STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition of Jose Nunes	:	
	:	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 1973 - 1976.	:	

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

Jose Nunes
843 Park Pl.
Uniondale, NY 11553

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 November, 1981.

Anne A. Hagelund

J. Vredenburg

STATE OF NEW YORK
STATE TAX COMMISSION

In the Matter of the Petition of Jose Nunes	:	
	:	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 1973 - 1976	:	

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 November, 1981, he served the within notice of Decision by certified mail upon Joseph F. Garcia the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Joseph F. Garcia
c/o Garcia & Stallone
1 Huntington Quadrangle
Huntington Station, NY 11746

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 November, 1981.

Annie R. Hagelund

J. Vredenburg

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

November 6, 1981

Jose Nunes
843 Park Pl.
Uniondale, NY 11553

Dear Mr. Nunes:

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
Joseph F. Garcia
c/o Garcia & Stallone
1 Huntington Quadrangle
Huntington Station, NY 11746
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition of Joaquim Mendes	:	
	:	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 1973-1976.	:	

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

Joaquim Mendes
169 Wardell Rd.
Mineola, NY 11501

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 November, 1981.

Connie A. Hagerland

J. Vredenburg

STATE OF NEW YORK
STATE TAX COMMISSION

In the Matter of the Petition of Joaquim Mendes	:	
	:	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 1973-1976	:	

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 November, 1981, he served the within notice of Decision by certified mail upon Joseph F. Garcia the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Joseph F. Garcia
Garcia & Stallone
One Huntington Quadrangle
Huntington Station, NY 11746

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 November, 1981.

Anne A. Hagelund

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

November 6, 1981

Joaquim Mendes
169 Wardell Rd.
Mineola, NY 11501

Dear Mr. Mendes:

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
Joseph F. Garcia
Garcia & Stallone
One Huntington Quadrangle
Huntington Station, NY 11746
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition

of

JOSE NUNES

for Redetermination of a Deficiency or for Refund of Personal Income Tax under Article 22 of the Tax Law for the Years 1973 thorugh 1976.

In the Matter of the Petition

of

JOAQUIM MENDES

for Redetermination of a Deficiency or for Refund of Personal Income Tax under Article 22 of the Tax Law for the Years 1973 through 1976.

DECISION

Petitioners, Jose Nunes, 843 Park Place, Uniondale, New York 11553, and Joaquim Mendes, 169 Wardwell Road, Mineola, New York 11501, filed petitions for redetermination of a deficiency or for refund of personal income tax under Article 22 of the Tax Law for the years 1973 through 1976 (File Nos. 19650 and 19649).

A combined formal hearing was held before Robert Couze, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on January 6, 1981 at 9:15 A.M. Petitioners appeared by Garcia & Stallone, Esqs. (Joseph F. Garcia, Esq., of counsel). The Audit Division appeared by Ralph J. Vecchio, Esq. (Angelo A. Scopellito, Esq., of counsel).

ISSUES

I. Whether petitioner Jose Nunes was a person required to collect, truthfully account for and pay over withholding taxes due from Ataipa Construction Corporation for the years 1973 through 1976.

II. Whether petitioner Joaquim Mendes was a person required to collect, truthfully account for and pay over withholding taxes due from Ataipa Construction Corporation for the years 1973 through 1976.

FINDINGS OF FACT

1. On February 28, 1977, the Audit Division issued notices of deficiency and statements of deficiency against each petitioner in the amount of $7,243.56 for the tax years 1973, 1974, 1975 and 1976. The statements asserted that each petitioner was a person required to collect, truthfully account for and pay over withholding taxes due from Ataipa Construction Corporation for the yeras 1973, 1974, 1975 and 1976 pursuant to the provisions of subsections (g) and (n) of section 685 of the New York Tax Law.

2. The aforementioned statements of deficiency asserted the liability for the several withholding periods in sums as follows:

WITHHOLDING PERIOD	AMOUNT
7/1 - 12/31/73	$3,774.98
12/16 - 12/31/74	182.70
2/1 - 2/15/75	425.30
2/16 - 2/28/75	162.30
3/1 - 3/15/75	390.60
3/16 - 3/31/75	257.60
4/1 - 4/15/75	326.20
4/16 - 4/30/75	279.50
5/1 - 5/15/75	216.70
5/16 - 5/31/75	149.50
6/1 - 6/15/75	80.00
6/16 - 6/30/75	86.60
7/1 - 7/15/75	38.50
7/16 - 7/31/75	36.40
8/1 - 8/15/75	96.40
8/16 - 8/31/75	95.00
9/1 - 9/15/75	26.20
9/16 - 9/30/75	18.70
10/1 - 10/15/75	140.20
10/16 - 10/31/75	151.90
11/1 - 11/15/75	88.10
11/16 - 11/30/75	83.80
12/1 - 12/15/75	56.50
12/16 - 12/31/75	30.80
1/1 - 1/15/76	16.90
1/16 - 1/31/76	18.60
TOTAL	$7,229.98

3. On October 9, 1979, as a result of conferences held in the Tax Appeals Bureau, the Audit Division conceded that since petitioners did not become associated with Ataipa Construction Corporation until November 15, 1974, they could not be held responsible for the withholding of taxes prior to that date.

4. Accordingly, at the hearing herein, the attorney for the Audit Division and the attorney for the petitioners stipulated that the taxes for the withholding period 7/1 - 12/31/73 in the sum of $3,774.98 were no longer in issue and that the aforementioned asserted liability had thus been reduced.

5. The petitioners were both born in Portugal. In 1974 petitioner Jose Nunes spoke and understood very little English and petitioner Joaquim Mendes did not speak nor understand any English at all.

