

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of
Marvin Safir :

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 :
Years 1976 & 1978.

State of New York :

ss.:

County of Albany :

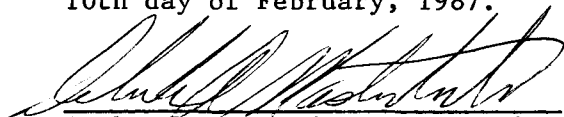
David Parchuck/Janet M. Snay, being duly sworn, deposes and says that he/she is an employee of the State Tax Commission, that he/she is over 18 years of age, and that on the 10th day of February, 1987, he/she served the within notice of Decision by certified mail upon Marvin Safir the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

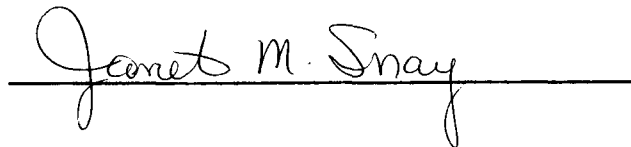
Marvin Safir
28 East 73rd Street
New York, NY 10021

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
10th day of February, 1987.


Authorized to administer oaths
pursuant to Tax Law section 174



STATE OF NEW YORK

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of
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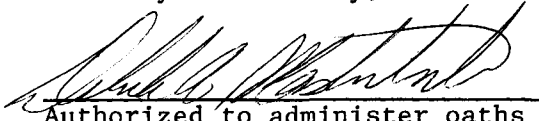
David Parchuck/Janet M. Snay, being duly sworn, deposes and says that he/she is an employee of the State Tax Commission, that he/she is over 18 years of age, and that on the 10th day of February, 1987, he served the within notice of Decision by certified mail upon Michael A. Schub, the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

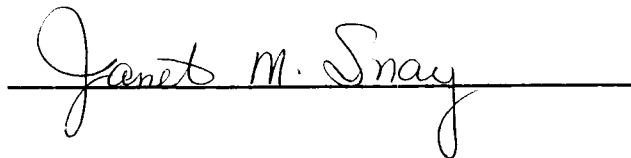
Michael A. Schub
845 Third Avenue; Suite 1400
New York, NY 10022

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
10th day of February, 1987.


Authorized to administer oaths
pursuant to Tax Law section 174



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

February 10, 1987

Marvin Safir
28 East 73rd Street
New York, NY 10021

Dear Mr. Safir:

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:
Michael A. Schub
845 Third Avenue; Suite 1400
New York, NY 10022

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of :
MARVIN SAFIR : DECISION
for Redetermination of a Deficiency or for :
Refund of Personal Income Tax under Article 22 :
of the Tax Law for the Years 1976 and 1978. :

Petitioner, Marvin Safir, 28 East 73rd Street, New York, New York 10021, filed a petition for redetermination of a deficiency or for refund of personal income tax under Article 22 of the Tax Law for the years 1976 and 1978 (File No. 61596).

On July 15, 1986, petitioner advised the State Tax Commission, in writing, that he desired to waive a hearing and submit the case to the State Tax Commission upon the entire record contained in the file, with submission of additional evidence and documents by August 29, 1986. After due consideration of said record, the Commission renders the following decision.

ISSUE

Whether petitioner, Marvin Safir, is subject to a penalty pursuant to section 685(g) of the Tax Law as a person who willfully failed to collect, truthfully account for and pay over the New York State withholding taxes due from 155 East 80th Street Restaurant, Inc. for the years 1976 and 1978.

FINDINGS OF FACT

1. 155 East 80th Street Restaurant, Inc. (hereinafter "the corporation") failed to pay over the New York State personal income taxes withheld from the wages of its employees for the following periods:

<u>Withholding Tax Period</u>	<u>Amount</u>
December 1, 1976 through December 31, 1976	\$186.30
July 1, 1978 through December 31, 1978	131.76
TOTAL	<u>\$318.06</u>

2. On April 29, 1985, the Audit Division issued a Statement of Deficiency in conjunction with a Notice of Deficiency against Marvin Safir (hereinafter "petitioner") wherein a penalty was asserted pursuant to section 685(g) of the Tax Law for an amount equal to the New York State withholding taxes due from the corporation for the aforestated periods. Such penalty was asserted on the grounds that petitioner was a person required to collect, truthfully account for and pay over said taxes and that he willfully failed to do so.

3. The record clearly shows that petitioner was president of the corporation during the periods at issue herein.

4. Petitioner did not deny that he was the person responsible for the collection and payment of the withholding taxes at issue.

5. Petitioner's defense, according to his petition and perfected petition, is that:

a - "The deficiency assessment in question was made against Petitioner on or about April 29, 1985, by mailing of a 'Statement of Deficiency'. The attempt to assess this penalty more than three years after the withholding periods involved contravenes the general statutes of limitation of the State of New York and is unenforceable."

b - "Department of Taxation and Finance is seeking to hold Petitioner liable as an officer of a corporation for withholding taxes. The State Tax Commission has no authority to require an administrative hearing under Tax Law section 1138(a) where a return was filed and was not found to be insufficient Parsons v. State Tax Commission 34 N.Y. 2d 190 (1974)."

6. Although petitioner was granted until August 29, 1986 to submit additional evidence, he failed to do so.

CONCLUSIONS OF LAW

A. 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." (Wolfstitch v. New York State Tax Commission, 106 AD2d 745 [citations omitted].) The Notice of Deficiency issued April 29, 1985 was, therefore, timely.

B. That the withholding tax penalty is imposed under Article 22 of the Tax Law; therefore Tax Law section 1138(a), which is part of Article 28, and the holding in Parsons v. State Tax Commission (34 NY2d 190) are both inapplicable to deprive the State Tax Commission of jurisdiction to hear this matter.

C. 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."

D. That section 685(n) of the Tax Law provides that, for purposes of subdivision (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."

E. That petitioner was a person required to collect, truthfully account for and pay over the withholding taxes of the corporation during the periods at issue herein within the meaning and intent of sections 685(g) and 685(n) of

the Tax Law. Accordingly, the penalty asserted against him is sustained.

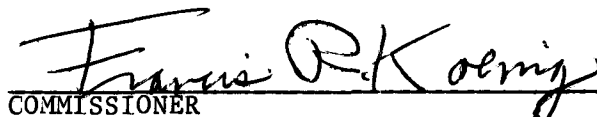
F. That the petition of Marvin Safir is denied and the Notice of Deficiency issued against him on April 29, 1985 is sustained.


DATED: Albany, New York

STATE TAX COMMISSION

FEB 10 1987


PRESIDENT


COMMISSIONER


COMMISSIONER