

STATE OF NEW YORK
STATE TAX COMMISSION

In the Matter of the Petition :

of

Donald A. Tesch :

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 1972 & 1973. :

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 19th day of September, 1980, he served the within notice of Decision by certified mail upon Donald A. Tesch, the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

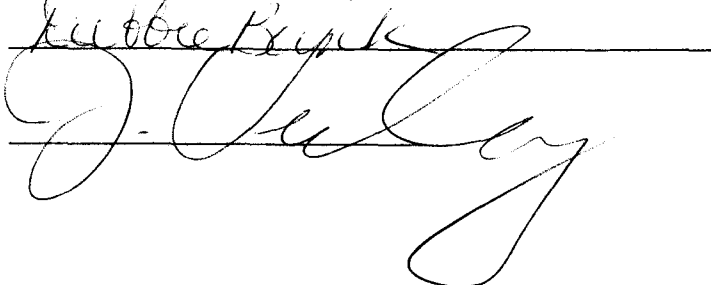
Donald A. Tesch
924 E. Lake Rd.
Rushville, NY 14544

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

19th day of September, 1980.



Notary Public

STATE OF NEW YORK
STATE TAX COMMISSION

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of

Donald A. Tesch :

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for Redetermination of a Deficiency or a Revision :
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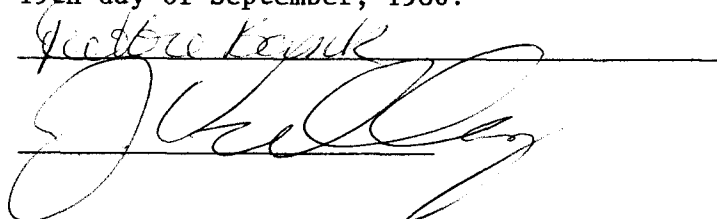
Jay Vredenburg, being duly sworn, deposes and says that he is an employee of the Department of Taxation and Finance, over 18 years of age, and that on the 19th day of September, 1980, he served the within notice of Decision by certified mail upon Jack M. Battaglia the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Mr. Jack M. Battaglia
Rubin, Levey & Battaglia
950 Crossroads Bldg.
Rochester, NY 14614

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
19th day of September, 1980.



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

September 19, 1980

Donald A. Tesch
924 E. Lake Rd.
Rushville, NY 14544

Dear Mr. Tesch:

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
Jack M. Battaglia
Rubin, Levey & Battaglia
950 Crossroads Bldg.
Rochester, NY 14614
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of :
DONALD A. TESCH :
for Redetermination of a Deficiency or for :
Refund of Personal Income Tax under Article 22 :
of the Tax Law for the Years 1972 and 1973 :

Petitioner, Donald A. Tesch, 924 East Lake Road, Rushville, New York 14544, 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 1972 and 1973 (File No. 10728).

A formal hearing was held before Julius E. Braun, Hearing Officer, at the offices of the State Tax Commission, One Marine Midland Plaza, Rochester, New York, on November 19, 1976 at 10:30 A.M., and on July 27, 1979 at 9:15 A.M. Petitioner appeared by Jack M. Battaglia, Esq. The Audit Division appeared by Peter Crotty, Esq. (Richard Kaufman and Barry Bresler, Esqs., of counsel).

ISSUE

Whether petitioner was a person required to collect, truthfully account for and pay over the withholding taxes due from Syracuse Foundry, Inc. for 1972 and 1973.

FINDINGS OF FACT

1. On April 12, 1974, the Audit Division issued a Statement of Deficiency against petitioner, Donald A. Tesch, imposing a penalty equal to the amount of New York State withholding taxes due from Syracuse Foundry, Inc. for the periods October 16, 1972 to November 30, 1972 and January 1, 1973 to March 9, 1973. This was done on the grounds that he was a person required to collect, truthfully account for and pay over said taxes, and that he willfully failed

to do so; therefore, on April 12, 1974, a Notice of Deficiency was issued to him for \$16,361.11.

2. Syracuse Foundry, Inc. failed to pay over to New York State \$16,361.11 in personal income taxes withheld from its employees' wages for the periods in issue.

3. Donald A. Tesch was hired on or about April 1, 1971 by Stan Leven, Esq. an attorney and a 30 percent stockholder to become the president of the Clutch Guard Coproration. He initially became a shareholder with a \$4,000.00 investment and subsequently owned 30 percent of the stock with the attorney and another investor (Jerome C. Cook). Clutch Guard Corporation acquired Syracuse Foundry, Inc. on November 1, 1971 as a wholly owned subsidiary. Donald A. Tesch was Syracuse Foundry, Inc.'s president and he had complete responsibility of its operation. The company went into bankruptcy receivership on March 9, 1973 at which time a trustee was appointed to oversee the business.

4. The computer printout for the Syracuse Foundry, Inc. payroll that was prepared by one of the local banks indicated that for the period January 1, 1973 to June 17, 1973, the total state withholding tax for 1973 was \$10,701.35 for union employees and \$3,553.95 for non-union employees. The combined total for the year to June 17, 1973 was \$14,255.30. Semi-monthly employers return indicating personal income tax withheld for the period August 16, 1972 to August 31, 1972 showed that \$1,735.00 was remitted by Syracuse; for the period September 16, 1972 to September 30, 1972, \$1,226.90 was withheld and remitted; for the period October 1, 1972 to October 15, 1972 \$1,275.80 was withheld and remitted. For all of 1972, form IT-2103 signed on January 31, 1973 by Donald A. Tesch as president indicates that \$27,769.90 was withheld and remitted by Syracuse. The average weekly tax withheld for 1972 was \$532.00; the average weekly tax withheld for the twenty-three weeks in 1973 was \$620.00.

5. Records of the Audit Division indicated that for the periods October 16, 1972 to November 30, 1972 and January 1, 1973 to March 9, 1973 unpaid withholding taxes were due, which amounts were estimated. Based on the weekly average for 1972, the withholding tax for the seven week period due was \$3,724.00; and for the ten week period in 1973, \$6,200.00 was due.

CONCLUSIONS OF LAW


A. That petitioner, Donald A. Tesch, was a person required to collect, truthfully account for and pay over the withholding taxes due from Syracuse Foundry, Inc. and that he willfully failed to do so within the meaning of subsections (g) and (n) of section 685 of the Tax Law for the period of October 16, 1972 to November 30, 1972 and January 1, 1973 to March 9, 1973. Accordingly, petitioner is liable to a penalty pursuant to section 685(g) of the Tax Law equal to the total amount of tax due from said corporation. This is estimated to be \$9,924.00 for the period in issue.

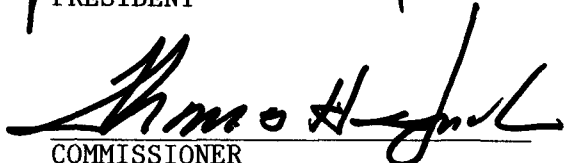
B. That the Audit Division is instructed to modify the Notice of Deficiency issued April 12, 1974 in accordance with Conclusions of Law "A". However, except as so modified, the Notice is otherwise sustained and the petition of Donald A. Tesch is denied.

DATED: Albany, New York

SEP 19 1980

STATE TAX COMMISSION


PRESIDENT


COMMISSIONER


COMMISSIONER