

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition	:	
of	:	
Donald M. Meyers	:	
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	:	
1975 & 1976.	:	

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 27th day of April, 1983, he served the within notice of Decision by certified mail upon Donald M. Meyers, the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Donald M. Meyers  
250 Gorge Rd. - 5D  
Cliffside Park, NJ 07010

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  
27th day of April, 1983.

David Parchuck

Marie C. Hagelund

AUTHORIZED TO ADMINISTER  
OATHS PURSUANT TO TAX LAW  
SECTION 174

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

April 27, 1983

Donald M. Meyers  
250 Gorge Rd. - 5D  
Cliffside Park, NJ 07010

Dear Mr. Meyers:

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

Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

---

In the Matter of the Petition	:	
of	:	
DONALD M. MEYERS	:	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, Donald M. Meyers, 250 Gorge Road, Apt. 5D, Cliffside Park, New Jersey 07010, 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. 28331).

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 October 27, 1982 at 10:45 A.M. Petitioner appeared pro se. The Audit Division appeared by Paul B. Coburn, Esq. (Thomas Sacca, Esq., of counsel).

ISSUE

Whether petitioner was a person who willfully failed to collect, truthfully account for and pay over the New York State withholding taxes due from Israeli Fashions of Tomorrow, Inc. and thus subject to a penalty equal in amount to said past due corporate withholding taxes.

FINDINGS OF FACT

1. On June 25, 1979, the Audit Division issued a Notice of Deficiency to petitioner imposing a penalty, pursuant to section 685(g) of the Tax Law, in an amount equal to the unpaid withholding tax due from Israeli Fashions of Tomorrow, Inc. (hereinafter "Israeli"), for the years 1975 and 1976. The Notice of Deficiency 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 Israeli and that he willfully failed to do so. The total penalty asserted due in the Notice of Deficiency was \$936.90, with \$455.90 being attributed to the period December 1, 1975 to December 31, 1975 and the balance, to wit \$481.00, being attributed to the entire 1976 calendar year.

2. During the periods in question petitioner was president and chief operating officer of Israeli. Petitioner also owned one-half of the issued and outstanding stock of Israeli.

3. Forms IT-2103, Reconciliation of Personal Income Tax Withheld, were filed by Israeli for the years 1975 and 1976 on January 30, 1976 and February 21, 1977, respectively. Both of the Forms IT-2103 were signed by petitioner as president. Petitioner also signed the New York State Corporation Franchise Tax Report filed by Israeli for the fiscal year ended June 30, 1975. Said return was signed by petitioner on December 11, 1975.

4. Prior to the periods in question, petitioner negotiated and consummated for Israeli an accounts receivable financing agreement with the National Bank of North America (hereinafter "National"). Israeli also had numerous corporate loans with National which had been personally guaranteed by petitioner.

5. In early December 1975, petitioner went abroad in an attempt to arrange a refinancing of Israeli's debts with foreign investors. While petitioner was abroad, National called in all of Israeli's notes and also stopped advancing Israeli funds pursuant to the accounts receivable financing agreement. Petitioner immediately returned to the United States, however, he was unable to refinance Israeli's debts and, accordingly, Israeli was unable to make payment to National on the loans which had been called in.

6. From December 1975 until sometime in February 1976, the date Israeli ceased operations, petitioner continued to run the business. During this period petitioner attempted to collect as much of the outstanding accounts receivable as possible, to sell and ship all goods being held in inventory and to locate a buyer for the corporation. Petitioner had complete control of the inventory, being able to sell it and ship it as he saw fit.

7. All payments received by Israeli from its customers were turned over to National pursuant to the accounts receivable financing agreement. When National stopped advancing funds to Israeli under the accounts receivable financing agreement, Israeli still continued to turn over all receipts in an effort to reduce its loan balance.

8. During the periods at issue National kept Israeli's corporate checking account at a zero or overdrawn balance. On a weekly basis petitioner would submit to National a list of persons or firms that were due payment. National would advise petitioner which creditors to pay. Upon notification from National as to which creditors to pay, Israeli would draft the checks and make payments to the approved creditors. Petitioner was under the impression that if he attempted to make payment to a creditor not authorized by National, that National would not have honored the check.

9. The payroll expense was included in the weekly list of creditors which petitioner furnished to National. The amount of payroll expense shown on the weekly list was the net payroll. Petitioner assumed that National was maintaining a reserve fund for taxes withheld and not yet remitted to New York State. For the periods in question petitioner did not draft any checks in payment of the New York State income tax withheld from Israeli's employees.

10. The Internal Revenue Service has questioned petitioner with respect to Federal withholding taxes due from Israeli, however, he has not been personally assessed for any Federal withholding taxes not paid by Israeli.

CONCLUSIONS OF LAW

A. That petitioner, Donald M. Meyers, was a person required to collect, truthfully account for and pay over taxes withheld from the wages of the employees of Israeli Fashions of Tomorrow, Inc. for the period December 1, 1975 to December 31, 1976, within the meaning and intent of subsections (g) and (n) of section 685 of the Tax Law.

Petitioner was a shareholder and officer of Israeli. He was an authorized signatory and signed checks on Israeli's checking account. Petitioner signed and filed the 1975 New York State corporation tax return and Forms IT-2103, Reconciliation of Personal Income Tax Withheld, for the years 1975 and 1976. Petitioner negotiated and executed with National the accounts receivable financing agreement whereby the latter financed Israeli's operations. Petitioner personally guaranteed Israeli's corporate loans.

B. That petitioner's failure to collect, truthfully account for and pay over the taxes was willful. Petitioner entered into, acceded to and continued the accounts receivable financing agreement with National under which other creditors were preferred to New York State. He was fully aware that the withholding tax liability was accruing. Petitioner was free to rescind the agreement with National if it involved him in a breach of the duties imposed upon him under sections 671 and 674 of the Tax Law. See Kalb v. United States, 505 F.2d 506 (2d Cir. 1974) and State Tax Commission decision in Matter of the Petitions of Morton Tillman and Sheldon M. Bernstein, signed April 9, 1982.

C. That the petition of Donald M. Meyers is denied and the Notice of Deficiency dated June 25, 1979 is sustained.

DATED: Albany, New York

APR 27 1983

STATE TAX COMMISSION

Rodriguez  
PRESIDENT

Frank R. Koenig  
COMMISSIONER

Mark J. Jindal  
COMMISSIONER