

STATE OF NEW YORK  
STATE TAX COMMISSION

In the Matter of the Petition :

of

Rudolph Ornstein :

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 Period 5/1/74-7/1/75. :

State of New York

County of Albany

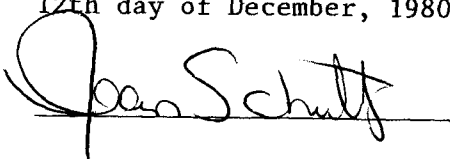
Jay Vredenburg, being duly sworn, deposes and says that he is an employee of the Department of Taxation and Finance, over 18 years of age, and that on the 12th day of December, 1980, he served the within notice of Decision by certified mail upon Rudolph Ornstein, the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

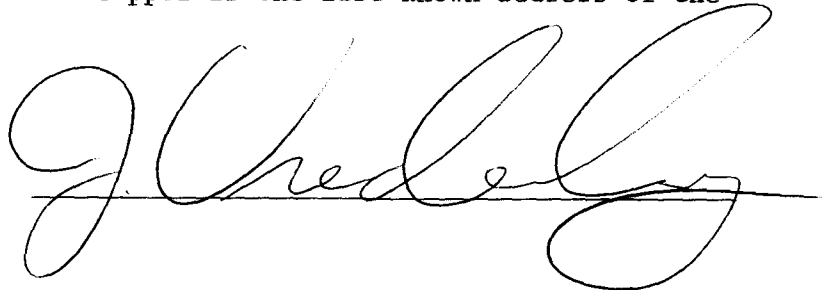
Rudolph Ornstein  
10 W. 74th St.  
New York, NY 10023

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  
12th day of December, 1980.

  
Joan Schutt

  
Jay Vredenburg

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

December 12, 1980

Rudolph Ornstein  
10 W. 74th St.  
New York, NY 10023

Dear Mr. Ornstein:

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

Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

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In the Matter of the Petition  
of  
RUDOLPH ORNSTEIN  
for Redetermination of a Deficiency or  
for Refund of Personal Income Tax under  
Article 22 of the Tax Law for the Period  
May 1, 1974 through July 1, 1975.

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DECISION

Petitioner, Rudolph Ornstein, 10 West 74th Street, New York, New York 10023, filed a petition for redetermination of a deficiency or for refund of personal income tax under Article 22 of the Tax Law for the period May 1, 1974 through July 1, 1975 (File No. 15710).

A small claims hearing was held before William Valcarcel, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on April 24, 1980 at 9:15 A.M. Petitioner appeared pro se. The Audit Division appeared by Ralph J. Vecchio, Esq. (A. Schwartz, Esq., of counsel).

ISSUE

Whether petitioner, Rudolph Ornstein, is subject to a penalty under section 685(g) of the Tax Law, as a person who willfully failed to collect, truthfully account for and pay over withholding taxes.

FINDINGS OF FACT

1. Rudolph Ornstein and Son, Inc. (corporation) filed, without remittance, New York State employer's returns for personal income taxes withheld for the following periods:

<u>WITHHOLDING TAX PERIOD</u>	<u>AMOUNT</u>
May 1 to May 31, 1974	\$188.20
June 1 to June 30, 1974	179.50
July 1 to July 31, 1974	139.00
August 1 to August 31, 1974	115.00
September 1 to September 30, 1974	105.30

In addition, the Audit Division estimated that withholding taxes were due for the period November 1, 1974 through July 1, 1975 of \$1,621.20. Accordingly, the Audit Division computed the total corporate withholding tax liability as \$2,348.20, plus interest of \$99.85, which totalled \$2,448.05.

2. On June 28, 1976, the Audit Division issued a Notice of Deficiency in the sum of \$2,348.20, along with an explanatory Statement of Deficiency on which petitioner, Rudolph Ornstein, was held subject to a penalty under section 685(g) of Tax Law, as a person who willfully failed to collect and/or pay over personal income taxes withheld.

3. Petitioner, Rudolph Ornstein, was president and majority stockholder of the corporation, when prior to the year in issue he developed heart disease and congestive heart failure. Petitioner's physician recommended that he be protected from emotional shocks. Accordingly, he turned all the managerial, operational and financial functions of the corporation to his son, who was vice-president and owned approximately 48 percent of the corporate stock.

4. During the year 1974, petitioner was hospitalized four or five times and was under constant medical treatment and could not participate in the day-to-day operations of the corporation.

5. Petitioner was not informed by his son that the corporation was experiencing financial problems during 1974 or that it was unable to pay the withholding taxes due, in order to protect petitioner from stress that could worsen his medical condition or impair his recovery. Whenever petitioner inquired, he was assured by his son that everything was fine and appropriately being taken care of.

6. The corporation continued experiencing difficulties and subsequently filed for bankruptcy. On September 6, 1979, the United States District Court,

Southern District of New York, ordered the trustee to pay \$1,505.33 to the New York State Income Tax Bureau pursuant to a priority tax claim of \$2,448.05.

7. Petitioner contended that the estimated withholding taxes of \$1,621.20 for the period November 1, 1974 through July 1, 1975 were erroneous, since the corporation had only one employee during that period.

CONCLUSIONS OF LAW

A. That petitioner's failure to collect, truthfully account for and pay over withholding taxes was not willful, since his failure was not a voluntary and intentional act rendered with knowledge of the consequences.

B. That petitioner, Rudolph Ornstein, is not subject to a penalty in accordance with the meaning and intent of section 685(g) of the Tax Law.

C. That the petition of Rudolph Ornstein is granted and the Notice of Deficiency issued June 28, 1976 is cancelled.

DATED: Albany, New York

DEC 12 1980

STATE TAX COMMISSION

  
PRESIDENT

  
COMMISSIONER

  
COMMISSIONER