

STATE TAX COMMISSION

In the Matter of the Petition	:	
of	:	
Arnold S. Malamud	:	
		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	:	
1976.	:	
	:	

State of New York }
County of Albany } ss.:

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 21st day of March, 1984, he served the within notice of Decision by certified mail upon Arnold S. Malamud, the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Arnold S. Malamud
370 E. 76th St.
New York, NY 10021

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
21st day of March, 1984.

David Parbrook

James A. Haynes
Authorized to administer oaths
pursuant to Tax Law section 174

STATE OF NEW YORK

STATE TAX COMMISSION

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of :
Arnold S. Malamud :
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 :
1976. :

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 21st day of March, 1984, he served the within notice of Decision by certified mail upon Hy Davidson, the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Hy Davidson
60 E. 42nd St., Suite 2406
New York, NY 10165

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
21st day of March, 1984.

David Parchuck

James R. Haggard
Authorized to administer oaths
pursuant to Tax Law section 174

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

March 21, 1984

Arnold S. Malamud
370 E. 76th St.
New York, NY 10021

Dear Mr. Malamud:

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
Hy Davidson
60 E. 42nd St., Suite 2406
New York, NY 10165
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

	:	
In the Matter of the Petition	:	
	:	
of	:	
	:	
ARNOLD S. MALAMUD	:	DECISION
	:	
for Redetermination of a Deficiency or for	:	
Refund of Personal Income Tax under Article 22	:	
of the Tax Law for the Year 1976.	:	
	:	

Petitioner, Arnold S. Malamud, 370 East 76th Street, New York, New York 10021, 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 1976 (File No. 31593).

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 June 21, 1983 at 1:15 P.M., with all briefs to be submitted by August 5, 1983. Petitioner appeared with Hy Davidson, Esq. The Audit Division appeared by John P. Dugan, Esq. (Paul Lefebvre, Esq., of counsel).

ISSUES

I. Whether petitioner, Arnold S. Malamud, is subject to a penalty pursuant to section 685(g) of the Tax Law, as a person who willfully failed to collect, truthfully account for and pay over the New York State withholding taxes due from M.S.S. Restaurant Corp.

II. Whether the Notice of Deficiency was timely issued against petitioner.

FINDINGS OF FACT

1. M.S.S. Restaurant Corp. (MSS), 452 Avenue of the Americas, New York, New York 10011, failed to pay over the New York State personal income taxes

withheld from the wages of its employees for the period November 1, 1976 through November 30, 1976.

2. On January 28, 1980, the Audit Division issued a Statement of Deficiency in conjunction with a Notice of Deficiency against Arnold S. Malamud (hereinafter petitioner) wherein a penalty was asserted pursuant to section 685(g) of the Tax Law for an amount equal to the New York State withholding taxes due from MSS for the aforestated period. Said penalty was asserted on the grounds that petitioner was a person required to collect, truthfully account for and pay over the withholding taxes, and that he willfully failed to do so.

3. On January 20, 1977, MSS filed an employer's return of withholding tax for the month of November, 1976 whereon it indicated that the taxes withheld were \$923.08. Since no remittance was made with the return, a notice and demand was issued against MSS for said amount on August 25, 1977.

4. The deficiency asserted herein against petitioner was \$897.90. Such reduced amount resulted from a subsequent payment of \$25.18 made to the MSS account.

5. The aforestated Notice of Deficiency was initially mailed to an incorrect address. When such notice was returned, it was remailed to petitioner at his proper address.

6. Petitioner claimed that from 1964 to 1979 he was actively engaged full time in conducting a business known as Kingsboro Bookstore, Inc. Such business was owned and operated by petitioner and his "partner", one Mr. Joel Schwartz.

7. Petitioner alleged that in or about 1976, Joel Schwartz, whom he regarded not only as a business associate but as a trusted personal friend, requested that he invest in MSS, a restaurant Mr. Schwartz was involved with.

Petitioner claimed he invested \$11,000.00 in MSS for approximately one sixteenth interest.

8. Petitioner testified that he never participated in the business of MSS in any manner. He claimed that he only visited the premises of MSS occasionally as a customer. His relationship with MSS, he claimed, was solely that of an investor.

9. Petitioner held the title of vice president of MSS. He claimed he accepted such title at Mr. Schwartz's request. Mr. Schwartz held the title of president.

10. During the hearing held herein, the Audit Division introduced a sales tax Certificate of Registration for MSS. Such certificate was signed by petitioner as vice president on September 10, 1975. Petitioner testified that he had no recollection of signing such certificate and that his signature may have been forged.

11. Petitioner testified that he never received income in any form from MSS. He offered to submit copies of his 1975 through 1978 New York State tax returns to evidence same. Although sufficient time was granted to make such submission, he failed to do so.

12. Although petitioner had the authority to sign checks, he claimed that such authority was granted to cover emergency situations only and that he never actually did sign MSS checks.

13. Petitioner claimed that the Notice of Deficiency was untimely issued since "the tax was due in November 1976" and petitioner "received first notice in January 1980".

CONCLUSIONS OF LAW

A. That section 683(b)(2) of the Tax Law provides that:

"For purposes of this section, if a return of withholding tax for any period ending with or within a calendar year is filed before April fifteenth of the succeeding calendar year, such return shall be deemed to be filed on April fifteenth of such succeeding calendar year."

B. That the Notice of Deficiency at issue herein was timely issued pursuant to section 683(b)(2) of the Tax Law.

C. That section 685(g) of the Tax Law provides that:

"Any person required to collect, truthfully account for, and pay over the tax imposed by this article 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."


D. That petitioner has failed to sustain his burden of proof required pursuant to section 689(e) of the Tax Law to show that he was not a person required to collect, truthfully account for and pay over the New York State withholding taxes of MSS for the period at issue herein. Accordingly, the penalty asserted pursuant to section 685(g) of the Tax Law is hereby sustained.


E. That the petition of Arnold S. Malamud is denied and the Notice of Deficiency dated January 28, 1980 is sustained.

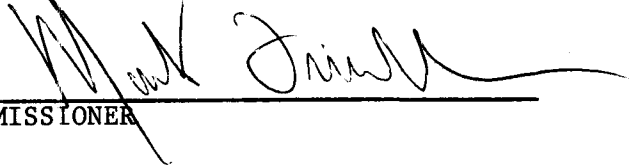
DATED: Albany, New York

STATE TAX COMMISSION

MAR 21 1984


PRESIDENT


COMMISSIONER


COMMISSIONER