

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition
of
Jose Rodrigues

:

:

: 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 6th day of November, 1981, he served the within notice of Decision by certified mail upon Jose Rodrigues, the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Jose Rodrigues
32 Burling Lane
New Rochelle, NY 10005

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.

Annice G. Hagelund

J. Vredenburg

STATE OF NEW YORK
STATE TAX COMMISSION

In the Matter of the Petition
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for Redetermination of a Deficiency or a Revision :
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Tax under Article 22 of the Tax Law for the Year :
1974

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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 6th day of November, 1981, he served the within notice of Decision by certified mail upon Paul A. Victor the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Paul A. Victor
Dublirer, Haydon, Straci & Victor
67 Wall St.
New York, NY 10005

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.

Gennie A. Haglund

J. Vredenburg

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

November 6, 1981

Jose Rodrigues
32 Burling Lane
New Rochelle, NY 10005

Dear Mr. Rodrigues:

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
Paul A. Victor
Dublirer, Haydon, Straci & Victor
67 Wall St.
New York, NY 10005
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition	:	
of	:	
JOSE RODRIGUES	:	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, Jose Rodrigues, 32 Burling Lane, New Rochelle, New York 10005, 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. 20705).

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 January 8, 1981 at 9:15 A.M. Petitioner, Jose Rodrigues, appeared with Dublirer, Haydon, Straci & Victor (Paul A. Victor, Esq., of counsel). The Audit Division appeared by Ralph J. Vecchio, Esq. (Angelo Scopellito, Esq., of counsel).

ISSUES

I. Whether petitioner, Jose Rodrigues, is liable for a penalty equal in amount to the unpaid New York State withholding taxes due from Richlee Building Supplies, Inc.

II. Whether the Audit Division has properly determined the amount, if any, of unpaid withholding taxes due and owing from Richlee Building Supplies, Inc. for 1974.

FINDINGS OF FACT

1. Under date of July 25, 1977 the Audit Division issued a Statement of Deficiency to petitioner imposing a penalty, pursuant to section 685(g) of the

Tax Law, in an amount equal to the alleged unpaid withholding taxes due from Richlee Building Supplies, Inc. (hereinafter "Richlee") for the period April 1, 1974 to June 30, 1974. Said statement was issued on the grounds that petitioner was a person required to collect, truthfully account for and pay over said corporate withholding taxes and that he willfully failed to do so. Accordingly, on July 25, 1977 a Notice of Deficiency was issued against petitioner in the amount of \$2,188.40.

2. On July 31, 1974 Richlee filed forms IT-2101, Employer's Return - Personal Income Tax Withheld, for the semi-monthly periods ending April 15, 1974, April 30, 1974, May 15, 1974, May 31, 1974, June 15, 1974 and June 30, 1974. These returns were filed without any amounts being inserted in the tax withheld section. Subsequent to the filing of the semi-monthly returns, the Audit Division determined that tax was withheld by Richlee from its employees in the following amounts:

<u>PERIOD</u>	<u>AMOUNT</u>
4/1/74 to 4/15/74	\$ 320.20
4/16/74 to 4/30/74	339.60
5/1/74 to 5/15/74	352.20
5/16/74 to 5/31/74	510.30
6/1/74 to 6/15/74	340.50
6/16/74 to 6/30/74	325.60
TOTAL	<u>\$2,188.40</u>

3. Petitioner, Jose Rodrigues, was secretary-treasurer of Richlee during the periods in question. The New York State Corporation Franchise Tax Report filed by Richlee for the fiscal year ended August 31, 1973 was signed by Jose Rodrigues as secretary-treasurer on January 11, 1974. Said corporate return reported total receipts in excess of 1.3 million dollars. Petitioner's personal income tax return for the calendar year 1975 indicated that he received wages of \$1,400.00 from Richlee, from which \$56.80 of New York State tax was withheld.

4. It is petitioner's contention that Richlee was not in business during the periods in question and, accordingly, there were no wages paid from which tax was withheld. It was further argued that the estimated amount of tax withheld and not remitted, as determined by the Audit Division, was not based on proper documentary evidence and, therefore, the actions of the Audit Division were arbitrary and capricious. Petitioner, although present at the hearing held herein, did not offer his oral testimony nor did he submit any documentary evidence.

CONCLUSIONS OF LAW

A. That subsection (e) of section 689 of the Tax Law places the burden of proof upon the petitioner to overcome a deficiency. That petitioner, Jose Rodrigues, has failed to sustain the burden of proof to show that he was not a person required to collect, truthfully account for and pay over to New York State withholding taxes due and owing from Richlee for the period April 1, 1974 to June 30, 1974, within the meaning and intent of subsections (g) and (n) of section 685 of the Tax Law.

B. That petitioner's failure to testify leads to the inference that his testimony would not have supported his version of the case and authorizes the strongest inference that the opposing evidence supports. (Dowling v. Hastings, 211 N.Y. 199; Isquith v. Isquith, 229 App. Div. 555; Vallee v. Vallee, 154 Misc. 620, aff'd 247 App. Div. 874; Eraser Co. v. Kaufman, 138 N.Y.S.2d 743.)

On the basis of the record, the inference is warranted that Richlee was conducting business during the periods in question and was not inactive as petitioner suggests.

C. That petitioner has failed to sustain the burden of proof to show that the amount of tax withheld and not remitted by Richlee, as determined by the

Audit Division, is incorrect and "...through his complete failure to present any proof as to the incorrectness of the statement of deficiency, has surrendered to the statutory presumption of correctness..." (Tavolacci v. State Tax Commission, 77 A.D.2d 759, 431 N.Y.S.2d 174).

D. That the petition of Jose Rodrigues is denied and the Notice of Deficiency dated July 25, 1977 is sustained.

DATED: Albany, New York

NOV 06 1981

STATE TAX COMMISSION


PRESIDENT


COMMISSIONER


COMMISSIONER