983

Jerome Guttenberg
2 Fifth Ave.
New York, NY 10011

Dear Mr. Guttenberg:

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 Law 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
Building #9 State Campus
Albany, New York 12227
Phone # (518) 457-2070

Very truly yours,

STATE TAX COMMISSION

cc: Petitioner's Representative
Theodore Mate
570 Seventh Ave.
New York, NY 10018
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition	:	
of	:	
JEROME GUTTENBERG	:	DECISION
for Redetermination of a Deficiency or for	:	
Refund of Personal Income Tax under Article 22	:	
of the Tax Law for the Years 1972 and 1973.	:	

Petitioner, Jerome Guttenberg, 2 Fifth Avenue, New York, New York 10011, 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 and 1973 (File No. 32443).

A formal hearing was held before Dennis M. Galliher, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York on February 8, 1983 at 1:15 P.M., with all briefs to be submitted by April 5, 1983. Petitioner appeared by Theodore Mate, C.P.A. The Audit Division appeared by Paul B. Coburn, Esq. (Anne W. Murphy, Esq., of counsel).

ISSUES

I. Whether the assertion of a penalty against petitioner pursuant to section 685(g) of the Tax Law is barred by operation of the statute of limitations.

II. Whether petitioner was a person required to collect, truthfully account for and pay over withholding tax with respect to Malcolm Starr, Inc., and willfully failed to do so, thus becoming liable for a penalty under section 685(g) of the Tax Law.

FINDINGS OF FACT

1. On February 25, 1980, the Audit Division issued to petitioner, Jerome Guttenberg, a Statement of Deficiency and a Notice of Deficiency asserting tax due as follows:

<u>PERIOD</u>	<u>AMOUNT</u>
2/1/72 - 9/30/72	\$ 2,921.24
1/1/73 - 4/18/73	21,391.84
Total	<u>\$24,313.08</u>

It was further indicated on the Statement of Deficiency that this asserted deficiency pertained to unpaid withholding taxes of Malcolm Starr, Inc.

2. Malcolm Starr, Inc. ("Starr") was, until its bankruptcy, engaged in the business of manufacturing women's evening wear, specifically medium to high priced dresses. During the period at issue, Starr was a publicly held corporation.

3. Petitioner commenced his employment with Starr, (then known as Frank Starr) in or about 1964 in the capacity of sales manager. Approximately two years thereafter, petitioner assumed the title of vice-president in charge of sales.

4. Petitioner's primary duty at Starr was to generate sales. He worked full-time for Starr and was responsible for overseeing Starr's four sales employees. These four employees reported to petitioner, and petitioner controlled the hiring and firing of Starr's four sales employees. Petitioner also entertained buyers of Starr's merchandise as part of his job.

5. Petitioner's title of vice-president in charge of sales was a title conferred upon him to lend more weight to his appearance of authority in dealing with stores and other buyers of Starr's merchandise. Petitioner was neither an officer nor a director of Starr, and that except for Mr. Malcolm Starr,

petitioner could not recall the persons who were the corporate officers and/or directors of Starr during the periods at issue.

6. Petitioner owned approximately \$10,000.00 worth of Starr's stock. Petitioner bought this stock as an investment, and did not receive this or any other stock from Starr as compensation for his employment.

7. Petitioner was not involved with the preparation of tax returns for Starr, had no check signing authority nor did he ever sign checks on behalf of Starr, and had no authority to order that any payments be made to any agency or creditor of Starr. Petitioner testified that he always received his paycheck and that, as far as he knew, all payrolls were met by Starr during the years petitioner worked for Starr. Finally, petitioner testified that he never was aware of the fact that withholding taxes or other bills were not being paid by Starr.

8. Petitioner left his employment with Starr in the latter part of 1972, at which time he went to work for Ann Fogarty, Inc., a company operating in the ladies' apparel industry but not interrelated with Starr in any way.

9. Petitioner resigned from Starr on November 17, 1972 and commenced employment, approximately one week thereafter, with Ann Fogarty, Inc., as vice-president of merchandising and sales.

10. Petitioner asserts that the Notice of Deficiency in this matter was issued approximately eight years after the periods at issue and thus the asserted deficiency is untimely as having been issued after expiration of the period of limitation on assessment. The Audit Division asserts, by contrast, that withholding tax returns were not filed by Starr during the periods of issue nor has the withholding tax due for these periods been paid. No evidence of either the filing of withholding tax returns or of payment of the tax was offered at the hearing.

CONCLUSIONS OF LAW

A. That with the exception of three specified instances not applicable in this case, the burden of proof in any case before the Tax Commission under Article 22 of the Tax Law is upon the petitioner [Tax Law section 689(e)]. Furthermore, pursuant to section 683(c)(1)(A) of the Tax Law, assessment may be made at any time if no return is filed. Petitioner has submitted no evidence that returns were filed during the periods at issue. Accordingly, the Notice of Deficiency was timely issued to petitioner and assessment is not barred by operation of the statute of limitations.

B. That where a person is required to collect, truthfully account for and pay over withholding taxes and willfully fails to collect and pay over such tax, section 685(g) of the Tax Law imposed on such person "...a penalty equal to the total amount of tax evaded, not collected, or not accounted for and paid over".

C. That section 685(n) of the Tax Law defines a person, for purposes of section 685(g) of the Tax Law, to include:

"...an individual, corporation, or partnership or an officer or employee of any corporation...who as such officer, employee or member is under a duty to perform the act in respect of which the violation occurs."

D. That the question of who is a "person" required to collect and pay over withholding taxes is to be determined on the basis of the facts presented. Some of the factors to be considered include whether petitioner owned stock, signed tax returns, or exercised authority over the employees and the assets of the corporation. McHugh v. State Tax Comm., 70 A.D.2d 987. (See also MacLean v. State Tax Comm., 69 A.D.2d 951, aff'd 49 N.Y.2d 920, and Malkin v. Tully 65 A.D.2d 228).

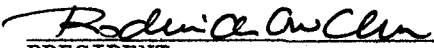
E. That petitioner was not employed by Malcolm Starr, Inc. after November of 1972, and thus would not in any event be responsible for withholding taxes asserted as unpaid during 1973. Furthermore, while petitioner was employed by Starr during the period from February 1, 1972 through September 30, 1972, in which withholding taxes were not paid (see Finding of Fact "1"), he was not a person required to collect, account for and pay over these taxes on behalf of Starr. Petitioner's prime function for Starr was to generate sales, with supervision of Starr's sales force included among his duties. His title of vice-president in charge of sales was given to convey a stronger appearance of authority in dealing with buyers. Petitioner did not prepare or sign any of Starr's tax returns, nor did he otherwise involve himself in this aspect of Starr's business. Finally, petitioner had no authority to sign checks on behalf of Starr or determine amounts to be paid or priority of payment among Starr's creditors.


F. That the petition of Jerome Guttenberg is granted in all respects and the Notice of Deficiency dated February 25, 1980 is cancelled.

DATED: Albany, New York

STATE TAX COMMISSION

JUN 17 1983


PRESIDENT


COMMISSIONER


COMMISSIONER