

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of :
Stuart Feinstein :
:
for Redetermination of a Deficiency or Revision :
of a Determination or Refund of NYS & NYC Income :
Tax under Article 22 & 30 of the Tax Law for the :
Year 1980. :

AFFIDAVIT OF MAILING

In the Matter of the Petition :
:
of :
:
JUDITH HARVEST :
:
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 :
of the City of New York for the Year 1980. :
:

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 28th day of June, 1985, he served the within notice of decision by certified mail upon Judith Harvest, the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Judith Harvest
230 Central Park South
New York, NY 10019

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.

Page 2

AFFIDAVIT OF MAILING

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
28th day of June, 1985.

David Paroluck

William A. Haggard
Authorized to administer oaths
pursuant to Tax Law section 174

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Robert J. Feinstein
520 Madison Avenue
New York, NY 10022

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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.

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Quinn A. Hayland
Authorized to administer oaths
pursuant to Tax Law section 174

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

June 28, 1985

Judith Harvest
230 Central Park South
New York, NY 10019

Dear Ms. Harvest:

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: Petitioner's Representative
Robert J. Feinstein
520 Madison Avenue
New York, NY 10022
Taxing Bureau's Representative

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Stuart Feinstein
138 East Chalres St., Apt. 5E
New York, NY 10014

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William A. Hayward
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In the Matter of the Petition
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STUART FEINSTEIN
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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 Year 1980.

DECISION

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of
JUDITH HARVEST
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 Year 1980.

Petitioner Stuart Feinstein, 135 Charles Street, Apartment 5E, New York, New York 10014, filed a petition 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 year 1980 (File No. 35972).

Petitioner Judith Harvest, 230 Central Park South, New York, New York 10019, filed a petition 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 year 1980 (File No. 35971).

A consolidated formal hearing was held before Doris Steinhardt, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on September 12, 1984 at 1:15 P.M., with all briefs to be submitted by February 28, 1985. Petitioners appeared by Robert J. Feinstein, Esq. The Audit Division appeared by John P. Dugan, Esq. (William Fox, Esq., of counsel).

ISSUES

I. Whether petitioners were persons responsible for collecting and paying over taxes withheld from the wages of employees of The Stuart Harvest Collection, Inc., who willfully failed to fulfill this responsibility, and are therefore liable for the penalty imposed under section 685(g) of the Tax Law and section T46-185.0(g) of the Administrative Code of the City of New York.

II. If so, whether the Audit Division properly estimated the amount of such penalty.

FINDINGS OF FACT

1. On September 28, 1981, the Audit Division issued to petitioner Stuart Feinstein a Statement of Deficiency and a Notice of Deficiency, asserting a penalty for New York State and New York City withholding taxes of The Stuart Harvest Collection, Inc. for the year 1980 in the estimated amount of \$8,262.65. On the same date, the Audit Division issued to petitioner Judith Harvest a Statement of Deficiency and a Notice of Deficiency, asserting a penalty for New York State and New York City withholding taxes of The Stuart Harvest Collection, Inc. for the year 1980 in the estimated amount of \$8,262.65.

For the period July 1, 1980 to September 30, 1980, the amount of the penalty asserted against each petitioner was based upon an Employer's Return of Tax Withheld filed by the corporation for such period without a remittance.

The penalties for the periods January 1, 1980 through June 30, 1980 and October 1, 1980 through December 31, 1980 were estimated, using the average monthly New York State and New York City taxes withheld during 1979. A breakdown of the penalties at issue is displayed below.

<u>DATE</u>	<u>NYS TAX</u>	<u>NYC TAX</u>
1/1/80-6/30/80	\$3,081.60	\$1,342.50
7/1/80-9/30/80	1,192.80	433.70
10/1/80-12/31/80	1,540.80	671.25

2. Petitioners are both graphic designers. Mr. Feinstein possesses a Bachelor of Arts degree from Pennsylvania State University, and Ms. Harvest was granted a Bachelor of Fine Arts by Barry College in Miami, Florida. In 1977, they formed The Stuart Harvest Collection, Inc., each taking one-half of the issued shares. Mr. Feinstein held the office of president, and Ms. Harvest, that of secretary-treasurer. For the period of the corporation's existence, petitioners devoted all their working time to the corporation's business and looked to the corporation as their sole source of income.

