

STATE OF NEW YORK

STATE TAX COMMISSION

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In the Matter of the Petition  
of

Fred Stupelman

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:

AFFIDAVIT OF MAILING

for Redetermination of a Deficiency or for Refund :  
of New York State Personal Income Tax under Article :  
22 of the Tax Law and New York City Personal :  
Income Tax under Chapter 46, Title T of the :  
Administrative Code of the City of New York for :  
the Years 1979 & 1980.

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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 17th day of January, 1986, he served the within notice of Decision by certified mail upon Fred Stupelman, the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Fred Stupelman  
246 Surrey Dr.  
New Rochelle, NY 10804

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  
17th day of January, 1986.

David Parchuck

James A. Hagelund

Authorized to administer oaths  
pursuant to Tax Law section 174

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

January 17, 1986

Fred Stupelman  
246 Surrey Dr.  
New Rochelle, NY 10804

Dear Mr. Stupelman:

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

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In the Matter of the Petition  
of

Monroe Studell

:

:

AFFIDAVIT OF MAILING

for Redetermination of a Deficiency or for Refund :  
of NYS Personal Income Tax under Article 22 of the  
Tax Law and New York City Personal Income Tax under:  
Chapter 46, Title T of the Administrative Code of  
the City of New York for the Years 1979 & 1980. :

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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 17th day of January, 1986, he served the within notice of Decision by certified mail upon Monroe Studell, the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Monroe Studell  
95 Christopher Street  
New York, NY 10014

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  
17th day of January, 1986.

David Parchuck

Charles A. Haglund

Authorized to administer oaths  
pursuant to Tax Law section 174

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

January 17, 1986

Monroe Studell  
95 Christopher Street  
New York, NY 10014

Dear Mr. Studell:

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:

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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

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In the Matter of the Petition :  
of :  
MONROE STUDELL :  
for Redetermination of a Deficiency or for :  
Refund of New York State Personal Income Tax :  
under Article 22 of the Tax Law and New York :  
City Personal Income Tax under Chapter 46, Title :  
T of the Administrative Code of the City of :  
New York for the Years 1979 and 1980. :

DECISION

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In the Matter of the Petition :  
of :  
FRED STUPELMAN :  
for Redetermination of a Deficiency or for :  
Refund of New York State Personal Income Tax :  
under Article 22 of the Tax Law and New York :  
City Personal Income Tax under Chapter 46, Title :  
T of the Administrative Code of the City of :  
New York for the Years 1979 and 1980. :

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Petitioners, Monroe Studell, 95 Christopher Street, New York, New York 10014, and Fred Stupelman, 246 Surrey Drive, New Rochelle, New York 10804, filed petitions for redetermination of deficiencies or for refunds of New York State personal income tax under Article 22 of the Tax Law and New York City personal income tax under Chapter 46, Title T of the Administrative Code of the City of New York for the years 1979 and 1980 (File Nos. 40685 and 40678).

A consolidated 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 July 24, 1985 at 10:45 A.M., with all briefs to be submitted by

September 10, 1985. Petitioners appeared pro se. The Audit Division appeared by John P. Dugan, Esq. (Angelo Scopellito, Esq., of counsel).

#### ISSUES

I. Whether petitioner Monroe Studell is subject to penalties, pursuant to section 685(g) of the Tax Law and section T46-185.0(g) of the Administrative Code of the City of New York, as a person who willfully failed to collect, truthfully account for and pay over the New York State and New York City withholding taxes due from Bronx Metal Fabricators Inc. for the years 1979 and 1980.

II. Whether petitioner Fred Stupelman is subject to penalties, pursuant to section 685(g) of the Tax Law and section T46-185.0(g) of the Administrative Code of the City of New York, as a person who willfully failed to collect, truthfully account for and pay over the New York State and New York City withholding taxes due from Bronx Metal Fabricators Inc. for the years 1979 and 1980.

