

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition
of
Benjamin Abrams

:

:

: 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 :
1970 & 1971

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 5th day of June, 1981, he served the within notice of Decision by certified mail upon Benjamin Abrams, the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Benjamin Abrams
252-30 Brattle Ave.
Little Neck, NY 11362

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
5th day of June, 1981.

Connie R Hagelund

J. Vredenburg

STATE OF NEW YORK
STATE TAX COMMISSION

In the Matter of the Petition :
of :
Benjamin Abrams :

: 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 :
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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 5th day of June, 1981, he served the within notice of Decision by certified mail upon Mortimer N. Felsinger 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. Mortimer N. Felsinger
Burns, Jackson, Miller, Summit & Spitzer
445 Park Ave.
New York, NY 10022

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
5th day of June, 1981.

Carrie A. Haglund

J. Vredenburg

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

June 5, 1981

Benjamin Abrams
252-30 Brattle Ave.
Little Neck, NY 11362

Dear Mr. Abrams:

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
Mortimer N. Felsinger
Burns, Jackson, Miller, Summit & Spitzer
445 Park Ave.
New York, NY 10022
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

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| In the Matter of the Petition | : | |
| | : | |
| of | : | |
| | : | |
| BENJAMIN ABRAMS | : | DECISION |
| | : | |
| for Redetermination of a Deficiency or | : | |
| for Refund of Personal Income Tax under | : | |
| Article 22 of the Tax Law for the Years | : | |
| 1970 and 1971. | : | |

Petitioner, Benjamin Abrams, 252-30 Brattle Avenue, Little Neck, New York 11362, 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 1970 and 1971 (File No. 26171).

A small claims hearing was held before James Hoefer, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on October 30, 1980 at 10:45 A.M. Petitioner, Benjamin Abrams, appeared with Burns, Jackson, Miller, Summit & Spitzer (Mortimer N. Felsinger, Esq., of counsel). The Audit Division appeared by Ralph J. Vecchio, Esq. (Samuel Freund and Michael Gitter, Esqs., of counsel).

ISSUE

Whether petitioner is subject to penalties pursuant to section 685(g) of the Tax Law as a person required to collect, truthfully account for and pay over withholding taxes due and owing from A.C.I. Chemical Corp., Heating Enterprises, Inc., Integrity Air Conditioning Corp., Ventil Aire Corp., Integrity Service, Inc. and Fine Aire Corp. for the years 1970 and 1971.

FINDINGS OF FACT

1. On the various dates enumerated below, the Audit Division issued statements of deficiency and notices of deficiency against petitioner, Benjamin

Abrams, imposing penalties equal to the total amount of unpaid New York State withholding taxes due from the following corporations:

| <u>Corporation and I/D No.</u> | <u>Date of Notice</u> | <u>Amount</u> | <u>Period</u> |
|--|-----------------------|---------------|------------------------------------|
| A.C.I. Chemical Corp. 11-2215785 | 3/26/73 | \$1,076.76 | 4/1 to 6/30/71 10/1 to 11/30/71 |
| Heating Enterprises, Inc. 13-1981647 | 12/18/72 | \$2,818.40 | 1/1 to 12/31/70 |
| Integrity Air Conditioning Corp. 11-2171353 | 1/29/73 | \$8,462.82 | 7/1 to 11/30/71 |
| Ventil Aire Corp. 11-1753449 | 1/29/73 | \$7,716.53 | 7/1 to 11/30/71 |
| A.C.I. Chemical Corp. 11-2215785 | 3/26/73 | \$ 223.34 | 7/1 to 9/30/71 |
| Integrity Service, Inc. 13-1961489 | 1/29/73 | \$2,878.15 | 4/1 to 11/30/71 |
| Fine Aire Corp. 11-2141082 | 12/18/72 | \$ 367.38 | 10/1 to 12/31/70 4/1 to 9/30/71 |

The total penalties asserted against petitioner amounted to \$23,553.38.

2. Petitioner did not timely file petitions for redetermination of said deficiencies pursuant to section 689(b) of the Tax Law. Accordingly, the deficiencies became assessments, subject to collection, on the ninety-first day from the date of the mailing of the Notice of Deficiency.

3. In order to obtain an administrative hearing regarding his liability for the past due withholding taxes of the above mentioned corporations, petitioner paid 5 percent of each deficiency, said payment totaling \$1,177.67. Petitioner, on March 22, 1977, filed a claim for refund for the \$1,177.67 paid towards the total due. No action was taken by the Audit Division to either accept or reject the refund claim and a timely petition for refund was thereafter submitted by petitioner on March 2, 1979 pursuant to section 689(c) of the Tax Law.

