

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of :
Stephen Cressent :
: 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 Year :
1974.

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

Stephen Cressent
14 Deerhill Ln.
Scarsdale, NY 10583

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 June, 1981.

James A. Hagedorn

J. Vredenburg

STATE OF NEW YORK
STATE TAX COMMISSION

In the Matter of the Petition :
of :
Stephen Cressent :

: 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 Year :
1974.

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 June, 1981, he served the within notice of Decision by certified mail upon John P. Frucco 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. John P. Frucco
56 Greenridge Ave.
White Plains, NY 10605

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 June, 1981.

Annie A. Hageland

J. Vredenburg

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

June 19, 1981

Stephen Cressent
14 Deerhill Ln.
Scarsdale, NY 10583

Dear Mr. Cressent:

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
John P. Frucco
56 Greenridge Ave.
White Plains, NY 10605
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition	:	
	:	
of	:	
	:	
STEPHEN CRESSENT	:	DECISION
	:	
for Redetermination of a Deficiency or	:	
for Refund of Personal Income Tax under	:	
Article 22 of the Tax Law for the Year	:	
1974.	:	

Petitioner, Stephen Cressent, 14 Deerhill Lane, Scarsdale, New York 10583, filed a petition for redetermination of a deficiency or for refund of personal income tax under Article 22 of the Tax Law for the year 1974 (File No. 24000).

A small claims 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 October 20, 1980 at 1:15 P.M. Petitioner appeared by John P. Frucco, Esq. The Audit Division appeared by Ralph J. Vecchio, Esq. (Frank Levitt, Esq., of counsel).

ISSUES

I. Whether petitioner 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 New York State withholding taxes due from Cappus Drug Co., Inc. for the period January 1, 1974 through September 30, 1974.

II. Whether petitioner had previously paid the withholding taxes due from Cappus Drug Co., Inc. for the period at issue.

FINDINGS OF FACT

1. Cappus Drug Co., Inc. (hereinafter Cappus), 210 Mamaroneck Avenue, Mamaroneck, New York, failed to pay over the New York State personal income

taxes withheld from the wages of its employees for the period January 1, 1974 through September 30, 1974.

2. On April 10, 1978 the Audit Division issued a Statement of Deficiency in conjunction with a Notice of Deficiency against petitioner, Stephen Cressent, 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 Cappus of \$1,003.60, for the period January 1, 1974 through September 30, 1974.

3. During the period at issue, petitioner was President, a director and 50 percent stockholder in Cappus, a retail pharmacy.

4. Cappus was formed in 1963 by petitioner and Mr. Walter Maas, who also was a director and a 50 percent stockholder and who held the position of secretary/treasurer.

5. During 1969, petitioner, Mr. Maas, and a third individual purchased another pharmacy. Petitioner contended that he left Cappus at this time and commenced working in the new store. He further contended that in 1972, when a third pharmacy was bought, he ceased devoting any time at all to the affairs of Cappus.

6. Petitioner contended that Mr. Walter Maas ran Cappus during the period at issue and was solely responsible for the collection and payment of taxes.

7. During the period at issue, petitioner was not on the payroll of Cappus, but did have authority to sign checks.

8. Petitioner contended that in December 1974 he was notified by his accountant that the withholding taxes were not being paid by Cappus. As a result, he contended that he purchased Mr. Maas' corporate stock and returned to work at Cappus in June 1975.

9. Cappus continued to operate and pay wages until sometime in calendar year 1976.

10. During the hearing, petitioner alleged that the full amount of withholding taxes for 1974 was actually paid by Cappus via check #9094, for \$1,362.17, which was issued to the New York State Department of Taxation and Finance on February 14, 1975. In response to petitioner's allegation, the Audit Division, in an attempt to verify same, was notified in writing by the Income Tax Withholding Section that said check was actually applied to outstanding withholding taxes, penalties and interest for calendar year 1973.

CONCLUSIONS OF LAW

A. That petitioner, Stephen Cressent, failed to sustain his burden of proof required pursuant to section 689(e) of the Tax Law to show that he was not a person required to collect, truthfully account for and pay over New York State personal income taxes withheld from employees of Cappus Drug Co., Inc. for the period at issue. Accordingly, the penalty asserted pursuant to section 685(g) of the Tax Law is hereby sustained.

B. That the withholding taxes due from Cappus Drug Co., Inc. for the period at issue were not previously paid as contended by petitioner.

C. That the petition of Stephen Cressent is denied and the Notice of Deficiency dated April 10, 1978 is hereby sustained.

DATED: Albany, New York

JUN 19 1981

STATE TAX COMMISSION


PRESIDENT


COMMISSIONER


COMMISSIONER