

In the Matter of the Petition

of

CARLIN and ATLAS

AFFIDAVIT OF MAILING

For a Redetermination of a Deficiency or
a Revision of a Determination or a Refund
of Personal Income
Taxes under Article ~~(x)~~ 22 of the
Tax Law for the Year(s) ~~or Period(s)~~
1969, 1970 and 1971.

State of New York
County of Albany

Bruce Batchelor, 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 14th day of April, 1977, he served the within
Notice of Decision by (certified) mail upon Carlin and Atlas

~~(representative of)~~ the petitioner in the within proceeding,

by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed
as follows:

Carlin and Atlas
140 Huguenot Street
New Rochelle, New York 10801

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

14th day of April, 1977.

Bruce Batchelor

Janet Mack

STATE OF NEW YORK
STATE TAX COMMISSION

In the Matter of the Petition

of

CARLIN and ATLAS

AFFIDAVIT OF MAILING

For a Redetermination of a Deficiency or :
a Revision of a Determination or a Refund :
of Personal Income :
Taxes under Article (x) 22 of the :
Tax Law for the Year(s) ~~or Period(s)~~ :
1969, 1970 and 1971.

State of New York
County of Albany

Bruce Batchelor , being duly sworn, deposes and says that
~~she~~ is an employee of the Department of Taxation and Finance, over 18 years of
age, and that on the 14th day of April , 19 77, ~~she~~ served the within
Notice of Decision by (certified) mail upon Hill M. Lalin

(representative of) the petitioner in the within proceeding,

by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed
as follows:

Mr. Hill M. Lalin
John H. Cohn & Co.
810 Broad Street
Newark, New Jersey 07102

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

14th day of April , 1977

Bruce Batchelor

Janet Mack



STATE OF NEW YORK
DEPARTMENT OF TAXATION AND FINANCE

STATE TAX COMMISSION

TAX APPEALS BUREAU
STATE CAMPUS
ALBANY, N.Y. 12227

ADDRESS YOUR REPLY TO

April 14, 1977

TELEPHONE: (518) **457-1723**

Carlin and Atlas
140 Huguenot Street
New Rochelle, New York 10801

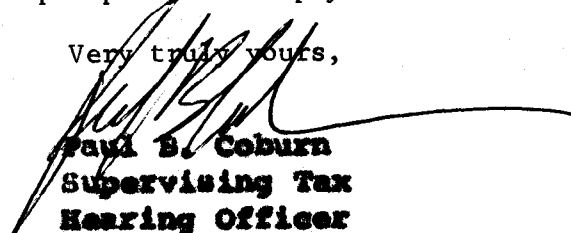
Gentlemen:

Please take notice of the **DECISION**
of the State Tax Commission enclosed herewith.

Please take further notice that pursuant to
Section (a) **690** of the Tax Law, any
proceeding in court to review an adverse deci-
sion must be commenced within **4 months**
from the date of this notice.

Inquiries concerning the computation of tax
due or refund allowed in accordance with this
decision or concerning any other matter relative
hereto may be addressed to the undersigned. They
will be referred to the proper party for reply.

Very truly yours,


Paul B. Coburn
Supervising Tax
Hearing Officer

Enc.

cc: Petitioner's Representative:

Taxing Bureau's Representative:

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition
of
CARLIN and ATLAS
for Redetermination of a Deficiency or
for Refund of Personal Income Tax under
Article 22 of the Tax Law for the Years
1969, 1970 and 1971.

DECISION

The joint venture of Carlin and Atlas of 140 Huguenot Street, New Rochelle, New York 10801, 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 1969, 1970 and 1971. (File No. 00676)

A formal hearing was held before Solomon Sies, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on October 22, 1976 at 10:30 a.m.

The petitioner appeared by Hill M. Lalin of the accounting firm of J. H. Cohn & Co. The Income Tax Bureau appeared by Peter Crotty, Esq. (Arthur Rosen, Esq. of counsel).