3. At the outset, the corporation manufactured and marketed limited numbers of gift items designed by petitioners. After several months, Macy's requested that petitioners design a product to be sold exclusively in "The Cellar", a special department in the Macy's retail establishment. Since food and other products were sold in The Cellar by weight, petitioners created and designed stationery which they called "Paper by the Pound." This product quickly became successful, and in order to manufacture sufficient quantities, the corporation found it necessary to expand its facilities, augment its staff and seek additional working capital. Two investors advanced monies to the corporation and received stock in exchange (thereby decreasing petitioners' percentage of ownership). Petitioners engaged a business manager, Mr. Gaetano

Maida, to oversee the financial affairs of the corporation and to locate additional financial resources.

4. On February 15, 1979, the corporation executed an Accounts Receivable Financing Agreement with Congress Financial Corporation ("Financial"), whereby Financial agreed to advance to the corporation a sum up to 80 percent of the net amount of receivables found acceptable by and assigned to Financial. A rider to the agreement provided, in pertinent part:

"You recognize that we will render substantial service to you in connection with the Security Interest in the Accounts Receivable. We will render financial advice and counsel and various other services not normally supplied by a financial institution including, but not limited to, the use of the facilities of Dun & Bradstreet, Inc. and other credit facilities and perform auditing of your books and records. In consideration of the monies to be advanced by us and the services to be furnished, you warrant and represent that you will utilize the minimum sum of \$125,000.00 per month and will therefore pay a minimum interest charge thereon at the rate provided herein...". (Emphasis in original.)

Neither petitioner was aware what other such services Financial rendered, if any.

5. Petitioners concentrated their efforts upon designing and marketing products, leaving the conduct of the corporation's business affairs to Mr. Maida. Mr. Maida supervised the preparation of the payroll, determined when creditors were paid and acted as liaison with Financial. As officers, petitioners possessed authority to hire and dismiss employees and to draft checks on the corporate account; they in fact signed payroll and other checks and tax returns, including withholding tax returns.

6. The corporation's financial difficulties began in 1980 with a paper strike. Lacking raw paper supplies, the corporation was unable to manufacture and ship stationery. Its receivables correspondingly decreased, with the effect that Financial advanced the corporation less and less funds. Petitioners

realized that the only viable solution was for the corporation to be acquired by or to merge with a paper manufacturing firm and thus actively pursued negotiations with several companies. At the same time, the corporation gradually dismissed its manufacturing personnel since they would no longer be needed.

7. Apparently concerned about the corporation's financial health, Financial began to exercise more control over The Stuart Harvest Collection, Inc., participating in the manager's decisions regarding payment of creditors. Financial representatives met only with Mr. Maida, refusing even to accept petitioners' telephone calls. Financial released funds sufficient to satisfy the corporation's primary creditors and to cover payroll, net of New York State and New York City withholding taxes.

8. In September or October, 1980, an agreement was drawn for the merger of The Stuart Harvest Collection, Inc. with a paper manufacturer, but before it was executed, the paper manufacturer reneged. In Mr. Feinstein's words, "[A]t that point it was October, and we had no money and we had no inventory..., and there was nothing for us to do at that point but to close." On December 1, 1980, The Stuart Harvest Collection, Inc. ceased doing business.

9. Petitioners acknowledge that they had access to the corporate records but did not consult them. In January, 1981, they first became aware that taxes withheld from the wages of the corporation's employees had not been paid over. At that time, Ms. Harvest entered into a contract for the sale of her cooperative apartment, and a title search revealed a lien against the property for a federal withholding tax penalty. Ms. Harvest paid the penalty and subsequently instituted a suit for refund; that litigation has not yet been concluded.

10. On December 30, 1980, Andrews Nelson Whitehead, a division of Boise Cascade, Inc.; Lindenmeyr Paper Corporation; and Bulkley Dunton Linde Lathrop, a division of Hammermill Paper Co., Inc.; all creditors of The Stuart Harvest Collection, Inc., filed a petition in the United States Bankruptcy Court for the Southern District of New York, seeking an order for relief under Chapter 11 of the United States Code. On May 4, 1981, the Department of Taxation and Finance filed a claim in such bankruptcy proceeding for withholding taxes in the sum of \$8,640.32.

11. Petitioners contest the amount of the penalties asserted against them, as well as the fact of their liability. Pursuant to provisions made at the hearing, petitioners submitted with their written arguments estimates of the New York State and New York City withholding taxes of The Stuart Harvest Collection, Inc. for the period January through November, 1980. The estimates were calculated as described below.

(a) Petitioners obtained from The Chase Manhattan Bank monthly summaries of the corporation's payroll checking account for January through November, 1980.

(b) Because the summaries reflected net payroll figures, petitioners found it necessary to "back in" to the gross income and withholding tax figures. They assumed that all the corporation's employees claimed one exemption and lived in New York City; however, they did take account of those employees they knew to have claimed two exemptions.

