

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of :
Arnold Rubman :

for Redetermination of a Deficiency or for Refund :
of Personal Income Tax under Article 22 of the Tax :
Law for the Period 5/1/79 - 10/31/79. :

AFFIDAVIT OF MAILING

In the Matter of the Petition :
of :
Herbert Rubman :

for Redetermination of a Deficiency or for Refund :
of Personal Income Tax under Article 22 of the Tax :
Law for the Period 5/1/79 - 10/31/79. :

State of New York :

ss.:

County of Albany :


David Parchuck, being duly sworn, deposes and says that he is an employee of the State Tax Commission, that he is over 18 years of age, and that on the 6th day of February, 1985, he served the within notice of Decision by certified mail upon Herbert Rubman, the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Herbert Rubman
661 Oakwood Court
Westbury, NY 11590

and by depositing same enclosed in a postpaid properly addressed wrapper in a post office 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 February, 1985.


Annie A. Haglund
Authorized to administer oaths
pursuant to Tax Law section 174



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

February 6, 1985

Herbert Rubman
661 Oakwood Court
Westbury, NY 11590

Dear Mr. Rubman:

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, a proceeding in court to review an adverse decision by the State Tax Commission may be instituted only 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
Robert P. Herzog
274 Madison Ave.
New York, NY 10016
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

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David Parchuck, being duly sworn, deposes and says that he is an employee of the State Tax Commission, that he is over 18 years of age, and that on the 6th day of February, 1985, he served the within notice of Decision by certified mail upon Arnold Rubman, the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Arnold Rubman
84 the Dell
Searingtown, NY 11507

and by depositing same enclosed in a postpaid properly addressed wrapper in a post office 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 February, 1985.

David Parchuck

James A. Hagelund
Authorized to administer oaths
pursuant to Tax Law section 174

STATE OF NEW YORK

STATE TAX COMMISSION

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of :
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for Redetermination of a Deficiency or for Refund :
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Law for the Period 5/1/79 - 10/31/79. :

State of New York :

ss.:

County of Albany :

David Parchuck, being duly sworn, deposes and says that he is an employee of the State Tax Commission, that he is over 18 years of age, and that on the 6th day of February, 1985, he served the within notice of Decision by certified mail upon Robert P. Herzog, the representative of the petitioners in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

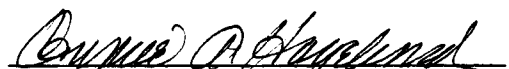
Robert P. Herzog
274 Madison Ave.
New York, NY 10016

and by depositing same enclosed in a postpaid properly addressed wrapper in a post office 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 February, 1985.




Authorized to administer oaths
pursuant to Tax Law section 174

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

February 6, 1985

Arnold Rubman
84 the Dell
Searingtown, NY 11507

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Albany, New York 12227
Phone # (518) 457-2070

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STATE TAX COMMISSION

cc: Petitioner's Representative
Robert P. Herzog
274 Madison Ave.
New York, NY 10016
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition	:	
of	:	DECISION
ARNOLD RUBMAN	:	
for Redetermination of a Deficiency or for	:	
Refund of Personal Income Tax under Article 22	:	
of the Tax Law for the Period May 1, 1979	:	
through October 31, 1979.	:	

In the Matter of the Petition	:
of	:
HERBERT RUBMAN	:
for Redetermination of a Deficiency or for	:
Refund of Personal Income Tax under Article 22	:
of the Tax Law for the Period May 1, 1979	:
through October 31, 1979.	:

Petitioners, Arnold Rubman, 84 the Dell, Searingtown, New York 11507 and Herbert Rubman, 661 Oakwood Court, Westbury, New York 11590, filed petitions for redetermination of a deficiency or for refund of personal income tax under Article 22 of the Tax Law for the period May 1, 1979 through October 31, 1979 (File Nos. 38892 and 38893).

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 September 18, 1984 at 2:45 P.M. Petitioners appeared by Robert P. Herzog, Esq. The Audit Division appeared by John P. Dugan, Esq. (Angelo Scopellito, Esq., of counsel).

ISSUES

I. Whether notices of deficiency which were timely received by petitioners are rendered invalid because they may not have been sent by certified or registered mail.

II. Whether petitioners were persons required to collect, truthfully account for and pay over withholding taxes, who willfully failed to do so and are thus liable to a penalty under section 685(g) of the Tax Law.

FINDINGS OF FACT

1. On July 26, 1982, the Audit Division issued a Notice of Deficiency, along with a Statement of Deficiency, asserting a penalty pursuant to section 685(g) of the Tax Law against petitioner Arnold Rubman as a person required to collect, truthfully account for and pay over withholding taxes of Banner Curtain Co., Inc. ("Banner") in the amount of \$8,339.75 for the period May 1, 1979 through October 31, 1979. On the same date, a similar notice was issued against petitioner Herbert Rubman in the same amount and for the same period.

