

STATE OF NEW YORK
STATE TAX COMMISSION

In the Matter of the Petition

of

MILTON WEINSTEN

AFFIDAVIT OF MAILING

For a Redetermination of a Deficiency or :
a Revision of a Determination or a Refund :
of Personal Income :
Taxes under Article(s) 22 of the :
Tax Law for the Year(s) ~~or Period(s)~~ 1970 :
and 1971.

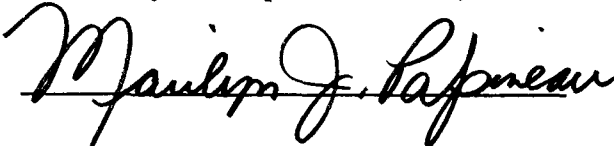
State of New York
County of Albany

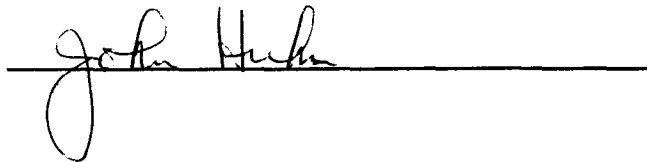
John Huhn , being duly sworn, deposes and says that
~~she~~ she is an employee of the Department of Taxation and Finance, over 18 years of
age, and that on the 6th day of April , 1979 , ~~she~~ she served the within
Notice of Decision by (certified) mail upon Milton Weinsten
~~(representative of)~~ the petitioner in the within proceeding,
by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed
as follows: Milton Weinsten
17 Bardion Lane
Harrison, New York 10582
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)~~
~~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

6th day of April , 1979.





STATE OF NEW YORK
STATE TAX COMMISSION

In the Matter of the Petition

of

MILTON WEINSTEN

AFFIDAVIT OF MAILING

For a Redetermination of a Deficiency or :
a Revision of a Determination or a Refund :
of Personal Income :
Taxes under Article(s) 22 of the :
Tax Law for the Year(s) ~~xxx Period(s)~~ 1970 :
and 1971.

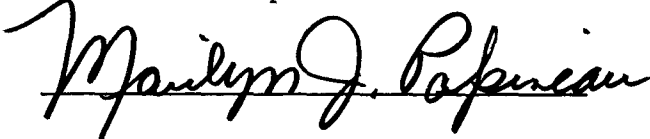
State of New York
County of Albany

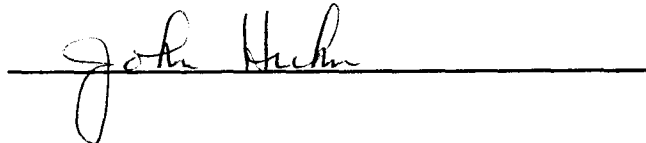
John Huhn , being duly sworn, deposes and says that
she is an employee of the Department of Taxation and Finance, over 18 years of
age, and that on the 6th day of April , 1979 , she served the within
Notice of Decision by (certified) mail upon Samuel J. Elias, CPA
(representative of) the petitioner in the within proceeding,
by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed
as follows: Samuel J. Elias, CPA
539 Greystone Road
Morion, Pennsylvania 19066
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

6th day of April , 1979.


Marilyn J. Papineau


John Huhn



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

JAMES H. TULLY JR., PRESIDENT
MILTON KOERNER
THOMAS H. LYNCH

April 6, 1979

Milton Weinstein
17 Bardion Lane
Harrison, New York 10582

Dear Mr. Weinstein:

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 the Deputy Commissioner and Counsel to the New York State Department of Taxation and Finance, Albany, New York 12227. Said inquiries will be referred to the proper authority for reply.

Sincerely,


Joseph Chyrywat
Hearing Examiner

cc: Petitioner's Representative

Taxing Bureau's Representative

STATE TAX COMMISSION

In the Matter of the Petition :
of :
MILTON WEINSTEN : DECISION
for Redetermination of a Deficiency or :
for Refund of Personal Income Tax under :
Article 22 of the Tax Law for the Years :
1970 and 1971. :

A small claims hearing was held before Harry Huebsch, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on April 19, 1978 at 1:15 P.M. Petitioner appeared by Samuel J. Elias, CPA. The Income Tax Bureau appeared by Peter Crotty, Esq. (William Fox, Esq., of counsel).

I. Whether petitioner was a person required to collect, truthfully account for and pay over New York State withholding taxes of Leemick Industries, Inc. during 1971.

III. Whether petitioner's personal bankruptcy relieved him of liability for the penalty imposed under section 685(g) of the Tax Law.

FINDINGS OF FACT

1. Leemick Industries, Inc. failed to pay over to the Income Tax Bureau, New York State personal income taxes of \$1,213.70, which it withheld from its employees during the period January 1, 1971 to July 1, 1971.

