

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

May 29, 1985

8 West 65th Street Corp.
745 Seventh Ave.
New York, NY 10019

Gentlemen:

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
Moses S. Rosengarten
Joseph Korff
689 Fifth Ave., Suite 500
New York, NY 10022
Taxing Bureau's Representative

STATE TAX COMMISSION

A formal hearing was held before Frank W. Barrie, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on June 15, 1984 at 9:00 A.M., with all briefs to be submitted by September 14, 1984. Petitioner appeared by Moses S. Rosengarten, Esq. The Audit Division appeared by John P. Dugan, Esq. (Lawrence Newman, Esq., of counsel).

I. Whether the petition was timely filed.

II. Whether petitioner's failure to timely file returns and pay withholding taxes was due to reasonable cause and not due to willful neglect.

1. On January 5, 1983, the Audit Division issued ten documents entitled, "Notice and Demand for Payment of New York State and/or New York City Withholding Tax Due" against petitioner detailed as follows:

<u>Period Covered by Withholding Tax Return</u>	<u>Tax Withheld</u>	<u>Penalty</u>	<u>Interest</u>
January 1, 1982 to January 31, 1982	\$ 835.65	\$229.80	\$117.15
February 1, 1982 to February 28, 1982	1,433.02	394.08	184.87
March 1, 1982 to March 31, 1982	1,326.93	358.27	152.03
April 1, 1982 to April 30, 1982	1,467.85	381.64	144.94
May 1, 1982 to May 31, 1982	1,191.75	303.89	102.68
June 1, 1982 to June 30, 1982	1,221.35	305.33	88.17
July 1, 1982 to July 31, 1982	1,571.35	314.27	87.82
August 1, 1982 to August 31, 1982	1,276.70	248.96	55.29
September 1, 1982 to September 30, 1982	1,310.42	190.01	38.45
October 1, 1982 to October 31, 1982	1,576.15	78.81	21.29

2. In mid-December of 1982, petitioner filed, after the expiration of applicable due dates, withholding tax returns for the periods noted in Finding of Fact "1", supra, and paid the personal income taxes which it had withheld from the wages of its employees. It is unclear from the record whether or when the interest was paid. However, petitioner is challenging only the penalties imposed pursuant to Tax Law §685(a)(1) (for failure to timely file returns) and Tax Law §685(a)(2) (for failure to pay the tax due shown on said returns on or before the prescribed date).

3. Petitioner is a real estate development firm engaged in the rehabilitation of housing units. During the period at issue, it employed approximately thirty persons and its major project was the rehabilitation of a Manhattan apartment house and conversion thereof into ten condominium units.¹ Petitioner is owned by two shareholders, James E. Fusco and Robert J. Reveley.

4. Petitioner's controller, Joseph Granucci, contends that penalties should not be imposed against petitioner because (i) its accountant during the

1 Joseph Granucci testified that a project at 8 West 56th Street was the major activity of petitioner during the period at issue. It is not clear whether he incorrectly noted the address of such project given petitioner's name, 8 West 65th Street Corp.

period at issue suffered "severe personal hardship" and (ii) petitioner suffered setbacks and difficulties in "developing a residential condominium project." Joseph Granucci became petitioner's controller after the period at issue and his testimony was not based upon his personal knowledge. Rather it was based upon conversations he had with James E. Fusco and Robert J. Reveley, who did not testify at the hearing herein. In lieu of testimony, they each submitted an affidavit.

5. Petitioner's petition for a hearing to review the assessment of the penalties at issue was mailed on April 1, 1983.

CONCLUSIONS OF LAW

A. That Tax Law §171, subdivision Twenty-first, provides in part as follows:

"Where the request for a hearing is made by a person seeking review of any taxes determined or claimed to be due under this chapter, the liability of such person shall become finally and irrevocably fixed unless such person, within ninety days from the time such liability is assessed, shall petition the tax commission for a hearing to review such liability."

B. That the date of assessment of the penalties at issue herein was January 5, 1983, which is the date on which the Audit Division issued the ten documents entitled "Notice and Demand for Payment of New York State and/or New York City Withholding Tax Due". The petition mailed on April 1, 1983 was filed within ninety days of the date of assessment and was therefore timely filed.

C. That penalties are imposed for failure to file a return on or before the prescribed date [Tax Law §685(a)(1)] and for failure to pay the tax shown on a return on or before the prescribed date [Tax Law §685(a)(2)], unless it is shown that said failure was due to reasonable cause and not due to willful neglect.

D. That section 689(e) of the Tax Law places the burden of proof on petitioner except in three specifically enumerated instances, none of which are at issue herein. The limited evidence submitted by petitioner does not establish that its failure to timely file returns or its failure to timely pay the tax shown on said returns was due to reasonable cause and not willful neglect.

E. That the petition of 8 West 65th Street Corp. is denied.

DATED: Albany, New York

MAY 29 1985

STATE TAX COMMISSION

Bdwin A. C. Cus.
PRESIDENT

Francis D. Koenig
COMMISSIONER

Mark J. Judd
COMMISSIONER