

STATE OF NEW YORK
STATE TAX COMMISSION

In the Matter of the Petition :

of

Bernard W. Berger :

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 1972. :

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 9th day of January, 1981, he served the within notice of Decision by certified mail upon Bernard W. Berger, the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Bernard W. Berger
217-16 N. Grand Central Pkwy.
Floral Park, NY 11005

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
9th day of January, 1981.

Cornelia R. Hagelund

J. Vredenburg

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

January 9, 1981

Bernard W. Berger
217-16 N. Grand Central Pkwy.
Floral Park, NY 11005

Dear Mr. Berger:

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

In the Matter of the Petition	:	
of	:	
BERNARD W. BERGER	:	DECISION
for Redetermination of a Deficiency or for	:	
Refund of Personal Income Tax under Article 22	:	
of the Tax Law for the Year 1972.	:	

Petitioner, Bernard W. Berger, 271-16 North Grand Central Parkway, Floral Park, New York 11005, 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 1972 (File No. 19123).

A formal hearing was held before Edward L. Johnson, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on August 15, 1979 at 1:15 P.M. Petitioner appeared pro se. The Audit Division appeared by Peter Crotty, Esq. (Bruce M. Zalaman, Esq. of counsel).

ISSUES

I. Whether a Notice of Deficiency dated February 28, 1977 asserting a penalty under section 685(g) of the Tax Law against an officer of a corporation for failure to collect and pay over income taxes withheld from employees in the calendar year 1972 was timely.

II. Whether under section 685(g) of the Tax Law petitioner was a person who willfully failed to collect, truthfully account for and pay over personal income taxes withheld from employees of Zsa Zsa International, Inc. during 1972 and is, therefore, subject to a penalty equal to the total amount of the tax evaded, not collected, not accounted for, or not paid over to the state.

III. Whether petitioner's prior discharge in personal bankruptcy is effective as a legal bar to collection of the withholding tax penalty.

IV. Whether by its failure to pursue corporate assets for any alleged deficiencies upon being notified that such assets existed, the State of New York is estopped from pursuing petitioner for the alleged deficiencies.

V. Whether New York State's failure to file a timely reply to petitioner's perfected petition bars continuation of the proceeding.

FINDINGS OF FACT

1. Zsa Zsa International, Inc. ("Zsa Zsa") failed to pay over to New York State all the income tax withheld from its employees for 1972.

2. On February 28, 1977, Bernard W. Berger was sent a Notice of Deficiency together with a Statement of Deficiency asserting that, as an officer of Zsa Zsa, petitioner had been determined to be a person under a duty to collect and pay over withholding taxes collected from employees for the calendar year 1972 in the amount of \$5,230.50. For failure to do so, petitioner was determined to be liable to a penalty equal to the unpaid income taxes withheld for 1972 and not paid over to the State, i.e., \$5,230.50.

3. On July 7, 1978, petitioner was requested to file a Perfected Petition. On August 11, 1978, the Tax Appeals Bureau acknowledged receipt of the Perfected Petition dated August 4, 1978 from Bernard W. Berger demanding redetermination of the alleged deficiency. Petitioner asserted that the Notice of Deficiency was time barred.

4. On October 23, 1978, the Department of Taxation and Finance mailed its answer to the petition, alleging that the Statute of Limitations set forth in section 683(c)(1)(A) of the Tax Law was inapplicable since no withholding tax returns were filed by the corporation of which petitioner was an officer. As an affirmative defense, the answer also alleged that income taxes withheld were a trust fund for the state under section 675 of the Tax Law.

5. The records of the Department of Taxation and Finance show that 43 individual withholding tax statements (form IT-2102) for 1972 were filed for Zsa Zsa and that of the total tax of \$8,425.80, the sum of \$3,195.30 had been acknowledged as paid, leaving a balance unpaid of \$5,230.50. No reconciliation statement for 1972 withholding tax (form IT-2103) was filed. No documentary or satisfactory evidence was submitted to show that withholding tax returns (form IT-2101) were filed for the year 1972.