(c) Petitioners consulted the 1980 federal, state and local withholding tax and Federal Insurance Contributions Act schedules to arrive at the following amounts of New York State and New York City withholding taxes:

	<u>NYS</u> <u>WITHHOLDING</u>	<u>NYC</u> <u>WITHHOLDING</u>
January	\$ 643.30	\$ 266.08
February	376.10	153.00
March	424.20	172.20
April	1,172.10	496.41
May	528.80	211.05
June	457.20	181.80
July	519.70	207.05
August	447.20	179.60
September	302.30	119.50
October	283.30	126.25
November	38.10	14.90
	<u>\$5,192.30</u>	<u>\$2,127.84</u>

CONCLUSIONS OF LAW

A. That in determining whether petitioners are liable for the penalty asserted against them pursuant to subsection (g) of section 685 of the Tax Law and subsection (g) of section T46-185.0 of the Administrative Code of the City of New York, the threshold question is whether they were persons required to collect, truthfully account for and pay over taxes withheld from the wages of employees of The Stuart Harvest Collection, Inc. Tax Law section 685(n) and Administrative Code section T46-185.0(n). Relevant factors include whether petitioners signed the corporation's tax returns, possessed the right to hire and discharge employees or derived a substantial part of their income from the corporation; other pertinent areas of inquiry include the amount of stock petitioners held, the sphere of their duties and their authority to pay corporate obligations. Matter of Amengual v. State Tax Comm., 95 A.D.2d 949 (3d Dept. 1983). Recapitulating the evidence presented, each petitioner herein was an officer and one of four shareholders in the closely-held corporation; devoted all of his/her time to and derived all of his/her income from the corporation; and possessed authority to and did sign corporate checks and returns. Clearly,

each was a person required to collect and pay over the withholding taxes during the year at issue.

B. That petitioners were not relieved of their obligations and responsibilities with respect to the collection and payment of withholding taxes by their choice to leave the management and financial decisions to Mr. Maida and later, to Mr. Maida and Financial principals. "[C]orporate officials responsible as fiduciaries for tax revenues cannot absolve themselves merely by disregarding their duty and leaving it to someone else to discharge [citation omitted]." Matter of Ragonesi v. N.Y.S. Tax Comm., 88 A.D.2d 707, 708 (3d. Dept. 1982).

C. That in estimating the New York State and New York City taxes withheld from employee wages during 1980, petitioners relied upon summaries of the corporation's payroll checking account. Their estimates were thus more accurate than those of the Audit Division, which utilized withholding tax returns filed by the corporation for the prior year. The penalty against each petitioner should accordingly be reduced to \$7,320.14.

D. That the petitions of Stuart Feinstein and of Judith Harvest are granted to the extent indicated in Conclusion of Law "C"; the notices of deficiency issued against them on September 28, 1981 should be modified in accordance therewith; and the asserted deficiencies are in all other respects sustained.

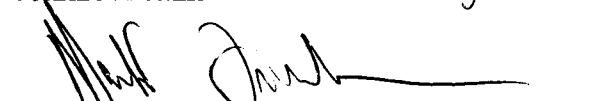
DATED: Albany, New York

STATE TAX COMMISSION

JUN 28 1985


PRESIDENT


COMMISSIONER


COMMISSIONER

TA 28 (9-79)

STATE OF NEW YORK
State Tax Commission
TAX APPEALS BUREAU
STATE CAMPUS
ALBANY, N. Y. 12227

CLAIM CHECK
NO.

800959

☐ HOLD

DATE

7/1

1ST NOTICE

2ND NOTICE

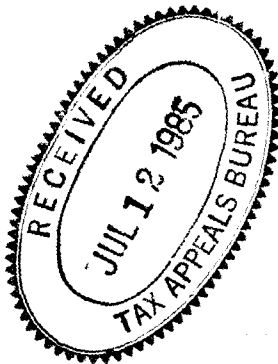
CERTIFIED

P 693 169 9

MAIL

RETURN

Detached from
PS Form 3841-A
Oct. 1986



Judith Harvest
230 Central Park South
New York, NY 10019

D.O.A.B.

Misc.

RECEIVED
TO
SENDER
©



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9. Petitioners acknowledge that they had access to the corporate records but did not consult them. In January, 1981, they first became aware that taxes withheld from the wages of the corporation's employees had not been paid over. At that time, Ms. Harvest entered into a contract for the sale of her cooperative apartment, and a title search revealed a lien against the property for a federal withholding tax penalty. Ms. Harvest paid the penalty and subsequently instituted a suit for refund; that litigation has not yet been concluded.

