

STATE OF NEW YORK
STATE TAX COMMISSION

In the Matter of the Petition :
of
Psaty & Fuhrman, Inc. :
for Redetermination of a Deficiency or a Revision :
of a Determination or a Refund of
Personal Income Tax :
under Article 22 of the Tax Law
for the Years 1969 - 1971. :

AFFIDAVIT OF MAILING

State of New York
County of Albany

Jay Vredenburg, being duly sworn, deposes and says that he is an employee of the Department of Taxation and Finance, over 18 years of age, and that on the 26th day of November, 1979, he served the within notice of Decision by certified mail upon Psaty & Fuhrman, Inc., the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Psaty & Fuhrman, Inc.
369 Lexington Ave.
New York, NY 10017

and by depositing same enclosed in a postpaid properly addressed wrapper in a (post office or official depository) 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 November, 1979.

Joanne Krapp

J. Vredenburg

STATE OF NEW YORK
STATE TAX COMMISSION

In the Matter of the Petition :
of
Psaty & Fuhrman, Inc. :

AFFIDAVIT OF MAILING

for Redetermination of a Deficiency or a Revision :
of a Determination or a Refund of
Personal Income Tax :
under Article 22 of the Tax Law
for the Years 1969 - 1971. :

State of New York
County of Albany

Jay Vredenburg, being duly sworn, deposes and says that he is an employee of the Department of Taxation and Finance, over 18 years of age, and that on the 26th day of November, 1979, he served the within notice of Decision by certified mail upon Emit Romani the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Mr. Emit Romani
Saverin & DiVittorio
747 Third Ave.
New York, NY

and by depositing same enclosed in a postpaid properly addressed wrapper in a (post office or official depository) 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 November, 1979.

Joanne Knapp

J. Vredenburg

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

November 26, 1979

Psaty & Fuhrman, Inc.
369 Lexington Ave.
New York, NY 10017

Gentlemen:

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, any proceeding in court to review an adverse decision by the State Tax Commission can only be instituted under Article 78 of the Civil Practice Laws 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
Deputy Commissioner and Counsel
Albany, New York 12227
Phone # (518) 457-6240

Very truly yours,

STATE TAX COMMISSION

cc: Petitioner's Representative
Emit Romani
Saverin & DiVittorio
747 Third Ave.
New York, NY
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition	:	
	:	
of	:	
	:	
PSATY & FUHRMAN, INC.	:	DECISION
	:	
for Redetermination of a Deficiency or	:	
for Refund of Personal Income Tax under	:	
Article 22 of the Tax Law for the Years	:	
1969, 1970 and 1971.	:	

Petitioner, Psaty & Fuhrman, Inc., 369 Lexington Avenue, New York, New York 10017, 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 1969, 1970 and 1971 (File No. 00675).

A formal hearing was held before Harvey B. Baum, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on September 27, 1977 at 2:45 P.M. Petitioner appeared by Emit Romani of Saverin & DiVittorio, CPA's. The Income Tax Bureau appeared by Peter Crotty, Esq. (Richard Kaufman, Esq., of counsel).

ISSUE

Whether reimbursement for travel and lodging expenses paid by petitioner to his employees constituted "supplemental income" to employees; therefore, subject to withholding.

FINDINGS OF FACT

1. On February 26, 1973, the Income Tax Bureau issued a Notice of Deficiency against petitioner, Psaty & Fuhrman, Inc., for the years 1969, 1970 and 1971. Said notice asserted personal income tax of \$6,060.61, plus interest of \$814.83, for a total due of \$6,875.44. The notice indicated that the deficiency was for five percent of the supplemental income paid to employees for the years at issue and was due to the failure of petitioner to withhold New York State tax.

2. Petitioner, Psaty & Fuhrman, Inc., timely filed a petition for redetermination of deficiency for the years at issue, alleging that the reimbursement made to employees for said years constituted expenditures for travel and lodging in accordance with section 162(a)(2) of the Internal Revenue Code; that "such expenditures are not supplemental income or subject to withholding taxes".

