

STATE OF NEW YORK  
STATE TAX COMMISSION

In the Matter of the Petition :

of

Roy R. Ferenbaugh :

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 Years 1974, 1975. :

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 Roy R. Ferenbaugh, the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Roy R. Ferenbaugh  
135 Devon Rd.  
Rochester, NY 14619

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.

*Annie P. Hagelund*

*J. Vredenburg*

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

March 6, 1981

Roy R. Ferenbaugh  
135 Devon Rd.  
Rochester, NY 14619

Dear Mr. Ferenbaugh:

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 TAX COMMISSION

A small claims hearing was held before Carl P. Wright, Hearing Officer, at the offices of the State Tax Commission, One Marine Midland Plaza, Rochester, New York, on October 21, 1980 at 10:45 A.M. Petitioner, Roy R. Ferenbaugh, appeared pro se. The Audit Division appeared by Ralph J. Vecchio, Esq. (Alexander Weiss, Esq., of counsel).

## ISSUES

I. Whether petitioner is subject to a penalty in accordance with section 685(g) of the Tax Law as a person who willfully failed to collect, or truthfully account for and pay withholding taxes for the years 1974 and 1975.

II. Whether the statutory period of limitation on assessment had expired since petitioner argued no assessment was made within the three-year period.

III. Whether petitioner's personal bankruptcy relieved him of liability for the penalty imposed under 685(g) of the Tax Law.

FINDINGS OF FACT

1. R & D Home Auto Care, Inc. filed New York State employer's returns on the following dates for personal income tax withheld for the following periods and amounts. However, no monies were remitted.

<u>Date Filed</u>	<u>Period</u>	<u>Amount</u>
4/29/75	1/1/74 - 6/30/74	\$ 338.30
4/21/75	7/1/74 - 12/31/74	781.79
7/31/75	1/1/75 - 6/30/75	1,174.50
10/24/75	7/1/75 - 9/22/75	634.77
		<u>\$2,929.36</u>

2. On September 26, 1977, a Statement of Deficiency and a Notice of Deficiency were issued against petitioner, Roy R. Ferenbaugh, for 1974 and 1975 for withholding taxes due from R & D Home Auto Care, Inc. in the amount of \$2,929.36.

3. On September 12, 1978, the Audit Division reduced the liability of R & D Home Auto Care, Inc. for unpaid withholding tax for 1974 from \$1,120.09 to \$383.21.

4. Petitioner, Roy R. Ferenbaugh, was president and stockholder of R & D Home Auto Care, Inc. during 1974 and 1975. In his capacity as president, he prepared and signed the withholding tax returns at issue. His duties included accounting and clerical work, for which he received no remuneration.

5. During the period at issue, petitioner, Roy R. Ferenbaugh, was a full-time employee of Bausch and Lomb. The daily operations of R & D Home Auto Care, Inc. was under the direction and control of David Schranck, who was the only other officer and stockholder of said corporation. Petitioner contended that use of the funds of said corporation was directed by David Schranck, though petitioner had the authority to sign checks and was aware of the corporation's financial problems.

6. Petitioner contended that he was not liable for the penalty for two reasons. First being, that no assessment was made within three years from the date the returns were filed. Secondly, petitioner was involved in personal bankruptcy proceedings under Chapter 11 in the United States District Court in June 1979. That the penalties were part of the proceedings and the Audit Division failed to proceed on a priority claim in the proceedings. That the Audit Division's failure to proceed on its claim resulted in the discharge of the liability for the penalty imposed on him under section 685(g) of the Tax Law.

#### CONCLUSIONS OF LAW

A. That petitioner, Roy R. Ferenbaugh, as president of R & D Home Auto Care, Inc., was a person (within the meaning of section 685(g) of the Tax Law) required to collect, account for and pay over withholding taxes to New York State. Petitioner cannot avoid liability by preparing and signing New York State employer's returns and then failing to concern himself with whether the taxes were being paid.

B. That his conduct was willful within the meaning of the statute. Deliberate fraud need not be proved. The cases that have considered this question in detail and that have absolved a responsible corporate officer from his duty to see that the withholding taxes were paid have found that he attempted to meet his duties in this regard, but his efforts were thwarted. (Levy v. U.S., 140 F. Supp. 834; see note in 22 A.L.R. 3d at p 98ff; Levin v. Gallman, 42 N.Y.2d 32). Petitioner made no such showing in this case; therefore, he is liable for penalty equal to the amount of unpaid withholding taxes for 1974 and 1975 under section 685(g) of the Tax Law.

C. That the Notice of Deficiency issued against petitioner on September 26, 1977 for 1974 and 1975 was issued within three years after the New York State employer's returns were filed in accordance with section 683(b)(2) of the Tax Law. Section 683(e) of the Tax Law states that, "The running of the period of limitation on assessment or collection of tax or other amount shall, after mailing of a Notice of Deficiency, be suspended for the period during which the Tax Commission is prohibited under subsection (c) of section six hundred eight-one from making the assessment or from collecting by levy." Therefore, the Audit Division can properly assert a claim where a Notice of Deficiency is issued within three years after a return is filed, but its collection proceeding is not commenced until well beyond the three years after a return was filed.

D. That the failure of the Audit Division to proceed in the Chapter 11 proceedings of petitioner, Roy R. Ferenbaugh, although it may have had knowledge of said proceedings, did 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)]. The Audit Division is not required to make an attempt to collect unpaid withholding taxes from Chapter 11 proceedings before imposing and collecting the penalty provided for by section 685(g) of the Tax Law from responsible officers.

E. That the petition of Roy R. Ferenbaugh is granted to the extent that the penalty imposed pursuant to section 685(g) of the Tax Law is reduced by \$736.88. The Audit Division is hereby directed to accordingly modify the Notice of Deficiency issued on September 26, 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