

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :  
of  
Thomas Mutarelli :

AFFIDAVIT OF MAILING

for Redetermination of a Deficiency or Revision :  
of a Determination or Refund of Personal Income  
Tax under Article(s) 22 of the Tax Law for the :  
Period 2/1/82-4/15/84.

State of New York :

ss.:

County of Albany :

David Parchuck/Janet M. Snay, being duly sworn, deposes and says that he/she is an employee of the State Tax Commission, that he/she is over 18 years of age, and that on the 26th day of May, 1987, he/she served the within notice of Decision by certified mail upon Thomas Mutarelli the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Thomas Mutarelli  
89-08 175th Street  
Jamaica, NY 11432

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  
26th day of May, 1987.

David Parchuck  
Authorized to administer oaths  
pursuant to Tax Law section 174

Janet M. Snay

STATE OF NEW YORK

STATE TAX COMMISSION

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In the Matter of the Petition :  
of  
Murray Galin :

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for Redetermination of a Deficiency or Revision :  
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Murray Galin  
4811 Avenue J  
Brooklyn, NY 11234

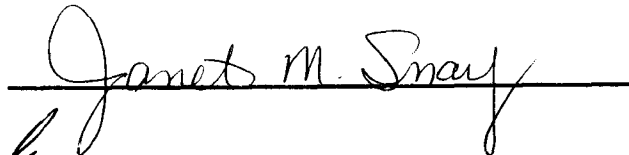
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State of New York :  
ss.:  
County of Albany :

David Parchuck/Janet M. Snay, being duly sworn, deposes and says that he/she is an employee of the State Tax Commission, that he/she is over 18 years of age, and that on the 26th day of May, 1987, he served the within notice of Decision by certified mail upon David Goldstein, the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

David Goldstein  
Goldstein and Lieberman, Esqs.  
132 Nassau St.  
New York, NY 10038

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  
26th day of May, 1987.

David Parchuck  
Authorized to administer oaths  
pursuant to Tax Law section 174

Janet M. Snay

STATE OF NEW YORK

STATE TAX COMMISSION

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In the Matter of the Petition :  
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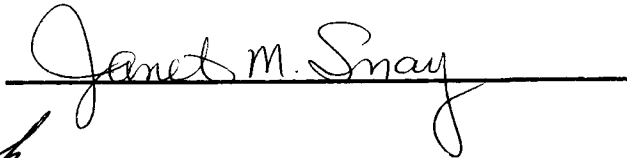
David Goldstein  
Goldstein and Lieberman, Esqs.  
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Sworn to before me this  
26th day of May, 1987.

  
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Authorized to administer oaths  
pursuant to Tax Law section 174

  
\_\_\_\_\_

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

May 26, 1987

Thomas Mutarelli  
89-08 175th Street  
Jamaica, NY 11432

Dear Mr. Mutarelli:

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  
Audit Evaluation Bureau  
Assessment Review Unit  
Building #9, State Campus  
Albany, New York 12227  
Phone # (518) 457-2086

Very truly yours,

STATE TAX COMMISSION

cc: Taxing Bureau's Representative

Petitioner's Representative:  
David Goldstein  
Goldstein and Lieberman, Esqs.  
132 Nassau Street  
New York, NY 10038

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

May 26, 1987

Murray Galin  
4811 Avenue J  
Brooklyn, NY 11234

Dear Mr. Galin:

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.

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Very truly yours,

STATE TAX COMMISSION

cc: Taxing Bureau's Representative

Petitioner's Representative:  
David Goldstein  
Goldstein and Lieberman, Esqs.  
132 Nassau St.  
New York, NY 10038

STATE OF NEW YORK

STATE TAX COMMISSION

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In the Matter of the Petitions  
of  
MURRAY GALIN  
for Redetermination of Deficiencies or for  
Refunds of Personal Income Tax under Article 22 :  
of the Tax Law for the Period February 1, 1982  
through April 15, 1984. :

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DECISION

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In the Matter of the Petitions  
of  
THOMAS MUTARELLI  
for Redetermination of Deficiencies or for  
Refunds of Personal Income Tax under Article 22 :  
of the Tax Law for the Period February 1, 1982  
through April 15, 1984. :

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Petitioner, Murray Galin, 4811 Avenue J, Brooklyn, New York 11234, filed petitions for redetermination of deficiencies or for refunds of personal income tax under Article 22 of the Tax Law for the period February 1, 1982 through April 15, 1984 (File Nos. 60122 and 61265).

