

STATE OF NEW YORK  
STATE TAX COMMISSION

In the Matter of the Petition  
of

Alan Alper

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 Year 1976. :

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 20th day of February, 1981, he served the within notice of Decision by certified mail upon Alan Alper, the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Alan Alper  
15-54 208th St.  
Bayside, NY 11367

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  
20th day of February, 1981.

*Connie A. Haglund*

*J. Vredenburg*

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

February 20, 1981

Alan Alper  
15-54 208th St.  
Bayside, NY 11367

Dear Mr. Alper:

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	:	
ALAN ALPER	:	DECISION
for Redetermination of a Deficiency or	:	
for Refund of Personal Income Tax under	:	
Article 22 of the Tax Law for the Year	:	
1976.	:	

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Petitioner, Alan Alper, 15-54 208th Street, Bayside, New York 11367, filed a petition for redetermination of a deficiency or for refund of personal income tax under Article 22 of the Tax Law for the year 1976 (File No. 23933).

A formal hearing was held before Gasper S. Fasullo, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on July 29, 1980 at 10:45 A.M. Petitioner appeared pro se. The Audit Division appeared by Ralph J. Vecchio, Esq. (Aliza Schwadron, Esq., of counsel).

ISSUE

Whether petitioner was a person required to collect, truthfully account for and pay over the withholding taxes due from Software Unlimited, Inc. for the year 1976.

FINDINGS OF FACT

1. In 1976, petitioner was vice-president of and a 50 percent shareholder in Software Unlimited, Inc. ("Software"), a data processing bureau.
2. Throughout the year 1976, the Audit Division received from Software, Forms IT-2101 (Personal Income Tax Withheld) for the period January 1, 1976 through December 31, 1976. Although the sum of \$6,405.80 was withheld, no payment was remitted with the returns.

3. On July 31, 1978, a Notice of Deficiency and a Statement of Deficiency were issued against petitioner asserting a penalty equal to the amount of the unpaid New York State withholding tax due from Software for the period January 1, 1976 through December 31, 1976.

4. Petitioner does not deny that the taxes withheld were not remitted to New York State and admits his liability therefor.

5. On February 6, 1976, and periodically prior thereto, American Bank and Trust Company ("American"), one of Software's clients, advanced sums of money to Software against advance billings so as to enable Software to meet its net payroll and other operating expenses.

6. Petitioner contends that such advances by American for Software's net payroll caused American to become liable for Software's withholding tax liability for the year 1976. In support of this contention, petitioner cited section 3505 of the Internal Revenue Code and "a very similar law in the New York State Tax Law structure", apparently section 678(b) of the Tax Law.

7. An assessment of approximately \$13,000.00 for withholding taxes due the Internal Revenue Service is being paid by petitioner in monthly installments of \$50.00 each.

#### CONCLUSIONS OF LAW

A. That petitioner, Alan Alper, was a person required to collect, truthfully account for and pay over withholding taxes due from Software within the meaning of subsections (n) and (g) of section 685 of the Tax Law, and that he willfully failed to do so. Therefore, he is liable for the penalty imposed under subsection (g) of section 685 of the Tax Law.

B. That section 678(b) of the Tax Law provides as follows:

" (b) Funds supplied to employer by third parties.-- If a lender, surety or other person supplies funds to or for the account of an employer for the specific purpose of paying wages of the employees of such employer, with actual notice or knowledge that such employer does not intend to or will not be able to make timely payment or deposit of the amounts of tax required by this article to be deducted and withheld by such employer from such wages, such lender, surety or other person shall be liable for the amount of the taxes (together with interest) which are not paid over to the tax commission by such employer with respect to such wages. However, the liability of such lender, surety or other person shall be limited to an amount equal to twenty-five percent of the amount so supplied to or for the account of such employer for such purpose."

(Section 3505(b) of the Internal Revenue Code is similar.)

C. That the penalty imposed under section 685(g) of the Tax Law is independent of the liability of third parties under section 678(b) of the Tax Law or section 3505(b) of the Internal Revenue Code. Assuming that American was liable under section 678(b) or its Federal counterpart, petitioner is not thereby relieved from his own liability for the penalty imposed against him under section 685(g) of the Tax Law.

D. That the petition of Alan Alper is denied and the Notice of Deficiency dated and issued July 31, 1978 is sustained.

DATED: Albany, New York

FEB 20 1981

STATE TAX COMMISSION

PRESIDENT

COMMISSIONER

COMMISSIONER

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

February 20, 1981

Alan Alper  
15-54 208th St.  
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Very truly yours,

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STATE OF NEW YORK

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DATED: Albany, New York

FEB 20 1981

STATE TAX COMMISSION

  
PRESIDENT

  
COMMISSIONER

  
COMMISSIONER

STATE OF NEW YORK  
State Tax Commission  
TAX APPEALS BUREAU  
STATE CAMPUS  
ALBANY, N. Y. 12227

# CERTIFIED

No. 5174

MA  
IN  
THE

Do not enter a car or van.

~~Alan Alper  
15-54 208th St.  
Bayside, NY 11364~~

Ms. Ford

