

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition
of
John Cipollone

AFFIDAVIT OF MAILING

for Redetermination of a Deficiency or a Revision :
of a Determination or a Refund of NYS & NYC Income :
Tax under Article 22 & 30 of the Tax Law for the :
Year 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 27th day of May, 1982, he served the within notice of Decision by certified mail upon John Cipollone, the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

John Cipollone
915 Split Rock Rd.
Pelham Manor, NY 10803

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
27th day of May, 1982.

Annice P. Hagelund

J. Vredenburg

STATE OF NEW YORK
STATE TAX COMMISSION

In the Matter of the Petition :
of :
John Cipollone :

AFFIDAVIT OF MAILING

for Redetermination of a Deficiency or a Revision :
of a Determination or a Refund of NYS & NYC Income :
Tax under Article 22 & 30 of the Tax Law for the :
Year 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 27th day of May, 1982, he served the within notice of Decision by certified mail upon Norman Greene the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Norman Greene
26 Burling Ln.
New Rochelle, NY 10801

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
27th day of May, 1982.

Barrie A. Hays

J. Vredenburg

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

May 27, 1982

John Cipollone
915 Split Rock Rd.
Pelham Manor, NY 10803

Dear Mr. Cipollone:

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 & 1312 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
Law Bureau - Litigation Unit
Albany, New York 12227
Phone # (518) 457-2070

Very truly yours,

STATE TAX COMMISSION

cc: Petitioner's Representative
Norman Greene
26 Burling Ln.
New Rochelle, NY 10801
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition	:	
of	:	
JOSEPH CIPOLLONE	:	DECISION
for Redetermination of a Deficiency or for	:	
Refund of Personal Income Tax under Articles 22 :	:	
and 30 of the Tax Law for the Years 1976 and	:	
1977.	:	

Petitioner, Joseph Cipollone, 3371 Agar Place, Bronx, New York 10465, filed a petition for redetermination of a deficiency or for refund of New York State personal income tax under Article 22 of the Tax Law and New York City personal income tax under Article 30 of the Tax Law for the years 1976 and 1977 (File No. 24225).

A formal hearing was held before Robert A. Couze, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on September 14, 1981 at 9:50 A.M. Petitioner appeared by Bloom & Amrod, Esqs. (Robert A. Bloom, Esq., of counsel) and Norman Greene, CPA. The Audit Division appeared by Ralph J. Vecchio, Esq. (Angelo A. Scopellito, Esq., of counsel).

ISSUE

Whether petitioner, Joseph Cipollone, was a person required to collect, truthfully account for and pay over withholding taxes due from Aberdeen Associates, Inc., for the year 1976.

FINDINGS OF FACT

1. On August 28, 1978 the Audit Division issued a Statement of Deficiency and a Notice of Deficiency against petitioner, Joseph Cipollone, in the amounts of \$12,105.46 and \$3,161.16 for the years 1976 and 1977, respectively. The

Notice alleged that petitioner was a person required to collect, truthfully account for and pay over New York State Withholding Taxes due from Aberdeen Associates, Inc., for the years 1976 and 1977.

2. On April 17, 1980 the Audit Division issued a Notice of Claim increasing by \$4,775.60 the aforementioned asserted tax deficiency. The \$4,775.60 is for New York City Withholding Taxes asserted to be due for the year 1976. Thus the total deficiency is \$20,042.22.

3. The Statement of Deficiency issued on August 28, 1978 is obviously erroneous in that the last withholding tax period should read "11/16 - 11/30/76" rather than "11/16 - 11/30/77". Accordingly, the year 1977 is not at issue.

4. Petitioner was born in Italy in 1937. He came to the United States at the age of 10. Subsequent to his arrival in the United States, he spent only a few months in school; having to work to help support his family. Accordingly, at best, petitioner reads and writes very little English.

5. Aberdeen Associates, Inc., the corporate employer, herein, was in the construction business; doing primarily excavation work.

6. Petitioner first became associated with Aberdeen in approximately 1968. At the time, Aberdeen was made up of ten partners; petitioner being one of them. At that time, one Joe Malara performed all of Aberdeen's managerial duties; and petitioner's duties were that of a general field foreman.

