

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of :
Leslie J. Saferstein :
for Redetermination of a Deficiency or for Refund :
of New York City Personal Income Tax under Article :
30 of the Tax Law for the Year 1976. :

AFFIDAVIT OF MAILING

In the Matter of the Petition :
of :
Herbert Herz :
for Redetermination of a Deficiency or for Refund :
of New York City Personal Income Tax under Article :
30 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 1st day of June, 1984, he served the within notice of Decision by certified mail upon Leslie J. Saferstein, the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Leslie J. Saferstein
South Rd., Harbor Acres
Sands Point, NY 11050

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
1st day of June, 1984.

David Parchuck

James J. O'Hara
Authorized to administer oaths
pursuant to Tax Law section 174

STATE OF NEW YORK

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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 1st day of June, 1984, he served the within notice of Decision by certified mail upon Herbert Herz, the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

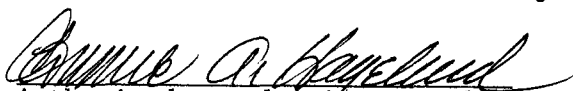
Herbert Herz
20 Pryer Manor Rd.
Larchmont, NY 10538

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Sworn to before me this
1st day of June, 1984.




Authorized to administer oaths
pursuant to Tax Law section 174

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

June 1, 1984

Herbert Herz
20 Pryer Manor Rd.
Larchmont, NY 10538

Dear Mr. Herz:

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 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
ALBANY, NEW YORK 12227

June 1, 1984

Leslie J. Saferstein
South Rd., Harbor Acres
Sands Point, NY 11050

Dear Ms. Saferstein:

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.

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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 :
LESLIE J. SAFERSTEIN :
for Redetermination of a Deficiency or for :
Refund of New York City Personal Income Tax :
under Article 30 of the Tax Law for the Year :
1976.

DECISION

In the Matter of the Petition :
of :
HERBERT HERZ :
for Redetermination of a Deficiency or for :
Refund of New York City Personal Income Tax :
under Article 30 of the Tax Law for the Year :
1976.

Petitioners, Leslie J. Saferstein, South Road, Harbor Acres, Sands Point, New York 11050 and Herbert Herz, 20 Pryer Manor Road, Larchmont, New York 10538, filed petitions for redetermination of deficiencies or for refunds of New York City personal income tax under Article 30 of the Tax Law for the year 1976 (File Nos. 32328 and 32330).

A consolidated 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 November 4, 1983 at 9:00 A.M., with all briefs to be submitted by December 4, 1983. Petitioners appeared pro se. The Audit Division appeared by John P. Dugan, Esq. (Paul Lefebvre, Esq., of counsel).

ISSUES

I. Whether petitioner Leslie J. Saferstein is subject to a penalty, pursuant to sections 1312(a) and 685(g) of the Tax Law, as a person who willfully failed to collect, truthfully account for and pay over the New York City withholding taxes due from Vogue Instrument Corp.

II. Whether petitioner Herbert Herz is subject to a penalty, pursuant to sections 1312(a) and 685(g) of the Tax Law, as a person who willfully failed to collect, truthfully account for and pay over the New York City withholding taxes due from Vogue Instrument Corp.

FINDINGS OF FACT

1. Pursuant to the Audit Division, Vogue Instrument Corp. ("Vogue"), 131 Street & Jamaica Avenue, Jamaica, New York 11418, failed to pay over the New York City personal income taxes withheld from the wages of its employees for the following periods:

<u>PERIOD</u>	<u>AMOUNT</u>
November 1, 1976 to November 5, 1976	\$ 203.76
November 8, 1976 to November 12, 1976	200.57
November 15, 1976 to November 19, 1976	207.03
November 22, 1976 to November 26, 1976	225.63
November 29, 1976 to December 3, 1976	<u>214.59</u>
TOTAL	<u>\$ 1,051.58</u>

2. On September 24, 1979, the Audit Division issued a Statement of Deficiency in conjunction with a Notice of Deficiency against petitioner Leslie J. Saferstein wherein a penalty was asserted pursuant to section 685(g), as incorporated into section 1312(a) of the Tax Law, for an amount equal to the aforestated New York City withholding taxes due from Vogue. Said penalty was asserted on the grounds that petitioner was a person required to collect, truthfully account for and pay over said taxes, and that he willfully failed to

do so. A similar set of documents was issued against petitioner Herbert Herz under the same date. The deficiency asserted therein and the Audit Division's grounds for asserting such deficiency were identical to those of Mr. Saferstein.

3. During the periods at issue Vogue, a designer and manufacturer of computer printers, was involved in a Chapter XI proceeding and operated as a debtor-in-possession. Petitioners alleged that all of the withholding taxes at issue were paid pursuant to a court order.

4. Petitioner Leslie J. Saferstein held the title of President of Vogue. He devoted full time to the corporation and pursuant to Vogue's U.S. Corporation Income Tax Return filed for the fiscal year ending June 30, 1976, he held eight (8) percent of the outstanding stock. He described his areas of responsibility with Vogue as the day-to-day manufacturing and certain customer relations. However, no documentation or other evidence was submitted to show that these were his only responsibilities.

