

STATE OF NEW YORK
STATE TAX COMMISSION

In the Matter of the Petition :

of

Henry Fernandes :

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 1973, 1974. :

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 Henry Fernandes, the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Henry Fernandes
85 Thorncliff Park Dr., Apt. 2201
Toronto 17, CANADA M 44116

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.

Anna P. Haglund

J. Vredenburg

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

February 20, 1981

Henry Fernandes
85 Thorncliff Park Dr., Apt. 2201
Toronto 17, CANADA M 44116

Dear Mr. Fernandes:

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	:	
HENRY FERNANDES	:	DECISION
for Redetermination of a Deficiency or	:	
for Refund of Personal Income Tax under	:	
Article 22 of the Tax Law for the Years	:	
1973 and 1974.	:	

Petitioner, Henry Fernandes, 85 Thorncliff Park Drive, Apt. 2201, Toronto 17, Ontario, Canada, filed a petition for redetermination of a deficiency or for refund of personal income tax under Article 22 of the Tax Law for the years 1973 and 1974 (File No. 19919).

A small claims hearing was held before Samuel Levy, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on September 30, 1980 at 1:15 P.M. Petitioner appeared pro se. The Audit Division appeared by Ralph J. Vecchio, Esq. (Irwin Levy, Esq., of counsel).

ISSUE

Whether petitioner, Henry Fernandes, was a person required to collect, truthfully account for and pay over withholding taxes due and unpaid from Zephyr Films, Incorporated for 1973 and 1974.

FINDINGS OF FACT

1. On March 28, 1977, the Audit Division issued a Notice of Deficiency and Statement of Deficiency against petitioner, Henry Fernandes, imposing a penalty against him equal to the amount of unpaid New York State withholding

taxes due from Zephyr Films, Incorporated in the amount of \$1,358.18 for 1973 and \$702.47 for the period March 1, 1974 to March 31, 1974. The penalty was issued on the basis that petitioner was a person required to collect, truthfully account for and pay over said taxes and that he willfully failed to do so.

2. Zephyr Films, Incorporated ("corporation"), incorporated under the laws of New York, was engaged in the production of animated television commercials. The founders of the corporation were petitioner, Henry Fernandes, and Zack Zaharias, who held the offices of president and secretary, respectively. Each of the incorporators held a fifty (50) percent interest in the corporation.

3. Petitioner contended that his principal duty for the "corporation" was to prepare the budgets for the various animated television productions; that although he was a required signatory on all corporate checks, he was not involved with the day-to-day financial activities of the entity, which was the sole province of the secretary of the corporation. That he first became aware that the "corporation" was delinquent in its withholding taxes sometime in 1973 when informed by the Internal Revenue Service that there was an unpaid balance due on same.

4. Funds which were available during 1973 to pay outstanding delinquent taxes were used by the corporation at the insistence of the petitioner to pay various creditors, other than the Federal and New York State governments. The priority of payments to non-governmental creditors of the corporation was done, so that petitioner could retain his "good name" in the industry.

5. Petitioner sold his interest in the corporation in December of 1973 for the sum of \$1,500.00.

6. At a conference, it was held that petitioner was not a person required to collect, truthfully account for and pay over New York State

withholding taxes due from the corporation subsequent to December 31, 1973, and was so stipulated by the attorney for the Audit Division.

CONCLUSIONS OF LAW

A. That petitioner, Henry Fernandes, is a person under a duty to collect, truthfully account for and pay over the tax under section 685(g) of the Tax Law; and that as an officer of Zephyr Films, Incorporated, his failure to pay over the income taxes withheld for 1973 was willful within the meaning and intent of section 685(g) of the Tax Law.

B. That the petition of Henry Fernandes is granted to the extent that the penalty imposed against him for 1974 is cancelled.

C. That the petition of Henry Fernandes is granted to the extent indicated in Conclusion of Law "B"; that the Audit Division is hereby directed to modify the Notice of Deficiency issued on March 28, 1977; and that, except as so granted, the petition is in all other respects denied. The Notice of Deficiency, as modified, is sustained.

DATED: Albany, New York

FEB 20 1981

STATE TAX COMMISSION


PRESIDENT


COMMISSIONER


COMMISSIONER