6. Zsa Zsa, a cosmetic company incorporated in New York State in March, 1971, operated from January, 1972 until November 7, 1972. Petitioner was president of Zsa Zsa. He had the authority to, and did, sign checks and tax returns.

7. On October 5, 1973, petitioner filed a petition in personal bankruptcy in the United States District Court for the Eastern District of New York under Bankruptcy No. 73B1024. In the bankruptcy schedule of priority creditors, petitioner listed the State Tax Commission as being owed approximately \$1,600.00 by Zsa Zsa for which the bankrupt might be contingently liable.

A discharge in bankruptcy order was signed by Federal Bankruptcy Judge Boris Radoyevich in Westbury, New York on May 16, 1975, releasing petitioner from all debts dischargeable under Article 17 of the Federal Bankruptcy Act.

8. On May 23, 1977 petitioner informed the Tax Department that the corporation had over \$30,000.00 in cash being held by a trustee in Bankruptcy to pay any tax liability of the corporation. No evidence was presented to indicate that the Audit Division contacted the trustee for the payment of the withholding tax.

CONCLUSIONS OF LAW

A. That generally no tax may be assessed more than three years after the return was filed (or deemed to be filed) except that the tax may be assessed at any time, if:

1. no return is filed (section 683(c)(1)(A) of the Tax Law), or
2. a false or fraudulent return is filed with intent to evade tax (section 683(c)(1)(B) of the Tax Law).

By the admission of the Income Tax Bureau, individual withholding tax statements were filed for 1972 and the income tax withheld partially paid.

The filing of individual withholding tax statements (form IT-2102) does not constitute the filing of withholding tax returns in accordance with section 674 of the Tax Law. Therefore, pursuant to section 683(c)(1)(A) no return was filed and the tax may be assessed at any time. The issuance of a Notice of Deficiency on February 28, 1977 was not time barred under section 683 of the Tax Law.

B. That petitioner, Bernard W. Berger, as president of Zsa Zsa International, Inc. was a person required to collect, truthfully account for and pay over personal income taxes withheld from employees within the meaning and intent of section 685(n) of the Tax Law and he is liable to the penalty imposed under section 685(g) of the Tax Law.

C. That the petitioner's prior discharge in personal bankruptcy is not an effective legal bar to collection of the withholding tax penalty. Milton Weinstein, State Tax Commission, April 6, 1979, Matter of Onofre J. Sotelo and Nami Sotelo, Bankrupts, 436 U.S. 268; 56 L.Ed. 2d 275 rev'g 551 F.2d 1090.

D. That the Audit Division is not required to attempt to collect unpaid withholding taxes from a corporation, or from its trustee in bankruptcy,

before imposing on and collecting from responsible officers the penalty imposed by section 685(g) of the Tax Law. Stanley Yellin, State Tax Commission, June 22, 1979.

E. That the requirements of 20 NYCRR 601.6(a)(1) that the Law Bureau of the Department of Taxation and Finance file an answer "within 60 days" from a specified date should not be regarded as mandatory but is directory only, Matter of Hamelburg v. Tully, Supreme Court, Albany County Special Term, Prior H. December 6, 1979.

F. That petitioner, Bernard W. Berger, was liable to the penalty only for the period he was president of Zsa Zsa International, Inc. The Audit Division is directed to modify the Notice of Deficiency accordingly.

G. That the petition of Bernard W. Berger is granted to the extent indicated in Conclusion of Law "F", supra, and in all other respects is denied and the Notice of Deficiency dated February 28, 1977 as modified is sustained.

DATED: Albany, New York

JAN 09 1981

STATE TAX COMMISSION

James W. Tully
PRESIDENT

Thomas H. Quinn
COMMISSIONER

Francis R. Koenig
COMMISSIONER