

STATE OF NEW YORK

STATE TAX COMMISSION

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In the Matter of the Petition :  
of :  
Eugene Goldenberg :  
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.

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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 30th day of October, 1981, he served the within notice of Decision by certified mail upon Eugene Goldenberg, the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Eugene Goldenberg  
3855 Shore Pky.  
Brooklyn, NY 11235

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  
30th day of October, 1981.

*Carmie A. Hegeland*

*Jay Vredenburg*

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

October 30, 1981

Eugene Goldenberg  
3855 Shore Pky.  
Brooklyn, NY 11235

Dear Mr. Goldenberg:

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 Samuel Levy, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on November 20, 1980 at 9:15 A.M. Petitioner appeared pro se. The Audit Division appeared by Ralph J. Vecchio, Esq. (Angelo Scopellito, Esq., of counsel).

## ISSUES

I. Whether petitioner, Eugene Goldenberg, is subject to a penalty under section 685, subdivisions (g) and (n) of the Tax Law, as a person who wilfully failed to collect, account for and pay over withholding tax due and owing from North American Planning Corp. (hereinafter "North American") for 1972.

II. Whether the Notice of Deficiency issued against petitioner, Eugene Goldenberg, for 1972 is barred by the statute of limitations.

FINDINGS OF FACT

1. On January 30, 1973, a Form IT-2103, Reconciliation of Personal Income Tax withheld for the calendar year 1972, was filed with the Audit Division by North American which showed income tax collected from its employees of \$4,870.91. The form was signed by Joseph Ellison, Trustee.

On April 15, 1975, a Notice and Demand for Unpaid Withholding Tax Due (Form IT-2103.20) was sent to North American which showed tax paid or previously assessed of \$3,981.90 against amount withheld of \$4,870.91, supra, leaving a balance due of \$889.01. The unpaid balance was incurred for the period July 1, 1972 through July 30, 1972.

2. On February 28, 1977, the Audit Division issued a Notice of Deficiency and Statement of Deficiency against petitioner, Eugene Goldenberg, imposing a penalty against him equal to the amount of New York withholding tax due and owing from North American in the amount of \$889.01. The penalty was issued on the ground that petitioner was a person required to collect, truthfully account for and pay over tax at issue and that he wilfully failed to do so.

3. Petitioner was a full time employee, director and president of North American, a publicly held corporation, and held a six percent (6%) interest in its outstanding stock. Petitioner was associated with North American from approximately 1957 to sometime in July 1972.

4. On July 25, 1972, Mr. Joseph D. Ellison was appointed as temporary receiver for North American by the United States District Court for the Southern District of New York.

Under date of September 12, 1972, an order was issued by the United States District Court for the Southern District of New York entered on August 8,

1972, wherein Joseph D. Ellison was appointed trustee for the liquidation of the business of North American.

5. Petitioner contends that Joseph D. Ellison assumed management and control of North American under date of July 12, 1972 as temporary trustee. That his first act as temporary trustee was to terminate petitioner's employment, and, remove him from the office of president and director of North American effective July 14, 1972. That the trustee refused to pay his salary due for the period July 1, 1972 through July 15, 1972, and, which salary still remains unpaid.

Petitioner's contention that the trustee was appointed under date of July 12, 1972 is in direct conflict with court order which indicates that the trustee was appointed July 25, 1972.

6. At the hearing, the attorney for the Bureau stipulated that based on his examination of documents submitted by petitioner, that at the time the trustee assumed control over North American, there were sufficient funds set aside by it in a trust account earmarked for payment of tax at issue.

7. The trustee for North American failed to make payment of tax at issue, although funds to pay same were available, because he had not been authorized by the court to pay any payroll taxes accruing prior to his appointment.

8. Petitioner sets forth as an affirmative defense the statute of limitation with respect to the Notice of Deficiency for 1972.

#### CONCLUSIONS OF LAW

A. That since a withholding tax return (Form IT-2101) was not filed by North American, for the month of July 1972, then the three (3) year statute of

limitations for assessment has not run for said month in accordance with the meaning and intent of section 683(c)(1)(A) of the Tax Law.

B. That petitioner, Eugene Goldenberg, was a person required to collect, truthfully account for, and pay over unpaid New York State personal income tax withheld by North American within the meaning of section 685(n) of the Tax Law. However, petitioner did not willfully fail to collect such tax or truthfully account for such tax, since at the time the trustee assumed control over North American, there was sufficient funds set aside by it in a trust account earmarked for said tax. Accordingly, petitioner is not subject to a penalty in an amount equal to the imposed withholding tax for North American within the meaning of section 685(g) of the Tax Law.

C. That the petition of Eugene Goldenberg is granted and the Notice of Deficiency issued February 28, 1977 is cancelled.


DATED: Albany, New York

OCT 30 1981

STATE TAX COMMISSION

  
PRESIDENT

  
COMMISSIONER

  
COMMISSIONER