

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of
Theodore K. Landau : AFFIDAVIT OF MAILING

for Redetermination of a Deficiency or Revision :
of a Determination or Refund of NYS & NYC Personal :
Income Taxes under Article 22 of the Tax Law and :
Chapter 46, Title T of the Administrative Code of :
the City of New York for the Years 1977 & 1979. :

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 18th day of January, 1984, he served the within notice of Decision by certified mail upon Theodore K. Landau, the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Theodore K. Landau
6881 N. Grande Dr.
Boca Raton, FL 33433

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
18th day of January, 1984.

David Parchuck

James A. Haydel
pursuant to Tax Law section 174

Authorized to administer oaths

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of
Theodore K. Landau : AFFIDAVIT OF MAILING
for Redetermination of a Deficiency or Revision :
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Income Taxes under Article 22 of the Tax Law and :
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the City of New York for the Years 1977 & 1979. :

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 18th day of January, 1984, he served the within notice of Decision by certified mail upon Bernard Lippert, the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:


Bernard Lippert
10 East 40th St.
New York, NY 10016

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
18th day of January, 1984.




pursuant to Tax Law section 174

Authorized to administer oaths

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

January 18, 1984

Theodore K. Landau
6881 N. Grande Dr.
Boca Raton, FL 33433

Dear Mr. Landau:

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 & 1312 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 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
Bernard Lippert
10 East 40th St.
New York, NY 10016
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition	:	
of	:	
THEODORE K. LANDAU	:	DECISION
for Redetermination of a Deficiency or for	:	
Refund of New York State and New York City	:	
Personal Income Taxes under Article 22 of the	:	
Tax Law and Chapter 46, Title T of the	:	
Administrative Code of the City of New York for	:	
the Years 1977 and 1979.	:	

Petitioner, Theodore K. Landau, 6881 N. Grande Drive, Boca Raton, Florida 33433, filed a petition for redetermination of a deficiency or for refund of New York State personal income tax under Article 22 of the Tax Law and New York City personal income tax under Chapter 46, Title T of the Administrative Code of the City of New York for the years 1977 and 1979 (File No. 32716).

A small claims hearing was held before Allen Caplowaith, Hearing Officer at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on April 19, 1983 at 10:45 A.M., with all briefs to be submitted by May 19, 1983. Petitioner appeared by Bernard Lippert, C.P.A. The Audit Division appeared by John P. Dugan, Esq. (Anna Colello, Esq., of counsel).

ISSUE

Whether petitioner, Theodore K. Landau, is subject to a penalty as a person who willfully failed to collect, truthfully account for and pay over the New York State and New York City withholding taxes due from Mabro International, Inc.

FINDINGS OF FACT

1. Mabro International, Inc. (Mabro), 200 Park Avenue, New York, New York 10017, failed to pay over the entire amount of New York State and New York City

personal income taxes withheld from the wages of its employees for the peroids January 1, 1977 through March 15, 1977 and July 16, 1979 through August 8, 1979.

2. On April 28, 1980 the Audit Division issued a Statement of Deficiency in conjunction with a Notice of Deficiency against Theodore K. Landau (hereinafter petitioner) wherein a penalty was asserted pursuant to section 685(g) of the Tax Law and section T46-185.0(g) of Chapter 46, Title T of the Administrative Code of the City of New York for an amount equal to the New York State and New York City withholding taxes due from Mabro for the periods as follows:

<u>Period</u>	<u>Amount</u>
January 1, 1977 through March 15, 1977	\$3,047.89
July 16, 1979 through August 8, 1979	616.00
TOTAL	<u>\$3,663.89</u>

3. During 1977 Mabro withheld New York State income tax of \$12,336.30 and New York City income tax of \$1,086.69 from the wages of its employees. Payments made for 1977 totalled \$9,598.67 for New York State and \$836.43 for New York City. Accordingly, balances still due for said period compute to \$2,737.63 for New York State and \$250.26 for New York City, totaling \$2,987.89.

4. During the hearing the Audit Division conceded that the deficiency asserted for the 1977 period was overstated by \$60.00 and accordingly should be reduced to \$2,987.89.

