

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition	:	
of	:	
Jane B. Friedlander	:	
	:	AFFIDAVIT OF MAILING
for Redetermination of a Deficiency or Revision	:	
of a Determination or Refund of Personal Income	:	
Tax under Article 22 of the Tax Law for the Year	:	
1977.	:	

State of New York :

ss.:

County of Albany :

David Parchuck, being duly sworn, deposes and says that he is an employee of the State Tax Commission, that he is over 18 years of age, and that on the 31st day of December, 1984, he served the within notice of Decision by certified mail upon Jane B. Friedlander, the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Jane B. Friedlander  
c/o James Treacy  
151 N. Delaware St., Market Sq. Center, Suite 1135  
Indianapolis, IN 46204

and by depositing same enclosed in a postpaid properly addressed wrapper in a post office 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  
31st day of December, 1984.

David Parchuck

Nicola J. Williams  
Authorized to administer oaths  
pursuant to Tax Law section 174

STATE OF NEW YORK

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Tax under Article 22 of the Tax Law for the Year	:	
1977.		
	:	

State of New York :

ss.:

County of Albany :

David Parchuck, being duly sworn, deposes and says that he is an employee of the State Tax Commission, that he is over 18 years of age, and that on the 31st day of December, 1984, he served the within notice of Decision by certified mail upon Jacob Friedberg, the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Jacob Friedberg  
1328 Broadway, Rm. 650-2  
New York, NY 10001

and by depositing same enclosed in a postpaid properly addressed wrapper in a post office 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  
31st day of December, 1984.

David Parchuck

Nicola J. Williams  
Authorized to administer oaths  
pursuant to Tax Law section 174

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

December 31, 1984

Jane B. Friedlander  
c/o James Treacy  
151 N. Delaware St., Market Sq. Center, Suite 1135  
Indianapolis, IN 46204

Dear Ms. Friedlander:

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, a proceeding in court to review an adverse decision by the State Tax Commission may be instituted only 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  
Jacob Friedberg  
1328 Broadway, Rm. 650-2  
New York, NY 10001  
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

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In the Matter of the Petition	:	
	:	
of	:	
	:	
JANE B. FRIEDLANDER	:	DECISION
	:	
for Redetermination of a Deficiency or for	:	
Refund of Personal Income Tax under Article 22	:	
of the Tax Law for the Year 1977.	:	

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Petitioner, Jane B. Friedlander, c/o James Treacy, 151 North Delaware Street, Market Square Center, Indianapolis, Indiana 46204, filed a petition for redetermination of a deficiency or for refund of personal income tax under Article 22 of the Tax Law for the year 1977 (File No. 37389).

A formal hearing was held before Daniel J. Ranalli, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on July 24, 1984 at 9:15 A.M. Petitioner appeared by Jacob Friedberg, Esq. The Audit Division appeared by John P. Dugan, Esq. (Thomas C. Sacca, Esq., of counsel).

#### ISSUE

Whether petitioner, as a person required to collect, truthfully account for and pay over withholding taxes of Stagedoor Consultants International, Inc., willfully failed to do so and is thus liable to a penalty under section 685(g) of the Tax Law.

#### FINDINGS OF FACT

1. On March 29, 1982, the Audit Division issued a Notice of Deficiency, along with a Statement of Deficiency, asserting a penalty pursuant to section 685(g) of the Tax Law against petitioner, Jane B. Friedlander, as a person required to collect, truthfully account for and pay over withholding taxes of

Stagedoor Consultants International, Inc. ("Stagedoor") in the amount of \$5,139.27 for the period January 1, 1977 through December 31, 1977.

2. Petitioner was the president of Stagedoor, a theatrical management company engaged in producing touring companies for various plays. Stagedoor was a partner in the South Pacific Touring Company ("South Pacific") which operated from July to September, 1977 as a weekly touring company and then terminated its operations. To handle the remittance of withholding taxes, Stagedoor deposited the taxes in its savings account each time the payroll was distributed. The bank would then write checks on the appropriate dates and forward the checks along with cover letters to the Department of Taxation and Finance.

3. Prior to the hearing, the Audit Division discovered that additional withholding tax payments had been timely made during the period in issue and reduced the deficiency to \$2,039.47. At the hearing, petitioner submitted a cancelled bank check from Solebury National Bank of New Hope, Pennsylvania to the New York State Income Tax Bureau in the amount of \$1,290.47 and dated September 21, 1977. The Audit Division conceded that the deficiency should be further reduced by the amount of the check, leaving \$748.80 in issue.

4. When South Pacific ceased operations, a new company, Coming Attractions, was formed to plan a new season of tours. The new company used the same bank account as South Pacific. On January 31, 1978, a check in the amount of \$748.80 was mailed to the Income Tax Bureau on behalf of Stagedoor; however, it was marked for the Coming Attractions account rather than for South Pacific. The cancelled check was not available, however, the cover letter which accompanied the check was submitted in evidence, as well as a letter from the bank indicating that a search of its records revealed that such a check was forwarded to the

Income Tax Bureau on January 31, 1978. Petitioner argues that the full amount of withholding taxes had been sent in and that the final \$748.80 payment was misapplied by the Audit Division due to the name change from South Pacific to Coming Attractions. Petitioner further argues that, in any event, her efforts to ensure proper remittance of withholding taxes, together with the fact that a check was mailed by the bank, demonstrates that she did not willfully fail to collect and pay over the tax.

5. Petitioner also argues that she did not receive proper notice since her name was misspelled "Frielander" instead of Friedlander on the Notice of Deficiency. Additionally, petitioner argues that the Statute of Limitations had expired when the notice was mailed, despite the fact that formal tax returns were never filed, because the cover letters accompanying each check qualified as returns.

#### CONCLUSIONS OF LAW

A. That section 685(g) of the Tax Law provides that any person required to collect, truthfully account for and pay over personal income tax, who willfully fails to collect such tax or truthfully account for and pay over such tax or willfully attempts in any manner to evade or defeat the tax or the payment thereof, shall, in addition to other penalties provided by law, be liable to a penalty equal to the total amount of the tax evaded, or not collected, or not accounted for and paid over.

B. That it is clear from the record that a check for the remaining \$748.80 in issue was mailed by the bank on behalf of Stagedoor. Whether the partnership name change caused the Audit Division to misapply the payment is impossible to determine based on the existing record; however, regardless of whether the check was misapplied, lost in the mail, or lost in any other

manner, it is equally clear that petitioner did not exhibit any willfulness in failing to collect, truthfully account for and pay over the tax. She did everything in her power to ensure that proper payment was made. Petitioner, therefore, is not subject to a penalty under section 685(g) of the Tax Law.


C. That in view of Conclusion of Law "B", it is unnecessary to address the timeliness and proper notice issues raised by petitioner.

D. That the petition of Jane B. Friedlander is granted and the Notice of Deficiency issued March 29, 1982 is cancelled.


DATED: Albany, New York

STATE TAX COMMISSION

DEC 31 1984

  
PRESIDENT

  
COMMISSIONER

  
COMMISSIONER