6. As conceded, both petitioners joined Ataipa Construction Corporation, a cement contractor, on November 15, 1974. Ataipa was under the exclusive ownership and control of a party by the name of Manuel daSilva. The petitioners' duties with Ataipa consisted of the driving, loading and unloading of trucks and work identified as being that of a common laborer in the construction industry. The petitioners were each paid an amount which started at $50.00 per week with a maximum of over $100.00 per week during the period at issue. They also were given a small apartment, for which they had to pay rent, over Ataipa's office. At the same time they were employed, petitioner Jose Nunes was made a vice-president of Ataipa and petitioner Joaquim Mendes was made a secretary-treasurer, therein.

7. That the only managerial function petitioner Joaquim Mendes ever performed on behalf of Ataipa was to sign one pay check, at Manuel daSilva's direction, for petitioner Jose Nunes; the check was dishonored as the checking account had been closed out by Mr. daSilva.

8. That the only managerial function petitioner Jose Nunes ever performed on behalf of Ataipa was to sign the pay checks for a single month during Mr. daSilva's absence because he was hospitalized.

9. That petitioners were officers in name only. Whenever petitioners questioned the financial conditions or asked to see the financial records of Ataipa, they received a reply from Mr. daSilva that those matters were none of their business. That Mr. daSilva did not expect petitioners to perform any managerial or fiscal functions on behalf of Ataipa nor did he regard them as actually being managers of Ataipa.

10. That petitioners severed all relations with Ataipa on December 17, 1975. That at the time petitioners severed relations with Ataipa, it owed them back pay which they never received.

11. That petitioners collected unemployment insurance after they severed their relations with Ataipa.

CONCLUSIONS OF LAW

A. That during the years in 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."

B. That 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."

C. That petitioners were not persons required to collect, truthfully account for and pay over such tax within the meaning of section 685(g) of the Tax Law and are not liable to the penalty.

D. That the petitions herein of Jose Nunes and Joaquim Mendes are granted, and the notices of deficiency dated February 28, 1977 are hereby cancelled.

DATED: Albany, New York

NOV 06 1981

STATE TAX COMMISSION

PRESIDENT

COMMISSIONER

COMMISSIONER

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

November 6, 1981

Joaquim Mendes
169 Wardell Rd.
Mineola, NY 11501

Dear Mr. Mendes:

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
Joseph F. Garcia
Garcia & Stallone
One Huntington Quadrangle
Huntington Station, NY 11746
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition of JOSE NUNES for Redetermination of a Deficiency or for Refund of Personal Income Tax under Article 22 of the Tax Law for the Years 1973 thorugh 1976.	DECISION
In the Matter of the Petition of JOAQUIM MENDES for Redetermination of a Deficiency or for Refund of Personal Income Tax under Article 22 of the Tax Law for the Years 1973 through 1976.	

Petitioners, Jose Nunes, 843 Park Place, Uniondale, New York 11553, and Joaquim Mendes, 169 Wardwell Road, Mineola, New York 11501, filed petitions for redetermination of a deficiency or for refund of personal income tax under Article 22 of the Tax Law for the years 1973 through 1976 (File Nos. 19650 and 19649).

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I. Whether petitioner Jose Nunes was a person required to collect, truthfully account for and pay over withholding taxes due from Ataipa Construction Corporation for the years 1973 through 1976.

II. Whether petitioner Joaquim Mendes was a person required to collect, truthfully account for and pay over withholding taxes due from Ataipa Construction Corporation for the years 1973 through 1976.

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4. Accordingly, at the hearing herein, the attorney for the Audit Division and the attorney for the petitioners stipulated that the taxes for the withholding period 7/1 - 12/31/73 in the sum of $3,774.98 were no longer in issue and that the aforementioned asserted liability had thus been reduced.

5. The petitioners were both born in Portugal. In 1974 petitioner Jose Nunes spoke and understood very little English and petitioner Joaquim Mendes did not speak nor understand any English at all.

6. As conceded, both petitioners joined Ataipa Construction Corporation, a cement contractor, on November 15, 1974. Ataipa was under the exclusive ownership and control of a party by the name of Manuel daSilva. The petitioners' duties with Ataipa consisted of the driving, loading and unloading of trucks and work identified as being that of a common laborer in the construction industry. The petitioners were each paid an amount which started at $50.00 per week with a maximum of over $100.00 per week during the period at issue. They also were given a small apartment, for which they had to pay rent, over Ataipa's office. At the same time they were employed, petitioner Jose Nunes was made a vice-president of Ataipa and petitioner Joaquim Mendes was made a secretary-treasurer, therein.

7. That the only managerial function petitioner Joaquim Mendes ever performed on behalf of Ataipa was to sign one pay check, at Manuel daSilva's direction, for petitioner Jose Nunes; the check was dishonored as the checking account had been closed out by Mr. daSilva.

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CONCLUSIONS OF LAW

A. That during the years in 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."

B. That 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."

C. That petitioners were not persons required to collect, truthfully account for and pay over such tax within the meaning of section 685(g) of the Tax Law and are not liable to the penalty.

D. That the petitions herein of Jose Nunes and Joaquim Mendes are granted, and the notices of deficiency dated February 28, 1977 are hereby cancelled.

DATED: Albany, New York

NOV 06 1981

STATE TAX COMMISSION

PRESIDENT

COMMISSIONER

COMMISSIONER

TA 26 (9-79)

STATE OF NEW YORK
State Tax Commission
TAX APPEALS BUREAU
STATE CAMPUS
ALBANY, N. Y. 12227

Joaquim Mendes
169 Wardell Rd.
Mineola, NY 11501

TAX APPEALS BUREAU
NOV 17 1981