7. In approximately 1970 or 1971 one Ralph N. Trainello, an attorney, took over Aberdeen and also exclusively performed its managerial requirements. At the time of this takeover, petitioner's duties were general field foreman and he was told by Trainello that he had a 20 percent interest in Aberdeen. Petitioner testified that having 20 percent of the corporate taxpayer's stock only meant that he had a job.

8. Petitioner did not have any managerial function over the operation of the corporate employer and had he attempted to exercise any, he would have been fired.

9. Petitioner did not have any check writing authority, nor was he a member of the corporate employer's board of directors, nor did he make any decisions for or on behalf of Aberdeen.

10. In 1976, petitioner may or may not have signed papers for the corporate employer and if he did he was completely unaware of their nature and quality. Furthermore, if he in fact signed any papers, he signed them because he was told to do so by Mr. Trainello.

11. Petitioner and one John Cipollone (see File No. 24224) have jointly commenced an action against the aforementioned Ralph N. Trainello in the Supreme Court of the State of New York, County of Westchester. The verified complaint, as and for a fifth cause of action on behalf of plaintiffs John Cipollone and Joseph Cipollone against defendant Trainello, alleges the following:

"TWENTY-FOURTH: In or about July of 1977, defendant Trainello demanded a total of \$5,000.00 from the plaintiffs for alleged taxes due and owing to the City of New York by defendant Aberdeen.

TWENTY-FIFTH: Defendant Trainello told the plaintiffs that unless payment of the \$5,000.00 was made, he would not pay the balance due and owing on the aforesaid purchase agreements.

TWENTY-SIXTH: On or about July 14, 1977, the plaintiffs each paid \$2,5000.00 to defendant Trainello for a total of \$5,000.00.

TWENTY-SEVENTH: The aforesaid payment was made by the plaintiffs under duress and duly protested by the plaintiffs.

TWENTY-EIGHTH: Upon information and belief, the aforesaid sum of \$5,000.00 was used by defendant Trainello for his own use and benefit and not for a corporate purpose.

TWENTY-NINTH: Said "taxes" were an obligation assumed by defendants Trainello and/or Aberdeen pursuant to the agreements of March 31, 1977 (Exhibits "A" and "D") and otherwise for which neither of the plaintiffs was responsible.

THIRTIETH: By reason of the foregoing, there is now due and owing from defendant Trainello to each of the plaintiffs the sum of \$2,500.00."

12. Petitioner severed his relations with the corporate employer in 1977.

CONCLUSIONS OF LAW

A. That the personal income tax imposed by Article 30 of the Tax Law is by its own terms tied into and contains essentially the same provisions as Article 22 of the Tax Law. Therefore, in addressing the issues presented herein, unless otherwise specified all references to particular sections of Article 22 shall be deemed references (though uncited) to the corresponding sections of Article 30.

B. That section 685(g) of the Tax Law provides that any person required to collect, truthfully account for and pay over the personal income tax imposed by the Tax Law, 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.

C. That section 685(n) of the Tax Law defines the word "person", for the purpose of section 685(g), and reads as follows:

"For purpose of subsections (g)...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."

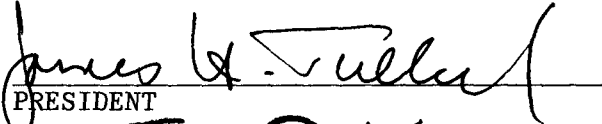
D. That petitioner was not a person required to collect, truthfully account for and pay over the personal income tax in issue herein.

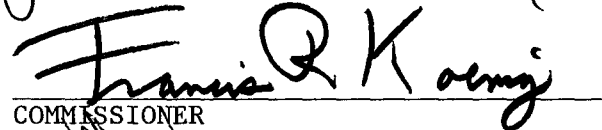
E. That the petition, herein, is granted and that the Notice of Deficiency is cancelled.


DATED: Albany, New York

MAY 27 1932

STATE TAX COMMISSION


PRESIDENT


COMMISSIONER


COMMISSIONER