

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition of Pearne Billings	: : : : : :	: : : : : :
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 1976 & 1977.		AFFIDAVIT OF MAILING

State of New York
County of Albany

David Parchuck, 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 27th day of May, 1983, he served the within notice of Decision by certified mail upon Pearne Billings, the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Pearne Billings
Short Cut Road
Sterling, NY 13064

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
27th day of May, 1983.

David Parchuck

James A. Highland
AUTHORIZED TO ADMINISTER
OATHS PURSUANT TO TAX LAW
SECTION 174

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

May 27, 1983

Pearne Billings
Short Cut Road
Sterling, NY 13064

Dear Mr. Billings:

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 Law 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
Building #9 State Campus
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	:	
PEARNE BILLINGS	:	DECISION
for Redetermination of a Deficiency or for	:	
Refund of Personal Income Tax under Article 22	:	
of the Tax Law for the Years 1976 and 1977.	:	

Petitioner, Pearne Billings, Short Cut Road, Sterling, New York 13064, 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 1976 and 1977 (File No. 24941).

A small claims hearing was held before Arthur Johnson, Hearing Officer, at the offices of the State Tax Commission, 333 East Washington Street, Syracuse, New York, on October 25, 1982 at 2:45 P.M. Petitioner appeared pro se. The Audit Division appeared by Paul B. Coburn, Esq. (Anne Murphy, Esq., of counsel).

ISSUE

Whether petitioner was a person who willfully failed to collect, truthfully account for and pay over New York State withholding taxes due from County Cleaners of Fulton, Inc. and thus subject to a penalty equal in amount to said past due corporate withholding taxes.

FINDINGS OF FACT

1. On December 18, 1978, the Audit Division issued a Notice of Deficiency to petitioner, Pearne Billings, imposing a penalty, pursuant to section 685(g) of the Tax Law, in an amount equal to the unpaid withholding taxes due from County Cleaners of Fulton, Inc. (hereinafter "County") for the years 1976 and 1977. Said Notice was issued on the grounds that petitioner was a person

required to collect, truthfully account for and pay over the New York State withholding taxes of County and that he willfully failed to do so. The total penalty asserted due in the Notice was \$2,507.03 (\$1,081.83 - 1976 and \$1,425.20 - 1977).

2. Petitioner was the president of Upstate Business Consultants, Inc. ("Upstate"). On August 16, 1976, Upstate executed a contract with County which provided that Upstate was to act in the capacity of business manager and financial consultant for the purpose of improving the financial status of County.

The contract granted Upstate the following authority:

- (a) to manage and direct the business and premises thereon;
- (b) to solicit, accept and receive payment on and from new accounts and customers;
- (c) to service and receive payment on existing accounts;
- (d) to ask, demand, collect and receive payments on all existing and new accounts;
- (e) to order, direct and superintend all repairs and decorations and to make disbursements for same;
- (f) to hire and fire employees and to pay the salaries or wages of same;
- (g) to make all purchases;
- (h) in general, to do and perform all acts and things incident to such management and to make all disbursements in connection therewith;
- (i) to supervise and direct all work by employees.

3. Although the contract between Upstate and County granted much authority to Upstate, it was not indicative of the actual duties performed or petitioner's role in the business operation. Petitioner's actual role with County was limited to those duties a financial consultant would provide. Petitioner would

make recommendations to Charles Bohnsack, a corporate officer and director of County, on ways to improve the financial condition of the corporation. He would suggest ways to increase sales, reduce expenses and improve customer services. Mr. Bohnsack, however, did not follow the advice given by petitioner and continued to operate County in the same manner that caused the financial difficulties. Finally, petitioner severed his relationship with County in the early part of 1977.

4. Petitioner was not an authorized signatory on the corporate checking account; he was not a corporate officer or stockholder; he did not prepare or sign any tax returns.

Petitioner gave advice as to what creditors should be paid, but had no control over the payment thereof.

CONCLUSIONS OF LAW


A. That petitioner, Pearne Billings, President of Upstate Business Consultants, Inc., was not a person required to collect, truthfully account for and pay over unpaid New York State personal income taxes withheld by County within the meaning and intent of section 685(n) of the Tax Law. Accordingly, petitioner is not subject to a penalty in an amount equal to the unpaid withholding taxes under 685(g) of the Tax Law.


B. That the petition of Pearne Billings is granted and the Notice of Deficiency issued December 18, 1978 is cancelled.

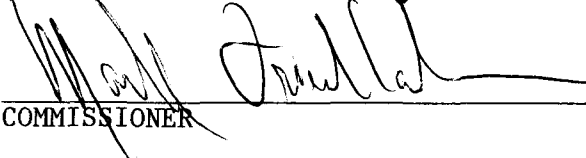
DATED: Albany, New York

STATE TAX COMMISSION

MAY 27 1983


PRESIDENT


COMMISSIONER


COMMISSIONER

TA 26 (9-79)

STATE OF NEW YORK
State Tax Commission
TAX APPEALS BUREAU

STATE CAMPUS

ALBANY, N. Y. 12227

RECEIVED
MAY 27 1983
NO POSTAGE
NECESSARY
IF MAILED
IN THE
UNITED STATES

[Handwritten signature]



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Pearne Billings
Short Cut Road
Sterling, NY 13864



CERTIFIED
P 481 207 842
MAIL



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

May 27, 1983

Pearne Billings
Short Cut Road
Sterling, NY 13064

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In the Matter of the Petition
of
PEARNE BILLINGS
for Redetermination of a Deficiency or for
Refund of Personal Income Tax under Article 22
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DECISION

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CONCLUSIONS OF LAW

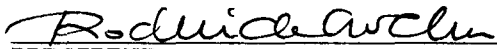
A. That petitioner, Pearne Billings, President of Upstate Business Consultants, Inc., was not a person required to collect, truthfully account for and pay over unpaid New York State personal income taxes withheld by County within the meaning and intent of section 685(n) of the Tax Law. Accordingly, petitioner is not subject to a penalty in an amount equal to the unpaid withholding taxes under 685(g) of the Tax Law.

B. That the petition of Pearne Billings is granted and the Notice of Deficiency issued December 18, 1978 is cancelled.

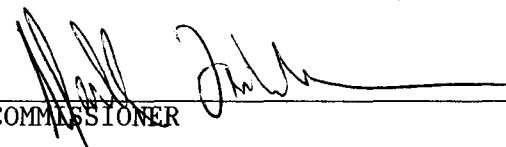
DATED: Albany, New York

STATE TAX COMMISSION

MAY 27 1983


PRESIDENT


COMMISSIONER


COMMISSIONER