Petitioner, Thomas Mutarelli, 89-08 175th Street, Jamaica, New York 11432, filed petitions for redetermination of deficiencies or for refunds of personal income tax under Article 22 of the Tax Law for the period February 1, 1982 through April 15, 1984 (File Nos. 59927 and 61266).

A consolidated hearing was held before Brian L. Friedman, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on January 14, 1987 at 9:15 A.M. Petitioners appeared by Goldstein

and Lieberman, Esqs. (David Goldstein, Esq., of counsel). The Audit Division appeared by John P. Dugan, Esq. (Kevin A. Cahill, Esq., of counsel).

#### ISSUES

I. Whether petitioner, Thomas Mutarelli, was a person required to collect, truthfully account for and pay over withholding taxes with respect to Galin Press Corporation for the period February 1, 1982 through April 15, 1984 and willfully failed to do so, thereby becoming liable for a penalty imposed pursuant to section 685(g) of the Tax Law.

II. Whether petitioner, Murray Galin, a person who was required to collect, truthfully account for and pay over withholding taxes with respect to Galin Press Corporation for the period February 1, 1982 through April 15, 1984, did pay such withholding taxes, thereby exempting himself from the penalty imposed pursuant to section 685(g) of the Tax Law.

#### FINDINGS OF FACT

1. On March 25, 1985, the Audit Division issued to Murray Galin and to Thomas Mutarelli statements of deficiency and notices of deficiency for withholding tax due from Galin Press Corporation for the following periods:

<u>Period</u>	<u>Amount</u>
February 1, 1982 through December 31, 1982	\$14,256.80
January 1, 1983 through December 31, 1983	11,866.62
January 1, 1984 through January 31, 1984	<u>1,183.12</u>
Total	\$27,306.54

2. On April 29, 1985, the Audit Division issued to Murray Galin and to Thomas Mutarelli statements of deficiency and notices of deficiency asserting withholding tax due from Galin Press Corporation in the amount of \$3,023.10 for the period February 1, 1984 through April 15, 1984.

3. At the hearing held herein, petitioner Murray Galin, by his representative, David Goldstein, Esq., admitted that he was a person who was required



to collect, truthfully account for and pay over withholding taxes with respect to Galin Press Corporation for the period February 1, 1982 through April 15, 1984. Petitioner Murray Galin contends, however, that all or a substantial portion of the amount of withholding taxes of Galin Press Corporation, asserted to be due by the aforesaid notices of deficiency, have been paid. In an attempt to prove such payment, petitioner Murray Galin offered photocopies of certain checks and money orders which he alleges were received by the Department of Taxation and Finance for payment of such deficiencies. On most of these copies, there was no indication as to the purpose of these payments. On others, an assessment number relating to a sales tax assessment was contained thereon. Several of the copies of the money orders were illegible.

4. Petitioner Thomas Mutarelli became associated with Galin Press Corporation in 1970. At that time, petitioners Thomas Mutarelli and Murray Galin took over the business from Mr. Galin's brother, Willie Galin. Petitioner Thomas Mutarelli became secretary of the corporation, while Murray Galin became president. Petitioner Thomas Mutarelli put up no money, but agreed that the corporation would assume previous corporate debts amounting to approximately \$135,000.00.