2. On September 30, 1974, the Income Tax Bureau issued a Notice of Deficiency against petitioner, Milton Weinsten, asserting a penalty equal to the amount of New York State withholding taxes due from Leemick Industries, Inc. for the period January 1, 1971 to July 1, 1971. It did so on the grounds that he was a person required to collect, truthfully account for and pay over said taxes, and that he willfully failed to do so.

3. During the period at issue, petitioner was president, treasurer, principal stockholder and chairman of the Board of Directors of Leemick Industries, Inc. The total financial structure of said corporation was under his direction and control and he was the only officer of the corporation with the authority to sign checks without a cosignatory.

4. Madalena Knits, Inc. failed to pay over to the Income Tax Bureau, New York State personal income taxes of \$1,691.60, which it withheld from its employees during the period December 1, 1970 through December 31, 1970. It also withheld \$1,748.00 from its employees during the period August 1, 1971 through November 2, 1971.

5. On March 25, 1974, the Income Tax Bureau issued a Notice of Deficiency against petitioner, asserting penalty equal to the amount of New York State withholding taxes due from Madalena Knits, Inc. for the periods at issue. It did so on the grounds that he was a person required to collect, truthfully account for and pay over said taxes and that he willfully failed to do so.

6. Madalena Knits, Inc. was a wholly-owned subsidiary of Leemick Industries, Inc. Petitioner was its principal officer at its inception and during the periods at issue, he had the power to dispense corporate funds. A Federal assessment for unpaid Federal income taxes withheld from employees had been issued against him.

7. Petitioner contended that he spent almost all of his time in Puerto Rico attending to business affairs and had little part in the day-to-day activities of Madalena Knits, Inc., and that use of the funds of said corporation was in the hands of others. Petitioner did not submit documentary or any satisfactory evidence to support his contention. It could not be ascertained at the hearing whether or not petitioner was an officer of Madalena Knits, Inc. during the periods at issue. He had the authority to sign checks and to decide whether other creditors were to be paid.

8. At the time of the hearing, petitioner was involved in personal bankruptcy proceedings under Chapter 11 in the United States District Court (Case #71-B-542). He did not submit evidence to show that the penalties were part of the proceedings. He contended that his personal bankruptcy eliminated the liability for the penalty imposed on him under section 685(g) of the Tax Law, because said penalty was dischargeable in bankruptcy. He based his contention on a recent decision rendered by the United States Court of Appeals, Seventh Circuit, In the Matter of Onofre J. Sotelo and Naomi Sotelo, Bankrupts, 551 F. 2d 1090, (1977), in which the court held that the 100% penalty was a penalty and not a tax and, therefore, dischargeable.

CONCLUSIONS OF LAW

A. That petitioner, Milton Weinsten, was a person required to collect, truthfully account for, and pay over New York State withholding taxes due from Leemick Industries, Inc. and Madalena Knits, Inc. in the respective amounts of \$1,213.70 and \$3,439.60, for the periods at issue, and that he willfully failed to

do so, within the meaning of subsections (g) and (n) of section 685 of the Tax Law. Accordingly, petitioner is subject to a penalty equal to said amounts under subsection (g) of section 685 of the Tax Law.

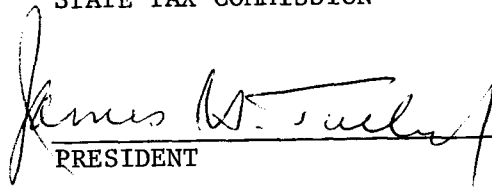
B. That the decision of the United States Court of Appeals was subsequently reversed by the United States Supreme Court, -US-, 56 L Ed 2d 275, which ruled that an individual's liability under 26 USC §6672 for the amount of sums which had been collected or withheld for Federal taxes from the wages paid to a corporation's employees, but which had never been paid over to the Federal government, was nondischargeable in bankruptcy, notwithstanding that such liability under §6672 was labeled a "penalty."

C. That the petition of Milton Weinsten is denied and the notices of deficiency issued September 30, 1974 regarding Leemick Industries, Inc. and March 25, 1974 regarding Madalena Knits, Inc. are sustained.

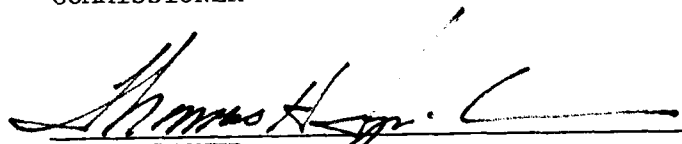
DATED: Albany, New York

April 6, 1979

STATE TAX COMMISSION


PRESIDENT


COMMISSIONER


COMMISSIONER