3. The Income Tax Bureau produced, as its witness, the Tax Examiner who prepared the payroll schedules of petitioner's employees. Said schedules were introduced into evidence as Exhibit "D", together with the purported supplemental income of said employees. The State's Exhibit "D" indicated both the regular payroll and the supplemental income, while Exhibit "E" constituted a weekly breakdown, by employee, of the purported reimbursement given to employees upon which no withholding was made.

4. The examiner also testified that the payroll and supplemental income schedules showed that the reimbursements were made continuously over a period in excess of one year while employees were working on construction of the Albany South Mall. In the opinion of the examiner, such expenditures were not considered reimbursement for travel and lodging away from home under the Internal Revenue Code, but were "supplemental income" subject to withholding under both Federal and New York Tax Law.

5. Petitioner's witness testified that petitioner was awarded a construction contract for work at the Albany South Mall and that the construction work was scheduled to be completed in six months, but delays caused by the State resulted in extending the period of construction to a period of more than two years. The witness also testified that because of a shortage of construction workers in the Albany area, petitioner had to hire workers who lived a considerable distance from Albany. The assignment to said area, though extended, constituted

temporary work away from each such employee's home, and that the per diem living allowance payments for travel and lodging were proper and were not subject to withholding tax.

6. That of the twenty-two employees receiving reimbursement, six were employed for less than two weeks and the remainder were employed at the Mall during various times (always in excess of one year). The men were hired through the Union Hall in New York City to do concrete work only. The reimbursement paid to employees for travel and lodging was made on a per diem basis. Separate checks were issued (from the regular payroll checks) for these expenditures.

7. Petitioner could not show the basis for fixing the amount of expenditure for travel or lodging given each employee. A substantial number of employees moved to the Albany area and worked for more than one contractor and continued to receive reimbursements. There was testimony to the effect that travel and lodging expenditures were, in some cases, based on union contract scales and that said expenses bore no relationship to the employees' wage scale. There was no evidence to indicate that any particular employee had to voucher or substantiate actual expenses for travel or lodging to justify the reimbursement received, but in the case of one employee the reimbursement amounted to \$12,000.00 for one year.

CONCLUSIONS OF LAW

A. That the reimbursement for travel and lodging received by employees who worked on the South Mall project continuously for a period greater than one year constituted additional income, subject to withholding tax, within the meaning and intent of Treasury Regulation section 31.3401(a)-1 (also see Rev. Rul. 59-371, 1959-2 CB 236).

B. That petitioner, Psaty & Fuhrman, Inc., was required to deduct and withhold tax under section 675 of the Tax Law and 20 NYCRR 160.31 for those

sixteen employees who worked longer than one year; that petitioner was not required to withhold said tax for the six employees who worked less than two weeks.

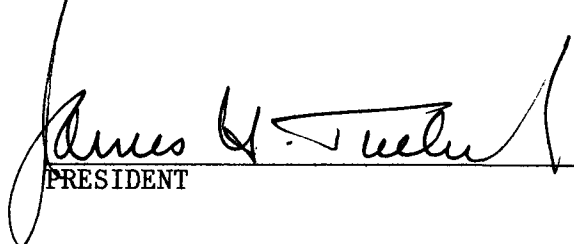
C. That the petition of Psaty & Fuhrman, Inc. is granted to the extent shown in Conclusion of Law "B".


D. That the Income Tax Bureau is hereby directed to modify the Notice of Deficiency issued on February 26, 1973, and that, except as so granted, the petition is in all other respects denied.

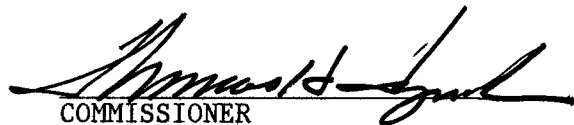
DATED: Albany, New York

NOV 26 1979

STATE TAX COMMISSION


PRESIDENT


COMMISSIONER


COMMISSIONER