

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :

of

Benito R. Fernandez :

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 :
1975 - 1977.

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 14th day of December, 1982, he served the within notice of Decision by certified mail upon Benito R. Fernandez, the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Benito R. Fernandez
222 E. 80th St., 5A
New York, NY 10021

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
14th day of December, 1982.

Charles C. Hagelund

J. Vredenburg

AUTHORIZED TO ADMINISTER
OATHS PURSUANT TO TAX LAW
SECTION 174

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

December 14, 1982

Benito R. Fernandez
222 E. 80th St., 5A
New York, NY 10021

Dear Mr. Fernandez:

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) 690690 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
Law Bureau - Litigation Unit
Albany, New York 12227
Phone # (518) 457-2070

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
BENITO R. FERNANDEZ
for Redetermination of a Deficiency or for
Refund of Personal Income Tax under Article 22
of the Tax Law for the Years 1975, 1976 and
1977.

DECISION

Petitioner, Benito R. Fernandez, 222 East 80th Street, Apt. 5A, New York, New York 10021, 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 1975, 1976 and 1977 (File No. 21830).

A formal hearing was held before Julius E. Braun, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on December 15, 1981 at 2:45 P.M. Petitioner appeared pro se. The Audit Division appeared by Ralph J. Vecchio, Esq. (Irwin Levy, Esq., of counsel).

ISSUES

I. Whether petitioner is subject to a penalty for unpaid State withholding taxes due from Typhoon Industries, Inc. ("Typhoon") for the years 1975, 1976 and 1977.

II. Whether the State Tax Commission must look to the Trustee in Bankruptcy for withholding taxes due from Typhoon.

FINDINGS OF FACT

1. On March 27, 1978, the Audit Division issued a Notice of Deficiency against petitioner asserting a penalty of \$11,720.97, which is equal to the

amount of unpaid New York State withholding taxes due from Typhoon for the years 1975, 1976 and 1977.

2. Petitioner alleged that he was Chairman of the Board and major stockholder of Typhoon until the first part of 1976, at which time he sold the business and resigned.

3. On January 16, 1980, pursuant to a conference with petitioner at which time various documentation was offered, the deficiency was reduced to \$9,876.77 for the periods of August 1, 1975 to December 31, 1976. The period in 1977 was eliminated. By letter of January 25, 1982 and subsequent to the hearing, petitioner admitted responsibility for the period of August 1, 1975 to December 31, 1975 in the amount of \$3,032.31. In addition, petitioner presented a contract to the effect that an agreement was entered into on February 1, 1976, whereby Typhoon was sold to Typhoon Fence of Lindenhurst, Inc., a domestic corporation. The closing was scheduled for March 1, 1976. Petitioner's attorney, Peter R. Newman, placed his notary stamp and seal at the end of the contract of sale. Petitioner testified that his attorney was unavailable at the hearing due to ill health.

4. The forms IT-2103, Reconciliation of Personal Income Tax Withheld, for the years 1975 and 1976, which were required to be filed not later than February 28, 1976 and February 28, 1977, were signed on January 26, 1976 and March 1, 1977, respectively. The signatures correspond to the signatures of the petitioner on his Perfected Petition, on the alleged contract of sale and on the bill of sale of the business. The same signature also appears on the 1976 Employer's Return - Personal Income Tax Withheld signed on August 2, 1976, a semi-annual form for the first half of that year. The amount withheld thereon was stated to be

\$3,804.20. No remittance was included. An unsigned withholding form for the latter half of 1976 with no remittance indicated \$3,040.26 was withheld. The form was stamped "Bankrupt".

5. Petitioner stated that, although Typhoon was in bankruptcy, there were sufficient funds for the payment of withholding taxes and the Tax Commission should look to the Trustee in Bankruptcy for reimbursement.

CONCLUSIONS OF LAW

A. That petitioner has not sustained the burden of proof required to show that he was not a person required to collect, truthfully account for and pay over New York State withholding taxes of Typhoon for 1975 and 1976, in accordance with the meaning and intent of section 685(n) of the Tax Law.

B. That petitioner has not sustained the burden of proof required to show that he did not willfully fail, or cause Typhoon to willfully fail, to collect, account for or pay over New York State withholding taxes due from said corporation. Therefore, petitioner was subject to the penalty imposed against him in accordance with the meaning and intent of section 685(g) of the Tax Law.

C. That the liability of Typhoon for withholding taxes due and the liability of petitioner for a penalty under section 685(g) of the Tax Law are separate and distinct. The fact that the Trustee in Bankruptcy may be holding sufficient funds to cover payment of the taxes at issue does not bar the Audit Division from asserting a penalty against petitioner under section 685(g) of the Tax Law.

D. That the petition of Benito R. Fernandez is granted to the extent that the Notice of Deficiency is reduced to \$9,876.77 as per Finding of Fact "3"; that the Audit Division is directed to accordingly modify the Notice of Deficiency

issued March 27, 1978; and that, except as so granted, the petition is in all other respects denied.

DATED: Albany, New York

DEC 14 1982

STATE TAX COMMISSION

ACTING

PRESIDENT

COMMISSIONER

COMMISSIONER