

STATE OF NEW YORK

STATE TAX COMMISSION

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In the Matter of the Petition :  
                    of :  
                    Howard Young :  
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 :  
1971 - 1973. :  
\_\_\_\_\_

AFFIDAVIT OF MAILING

State of New York  
County of Albany

Connie Hagelund, being duly sworn, deposes and says that she is an employee of the State Tax Commission, over 18 years of age, and that on the 10th day of November, 1983, she served the within notice of Decision by certified mail upon Howard Young, the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Howard Young  
166-35 Ninth Ave.  
Whitestone, NY 11357

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  
10th day of November, 1983.

Martha L. Sennelle

Connie Hagelund

STATE OF NEW YORK

STATE TAX COMMISSION

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In the Matter of the Petition :  
of :  
Howard Young :  
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 :  
1971 - 1973. :  
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AFFIDAVIT OF MAILING

State of New York  
County of Albany

Connie Hagelund, being duly sworn, deposes and says that she is an employee of the State Tax Commission, over 18 years of age, and that on the 10th day of November, 1983, she served the within notice of Decision by certified mail upon Robert Lusthaus the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Robert Lusthaus  
Cohen & Lusthaus  
600 Old Country Rd.  
Garden City, NY 11530

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  
10th day of November, 1983.

Martha L. Smuelle

Connie Hagelund

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

November 10, 1983

Howard Young  
166-35 Ninth Ave.  
Whitestone, NY 11357

Dear Mr. Young:

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  
Robert Lusthaus  
Cohen & Lusthaus  
600 Old Country Rd.  
Garden City, NY 11530  
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

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In the Matter of the Petition :  
of :  
HOWARD YOUNG : DECISION  
for Redetermination of a Deficiency or for :  
Refund of Personal Income Tax under Article 22 :  
of the Tax Law for the Years 1971 through 1973. :

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Petitioner, Howard Young, 166-35 Ninth Street, Whitestone, New York 11357 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 1971 through 1973 (File Nos. 32267, 32268 and 32273).

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 April 27, 1983 at 1:35 P.M. Petitioner appeared by Cohen & Lusthaus, P.C. (Robert Lusthaus, Esq., of counsel). The Audit Division appeared by John P. Dugan, Esq., (Irwin Levy, Esq., of counsel).

ISSUES

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

II. Whether the dollar amount of the penalty asserted against petitioner is correct.

FINDINGS OF FACT

1. On various dates, as detailed below, the Audit Division issued statements of deficiency and notices of deficiency to petitioner, Howard Young, asserting

penalties due in the amount of unpaid withholding tax owed by Stanley Frocks, Inc. as follows:

<u>Date Issued</u>	<u>Withholding Tax Period</u>	<u>Amount</u>
12/28/73	2/1/73 - 4/9/73	\$ 1,687.00
12/28/73	1971 (balance due)	359.76
	1972 (balance due)	168.36
	1/16/73 - 7/6/73	11,574.00
11/25/74	1972 (balance due)	3,798.35

2. The Audit Division, by its April 8, 1982 answers to the petitioner's perfected petitions, asserted in clarification of the amount shown as due by the foregoing documents, the following:

- a.) Stanley Frocks, Inc. ("Frocks") filed Forms IT-2103 ("Reconciliation of Personal Income Tax Withheld") for each of the years 1971 and 1972, indicating the amounts of tax withheld, but did not remit the full amounts reported thereon;
- b.) that the unremitted balances remaining due for 1971 and 1972 amounted to \$359.76 and \$168.36, respectively;
- c.) that Frocks failed to file its Form IT-2101 ("Employer's Return of Personal Income Tax Withheld") for the period January 16, 1973 through July 6, 1973, which failure resulted in the calculation by the Audit Division of an estimated deficiency for such period in the amount of \$11,574.00 based on the average withholding by Frocks for prior periods;
- d.) that the Statement of Deficiency and a Notice of Deficiency dated December 28, 1973 (the second statement under such date listed in Finding of Fact "1") included the estimated deficiency of \$11,574.00 ("c" above) together with the amounts remaining due for 1971 and 1972 ("b" above), for a total asserted deficiency of \$12,102.12;
- e.) that a corporation franchise tax refund due to Frocks was applied in reduction of the asserted deficiency (\$12,102.12; "d" above), with the remaining deficiency due after such reduction shown erroneously on the Notice of Deficiency and Statement of Deficiency dated November 25, 1974 as a balance due for the year 1972 in the amount of \$3,798.35;

- f.) that the balance of the reduced deficiency asserted (\$3,798.35) is in fact due for the period January 16, 1973 through July 6, 1973.

3. Frocks was, until adjudicated bankrupt on July 6, 1973, engaged in the business of selling "junior dresses" (sizes 5-13). Frocks was equally owned, prior to the periods at issue, by Milton Silverman and Morty Morris.

4. Petitioner has a long background of experience in the fashion/garment industry as a salesman. He first met Milton Silverman through a buyer (presumably a mutual acquaintance), and thereafter became involved in business with Silverman in or about 1964, at which time Silverman, Morty Morris and petitioner formed Pettitville, Inc. ("Pettitville"). These three individuals each owned one-third (1/3) of Pettitville's stock. The initial financing for Pettitville was provided by Milton Silverman and Morty Morris, through Frocks, and petitioner's role in Pettitville was to sell its line of clothing which consisted of specialty sized dresses (petite dresses in sizes 3-13).