#### FINDINGS OF FACT

1. Bronx Metal Fabricators Inc. (hereinafter "BMF"), 12 Weyman Avenue, New Rochelle, New York 10805, failed to pay over the New York State and New York City personal income taxes withheld from the wages of its employees for the following periods:

<u>Withholding Tax Period</u>	<u>Amount</u>
February 1, 1979 through December 31, 1979	\$17,387.19
April 1, 1980 through December 31, 1980	<u>52,414.33</u>
TOTAL	<u>\$69,801.52</u>

2. On November 29, 1982, the Audit Division issued a Statement of Deficiency in conjunction with a Notice of Deficiency against petitioner Monroe Studell wherein penalties were asserted pursuant to section 685(g) of the Tax Law and

section T46-185.0(g) of the Administrative Code of the City of New York for amounts equal to the total New York State and New York City withholding taxes due from BMF for the aforesated periods. Said penalties were asserted on the grounds that petitioner was a person required to collect, truthfully account for and pay over the withholding taxes at issue, and that he willfully failed to do so. A similar set of documents was issued under the same date against petitioner Fred Stupelman. The deficiency asserted therein and the Audit Division's grounds for asserting such deficiency were identical to those with respect to petitioner Monroe Studell.

3. During the years at issue petitioner Fred Stupelman was President and Treasurer of BMF. Petitioner Monroe Studell was Vice President and Secretary. Mr. Stupelman held 55 percent of BMF's outstanding stock. Mr. Studell held 45 percent of such stock. Both petitioners devoted their full time to the business, signed the corporation's tax returns and were authorized signatories on BMF's bank accounts.

4. Petitioners did not deny that they were persons responsible for withholding and paying over the New York State and City personal income taxes withheld from the employees of BMF during the periods at issue herein. However, they argued that the amounts asserted may well be overstated due to criminal misappropriation of BMF's funds by its bookkeeper, whose acts they alleged included the creation of fictitious employees for the purpose of converting the funds to her own use.

5. On February 26, 1982, BMF filed a voluntary petition under Chapter 11 of the Bankruptcy Reform Act of 1978 with the United States Bankruptcy Court, Southern District of New York, seeking reorganization pursuant to such chapter.

6. The estate of BMF has filed suit against BMF's former accountants for malpractice wherein damages were asserted in the amount of \$1,000,000.00 to \$2,000,000.00. Petitioners contended that payment of the withholding taxes at issue should come from the bankrupt estate rather than from them personally. They argued that the estate expects a substantial recovery from the aforesaid suit which would result in sufficient funds being available for payment in full of the withholding taxes at issue.

7. Petitioners were granted seven weeks subsequent to the hearing within which to submit documentation evidencing an overstatement in the deficiency due to the illegal actions of BMF's former bookkeeper, however, no such documentation was forthcoming.

#### 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 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."

For New York City purposes, section T46-185.0(g) of the Administrative Code of the City of New York contains a similar provision.

B. That sections 685(n) of the Tax Law and T46-185.0(n) of the Administrative Code of the City of New York provide that, for purposes of the aforementioned subdivisions (g), the term person:

"[I]ncludes 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 petitioners were persons who willfully failed to collect, truthfully account for and pay over the withholding taxes of BMF during the years at issue herein. BMF's subsequent bankruptcy had no effect on their duties and responsibilities during the years 1979 and 1980.

D. That petitioners have failed to sustain their burden of proof, imposed pursuant to section 689(e) of the Tax Law and section T46-189.0(e) of the Administrative Code of the City of New York, to show that the deficiencies asserted against them were erroneous or improper.

E. That the petition of Monroe Studell is denied and the Notice of Deficiency issued against him on November 29, 1982 is sustained.

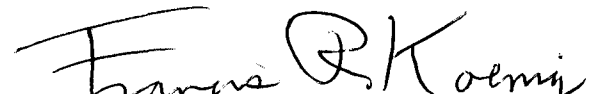
F. That the petition of Fred Stupelman is denied and the Notice of Deficiency issued against him on November 29, 1982 is sustained.


DATED: Albany, New York

STATE TAX COMMISSION

JAN 17 1986

  
PRESIDENT

  
COMMISSIONER

  
COMMISSIONER