

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition	:	
of	:	
Joseph Speaker	:	
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 27th day of May, 1983, he served the within notice of Decision by certified mail upon Joseph Speaker, the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Joseph Speaker
200 E. 27th St., Apt. 3W
New York, NY 10016

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 May, 1983.

David Parchuck

Annunzio R. Haglund

AUTHORIZED TO ADMINISTER
OATHS PURSUANT TO TAX LAW
SECTION 174

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

May 27, 1983

Joseph Speaker
200 E. 27th St., Apt. 3W
New York, NY 10016

Dear Mr. Speaker:

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

Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition	:	
	:	
of	:	
	:	
JOSEPH SPEAKER	:	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, Joseph Speaker, 200 East 27th Street, Apartment 3W, New York, New York, 10016, 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. 32442).

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 December 1, 1982 at 1:15 P.M., with all briefs to be submitted by January 7, 1983. Petitioner appeared pro se. The Audit Division appeared by Paul B. Coburn, Esq. (Anne W. Murphy, Esq., of counsel).

ISSUE

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, Joseph Speaker, a Statement of Deficiency and a Notice of Deficiency asserting tax due as follows:

<u>YEAR</u>	<u>AMOUNT</u>
<u>1972</u>	\$ 2,921.24
<u>1973</u>	<u>21,391.84</u>
<u>Total</u>	<u>\$24,313.08</u>

These amounts pertained to unpaid withholding tax due from Malcolm Starr, Inc., for the periods February 1, 1972 through September 30, 1972, and January 1, 1973 through April 18, 1973, respectively.

2. Malcolm Starr, Inc. ("Starr"), was, until its bankruptcy, engaged in the business of manufacturing ladies' apparel, including gala dresses, late-day and cocktail dresses and evening dresses. Starr was a publicly held corporation and had offices in New York, a warehouse in New Jersey, and factories in both the United States and Hong Kong. Petitioner testified that approximately sixty to sixty-five percent of Starr's incoming material came from Hong Kong.

3. Petitioner first became associated with Starr in or about 1969, after having sold to Starr his own company, Jobere, Inc. ("Jobere"), which had been engaged in the same business as Starr's although on a much smaller scale.

4. Petitioner has extensive background in the fashion industry, having first commenced work in the industry in 1933 for Maurice Rentner's company (which company was a dominant force in the industry and has since become known as Bill Blass). Petitioner gained his "hands on" experience through working directly in Rentner's factories, shipping departments, designing rooms, etc., and through running his own companies for a period of approximately twenty (20) years.

5. Petitioner became acquainted with Mr. Malcolm Starr, one of the principals of Starr, through Malcolm Starr's father and through petitioner's membership in the Fashion Originator's Guild of America (an industry trade association now known as the New York Fashion Council).

6. Approximately six months after commencing work for Starr as described above, Mr. Starr informed petitioner that petitioner would become the Executive Officer (Executive Vice-President) of Starr, upon the impending retirement of one John Colling, a principal at that time in Starr.

7. Petitioner met with Mr. Colling and Starr's then-controller one Mr. Reger. At this meeting he discovered that although Starr was capitalized at "about five (5) million dollars", it had an inventory of finished garments carried on the company (Starr's) books at approximately three (3) million dollars with no reserve taken on this inventory. In petitioner's estimation, such an inventory was practically worthless and grossly overstated in value, since specialty items of the type made by Starr were rendered basically unsaleable after the end of any one of the four yearly fashion seasons.

8. Petitioner testified that although he was told he was to be Mr. Colling's replacement as Executive Vice-President of Starr, he in fact became Mr. Starr's administrative assistant. Petitioner's actual duties in this role consisted primarily of maintaining production through coordinating the different divisions of Starr with respect to incoming shipments of finished materials and embroidery from Hong Kong and from other suppliers. Petitioner's duties also included, to a lesser extent, carrying out Mr. Starr's "wishes and routine details", dealing with small suppliers and factors (who knew petitioner from his previous work in the industry), fielding collection calls and seeing that payments to suppliers were apportioned among suppliers so as to maintain a flow of incoming materials available for manufacture.

9. Petitioner testified that purchasing projections were, in his opinion, far in excess of Starr's needs in view of past sales, and that actual purchases of materials were made far in advance of the actual manufacture of items. The

excess materials were made into finished goods, fabric inventories, piece goods or embroidery inventories and were almost immediately rendered unsaleable as out-of-fashion.

10. Petitioner voluntarily made a merchandising plan for each of the divisions of Starr, based on prior years' experience of actual sales less returns, in the hope of reducing Starr's volume of material and thus its exposure to loss. Petitioner also suggested that Starr's mark-ups on merchandise were too low. Both of these suggestions were rejected by Starr, and petitioner was told that he "didn't understand big business".

11. Petitioner testified that Mr. Starr owned "fifty-one (51) percent plus" of Starr's stock, would "face up" to none of his executives, and made all of his decisions in private, with Starr's employees learning of the decisions when their effect was felt within the company. For example, Mr. Starr, would make large purchases of "cuttings" in Hong Kong, with the decision to make such purchases becoming known when the materials began to arrive in the United States.

12. In early 1972, petitioner was notified by the Board of Directors that he had been appointed Treasurer of Starr, which position petitioner accepted.

13. It was upon petitioner's recommendation that Starr entered into Chapter XI Bankruptcy proceedings (arrangement proceedings, 11 USC § 701 et seq) in early April of 1973.