5. The corporation did business at 38 East First Street, New York, New York. Petitioner Thomas Mutarelli's duties consisted of supervising production and delivery and repairing printing presses when they broke down. He received a straight salary and never received bonuses, dividends or shares of corporate profits. He supervised approximately 18 to 20 workers in the printing shop. He had the authority to hire and fire these workers, but had no such authority with respect to the employees who worked in the office. Such office employees were hired, fired and supervised by Murray Galin. Murray Galin and his office

employees were in charge of soliciting customer orders and, thereafter, billing customers for the printed materials produced by the corporation. Galin Press Corporation's tax returns were prepared by Murray Galin and the corporation's accountant and were signed by Murray Galin. Petitioner Thomas Mutarelli neither prepared nor signed such returns. He did, however, sign corporate checks issued for purposes of payment of the corporation's taxes, since his signature, along with Murray Galin's, was required on all corporate checks. Prior to the closing of the business by a secured creditor, petitioner Thomas Mutarelli was not made aware that corporate taxes remained unpaid.

CONCLUSIONS OF LAW

A. That where a person is required to collect, truthfully account for and pay over withholding tax and willfully fails to collect and pay over such tax, section 685(g) of the Tax Law imposes on such person "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 term "person", for purposes of section 685(g) of the Tax Law, to include:

"an individual, corporation, or partnership or an officer or employee of any 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 the question of whether petitioner Thomas Mutarelli was a person under a duty to collect and pay over withholding taxes must be determined on the basis of the facts presented. Some of the factors to be considered include whether petitioner signed the corporation's tax returns, possessed the right to hire and discharge employees or derived a substantial portion of his income from the corporation. Other relevant factors include the amount of stock petitioner held, the actual sphere of his duties and his authority to pay corporate

obligations and/or exercise authority over the assets of the corporation.

(Matter of Amengual v. State Tax Commn., 95 AD2d 949 [3d Dept 1983]; McHugh v. State Tax Commn., 70 AD2d 987 [3d Dept. 1979].) Finally, the test of willfulness is whether the act, default or conduct was "voluntarily done with knowledge that, as a result, trust funds of the government will not be paid over; intent to deprive the government of its money need not be shown, merely something more than accidental nonpayment [citation omitted]." (Matter of Ragonesi v. New York State Tax Commn., 88 AD2d 707, 707-708 [3d Dept. 1982].)

D. That, with respect to Galin Press Corporation, although petitioner Thomas Mutarelli was an officer, possessed the authority to sign corporate checks and to hire and fire certain employees and derived a substantial portion of his income from the corporation, the actual sphere of his duties related only to the production and delivery of the printed materials and the repair of the corporation's printing presses. He had nothing whatsoever to do with preparing and signing the corporation's tax returns or any other aspect of office functions. He performed no duties relating to the financial operations of the corporation.

E. That petitioner Thomas Mutarelli was not a person who was responsible for the collection and payment of the withholding taxes of Galin Press Corporation for the period at issue herein and is, therefore, not liable for the penalty asserted against him pursuant to section 685(g) of the Tax Law.

F. That petitioner Murray Galin has not sustained his burden of proof, imposed pursuant to section 689(e) of the Tax Law, to show that the withholding taxes of Galin Press Corporation, for the period at issue herein, were paid. Since he has conceded that he was a person who was required to collect, truthfully account for and pay over the withholding taxes of said corporation, the penalty

imposed pursuant to section 685(g) of the Tax Law was properly asserted against him by the Audit Division.


G. That the petitions of Thomas Mutarelli are granted and the notices of deficiency issued against him on March 25, 1985 and April 29, 1985 are hereby cancelled.

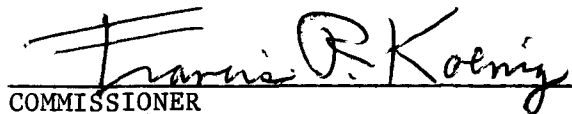
H. That the petitions of Murray Galin are denied and the notices of deficiency issued against him on March 25, 1985 and April 29, 1985 are hereby sustained.

DATED: Albany, New York

STATE TAX COMMISSION

MAY 26 1987.

  
PRESIDENT

  
COMMISSIONER

  
COMMISSIONER