ISSUE

Whether or not the per diem living allowance payments made by the petitioner to its employees constitute wages subject to withholding taxes.

FINDINGS OF FACT

1. On April 13, 1973, the Income Tax Bureau issued a Statement of Audit Changes against Carlin and Atlas for the years 1969, 1970 and 1971, imposing additional personal income tax in the amount of \$8,836.50, with interest of \$1,093.22, for a total of \$9,929.72. Accordingly, the Income Tax Bureau issued a Notice of Deficiency therefor. The applicant filed a timely petition for redetermination of said deficiency.

2. The Notice of Deficiency is predicated on the contention that the petitioner did not withhold and pay the required New York State withholding tax on "supplemental income paid to employees". An assessment was made based on 5% of such "total supplemental income" paid to employees.

3. The P. J. Carlin Construction Co., Inc. is a general contractor. The Atlas Tile and Marble Works, Inc. is a general contractor and also a tile subcontractor. Both corporations maintain principal places of business in Westchester

County, State of New York. Prior to 1969, the P. J. Carlin Construction Co., Inc. and the Atlas Tile and Marble Works, Inc. entered into a joint venture for the purpose of entering into a contract for the construction of the Justice Building and four New York State agency buildings located at the South Mall in Albany. As general contractor, the joint venture retained various parts of the contract, and also subcontracted particular segments to other contractors.

4. The Albany area and the construction unions in that area did not have sufficient construction personnel to accommodate all of the construction going on at the same time. It therefore became necessary for the petitioner to recruit construction personnel from counties outside the Albany area. The joint venture estimated that various parts of the contract were to be completed in less than a year.

5. The joint venture determined in good faith that the employees hired by it were employed away from their principal place of employment, and considered the assignment to the particular project to be temporary in nature.

6. The joint venture paid per diem expenses or living expenses to its employees. Such payments were separately designated on each pay check.

7. The petitioner did not withhold or pay over alleged withholding taxes on the per diem allowances paid to its employees because it did not consider such payments to be wages within the definition of wages pursuant to section 3401 of the Internal Revenue Code.

8. The Internal Revenue Service did not hold the petitioner liable for withholding taxes on the per diem living allowance payments made to its employees.

9. The Income Tax Bureau claims that since the Tax Commission has ruled that the payments received by employees are taxable, the employer is required to deduct and pay withholding tax on such payments.

CONCLUSIONS OF LAW

A. That whether or not payments are taxable to, or deductible by the employee is immaterial with regard to whether the payments are subject to withholding by the employer. "An employee may receive economic benefits from his employer that are not subject to the withholding provisions of the Code". Stubbs, Overbeck & Associates, Inc. v. U.S., (71-2 USTC par. 9520) 445 F2d 1142, aff'g Dist. Ct., (70-1 USTC par. 9449), 313 F. Supp. 23. See also Peoples Life

Ins. Co. v. U.S., (67-2 USTC par. 9608), 179 Ct. Cl. 318, 373 F2d 924; Acacia Mutual Life Ins. Co. v. U.S., (67-2 USTC par. 9608), 272 F. Supp. 188; England v. U.S., (65-1 USTC par. 9392) 345 F2d 414, Cert. denied, 382 U.S. 986.

B. That the per diem living allowance payments did not constitute remuneration for services performed for the petitioner by its employees.

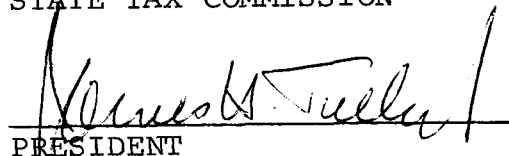
C. That the per diem living allowance payments were not wages within the meaning of sections 3401(a) and 3402(a) of the Internal Revenue Code and section 671(a)(1) of the Tax Law.

D. That the petitioner was not required to withhold and pay withholding taxes on the per diem living allowance payments to its employees. It was so held under similar facts in the case of Stubbs, Overbeck & Associates, Inc. v. U.S., supra. To the same effect see Royster Co. v. U.S., 479 F2d 387.

