

STATE OF NEW YORK

STATE TAX COMMISSION

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In the Matter of the Petition :  
of :  
Donald Levine :  
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 Period :  
10/1/76-11/15/77. :  
:

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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 16th day of July, 1985, he served the within notice of Decision by certified mail upon Donald Levine, the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Donald Levine  
1080 Furth Rd.  
N. Woodmere, NY 11581

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  
16th day of July, 1985.

David Parchuck

William O. Hagebund

Authorized to administer oaths  
pursuant to Tax Law section 174

STATE OF NEW YORK

STATE TAX COMMISSION

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Period 10/1/76-11/15/77. :  
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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 16th day of July, 1985, he served the within notice of Decision by certified mail upon Gerald M. Cotter, the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Gerald M. Cotter  
560 Northern Blvd., Suite 201B  
Great Neck, NY 11021

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  
16th day of July, 1985.

David Parchuck

James J. DeGasperis

Authorized to administer oaths  
pursuant to Tax Law section 174

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

July 16, 1985

Donald Levine  
1080 Furth Rd.  
N. Woodmere, NY 11581

Dear Mr. Levine:

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  
Gerald M. Cotter  
560 Northern Blvd., Suite 201B  
Great Neck, NY 11021  
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

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In the Matter of the Petition	:	
of	:	
DONALD LEVINE	:	DECISION
for Redetermination of a Deficiency or for	:	
Refund of Personal Income Tax under Article 22	:	
of the Tax Law for the Period October 1, 1976	:	
through November 15, 1977.	:	

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Petitioner, Donald Levine, 1080 Furth Road, North Woodmere, New York 11581, filed a petition for redetermination of a deficiency or for refund of personal income tax under Article 22 of the Tax Law for the period October 1, 1976 through November 15, 1977 (File No. 35626).

A formal hearing was held before Daniel J. Ranalli, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on September 17, 1984 at 10:45 A.M., with all briefs to be submitted by April 2, 1985. Petitioner appeared by Gerald M. Cotter, Esq. The Audit Division appeared by John P. Dugan, Esq. (Angelo A. Scopellito, Esq., of counsel).

#### ISSUES

I. Whether petitioner was a person required to collect, truthfully account for and pay over withholding taxes of Allen R. L. Machine Products Corp., who willfully failed to do so and is thus liable to a penalty under section 685(g) of the Tax Law.

II. Whether the Notice of Deficiency was issued against petitioner more than three years after the withholding tax returns were filed, thus falling outside the period of limitation for assessment.

FINDINGS OF FACT

1. On August 31, 1981, the Audit Division issued a Notice of Deficiency, along with a Statement of Deficiency, asserting a penalty pursuant to section 685(g) of the Tax Law against petitioner, Donald Levine, as a person required to collect, truthfully account for and pay over withholding taxes of Allen R. L. Machine Products Corp. ("Allen") for the amount of \$33,346.75 for the period October 1, 1976 through December 31, 1977.<sup>1</sup>

2. Petitioner was the president of Allen during the period in issue. He presented no evidence indicating that he was not a person required to collect, account for and pay over withholding taxes of Allen during the period in issue. Allen filed 24 of 27 withholding tax returns (Form IT-2101) due during the period in issue. No remittance was sent with any of the aforesaid returns. Petitioner was unable to produce the remaining three returns due for the period. These returns covered the periods February 1, 1977 through February 15, 1977, October 16, 1977 through October 31, 1977 and November 1, 1977 through November 15, 1977. Allen ceased doing business in November, 1977.

3. Allen filed reconciliations of personal income tax withheld (Form IT-2103) for 1976 and 1977. For 1976, Allen withheld \$21,942.60 in New York State and New York City taxes. Allen remitted \$15,604.70 in 1976, leaving a balance due of \$6,337.90 for 1976. In 1977, Allen withheld \$27,008.85 and remitted nothing. The Audit Division based the Notice of Deficiency on the amounts recorded on the reconciliations less taxes previously remitted. Of the \$27,008.85 withheld in 1977, Allen filed withholding returns without remittance

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<sup>1</sup> The proper period, later acknowledged by the Audit Division, was October 1, 1976 through November 15, 1977.

totalling \$24,586.85, leaving \$2,422.00 in tax for the periods for which no returns were filed.

CONCLUSIONS OF LAW

A. That section 685(g) of the Tax Law provides that any person required to collect, truthfully account for and pay over personal income tax, 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.

B. That section 685(n) of the Tax Law defines the word "person", for the purpose of section 685(g), and reads as follows:

"For purposes of subsections (g)...the term includes an individual, corporation or partnership or an officer or employee of any corporation (including a dissolved corporation), or a member or employee of any partnership, who as such officer, employee or member is under a duty to perform the act in respect of which the violation occurs."

C. That inasmuch as petitioner was president of Allen and presented no evidence that he was not a person required to collect, account for and pay over tax under sections 685(g) and 685(n) of the Tax Law, he has not met his burden of proof under section 689(e) of the Tax Law and he was, therefore, a person required to collect and pay over withholding taxes.

D. That the penalty for failure to pay withholding taxes under section 685(g) of the Tax Law is wholly distinct from any limitation on assessment under section 683. "It follows then that the penalty imposed against petitioner as a corporate officer is entirely distinct from an...assessment against the corporation. As a separate statutory liability, it need not be assessed within any particular period after the corporate assessment is made (citations omitted)."


Wolfstitch v. New York State Tax Commission, 106 A.D.2d 745. The Notice of Deficiency issued August 31, 1981 was, therefore, timely.

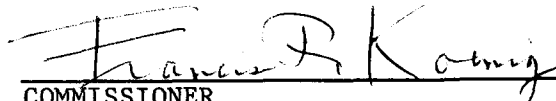
E. That the petition of Donald Levine is denied and the Notice of Deficiency issued August 31, 1981 is sustained.


DATED: Albany, New York

STATE TAX COMMISSION

JUL 16 1985

  
PRESIDENT

  
COMMISSIONER

  
COMMISSIONER