5. Petitioner Herbert Herz held the title of Chairman of Vogue. He devoted full time to the corporation and pursuant to Vogue's U.S. Corporation Income Tax Return filed for the fiscal year ending June 30, 1976, he held twelve (12) percent of the outstanding stock. He described his areas of responsibility with Vogue as marketing and finances. The accounting and payroll functions were divisions under his supervision.

6. Although they retained their titles, petitioners contended that during the debtor-in-possession period Vogue operated under court jurisdiction and control and accordingly, they should not be held responsible for any taxes which may not have been paid.

7. Since petitioners did not submit a copy of the aforestated court order, the actual degree of control assigned by the court to the corporation is not known.

8. Petitioners claimed that all of the corporate records of Vogue are in the hands of the trustee in bankruptcy and are unobtainable.

9. Petitioners submitted recently drawn notarized affidavits from three former employees of Vogue as follows:

(a) Patricia McGrath, former Accounts Receivable and Payroll Clerk, wherein she stated that "I know all the withholding taxes were paid since they were transferred to a special tax account together with the rest of the payroll which was transferred to the payroll account."

(b) Silke Franken (Jochimsen), former Accounting Manager, wherein she stated that "During the Chapter XI period I worked with Mr. Herz specifically on payroll matters. I can state unequivocally that Mr. Herz was concerned that withholding taxes were promptly paid. I took great care to make certain such taxes were paid. Also, a weekly report was submitted to the Court stating that all withholding taxes were paid."

(c) William J. Odendahl, Jr., wherein he stated that "My duties during that period (1963 to 1978) included a review of financial transactions and internal auditing. During the debtor-in-possession period, I was responsible for preparing tax returns and monitoring payment of any and all taxes.... During the debtor-in-possession period, all payroll taxes withheld were deposited in a separate 'Tax Account' utilized for that purpose in accordance with the order of the Court. All tax payments were then made from that account to the respective governmental agencies."

10. In contrast to the aforestated recent affidavit of Mr. Odendahl, Jr. is his letter of December 8, 1976 to the New York State Department of Taxation and Finance wherein he stated that:

"I am enclosing reports without remittance for the period April 23, 1976 to December 3, 1976 for Vogue Instrument Corp. The cards enclosed cover both the New York State and New York City taxes due for the period.

We would like to make a time payment arrangement to pay these taxes. I understand it requires an assessment by your office first, then an agreement with the local district office. We plan to make timely deposits starting with next week while we are waiting to make the time payment agreement."

11. A current accounts receivable computer transcript of the account of Vogue, obtained from the Tax Compliance Bureau, indicates that the withholding taxes at issue have not been paid to date.

CONCLUSIONS OF LAW

A. That the Department of Taxation and Finance is not required to attempt to collect unpaid withholding taxes from a corporation or from its trustee in bankruptcy before imposing on and collecting from responsible officers the penalty imposed by section 685(g) of the Tax Law. (Stanley Yellin v. New York State Tax Commission, 81 A.D.2d 196(1981)).

B. 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."

C. That section 1312(a) of the Tax Law incorporates section 685(g) for New York City purposes.

D. That petitioners Leslie J. Saferstein and Herbert Herz were corporate officials of Vogue. Corporate officials responsible as fiduciaries for tax revenues cannot absolve themselves merely by disregarding their duty and leaving it to someone else to discharge. Petitioners have not submitted any evidence to show the actual degree of control assigned by the court to the corporation or themselves during the debtor-in-possession period of Vogue. (See Matter of Gardineer v. State Tax Commission, 78 A.D.2d 928, 929).

E. That petitioner Leslie J. Saferstein was a person who willfully failed to collect, truthfully account for and pay over the New York City withholding taxes of Vogue for the periods at issue herein. Accordingly, he is liable for the penalty imposed pursuant to sections 1312(a) and 685(g) of the Tax Law.

F. That petitioner Herbert Herz was a person who willfully failed to collect, truthfully account for and pay over the New York City withholding taxes of Vogue for the periods at issue herein. Accordingly, he is liable for the penalty imposed pursuant to sections 1312(a) and 685(g) of the Tax Law.

G.. That the petition of Leslie J. Saferstein is denied and the Notice of Deficiency issued against him on September 24, 1979 is sustained.

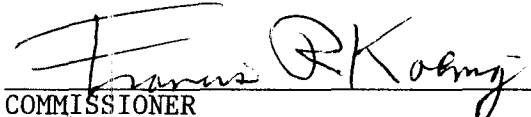
H. That the petition of Herbert Herz is denied and the Notice of Deficiency issued against him on September 24, 1979 is sustained.


DATED: Albany, New York

STATE TAX COMMISSION

JUN 01 1984


PRESIDENT


COMMISSIONER


COMMISSIONER