

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition	:	
of	:	
Nicholas J. Paolini	:	
for Redetermination of a Deficiency or Revision	:	AFFIDAVIT OF MAILING
of a Determination or Refund of Personal Income	:	
Tax under Article 22 of the Tax Law 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 31st day of December, 1984, he served the within notice of Decision by certified mail upon Nicholas J. Paolini, the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Nicholas J. Paolini
54 Huxley Drive
Snyder, NY 14226

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
STATE TAX COMMISSION
ALBANY, NEW YORK 12227

December 31, 1984

Nicholas J. Paolini
54 Huxley Drive
Snyder, NY 14226

Dear Mr. Paolini:

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: Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition	:	
of	:	
NICHOLAS J. PAOLINI	:	DECISION
for Redetermination of a Deficiency or for	:	
Refund of Personal Income Tax under Article 22	:	
of the Tax Law for the Years 1977 and 1979.	:	

Petitioner, Nicholas J. Paolini, 54 Huxley Drive, Snyder, New York 14226, 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 1977 and 1979 (File No. 38747).

A formal hearing was held before Dennis M. Galliher, Hearing Officer, at the offices of the State Tax Commission, 65 Court Street, Part I, Buffalo, New York on May 22, 1984 at 9:15 A.M., with all documents to be submitted by June 26, 1984. Petitioner appeared pro se. The Audit Division appeared by John P. Dugan, Esq. (Deborah J. Dwyer, Esq., of counsel).

ISSUE

Whether petitioner was a person required to collect, truthfully account for and pay over withholding tax with respect to Eronic, Inc. d/b/a Fridays & Saturdays Lounge, 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 July 26, 1982, the Audit Division issued to petitioner, Nicholas J. Paolini, a Statement of Deficiency and a Notice of Deficiency asserting a penalty against petitioner as follows:

<u>PERIOD</u>	<u>AMOUNT</u>
1/1/77 - 9/30/77	\$3,160.39
3/1/79 - 12/31/79	503.35
Total	<u>\$3,663.74</u>

It was further indicated that the penalty was based upon petitioner's responsibility for unpaid withholding taxes due from Eronic, Inc., d/b/a Fridays & Saturdays Lounge ("Eronic").

2. Eronic was, until it ceased operation, a restaurant and nightclub located in Cheektowaga, New York. Petitioner was an officer of Eronic and owned fifty percent of its outstanding stock until February 10, 1978, at which time petitioner terminated his association with Eronic. Based on such termination, the Audit Division has withdrawn its assertion of a penalty against petitioner for the period March 1, 1979 through December 31, 1979 (See Finding of Fact "1"). For the remaining period at issue (January 1, 1977 through September 30, 1977), petitioner admits and does not contest his personal responsibility for collecting, accounting for and paying over withholding tax due on behalf of Eronic. According to petitioner, the taxes due for the period at issue were not paid due to Eronic's financial condition at the time. Petitioner asserts, however, that prior to leaving Eronic he made provisions for payment of the withholding tax due for this period, but that the payment when made was applied to a later period.

3. Prior to leaving Eronic in February, 1978, petitioner and one Ernest Paolini obtained (and were listed as co-guarantors on) a loan to Eronic in the amount of \$44,100.00 from the Small Business Administration ("S.B.A."), the proceeds of which were to be used to discharge Eronic's outstanding liabilities. In conjunction with this loan, petitioner entered into a buy-out agreement with Eronic whereby he was to receive (when Eronic received the proceeds of the

S.B.A. loan) \$3,000.00 in return for his stock in Eronic, plus \$50,000.00 (payable at \$250.00 per week over 200 weeks) in return for his resignation from and covenant not to compete with Eronic. The terms of this agreement specified that upon receipt of the proceeds of the S.B.A. loan, Eronic was to pay off the following liabilities:

- "(A) New York State Unemployment Insurance
- (B) Federal Withholding Tax
- (C) New York State Withholding Tax
- (D) Social Security Tax
- (E) New York State Sales Tax".

4. Payments were to be calculated and made by Eronic's accountant, one Joseph Fornasiero. Petitioner testified that he checked with Mr. Fornasiero and was advised that the monies were paid according to the above sequence.

5. Petitioner asserts that monies were paid for New York State withholding taxes but were applied to the period January 1, 1978 through December 31, 1978 rather than to the (earlier) period at issue herein. An Audit Division computer printout reflects payment of an assessment for withholding tax in the amount of \$3,207.80 due for the period January 1, 1978 through December 31, 1978, but no payment(s) on the tax due for the period at issue.

6. No evidence was submitted by petitioner to show that; (a) any payments have been made on the deficiency outstanding for the period at issue, or (b) the monies paid and applied to the deficiency for 1978 (or any other payments made) had been earmarked in any way (e.g. by notation on the payment check or by some agreement) for the period at issue. Petitioner admits that he was aware of his personal obligation to pay the taxes at issue, based on his willful failure to have remitted the same when due. However, petitioner maintains that his subsequent good faith arrangements to make payment of such

taxes should serve to relieve him of responsibility, notwithstanding the failure of other persons to follow through and make the payments.

CONCLUSIONS OF LAW

A. That petitioner has admitted his responsibility for the (willfully) unpaid withholding taxes owed by Eronic for the period at issue. Notwithstanding his later efforts to arrange for the discharge of such unpaid taxes, via payment out of the S.B.A. loan proceeds, there has been no payment made covering the period at issue. The apparent failure of the persons upon whom petitioner relied to effect payment of the unpaid taxes for the period at issue does not absolve petitioner of his responsibility for such taxes. There is no evidence that petitioner or anyone else took any steps to make a payment specifically earmarked for the period at issue. Accordingly, petitioner remains liable for the amount due.

B. That the petition of Nicholas J. Paolini is hereby denied.

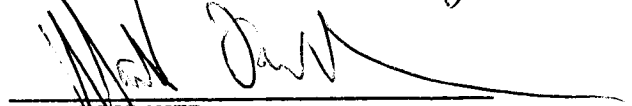
DATED: Albany, New York

STATE TAX COMMISSION

DEC 31 1984


PRESIDENT


COMMISSIONER


COMMISSIONER