E. That the petition of Carlin and Atlas is granted and the Statement of Audit Changes and Notice of Deficiency issued against the petitioner be and the same are hereby cancelled in full.

DATED: Albany, New York
April 14, 1977

STATE TAX COMMISSION


PRESIDENT


COMMISSIONER


COMMISSIONER

STATE OF NEW YORK
STATE TAX COMMISSION

In the Matter of the Petition

of
JOSEPH M. CARLINO

AFFIDAVIT OF MAILING

For a Redetermination of a Deficiency or :
a Revision of a Determination or a Refund :
of Personal Income :
Taxes under Article (s) 22 of the :
Tax Law for the Year (s) ~~xxxxxx~~ 1970.:

State of New York
County of Albany

Bruce Batchelor

, being duly sworn, deposes and says that

~~xx~~ she is an employee of the Department of Taxation and Finance, over 18 years of
age, and that on the 18th day of March, 1977, she served the within
NOTICE OF DEFAULT ORDER by (certified) mail upon Joseph M. Carlino

(~~representative~~) the petitioner in the within proceeding,

by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed

as follows: Mr. Joseph M. Carlino
111 Passaic Avenue
Spring Lake, New Jersey

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~~) petitioner.

Sworn to before me this

18th day of March, 1977.

Bruce Batchelor

Janet Mack



STATE OF NEW YORK
DEPARTMENT OF TAXATION AND FINANCE

TAX APPEALS BUREAU
STATE CAMPUS
ALBANY, N.Y. 12227

STATE TAX COMMISSION

ADDRESS YOUR REPLY TO

March 18, 1977

TELEPHONE: (518) 457-1723

Mr. Joseph M. Carlino
111 Passaic Avenue
Spring Lake, New Jersey

Dear Mr. Carlino:

Please take notice of the **DEFAULT ORDER**
of the State Tax Commission enclosed herewith.

Please take further notice that pursuant to
Section(§) **690** of the Tax Law, any
proceeding in court to review an adverse deci-
sion must be commenced within **4 months**
from the date of this notice.

Inquiries concerning the computation of tax
due or refund allowed in accordance with this
decision or concerning any other matter relative
hereto may be addressed to the undersigned. They
will be referred to the proper party for reply.

Very truly yours,

Aloysius J. Nendza
Aloysius J. Nendza
Supervisor of
Tax Conferences

Enc.

cc: ~~XXXXXXXXXXXXXXXXXXXX~~

Taxing Bureau's Representative:

STATE OF NEW YORK
STATE TAX COMMISSION

In the Matter of the Petition

of

JOSEPH M. CARLINO

DEFAULT ORDER

for Redetermination of Deficiency or for Refund of
Personal Income
Taxes under Article (X) 22 of the Tax Law for the
Year (S) 1970

Petitioner (S) Joseph M. Carlino, 111 Passaic Ave., Spring Lake, N.J.

filed a petition for redetermination of deficiency
or for refund of Personal Income taxes under Article (S)
22 of the Tax Law for the year (S) 1970 . File No. (S) 13106

A Pre-Hearing Conference on the petition was scheduled before
Allen Caplowaith, Conferee, at the offices of the State
Tax Commission, Two World Trade Center, New York, N.Y. 10047, Rm. 6531
on November 3, 1976 at 10:30 a.m. . Notice of said Pre-Hearing
Conference was given to petitioner (S) ~~XX~~

. Petitioner (S) ~~XX~~ did
not appear at the Pre-Hearing Conference . A default has been duly noted.

Now on motion of the attorney for the Department of Taxation and Finance,
it is

ORDERED that the petition of Joseph M. Carlino
be and the same is hereby denied.

DATED: Albany, New York
March 18, 1977

STATE TAX COMMISSION
Rene W. Tully
PRESIDENT
Melvin Krum
COMMISSIONER
Thomas H. Lyman
COMMISSIONER