

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition

of

JOSIF ARTEMIS

DECISION

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 :

Petitioner, Josif Artemis, 99-60 63rd Road, Rego Park, New York 11374, 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 1978 and 1979 (File No. 40149).

A hearing was held before Allen Caplowaith, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on August 19, 1985 at 1:15 P.M. Petitioner appeared by Allan Grossbach. The Audit Division appeared by John P. Dugan, Esq. (Angelo Scopellito, Esq., of counsel).

ISSUE

Whether petitioner, Josif Artemis, is subject to a penalty pursuant to section 685(g) of the Tax Law, as a person **who** willfully failed to collect, truthfully account for and pay over the New York State withholding taxes due from Over 5 Continents Industries, Inc. for the years 1978 and 1979.

FINDINGS OF FACT

1. Over 5 Continents Industries, Inc. (hereinafter "the corporation"), 147-32 Jamaica Avenue, Jamaica, New York 11435, failed to pay over the New York State personal income taxes withheld from the wages of its employees for the

<u>Withholding Tax Period</u>	<u>Amount</u>
November 16, 1978 through December 31, 1978	\$ 798.95
January 1, 1979 through December 31, 1979	<u>11,401.14</u>
TOTAL	<u>\$12,200.09</u>

2. On May 24, 1982, the Audit Division issued a Statement of Deficiency in conjunction with a Notice of Deficiency against Josif Artemis (hereinafter "petitioner") wherein a penalty was asserted pursuant to section 685(g) of the Tax Law for an amount equal to the New York State withholding taxes due from the corporation for the aforesated periods. Such penalty was asserted on the grounds that petitioner was a person required to collect, truthfully account for and pay over said taxes, and that he willfully failed to do so.

3. Petitioner did not personally appear for the hearing. His grounds for relief were stated in his petition as follows:

"1. Josif Artemis is not an officer of Over J. (sic) Continents Industries, Inc. and therefore should not be liable for any unpaid corporate liabilities. He is **also** not an employee of the above mentioned corporation,

2. Joseph (sic) Artemis became a stockholder of Over J. (sic) Continent Industries on 12/11/78 when he purchased 40 shares of stock. On 7/3/79 Josif Artemis sold his 40 shares of stock to Anatole Potik and Sergei Milman, the officers of the corporation. The liability for New York State withholding was incurred for the period 11/16/78 to 12/31/79. Obviously, our client should not be responsible for corporate liabilities incurred during the periods he was not a stockholder. A redetermination of the correct liability for the above period is in order.

3. Josif Artemis was a stockholder of the corporation for a short period of time. He was misled into purchasing the stock by the corporate officers. He performed no managerial services nor did he participate in making decisions on the part of the corporation. Therefore, he is not an officer of the corporation and should not be liable for any unpaid taxed (sic) by Over J. (sic) Continents Industries, Inc."

4. During the hearing held herein the Audit Division submitted a Sales Tax Bureau Certificate of Registration which was filed by the corporation and

validated by the Sales Tax Bureau on February 1, 1979. Said certificate indicated that petitioner was an "owner and/or principal officer" and that he held the title of Secretary.

5. Petitioner submitted a notarized affidavit, sworn to in "August, 1985", wherein he deposed and said:

"I, Josif Artemis, was an employee of Over J. (sic) Continents Industries, Inc. from 12/11/78 to April of 1979.

I purchased forty (40) shares of Over J. (sic) Continents Industries, Inc. on 12/11/78 for FIFTEEN THOUSAND AND NO/100 (\$15,000.00) DOLLARS. When I started, there was only one other employee, and when I left in April of 1979, there were three (3) employees in addition to myself, and Sergei Milman and Anatole Potik. It was my job to supervise the employees and see that the operations ran smoothly. I had nothing to do with keeping the books and records. I did not sign any Corporate Tax returns, Franchise Tax returns, Sales Tax returns or Payroll Tax returns.

When I left Over J. (sic) Continents Industries, Inc., I severed all ties and responsibilities. On 7/3/79 I sold my forty (40) shares of stock back to the owners, Sergei Milman and Anatole Potik, for FIFTEEN THOUSAND AND NO/100 (\$15,000.00) DOLLARS, exactly what I had paid for the stock. I had severed my relations with the company prior to the sale of stock.

I believe that Sergei Milman and Anatole Potik are the responsible officers."

6. Petitioner submitted a copy of his stock certificate evidencing the issuance to him of forty (40) shares of stock in the corporation on December 11, 1978. He further submitted a copy of a sales agreement evidencing the sale of said shares on July 3, 1979.

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 the tax imposed by this article 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 such tax which

B. That section 685(n) of the Tax Law provides that, for purposes of subdivision (g), the term person:

"[I]ncludes 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 petitioner has not sustained his burden of proof imposed under section 689(e) of the Tax Law to show that he was not a person required to collect, truthfully account for, and pay over the withholding taxes of Over 5 Continents Industries, Inc. for the years at issue who willfully failed to do so. It is noted that petitioner's affidavit contradicts his petition with respect to his status as an employee and officer of the corporation and his duties and responsibilities relative to such status. Accordingly, petitioner is subject to the penalty imposed pursuant to section 685(g) of the Tax Law.

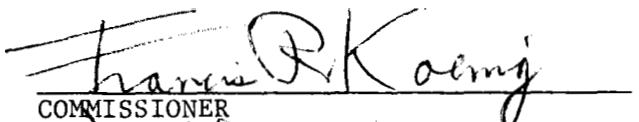
D. That the petition of Josif Artemis is denied and the Notice of Deficiency dated May 24, 1982 is hereby sustained.

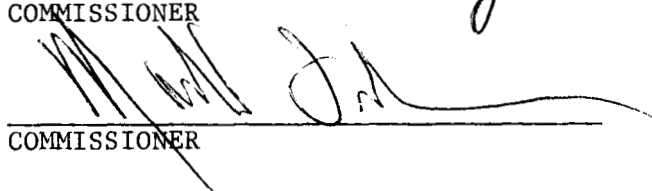
DATED: Albany, New York

STATE TAX COMMISSION

JAN 28 1986


PRESIDENT


COMMISSIONER


COMMISSIONER