14. At the time Starr entered into arrangement proceedings (early 1973) petitioner went to Hong Kong to sell whatever of Starr's Hong Kong assets were saleable. Originally, Starr's then-controller, Alan Grossman, was to go to Hong Kong, but petitioner made the trip instead, after he told Mr. Starr and

Mr. Grossman that he would be unable to cope with the financial aspects of operating the company in Mr. Grossman's absence.

15. Petitioner owned "about" twelve thousand (12,000) shares of Starr's stock, which he "guessed" represented approximately one or one and one-half percent (1-1½%) of Starr's stock.

16. Petitioner testified he remained with Starr because he was unsuccessful in securing other employment and was concerned about his financial situation in supporting his family.

17. Petitioner was removed from his office of Treasurer and from the Board of Directors of Starr in or about the middle of May 1973. At about the same time, petitioner was requested to resign from Starr and did so.

18. Petitioner spent his working time at Starr's offices at 530 7th Avenue in New York City, at the warehouse in New Jersey, occasionally at Starr's Hong Kong factory and with various customs brokers and factors. His normal work day started at 8:00 A.M. and he usually left at 6:30 or 7:00 P.M., after overseeing the routines of the various shipping and receiving departments, trying to enforce merchandising procedures, and monitoring customs brokers and talking to creditors. Petitioner also worked many Saturdays. Mr. Speaker testified that he spent little or no time with the controller, or in the bookkeeping office which, according to petitioner, had about 22 employees and was in a "pitiful condition".

19. Starr's payroll was made out in the bookkeeping office. Petitioner asked for and was given authority to sign payroll checks, and did so until a signature machine was installed. Petitioner indicated that he also had authority to sign and did sign checks for creditors with whom he dealt. Petitioner testified that he sought check signing authority because of money "leaking out

of the company at every pore", particularly in the areas of mechanical expenses such as petty cash, reimbursements, etc., and petitioner had hoped that a better system of control could be instituted.

20. Petitioner also occasionally charged plane tickets for business trips to Hong Kong by officers and employees of the company to his own American Express Card. Starr did not reimburse petitioner for these expenses, and petitioner's American Express bill for tickets, totalling approximately \$6,000.00, was finally paid by the group which purchased Starr, and then only after the threat of a lawsuit against petitioner by American Express.

21. Petitioner testified that Starr's controller or possibly its accountants prepared and filed withholding tax reports. Petitioner testified further that he did not sign tax returns, had no knowledge of when withholding tax reports or other tax returns were prepared or filed and whether or not payment of taxes accompanied the returns or was otherwise made, and that he did not come into contact with this aspect of the conduct of Starr.

22. Petitioner testified that he considered himself to be a "businessman" who knew how to operate a company efficiently in the fashion industry based on his experience in that particular industry, but did not consider himself a "financial" man and did not get involved with the mechanics of running the office. Petitioner further testified that when he had run his own company (Jobere), it was run in an efficient manner and that its obligations were paid in a prompt and timely manner.

23. Petitioner made and assumed responsibility for many decisions of a mechanical nature at what he termed a "low level stage", such as supervising the shipping department, hiring employees there, and deciding if they had to work on Saturdays and be paid for overtime work. Petitioner stated that, in

general, he did not fire personnel, and recalled only one occasion in which he had recommended the firing of an individual who was working in Starr's bookkeeping offices.

24. Petitioner testified that he did not make decisions involving the overall operation of Starr, and that his main responsibility was to keep production flowing. At times, this required petitioner to call Starr's controller and persuade him to pay certain creditors or factors, at least partially, in order to get merchandise shipped and to keep production going. Petitioner testified he could not order that payment be made to a creditor, as such, but could direct or seek payment only as described.

25. Petitioner testified that unpaid taxes were never called to his attention because that wasn't within his area of operation for Starr. Petitioner testified his first knowledge of an arrearage in taxes was at the meeting of creditors when Starr filed under Chapter 11.

26. Petitioner testified that his function for Starr was to coordinate Starr's five (5) divisions with incoming shipments from Hong Kong, handle clearance at airports, deal with customs brokers and maintain contact with dissatisfied factors and suppliers to whom payment was overdue. Petitioner stated his responsibility was to assure a flow of materials for production and to handle manufacturing problems, and that his requests for dollar control on sales projections and mark-ups were denied, thus frustrating his attempts to exercise control in his areas of responsibility.

CONCLUSIONS OF LAW

A. 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 imposes on such person "...a penalty equal

to the total amount of tax evaded, not collected, or not accounted for and paid over".

B. 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."

C. 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 NY2d 920, and Malkin v. Tully, 65 A.D.2d 228).

D. That petitioner Joseph Speaker was a person under a duty to collect, truthfully account for and pay over withholding taxes on behalf of Malcolm Starr, Inc. Although petitioner stated he had only limited authority within the company and that he was a "businessman" involved with production and not the finances of the company, he did have check signing authority and did sign payroll and other checks. Petitioner also held the office of Treasurer, hired and, at least on one occasion, fired employees, and owned stock in Malcolm Starr, Inc. Finally petitioner was aware of the late payment or non-payment of suppliers and other creditors of Malcolm Starr, Inc., and it was at petitioner's suggestion that Starr commence Chapter 11 arrangement proceedings. Accordingly, notwithstanding his stated lack of knowledge concerning non-payment of withholding taxes, petitioner was in a position to have been put on notice in his capacity

as treasurer, as well as otherwise, to inquire as to the status of payment of taxes.

E. That the petition of Joseph Speaker is hereby denied and the Notice of Deficiency dated February 25, 1980 is sustained.


DATED: Albany, New York

STATE TAX COMMISSION

MAY 27 1983


PRESIDENT


COMMISSIONER


COMMISSIONER