

STATE OF NEW YORK
STATE TAX COMMISSION

In the Matter of the Petition :
of :
John Falcone :
AFFIDAVIT OF MAILING
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 1969 - 1970. :

State of New York
County of Albany

Jay Vredenburg, 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 June, 1980, he served the within notice of Decision by certified mail upon John Falcone, the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

John Falcone
400 Spangle Dr.
North Babylon, NY 11703

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 June, 1980.

Joanne Knapp

J. Vredenburg

STATE OF NEW YORK
STATE TAX COMMISSION

In the Matter of the Petition :
of :
John Falcone :
AFFIDAVIT OF MAILING
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 1969 - 1970. :

State of New York
County of Albany

Jay Vredenburg, 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 June, 1980, he served the within notice of Decision by certified mail upon Benjamin Finkel the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Mr. Benjamin Finkel
Finkel, Goldstein & Berzow
67 Wall St.
New York, NY 10005

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 June, 1980.

Joanne Knapp

J. Vredenburg

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

June 6, 1980

John Falcone
400 Spangle Dr.
North Babylon, NY 11703

Dear Mr. Falcone:

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
Deputy Commissioner and Counsel
Albany, New York 12227
Phone # (518) 457-6240

Very truly yours,

STATE TAX COMMISSION

cc: Petitioner's Representative
Benjamin Finkel
Finkel, Goldstein & Berzow
67 Wall St.
New York, NY 10005
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of :
JOHN FALCONE : DECISION
for Redetermination of a Deficiency or for :
Refund of Personal Income Tax under Article :
22 of the Tax Law for the Years 1969 and :
1970.

Petitioner, John Falcone, 400 Spangle Drive, North Babylon, New York 11703, 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 and 1970 (File No. 24182).

A formal hearing was held before Edward L. Johnson, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on June 18, 1979 at 2:45 P.M. Petitioner appeared by Finkel, Goldstein & Berzow, Esqs. (Benjamin Finkel, Esq., of counsel). The Audit Division appeared by Peter Crotty, Esq. (Samuel J. Freund, Esq., of counsel).

ISSUE

Whether petitioner is liable for a penalty equal to the total amount of personal income taxes withheld from employees of a corporation of which he was an officer, where the income taxes withheld were not paid over to the state.

FINDINGS OF FACT

1. Monarch Centers, Inc. d/b/a Monarch Sewing Center, Inc. (sic) ("Monarch") failed to pay over to New York State all the income tax withheld from its employees for 1969 and 1970.

2. On January 18, 1971, petitioner, John Falcone, was sent a Notice of Deficiency and a Statement of Deficiency imposing a penalty under section 685(g) of the Tax Law as follows:

<u>WITHHOLDING TAX PERIOD</u>	<u>AMOUNT</u>
September 1 to December 31 - 1969	\$200.00
January 1 to March 6 - 1970	<u>691.50</u>
TOTAL AMOUNT DUE.....	<u>\$891.50</u>

On June 12, 1975, a Notice and Demand for Payment of Income Tax Due for \$891.50 was issued to petitioner and subsequently reduced to reflect a payment through bankruptcy.

3. Monarch filed a petition in bankruptcy in the United States District Court for the Eastern District of New York on April 3, 1970 under Docket No. 70B237. On December 30, 1975, the first and final dividend in the amount of \$226.55 was received from the estate of the bankrupt Monarch and applied as follows:

<u>WITHHOLDING TAX PERIOD</u>	<u>TAX</u>	<u>INTEREST</u>
September 1 to December 31 - 1969	\$200.00	\$2.06
January 1 to March 6 - 1970	24.49	-

4. Petitioner was employed fulltime as a hardware salesman for Levar Industrial Supply during 1969 and 1970. In April, 1969, petitioner joined with one Sal Anzini to found Monarch in order to sell stereos, sewing machines and records. Anzini found the business location, set up the operation, and managed the business. Petitioner was regarded as an investor who would share the profits. He was a holder of 25 percent of the corporate stock, and the president of Monarch.

5. Petitioner did not have check signing authority; he did not hire or fire employees; he did not sign any tax returns; and he made no decisions as to whom would be paid and when.

CONCLUSIONS OF LAW

A. That during the years at issue, subsection (g) of section 685 of the Tax Law provided, in part:

"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 the tax evaded, or not collected, or not accounted for and paid over."

During the years at issue, subsection (n) of section 685 of the Tax Law provided, in part, that:

"...the term person includes 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."

B. That petitioner was not a person required to collect, truthfully account for, and pay over tax within the meaning of sections 685(g) and (n) of the Tax Law and is not liable for the penalty.

C. That the petition of John Falcone is granted, and the Notice of Deficiency dated January 18, 1971 and the Notice and Demand for Payment dated June 12, 1975 is hereby cancelled.

DATED: Albany, New York

JUN 6 1980

STATE TAX COMMISSION
James A. Sullivan
PRESIDENT
Anna H. ...
COMMISSIONER
Francis R. Koenig
COMMISSIONER