2. Petitioners received the notices of deficiency in the mail in a timely manner. Petitioners could not remember whether the notices were sent by certified or registered mail; they could only remember receiving them in the mail. Petitioners asserted that since the Audit Division produced no proof that the notices were sent by certified or registered mail, the notices were invalid and the deficiencies should be cancelled.

3. Herbert Rubman was the president of Banner and Arnold Rubman was the secretary - treasurer. Both petitioners were authorized to sign Banner checks and tax returns and it is undisputed that they were persons required to collect, account for and pay over the withholding taxes.

4. On October 19, 1979, Banner filed a petition under Chapter 11 of the United States Code in the United States Bankruptcy Court for the Southern District of New York. On July 17, 1980, an order was entered by the court converting the matter to a proceeding under Chapter 7 of the United States Code. Subsequent to the conversion to Chapter 7, a notice to file claims was sent to all creditors and interested parties and the court fixed February 26, 1981 as the last day to file claims. The New York State Income Tax Bureau was one of the creditors listed with the clerk of the Bankruptcy Court, however, the Audit Division apparently, did not file a timely claim for the taxes due. At the time there were enough funds with the trustee to cover Banner's New York State withholding tax liability. Petitioners now maintain that the Audit Division should be precluded from imposing the penalty on them personally since it failed to obtain the taxes due from Banner by filing a claim in bankruptcy.

CONCLUSIONS OF LAW

A. That the mere allegation that the Audit Division did not mail the notices by registered or certified mail without any additional evidence is insufficient to meet petitioners' burden of proof as provided for in section 689(e) of the Tax Law. The only evidence offered by petitioners was testimony that the notices were received in the mail. Whether the notices were received by regular, registered or certified mail was not proven. Petitioners may not shift the burden of proof to the Audit Division by simply claiming that no evidence exists indicating the method of mailing.

B. That section 685(g) of the 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.


C. That the penalty imposed under section 685(g) of the Tax Law is separate and independent of the corporation's liability for the unpaid taxes and the fact that no claim was filed in the Bankruptcy Court for the unpaid withholding taxes does not preclude the Audit Division from imposing a 685(g) penalty equal to such taxes against petitioners, individually (see Yellin v. New York State Tax Commission, 81 A.D.2d 196).

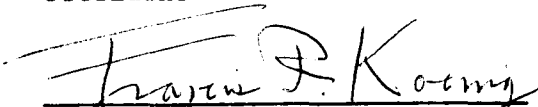
D. That the petitions of Arnold Rubman and Herbert Rubman are denied and the notices of deficiency issued July 26, 1982 are sustained.

DATED: Albany, New York

STATE TAX COMMISSION

FEB 06 1985


President


Commissioner


Commissioner

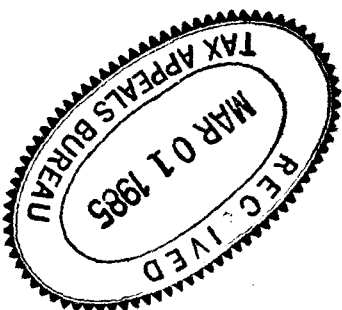
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STATE OF NEW YORK
State Tax Commission
TAX APPEALS BUREAU
STATE CAMPUS
ALBANY, N. Y. 12227



Out of Business _____
Unknown _____
Refused _____
No Such St. or # _____
Moved left file Address _____
Return For Better Address _____
Route # _____ Initials _____

Herbert Robman
661 Oakwood Court
Westbury, NY 11590



CLAIM CHECK
NO.

892798

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DATE

FEB 28 1985

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ALBANY, NEW YORK 12227

February 6, 1985

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Phone # (518) 457-2070

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STATE TAX COMMISSION

cc: Petitioner's Representative
Robert P. Herzog
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New York, NY 10016
Taxing Bureau's Representative

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In the Matter of the Petition

of

ARNOLD RUBMAN

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of the Tax Law for the Period May 1, 1979
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DECISION

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of

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B. That section 685(g) of the 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.

C. That the penalty imposed under section 685(g) of the Tax Law is separate and independent of the corporation's liability for the unpaid taxes and the fact that no claim was filed in the Bankruptcy Court for the unpaid withholding taxes does not preclude the Audit Division from imposing a 685(g) penalty equal to such taxes against petitioners, individually (see Yellin v. New York State Tax Commission, 81 A.D.2d 196).

D. That the petitions of Arnold Rubman and Herbert Rubman are denied and the notices of deficiency issued July 26, 1982 are sustained.

DATED: Albany, New York

STATE TAX COMMISSION

FEB 06 1985

Richard A. Allen
President

James R. Kony
Commissioner

Mark J. Miller
Commissioner