

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition	:	
of	:	
Jack Gilbert	:	
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	:	
1978 & 1979.	:	
		AFFIDAVIT OF MAILING
In the Matter of the Petition	:	
of	:	
Donald Gilbert	:	
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	:	
1978 & 1979.	:	

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 6th day of May, 1983, he served the within notice of Decision by certified mail upon Jack Gilbert, the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Jack Gilbert  
271-07H Grand Central Pkwy.  
Floral Park, NY 11005

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  
6th day of May, 1983.

David Parchuck

Annunzio A. Hayek

AUTHORIZED TO ADMINISTER  
OATHS PURSUANT TO TAX LAW  
SECTION 174

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

May 6, 1983

Jack Gilbert  
271-07H Grand Central Pkwy.  
Floral Park, NY 11005

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  
Lawrence Friedman  
85 West Hawthorne Ave.  
Valley Stream, NY 11580  
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

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Tax under Article 22 of the Tax Law for the Years	:	
1978 & 1979.	:	

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 6th day of May, 1983, he served the within notice of Decision by certified mail upon Donald Gilbert, the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Donald Gilbert  
100 Dogwood Road  
Roslyn, NY 11576

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  
6th day of May, 1983.

David Parchuck

Constance A. Stogeluck

AUTHORIZED TO ADMINISTER  
OATHS PURSUANT TO TAX LAW  
SECTION 174

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition	:	
of	:	
Jack Gilbert	:	
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	:	
1978 & 1979.	:	
		AFFIDAVIT OF MAILING
In the Matter of the Petition	:	
of	:	
Donald Gilbert	:	
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	:	
1978 & 1979.	:	

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 6th day of May, 1983, he served the within notice of Decision by certified mail upon Lawrence Friedman the representative of the petitioners in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Lawrence Friedman  
85 West Hawthorne Ave.  
Valley Stream, NY 11580

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  
6th day of May, 1983.

*Connie A. Hagelund*

*David Parchuck*

AUTHORIZED TO ADMINISTER  
OATHS PURSUANT TO TAX LAW  
SECTION 174

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

May 6, 1983

Donald Gilbert  
100 Dogwood Road  
Roslyn, NY 11576

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  
Lawrence Friedman  
85 West Hawthorne Ave.  
Valley Stream, NY 11580  
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

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In the Matter of the Petition :  
of :  
JACK GILBERT :  
for Redetermination of a Deficiency or for :  
Refund of Personal Income Tax under Article :  
22 of the Tax Law for the Years 1978 and 1979. :

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DECISION

In the Matter of the Petition :  
of :  
DONALD GILBERT :  
for Redetermination of a Deficiency or for :  
Refund of Personal Income Tax under Article :  
22 of the Tax Law for the Years 1978 and 1979. :  
:

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Petitioners Jack Gilbert, 271-074 Grand Central Parkway, Floral Park, New York 11005 and Donald Gilbert, 100 Dogwood Road, Roslyn, New York 11576, filed petitions for redetermination of a deficiency or for refund of personal income tax under Article 22 of the Tax Law for the years 1978 and 1979 (File Nos. 32820, 32821, 32822 and 32823).

A formal hearing was held before Daniel J. Ranalli, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on October 27, 1982 at 11:00 A.M. Petitioners appeared by Friedman & Goodman (Lawrence Friedman, CPA). The Audit Division appeared by Paul B. Coburn, Esq. (Anna Colello, Esq., of counsel).

ISSUE

Whether the Tax Commission is required to attempt to collect unpaid withholding taxes from a corporation's trustee in bankruptcy before collecting from responsible officers the penalty imposed by section 685(g) of the Tax Law.

FINDINGS OF FACT

1. On December 29, 1980 the Audit Division issued a Notice of Deficiency along with a Statement of Deficiency imposing a penalty pursuant to section 685(g) of the Tax Law against petitioner Jack Gilbert, president of Vogue Jewelry Novelty Co., Inc. ("Vogue Jewelry"), in the amount of \$7,062.75 for the years 1978 and 1979. On the same date the Audit Division issued another Notice of Deficiency imposing a 685(g) penalty against Jack Gilbert, president of Vogue Manufacturing Co., Inc. ("Vogue Manufacturing"), in the amount of \$5,528.15 for the year 1979. Notices in the same amounts and for the same years were issued on the same date against petitioner Donald Gilbert, vice president of the aforesaid corporations.

2. On January 17, 1980, Vogue Jewelry and Vogue Manufacturing filed voluntary petitions in bankruptcy and were eventually adjudicated bankrupt. Petitioners, as president and vice president, were admittedly responsible officers of the aforesaid corporations and their liability as such is not in issue. Petitioners alleged that the trustee in bankruptcy had sufficient assets to pay the withholding taxes. No evidence was introduced, however, indicating the exact amount of assets held by the trustee and whether these would be adequate to satisfy the deficiency.

3. Petitioners argued that it was the duty of the Tax Commission to file a claim with the trustee in bankruptcy prior to imposing a penalty on the

responsible officers. Since the Tax Commission had not filed such a claim, petitioners maintained that they should be relieved of any 685(g) penalties.

CONCLUSIONS OF LAW

A. That section 685(g) of the Tax Law provides that any person required to collect, truthfully account for and pay over withholding taxes who willfully fails to do so will be liable to a penalty equal to the total amount of the tax not collected, or not accounted for and paid over.

B. That the penalty imposed by section 685(g) "is separate and independent of the corporate liability for the unpaid withholding taxes" (Yellin v. New York State Tax Commission, 81 A.D.2d 196). Therefore, "the Audit Division is not required to attempt to collect unpaid withholding taxes from a corporation, or from its trustee in bankruptcy, before imposing on and collecting from responsible officers the penalty imposed by section 685(g) of the Tax Law" (Matter of C. Richard Schine, State Tax Commission, May 21, 1982).

C. That the petitions of Jack Gilbert and Donald Gilbert are denied and the notices of deficiency issued December 29, 1980 are sustained.

DATED: Albany, New York

STATE TAX COMMISSION

MAY 06 1983

Roderick A. O'Clair  
PRESIDENT

Francis P. Koening  
COMMISSIONER

Mark J. Smith  
COMMISSIONER