

STATE OF NEW YORK
STATE TAX COMMISSION

In the Matter of the Petition :

of

Edward C. Duvall :

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

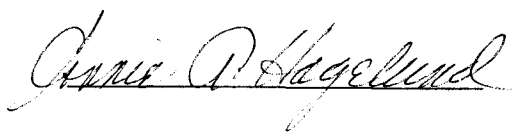
Jay Vredenburg, being duly sworn, deposes and says that he is an employee of the Department of Taxation and Finance, over 18 years of age, and that on the 6th day of March, 1981, he served the within notice of Decision by certified mail upon Edward C. Duvall, the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

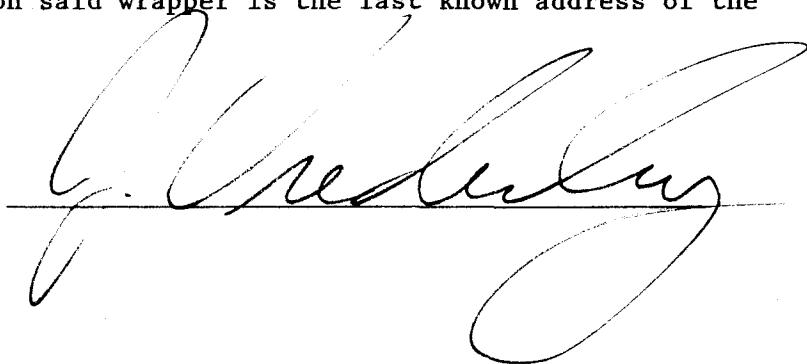
Edward C. Duvall
340 Gold St.
Buffalo, NY 14206

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
6th day of March, 1981.


James P. Hegeland


Jay Vredenburg

STATE OF NEW YORK
STATE TAX COMMISSION

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Personal Income Tax :
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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 6th day of March, 1981, he served the within notice of Decision by certified mail upon Nelson R. Barrett the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Mr. Nelson R. Barrett
37 Franklin St.
Buffalo, NY 14202

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 March, 1981.

Annice A. Hagellund

J. Vredenburg

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

March 6, 1981

Edward C. Duvall
340 Gold St.
Buffalo, NY 14206

Dear Mr. Duvall:

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
Nelson R. Barrett
37 Franklin St.
Buffalo, NY 14202
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition	:	
	:	
of	:	
	:	
EDWARD C. DUVALL	:	DECISION
	:	
for Redetermination of a Deficiency or	:	
for Refund of Personal Income Tax under	:	
Article 22 of the Tax Law for the Year	:	
1976.	:	

Petitioner, Edward C. Duvall, 340 Gold Street, Buffalo, New York 14206, 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. 21012).

A small claims hearing was held before Carl P. Wright, Hearing Officer, at the offices of the State Tax Commission, Genesee Building, One West Genesee Street, Buffalo, New York, on October 2, 1980 at 9:15 A.M. Petitioner, Edward C. Duvall, appeared with Nelson R. Barrett, Esq. The Audit Division appeared by Ralph J. Vecchio, Esq. (Paul A. Lefebvre, Esq., of counsel).

ISSUES

I. Whether petitioner was a person required to collect, truthfully account for and pay over New York State withholding taxes of Buffalo Biscuit Company, Inc. for 1976.

II. Whether petitioner's personal bankruptcy relieved himself of liability for the penalty imposed under section 685(g) of the Tax Law since the Audit Division failed to file any notice of claim in petitioner's individual bankruptcy.

FINDINGS OF FACT

1. Buffalo Biscuit Company, Inc. failed to pay over to the Withholding Tax Unit of the Department of Taxation and Finance, \$827.96 in New York State

personal income taxes withheld from its employees during the period March 1, 1976 through May 21, 1976.

2. On August 29, 1977, the Audit Division issued a Notice of Deficiency against petitioner, Edward C. Duvall, asserting a penalty equal to the amount of New York State withholding taxes due from Buffalo Biscuit Company, Inc. for the period March 1, 1976 through May 21, 1976. 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. On May 21, 1976, Buffalo Biscuit Company, Inc. and petitioner, Edward C. Duvall, each simultaneously filed a petition in bankruptcy. Petitioner contended there were sufficient assets existing in the corporation's estate in bankruptcy to pay a portion of the tax liability claimed by the State of New York, and that New York State received a partial payment upon its claim.

Petitioner further argued that sufficient assets existed in petitioner's individual estate in bankruptcy to pay the balance of the State's claim, but no part of said assets were applied to such claim because of the failure and neglect of the State of New York to file, in a timely manner, a due notice of claim within the time limited by bankruptcy laws for the filing of such claims. Since New York State did not file a claim in the petitioner's individual bankruptcy, they should cancel the Notice of Deficiency.

4. During the period at issue, petitioner was president, principal stockholder of Buffalo Biscuit Company, Inc. The total financial structure of said corporation was under his direction and control and he knew the withholding tax had not been paid.

5. On July 12, 1978, the Audit Division reduced the penalty against the petitioner pursuant to section 685(g) of the Tax Law from \$827.96 to \$650.67.

CONCLUSIONS OF LAW

A. That petitioner, Edward C. Duvall, was a person required to collect, truthfully account for and pay over New York State income tax withheld by Buffalo Biscuit Company, Inc., and that he willfully failed to do so, within the meaning of subdivisions (g) and (n) of section 685 of the Tax Law. Accordingly, petitioner is subject to a penalty equal to said sum under 685(g) of the Tax Law.

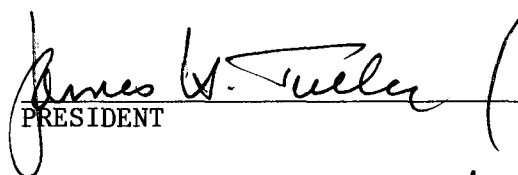
B. That the failure of the Audit Division to proceed in the bankruptcy proceedings of Edward C. Duvall, although it may have had knowledge of proceedings, does not discharge the liability of the corporation or of its responsible officers for said taxes. Withholding tax obligations cannot be discharged in bankruptcy [11 U.S.C. section 35(a)(1)(e)]. United States v. Sotelo, 436 U.S. 268. The Audit Division is not required to make an attempt to collect unpaid withholding taxes from a bankruptcy proceeding before imposing and collecting the penalty provided for by section 685(g) of the Tax Law from responsible officer. The fact that the Audit Division may have been dilatory in its attempts in collecting the withholding tax is immaterial since the Notice of Deficiency was issued within the period prescribed in section 683 of the Tax Law.

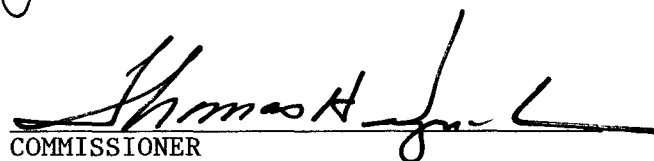
C. That the petition of Edward C. Duvall is granted to the extent that penalty imposed pursuant to section 685(g) of the Tax Law is reduced by \$177.29. The Audit Division is hereby directed to accordingly modify the Notice of

Deficiency issued on August 29, 1977 and that, except as so granted, the petition is in all other respects denied.

DATED: Albany, New York
MAR 06 1981

STATE TAX COMMISSION


PRESIDENT


COMMISSIONER


COMMISSIONER