5. Milton Silverman died in or about 1971, at which time petitioner and Morty Morris each became owners of fifty percent of Pettitville's stock. It was not specified whether Milton Silverman's stock ownership in Pettitville was acquired by Morty Morris and petitioner as a bequest from Milton Silverman, through a buy out agreement, or otherwise. Shortly thereafter, Morty Morris retired and desired to sell his fifty percent stock ownership of Pettitville. Petitioner agreed to let four individuals, Stanley Silverman, Howard Morris, Arthur Tucker and Stuart Kaylin, purchase Morty Morris' stock ownership in Pettitville.<sup>1</sup> Petitioner testified that he received from these four individuals

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<sup>1</sup> The four listed individuals who purchased Pettitville stock from Morty Morris are the sons and sons-in-law of Milton Silverman and Morty Morris.

a small percentage of Frock's stock (10 or 12 percent) as a gift (at no cost) for "letting the kids get involved with Pettitville". These four individuals owned most of Frock's stock at the time, paid Morty Morris directly for his stock in Pettitville, and petitioner did not oppose their purchase of such stock. Petitioner owned no stock in Frocks other than this 10 or 12 percent interest.

6. Petitioner was involved only in the operation of Pettitville and was not involved with the operation of Frocks. He had been "brought into the business" because of his experience and ability as a salesman. Pettitville was viewed as petitioner's firm, and it was his job to operate Pettitville and to sell its line of clothing.

7. Offices and showrooms for both Frocks and Pettitville were located in one building having a common entrance. However, the showrooms were on separate sides of the building and each corporation had separate sales personnel. Petitioner never worked in Frock's showroom or offices nor did he hire or fire Frock's employees or exercise control over such employees. Petitioner could hire and fire for Pettitville and do..."anything else necessary in the operation of Pettitville".

8. Petitioner received a small weekly salary from Frocks, although he performed no duties for Frocks in return for such salary. Petitioner testified that he might have held the title of secretary of Frocks, but that he "... didn't even know".

9. Petitioner never attended meetings held by Frocks, nor did he prepare or sign tax returns or reports on behalf of Frocks. He never was involved with the financial aspects or any other aspects of Frock's business and was not aware, nor was it his business to become aware of whether or not withholding and other taxes were properly accounted for and remitted on behalf of Frocks.

10. The bookkeeping and other office work for both Frocks and Pettitville were handled on a day to day basis by one Sylvia Jacobson. She testified that petitioner signed checks on behalf of Pettitville, but that she never went to him for his signature on a check issued by Frocks. Frocks and Pettitville had separate checking accounts. Petitioner never supervised Ms. Jacobson nor did he become involved in the day-to-day operation of office functions for Frocks or Pettitville.

11. Petitioner was one of several people authorized to sign checks on behalf of Frocks, but doubted ever having signed any checks issued by Frocks except for the possibility of a situation where no one else was available to sign. Two authorized signatures were required on checks issued by Frocks. According to Ms. Jacobson, Stanley Silverman ran Frocks' business on a day to day level, including the determination of which creditors were to be paid. If she had a problem in running the office, such as a lack of funds to pay bills or a question as to who to pay, she would bring the problem to the attention of Stanley Silverman for resolution. Stanley Silverman's only involvement with Pettitville was to determine the level of its production.

12. Howard Morris and Stuart Kaylin worked as salesmen with Frocks.

13. Petitioner only travelled to a limited extent and only did so for Pettitville.

14. Petitioner asserts that he was involved only with Pettitville and not with Frocks, that he worked, in fact, as a salesman whose responsibility was to see that Pettitville's line of clothing sold, and that he neither became involved in nor had the authority to become involved in the operation of Frocks.



15. Petitioner further challenges the amount of the penalty asserted, maintaining that the Audit Division's estimate of unpaid withholding tax for 1973 is unreasonable and overstated, and would have been more than offset by the amount of the corporation tax refund applied against the outstanding deficiencies in withholding tax. The dollar amount of the corporation tax refund was not specified.

#### 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... or a member or employee of any partnership, 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 N.Y.2d 920, and Malkin v. Tully 65 A.D.2d 228).

D. That petitioner Howard Young was not a person under a duty to collect, truthfully account for and pay over withholding taxes on behalf of Stanley

Frocks, Inc. Although he was given ownership of a small amount of its stock, was authorized to sign its checks and may have held the office of secretary, petitioner's relationship with Stanley Frocks, Inc. was not one in which he was actually involved with the company. Petitioner's duties involved only the operation of Petittville, Inc., and whatever sphere of authority he possessed or exercised was limited to the operation of Petittville. Petitioner was, in essence, a salesman who was not in a position of authority or responsibility with Stanley Frocks, Inc. such as to be subject to the penalty imposed by section 685(g) of the Tax Law as based on unpaid withholding tax owed by Stanley Frocks, Inc.


E. That in view of the foregoing, the second issue raised by petitioner is moot.


F. That the petition of Howard Young is granted and notices of deficiency dated December 28, 1973 and November 25, 1974, respectively, are cancelled.

DATED: Albany, New York

STATE TAX COMMISSION

NOV 10 1983

  
PRESIDENT

  
COMMISSIONER

  
COMMISSIONER