10. On December 30, 1980, Andrews Nelson Whitehead, a division of Boise Cascade, Inc.; Lindenmeyr Paper Corporation; and Bulkley Dunton Linde Lathrop, a division of Hammermill Paper Co., Inc.; all creditors of The Stuart Harvest Collection, Inc., filed a petition in the United States Bankruptcy Court for the Southern District of New York, seeking an order for relief under Chapter 11 of the United States Code. On May 4, 1981, the Department of Taxation and Finance filed a claim in such bankruptcy proceeding for withholding taxes in the sum of \$8,640.32.

11. Petitioners contest the amount of the penalties asserted against them, as well as the fact of their liability. Pursuant to provisions made at the hearing, petitioners submitted with their written arguments estimates of the New York State and New York City withholding taxes of The Stuart Harvest Collection, Inc. for the period January through November, 1980. The estimates were calculated as described below.

(a) Petitioners obtained from The Chase Manhattan Bank monthly summaries of the corporation's payroll checking account for January through November, 1980.

(b) Because the summaries reflected net payroll figures, petitioners found it necessary to "back in" to the gross income and withholding tax figures. They assumed that all the corporation's employees claimed one exemption and lived in New York City; however, they did take account of those employees they knew to have claimed two exemptions.

(c) Petitioners consulted the 1980 federal, state and local withholding tax and Federal Insurance Contributions Act schedules to arrive at the following amounts of New York State and New York City withholding taxes:

	<u>NYS</u> <u>WITHHOLDING</u>	<u>NYC</u> <u>WITHHOLDING</u>
January	\$ 643.30	\$ 266.08
February	376.10	153.00
March	424.20	172.20
April	1,172.10	496.41
May	528.80	211.05
June	457.20	181.80
July	519.70	207.05
August	447.20	179.60
September	302.30	119.50
October	283.30	126.25
November	38.10	14.90
	<u>\$5,192.30</u>	<u>\$2,127.84</u>

CONCLUSIONS OF LAW

A. That in determining whether petitioners are liable for the penalty asserted against them pursuant to subsection (g) of section 685 of the Tax Law and subsection (g) of section T46-185.0 of the Administrative Code of the City of New York, the threshold question is whether they were persons required to collect, truthfully account for and pay over taxes withheld from the wages of employees of The Stuart Harvest Collection, Inc. Tax Law section 685(n) and Administrative Code section T46-185.0(n). Relevant factors include whether petitioners signed the corporation's tax returns, possessed the right to hire and discharge employees or derived a substantial part of their income from the corporation; other pertinent areas of inquiry include the amount of stock petitioners held, the sphere of their duties and their authority to pay corporate obligations. Matter of Amengual v. State Tax Comm., 95 A.D.2d 949 (3d Dept. 1983). Recapitulating the evidence presented, each petitioner herein was an officer and one of four shareholders in the closely-held corporation; devoted all of his/her time to and derived all of his/her income from the corporation; and possessed authority to and did sign corporate checks and returns. Clearly,

each was a person required to collect and pay over the withholding taxes during the year at issue.

B. That petitioners were not relieved of their obligations and responsibilities with respect to the collection and payment of withholding taxes by their choice to leave the management and financial decisions to Mr. Maida and later, to Mr. Maida and Financial principals. "[C]orporate officials responsible as fiduciaries for tax revenues cannot absolve themselves merely by disregarding their duty and leaving it to someone else to discharge [citation omitted]." Matter of Ragonesi v. N.Y.S. Tax Comm., 88 A.D.2d 707, 708 (3d. Dept. 1982).

C. That in estimating the New York State and New York City taxes withheld from employee wages during 1980, petitioners relied upon summaries of the corporation's payroll checking account. Their estimates were thus more accurate than those of the Audit Division, which utilized withholding tax returns filed by the corporation for the prior year. The penalty against each petitioner should accordingly be reduced to \$7,320.14.


D. That the petitions of Stuart Feinstein and of Judith Harvest are granted to the extent indicated in Conclusion of Law "C"; the notices of deficiency issued against them on September 28, 1981 should be modified in accordance therewith; and the asserted deficiencies are in all other respects sustained.

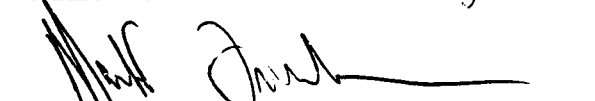
DATED: Albany, New York

STATE TAX COMMISSION

JUN 28 1985


PRESIDENT


COMMISSIONER


COMMISSIONER