4. Although petitioner has paid only 5 percent of the amount shown due on each of the seven notices of deficiency, counsel for both parties have stipulated that:

in the event it is determined that Mr. Abrams is liable, counsel for Mr. Abrams agrees to be bound with respect to the other monies outstanding, insofar as he will acknowledge that this is a decision on that amount. Counsel does not give up any rights to Article 78 or any further appeals which may be available to him. It is my (counsel for the Audit Division) understanding as well, that the Department agrees that in the event Mr. Abrams is not found liable and the refund claim is granted, we will take action to remove the warrants relating to the additional amounts claimed from Mr. Abrams.

5. The six corporations involved in this matter are all subsidiaries of Atmospheric Control Industries, Inc., with the stock of each subsidiary being held by the parent company. Petitioner was the vice-president of all of the corporations with the exception of A.C.I. Chemical Corp., of which petitioner was president.

6. Petitioner began his employment as credit manager with Atmospheric Control Industries, Inc. (hereinafter "Atmospheric") and its subsidiaries in March, 1970. In late 1970 petitioner was appointed as an officer of Atmospheric and its subsidiaries, as indicated in Finding of Fact "5", supra. As an officer of the corporations, petitioner's duties and responsibilities were still that of credit manager.

7. In conjunction with his appointment as an officer of the subject corporations, petitioner was granted authority to sign corporate checks. However, this authority was exercised only on those occasions when the chief executive officer of the corporations, Arthur Milgram, was absent.

8. During the years 1970 and 1971 petitioner received a salary only from the parent corporation, Atmospheric. This salary ranged from \$16,000.00 to \$20,000.00 per year.

9. Petitioner was not a stockholder of Atmospheric or any of the subsidiary corporations, nor was he a director of any of the corporations.

10. Petitioner was not involved in the financial management of any of the corporations, nor did he determine which creditors were to be paid.

11. Petitioner's responsibility for the past due Federal withholding taxes of Atmospheric and four of its subsidiaries was examined by the Internal Revenue Service. Said examination resulted in the determination that Mr. Abrams was not a person responsible for the payment of said withholding taxes and, accordingly, no penalty was asserted against him by the Internal Revenue Service.

12. As indicated above, Mr. Arthur Milgram was the chief executive officer of Atmospheric and its subsidiaries. Mr. Milgram was a substantial stockholder in Atmospheric and, in an effort to keep the companies afloat, had personally guaranteed bank loans made to Atmospheric and its subsidiaries. In an affidavit sworn to on December 5, 1975, Mr. Milgram indicated that petitioner was an employee of Atmospheric and its subsidiaries and "...had specific limited duties which were all performed under my supervision and direction."

CONCLUSIONS OF LAW

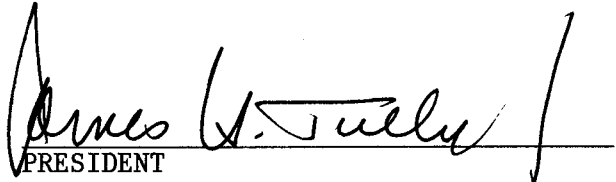
A. That petitioner, Benjamin Abrams, was not a person under a duty to collect, truthfully account for and pay over the New York State withholding taxes due from A.C.I. Chemical Corp., Heating Enterprises, Inc., Integrity Air Conditioning Corp., Ventil Aire Corp., Integrity Service, Inc. and Fine Aire Corp. for the years 1970 and 1971 within the meaning and intent of sections 685(g) and 685(n) of the Tax Law.

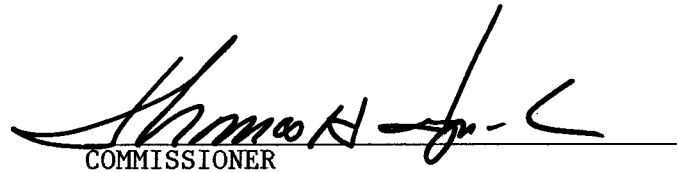
B. That the petition of Benjamin Abrams for refund of \$1,177.67 is granted and, pursuant to the stipulation entered between the parties, the unpaid balance of the notices of deficiency are cancelled in full.

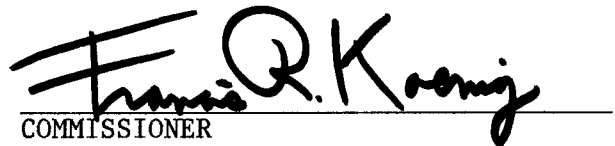
DATED: Albany, New York

STATE TAX COMMISSION

JUN 5 1981


PRESIDENT


COMMISSIONER


COMMISSIONER