

STATE TAX COMMISSION

of

DECISION

for Redetermination of a Deficiency or for
Refund of Personal Income Tax under Article 22 :
of the Tax Law for the Years 1977, 1978 and
1979.

A hearing was held before Arthur Bray, Hearing Officer, at the offices of the State Tax Commission, 333 East Washington Street, Syracuse, New York, on October 8, 1985 at 1:15 P.M., with all briefs to be submitted by December 13, 1985. Petitioner appeared by O'Hara, Felice & Crough (Brian K. Haynes, Esq. and John V. Bell, Esq., of counsel). The Audit Division appeared by John P. Dugan, Esq. (James Della Porta, Esq., of counsel).

ISSUES

- I. Whether the Notice of Deficiency issued by the Audit Division was legally sufficient.
- II. Whether petitioner filed a timely petition.
- III. Whether the Notice of Deficiency is barred by the statute of limitation
- IV. Whether petitioner is liable for the penalty asserted against him pursuant to section 685(g) of the Tax Law with respect to withholding taxes due

FINDINGS OF FACT

1. On October 26, 1981, the Audit Division issued a Notice of Deficiency accompanied by a Statement of Deficiency to petitioner, Robert R. Frank, asserting a penalty equal to the amount of unpaid withholding tax which the Audit Division determined was due from Liverpool Environmental Service, Inc. ("the corporation"). The Notice **of** Deficiency was not entitled as such. However, the first and last paragraphs stated:

"In accordance with the provisions of the New York State Tax Law (Articles 22 and 23), notice is given that the determination of your Personal and/or Unincorporated Business Tax liability for the above noted taxable year(s) shows a deficiency (or deficiencies) in the amount(s) shown above. The attached statement shows the computation of the deficiency or deficiencies.

* * *

IF YOU DO NOT AGREE, and do not sign and return this consent, the deficiency or deficiencies will become an assessment after the expiration of 90 days from the date of this letter, and will be subject to collection, as required by law, unless within that time you contest this determination by filing a petition with the State Tax Commission in accordance with the provisions **of** Section 689 of the Tax Law. You may obtain instructions for filing a petition with the Tax Commission from the Tax Appeals Bureau **or** any office of the Department of Taxation and Finance; ask for the 'Rules of Practice' before the Commission."

2. The Notice of Deficiency asserted that the penalty was due as follows:

<u>YEAR</u>	<u>AMOUNT</u>
1977	\$4,032.90
1978	2,652.10
1979	<u>2,091.20</u>
	\$8,776.20

3. The Notice **of** Deficiency was mailed by certified mail to petitioner's last known address and subsequently returned as unclaimed after the United States Postal Service left two notices.

4. Petitioner never received the Notice of Deficiency.

5. On May 31, 1982, petitioner filed a petition challenging the asserted deficiencies of personal income tax.

6. The corporation was formed in 1974. Its activities consisted of cleaning underground sewer mains and storm sewer pipes and then inspecting the pipes through the use of a closed circuit television camera.

7. At the time the corporation was formed, all of the outstanding stock was held by petitioner's mother-in-law, Norine Fitzgerald. However, petitioner was elected to a directorship and held the office of vice-president. During the year 1975, petitioner continued to be a director and vice-president.

8. On January 15, 1976, petitioner became the president of the corporation. Petitioner had been asked to become president because individuals within the corporation thought it would be helpful to have a new name associated with the company.

9. On August 16, 1976, Norine Fitzgerald transferred all of her stock to John Fitzgerald, who was petitioner's brother-in-law.

10. Petitioner continued to be president of the corporation until November 2 1977 when he resigned as director and president. Petitioner resigned because one or two weeks earlier he had been advised by an agent of the Internal Revenue Service that there were federal withholding taxes due. This was when petitioner first learned that the corporation was having financial difficulties. Petitioner resigned as an officer of the corporation because he did not wish to become involved with the withholding tax liability.

11. John Fitzgerald became the president of the corporation upon petitioner resignation. However, petitioner remained employed by the corporation until

12. Petitioner's duties remained the same during each **of** the years he was employed by the corporation. These duties consisted of supervising a crew **of** two or three individuals and telling them which sections of pipe had to be cleaned, which sections of pipe had to be viewed on closed circuit television and what hours to work.

13. Petitioner had the right to hire and fire employees. However, this right was limited to the two or three employees whom he supervised.

14. During the entire period of petitioner's employment with the corporation, he never examined or signed withholding tax returns. He did not know when they were prepared, paid or submitted.

15. Petitioner never signed payroll checks and did not believe that he had the authority **to** sign the corporation's checks. He never decided which **bills** were to be paid. He was never in charge of the corporation's assets and never had any control over the corporation's financial affairs.

16. **As** an officer, petitioner did not believe that he had access to the corporation's books and records and never received any of the corporation's financial reports.

17. Petitioner did not become aware that the monies withheld for New York State personal income tax had not been paid over until he received a Notice and Demand in March **of** 1982.

18. John Fitzgerald entered into a deferred payment agreement to pay the withholding tax due from the corporation. At the time **of** the hearing, he had made payments **of** \$2,100.00.

CONCLUSIONS OF LAW

A. That Tax Law §681(a) provides, in part:

"If upon examination of a taxpayer's return under this article the tax commission determines that there is a deficiency of income tax, it may mail a notice of deficiency to the taxpayer... A notice of deficiency shall be mailed by certified or registered mail to the taxpayer at his last known address in or out of this state."

B. That the document quoted in Finding of Fact "1" constituted a Notice of Deficiency within the meaning of Tax Law §681(a). There is no requirement in the Tax Law that the Notice of Deficiency be encaptioned as such.

C. That Tax Law §689(b) provides that a taxpayer may file a petition for redetermination of a deficiency within ninety days of the mailing of the Notice of Deficiency authorized by Tax Law §681(a). If a taxpayer does not file a petition within ninety days of the mailing of the Notice of Deficiency, the notice becomes an assessment (Tax Law §681(b)).

D. That since the Audit Division mailed the Notice of Deficiency to petitioner's last known address by certified mail and petitioner did not file a petition within ninety days of that mailing, the petition is untimely and must be dismissed (Tax Law §§ 681(a); 689(b)). It is noted that petitioner's failure to receive the Notice of Deficiency is immaterial (Matter of Kenning v. State Tax Comm., 72 Misc.2d 929, aff'd. 43 A.D.2d 815, mot. for lv. to app. den. 34 N.Y.2d 653; compare Matter of Ruggerite, Inc. v. State Tax Comm., 64 N.Y.2d 688, wherein the Court noted that a different result would occur with respect to sales tax). It is also noted that Matter of MacLean v. Procaccino (53 A.D.2d 965) is inapposite since the record contains an affidavit as to the authenticity of the Audit Division's mailing log as well as the letter which was returned by the Post Office.


E. That in view of Conclusion of Law "D", the remaining issues are moot.

F. That the petition of Robert R. Frank is denied and the Notice of Deficiency dated October 26, 1981 is sustained.


DATED: Albany, New York

STATE TAX COMMISSION

JUN 19 1986


PRESIDENT


COMMISSIONER


COMMISSIONER