

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition
of
John Omage, Jr.

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:

: 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 :
Periods 12/1-12/31/74 & 1/1-1/31/75

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 John Omage, Jr., the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

John Omage, Jr.
46 Bright St.
Westbury, NY 11590

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.

Constance A. Cleveland

J. Vredenburg

STATE OF NEW YORK
STATE TAX COMMISSION

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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 Samuel M. Schwartz 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. Samuel M. Schwartz
Schwartz & Berg
60 E. 42nd St.
New York, NY 10165

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.

Carma A. Haglund

Jay Vredenburg

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

June 5, 1981

John Oimage, Jr.
46 Bright St.
Westbury, NY 11590

Dear Mr. Oimage:

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
Samuel M. Schwartz
Schwartz & Berg
60 E. 42nd St.
New York, NY 10165
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition
of
JOHN OMAGE, JR.
for Redetermination of a Deficiency or
for Refund of Personal Income Tax under
Article 22 of the Tax Law for the Periods
December 1, 1974 to December 31, 1974 and
January 1, 1975 to January 31, 1975.

DECISION

Petitioner, John Omage, Jr., 46 Bright Street, Westbury, New York 11590, 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 1974 and 1975 (File No. 15278).

A small claims hearing was held before Samuel Levy, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on October 1, 1980 at 2:45 P.M. Petitioner appeared by Schwartz & Berg (Samuel M. Schwartz, CPA). The Audit Division appeared by Ralph J. Vecchio, Esq. (Abraham Schwartz, Esq., of counsel).

ISSUE

Whether petitioner is subject to a penalty under section 685 subdivisions (g) and (n) of the Tax Law, as a person who wilfully failed to collect, account for and pay over withholding taxes due and owing from Trunz Meat Co., Inc. (hereinafter "Trunz") for 1974 and 1975.

FINDINGS OF FACT

1. On April 21, 1976, the Audit Division issued a Notice of Deficiency and Statement of Deficiency against petitioner, John Omage, Jr., imposing a penalty against him equal to the amount of unpaid New York State withholding

taxes due and owing from Trunz in the amount of \$349.80 for the period December 1, 1974 to December 31, 1974 and \$94.40 for the period January 1, 1975 to January 31, 1975 for a total of \$444.20. The penalty was issued on the ground that petitioner was a person required to collect, truthfully account for and pay over taxes at issue, and that he wilfully failed to do so.

2. Petitioner had previously been employed as a production manager for his father who operated Peterson Meat Co., Inc., a meat packing business. Petitioner's father subsequently exchanged his interest in the Peterson Meat Co., Inc. for stock of Dvos, Inc. Subsequently, Dvos, Inc. acquired Trunz Meat Co., Inc., either in 1973 or 1974.

3. Petitioner was an officer and director of Trunz. However, he did not own any of the outstanding corporate stock. Petitioner did not have authority to sign checks nor determine financial policy of Trunz.

4. Petitioner's primary duty for Trunz was as a production foreman who supervised the meat processing department of the corporation. The duties which petitioner performed for the corporation were similar in nature to those which he performed when employed by his father.

5. Under date of September 11, 1974, petitioner resigned as an officer and director of Trunz effective September 13, 1974. The unpaid corporate liabilities at issue, accrued as of December 1, 1974, subsequent to petitioner's resignation of his office.

CONCLUSIONS OF LAW

A. That petitioner, John Omage, Jr., was not a person required to collect, truthfully account for and pay over unpaid New York State personal income taxes withheld by Trunz Meat Co., Inc., within the meaning of section 685(n) of the Tax Law. Accordingly, petitioner is not subject to a penalty in an amount

equal to the unpaid withholding taxes for Trunz Meat Co., Inc. under section 685(g) of the Tax Law.

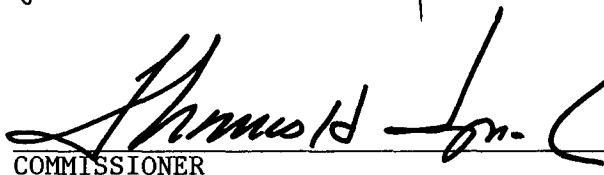
B. That the petition of John Omage, Jr. is granted and the Notice of Deficiency issued April 12, 1976 is cancelled.

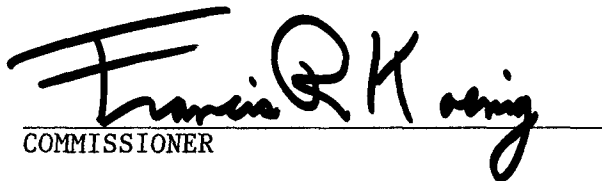
DATED: Albany, New York

STATE TAX COMMISSION

JUN 5 1981


PRESIDENT


COMMISSIONER


COMMISSIONER