5. For the period July 16, 1979 through August 8, 1979 the deficiency asserted of \$616.00 was estimated based on an average monthly amount. Neither withholding tax returns nor a Reconciliation of Tax Withheld are on record as being filed by Mabro for said period.

6. During the periods at issue herein petitioner was president of Mabro. As such, he signed both payroll checks and tax returns of the corporation.

7. Petitioner alleged that Mabro filed a petition under Chapter XI of the Bankruptcy Act on March 17, 1977, however, a copy of said petition, which was submitted subsequent to the hearing, lends no support to such allegation since the date inscribed thereon is illegible.

8. In a letter submitted subsequent to the hearing, petitioner's representative stated:

"Regarding the withholding taxes for the period January 1 to March 15, 1977, please be advised that Mr. Landau was directed by his counsel not to pay any prior bills, including tax bills, once Mabro entered into Chapter XI on March 17, 1977."

Additionally, in such letter he requested "the State's patience for a few more months" since sufficient funds were held by the trustee in bankruptcy and "it is possible that --- the referee in bankruptcy would require that this tax liability be liquidated prior to closing out the accounts."

9. Petitioner submitted documentation evidencing that Mabro was adjudicated bankrupt on August 8, 1979 and that a trustee was appointed on said date. Further documentation was submitted evidencing that Mabro had made a withholding tax payment of \$88.30 for the period June 16, 1979 through June 30, 1979 through an account entitled "Mabro International, Inc. Debtor In Possession: Tax Account." A copy of the Employers Return of Tax Withheld, which was submitted for said period, indicates that Mabro was filing on a semi-monthly basis at that time.

10. Petitioner argued that the trustee in bankruptcy, rather than he, was responsible for the deficiency asserted for the period July 16, 1979 through August 8, 1979. He further argued that the estimated deficiency of \$616.00 asserted for said period is grossly in error based on the amount withheld for

the period June 16, 1979 through June 30, 1979. (see Finding of Fact "9" supra).

CONCLUSIONS OF LAW

A. That section 685(g) of the Tax Law and Section T46-185.0(g) of Chapter 46, title T of the Administrative Code of the City of New York provide that:

"Any person required to collect, truthfully account for and pay over the tax imposed by this article/part 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 pursuant to section 685(n) of the Tax Law and section T46-185.0(n) of Chapter 46, Title T of the Administrative Code of the City of New York, the term "person" includes an individual, corporation or partnership or an officer or employee of any corporation (including a dissolved 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 test of willfulness has been stated by the Court of Appeals as follows:

"Whether the act, default, or conduct is consciously and voluntarily done with the knowledge that as a result, trust funds belonging to the Government will not be paid over but will be used for other purposes (citations omitted)."
Levin v. Gallman, 42 N.Y.2d 32, 34 (1977).

No showing of evil motive or intent to defraud is necessary. Kalb v. United States, 505 F.2d 506 (2d Cir.), cert. den. 421 U.S. 979 (1975).

D. That petitioner was a person who willfully failed to collect, truthfully account for, and pay over the New York State and City withholding taxes of Mabro for the periods at issue herein.

E. That the trustee in bankruptcy may be holding sufficient funds to cover payment of withholding taxes due from Mabro for the periods at issue does not bar the Audit Division from asserting a penalty against petitioner under section 685(g) of the Tax Law. Matter of Nat Ross, State Tax Commission, July 15, 1983.

F. That the estimated deficiency of \$616.00 asserted for the period July 16, 1979 through August 8, 1979 is reduced to \$140.88. Such amount is computed as follows:

Withholding for period 6/16/79 - 6/30/79	\$ 88.30
Daily Rate (\$88.30 divided by 15 days)	<u>\$ 5.87</u>
Number of Days in period 7/16/79 - 8/8/79	-24-
Revised estimated withholding (24 x \$5.87)	\$140.88

G. That the petition of Theodore K. Landau is granted to the extent provided in Conclusion of Law "F" supra, and except as so granted, said petition is, in all other respects, denied.

H. That the Audit Division is hereby directed to modify the Notice of Deficiency dated April 28, 1980 to be consistent with the decision rendered herein.

DATED: Albany, New York

JAN 18 1984

STATE TAX COMMISSION

Rodriguez
PRESIDENT

Francis R. Koenig
COMMISSIONER

Mark J. Smith
COMMISSIONER