

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition
of

Edward M. Gilbert

:

:

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

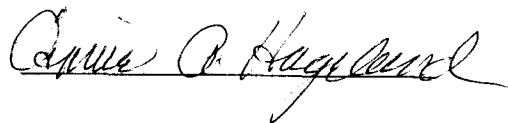
Jay Vredenburg, being duly sworn, deposes and says that he is an employee of the Department of Taxation and Finance, over 18 years of age, and that on the 26th day of March, 1982, he served the within notice of Decision by certified mail upon Edward M. Gilbert, the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

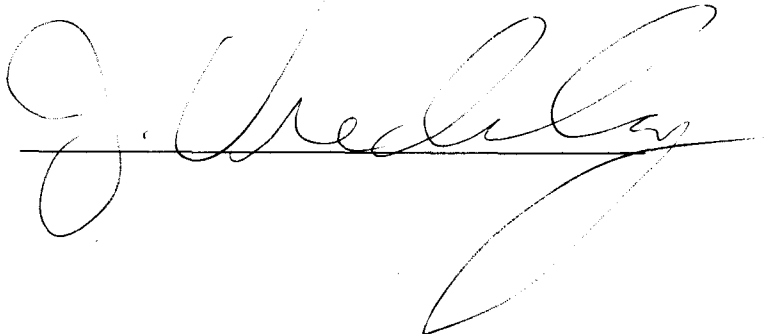
Edward M. Gilbert
110 E. 59th St.
New York, NY 10022

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
26th day of March, 1982.





STATE OF NEW YORK
STATE TAX COMMISSION

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Tax under Article 22 of the Tax Law for the Years :
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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 26th day of March, 1982, he served the within notice of Decision by certified mail upon Eugene A. Wolkoff the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Eugene A. Wolkoff
Callahan & Wolkoff
67 Wall St.
New York, NY 10005

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
26th day of March, 1982.

Bernie A. Hagelund

J. Vredenburg

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

March 26, 1982

Edward M. Gilbert
110 E. 59th St.
New York, NY 10022

Dear Mr. Gilbert:

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

Very truly yours,

STATE TAX COMMISSION

cc: Petitioner's Representative
Eugene A. Wolkoff
Callahan & Wolkoff
67 Wall St.
New York, NY 10005
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition	:	
of	:	
EDWARD M. GILBERT	:	DECISION
for a 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, Edward M. Gilbert, 110 East 59th Street, New York, New York 10022, filed a petition for a redetermination of a deficiency or for refund of personal income tax under Article 22 for the years 1973 and 1974. (File No. 16195)

A formal hearing was held before Robert A. Couze, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on July 14, 1981 at 10:40 A.M. Petitioner appeared by Callahan & Wolkoff, Esqs., (Eugene A. Wolkoff, Esq., of counsel). The Audit Division appeared by Ralph J. Vecchio, Esq. (Angelo A. Scopellito, Esq., of counsel).

ISSUE

Whether petitioner Edward M. Gilbert was a person required to collect, truthfully account for and pay over withholding taxes due from Northerlin Co., Inc.

FINDINGS OF FACT

1. On May 24, 1976 the Audit Division issued a Notice of Deficiency against petitioner in the amount of \$44,833.37 for the tax period May 1, 1973 through September 15, 1974. The Notice of Deficiency, in effect, asserted petitioner was a person required to collect, truthfully account for and pay over withholding taxes due from Northerlin Co., Inc. ("Northerlin") for the tax

period May 1, 1973 through September 15, 1974 pursuant to the provisions of subsections (g) and (n) of section 685 New York Tax Law.

2. The asserted liability for the several withholding periods is as follows:

"May 1 - December 31, 1973	\$27,326.14
January 1 - March 31, 1974	6,145.97
June 16 - June 30, 1974	5,967.08
September 1 - September 15, 1974	5,394.18
	<u>\$44,833.37"</u>

3. The corporate employer was in the waterproofing business, with 28 offices throughout the United States.

4. Petitioner was employed by Northerlin in or about 1969 or 1970 to January 4, 1974, the date he resigned.

5. From in or about 1969 or 1970 to between September 1 and September 30, 1973, petitioner was Northerlin's exclusive general manager and was responsible for its fiscal affairs.

6. In September 1973, Northerlin became associated with another company, Graham Stuart Corp.

7. Petitioner's testimony of his duties and responsibilities subsequent to the corporate taxpayer's association with Graham Stuart Corp. is inconsistent. At one time petitioner testified that subsequent to the association he, one Barry Shutte and one Mr. Fleck were responsible for managing Northerlin. Petitioner also testified that because he wanted to keep his job he also signed Northerlin payroll checks. Petitioner also testified that subsequent to Northerlin's association he could neither hire nor fire employees nor could he handle employee grievances nor could he determine employee salaries. At one time petitioner also testified that subsequent to the association he was devoided of all responsibility for Northerlin's fiscal matters. Immediately

thereafter petitioner testified that subsequent to the association he did not think he was consulted regarding Northerlin's fiscal affairs.

8. On another occasion petitioner testified that he was only a figurehead.

9. Sometime in December, 1973, between the 15th and prior to Christmas, petitioner went on vacation. He did not recall whether it was or was not with pay.

10. Petitioner resigned from Northerlin on January 4, 1974. He did not offer any evidence as to the effective time of day.

CONCLUSIONS OF LAW

A. That section 685(g) Tax Law provides that any person required to collect, truthfully account for, and pay over personal income tax, who willfully fails to collect such tax or truthfully account for and pay over such tax or willfully attempts in any manner to evade or defeat the tax or the payment thereof, shall, in addition to other penalties provided by law, be liable to a penalty equal to the total amount of the tax evaded, or not collected, or not accounted for and paid over.

B. That section 685(n) Tax Law defines the word "person", for the purpose of section 685(g), and reads as follows:

"For purposes of subsections (g) ...the term person includes an individual, corporation or partnership or an officer or employee of any corporation (including a dissolved corporation), or a member or employee of any partnership, who as such officer, employee, or member is under a duty to perform the act in respect of which the violation occurs."

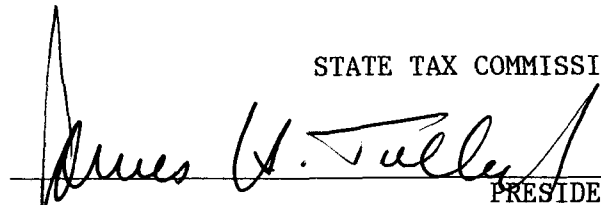
C. That section 689(e) Tax Law provides that petitioner has the burden of proof that he was not a person required to collect, truthfully account for and pay over the personal income tax in issue herein.

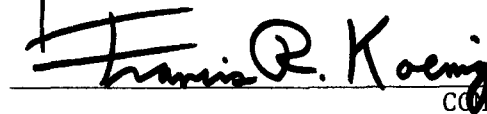
E. That so much of the petition herein for the period January 5, 1974 through September 15, 1974 is granted and that for a like period of time so much of the Notice of Deficiency is cancelled. That in all other respects the balance of the petition is denied and that the balance of the Notice of Deficiency is sustained.


DATED: Albany, New York

MAR 26 1982

STATE TAX COMMISSION


PRESIDENT


COMMISSIONER


COMMISSIONER