

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition
of

Arthur J. Kalenda

:

:

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 :
1970.

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 26th day of March, 1982, he served the within notice of Decision by certified mail upon Arthur J. Kalenda, the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Arthur J. Kalenda
167 Main St.
West Seneca, NY 14224

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
26th day of March, 1982.

Ann R. Hagelund

J. Vredenburg

STATE OF NEW YORK
STATE TAX COMMISSION

In the Matter of the Petition :

of

Arthur J. Kalenda :

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 :
1970. :

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 26th day of March, 1982, he served the within notice of Decision by certified mail upon Richard G. Schwind the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Richard G. Schwind
1010 Chemical Bank Bldg.
Buffalo, NY 14202

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
26th day of March, 1982.

Cornie A. Hagelund

J. Vredenburg

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

March 26, 1982

Arthur J. Kalenda
167 Main St.
West Seneca, NY 14224

Dear Mr. Kalenda:

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

Very truly yours,

STATE TAX COMMISSION

cc: Petitioner's Representative
Richard G. Schwind
1010 Chemical Bank Bldg.
Buffalo, NY 14202
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition	:	
of	:	
ARTHUR J. KALENDA	:	DECISION
for Redetermination of a Deficiency or for	:	
Refund of Personal Income Tax under Article 22 :	:	
of the Tax Law for the Year 1970.	:	

Petitioner, Arthur J. Kalenda, 167 Main Street, West Seneca, New York 14224, 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 1970 (File No. 13241).

A small claims hearing was held before Carl P. Wright, Hearing Officer, at the offices of the State Tax Commission, Genesee Building, One West Genesee Street, Buffalo, New York, on April 22, 1980 at 1:15 P.M. Petitioner, Arthur J. Kalenda, appeared with Richard G. Schwind, Esq. The Audit Division appeared by Ralph J. Vecchio, Esq. (Patricia L. Brumbaugh, Esq., of counsel).

ISSUE

Whether petitioner is liable for a penalty with respect to the failure of Buffalo Ornamental Iron Works, Inc. to remit withholding tax during 1970.

FINDINGS OF FACT

1. Buffalo Ornamental Iron Works, Inc. (hereinafter Ornamental) was a firm located at 88-106 Beacon Street, Buffalo, New York. The Audit Division's records indicated that Ornamental withheld from its employees New York State personal income taxes in the sum of \$1,724.03 during tax year 1970, and remitted \$420.43 for that period. Subsequently, Ornamental was billed for the balance due of \$1,303.60, along with penalties and interest.

2. On July 29, 1974, the Audit Division issued a Notice of Deficiency, along with a Statement of Deficiency, imposing a penalty pursuant to section 685(g) of the Tax Law against petitioner, Arthur J. Kalenda, in the amount of \$1,303.60 for 1970.

3. Petitioner was president and general manager of Buffalo Ornamental Iron Works, Inc. His responsibilities were to oversee the operations of Ornamental. In April, 1964, petitioner, on behalf of Ornamental signed a security agreement with Northern Financial Corporation which is a factoring firm. He submitted a copy of a security agreement for equipment dated May 10, 1968, which he signed on behalf of Ornamental that replaced the agreement of April 1964. Petitioner contended that from 1966 or 1967 all financial operations of Buffalo Ornamental Iron Works, Inc. were under the direct control of Northern Financial Corporation. All income of Ornamental was sent to Northern Financial Corporation who deposited the money in its own account. Upon request of the petitioner or either of the two other officers of Ornamental, Northern Financial Corporation would wire money to a bank upon which Ornamental would write checks for expenses and the payroll. Petitioner further contended that the last request for the total payroll funds was denied and Northern Financial Corporation wired money only for the net payroll. No evidence was submitted to substantiate this arrangement. Petitioner also contended his case was with the Internal Revenue Service and he could not obtain the information without a subpoena, since said documentation was in the file of one of the other officers of Ornamental. Six months prior to Ornamental being closed (May, 1970), petitioner personally borrowed \$60,000.00 and invested it in Ornamental.

4. The Internal Revenue Service held Mr. Kalenda as a responsible officer.

5. Petitioner, Arthur J. Kalenda, argued that even though he was a responsible officer, he should not be held responsible because under section 677 of the Tax Law a third party could be designated to perform certain acts required of employers and as such would supercede his authority at the time the deficiency occurred.

CONCLUSIONS OF LAW

A. That petitioner, Arthur J. Kalenda, has failed to sustain the burden of proof imposed by section 689(e) of the Tax Law to show he was not a person required to collect, truthfully account for and pay over New York State withholding tax due from Buffalo Ornamental Iron Works, Inc. for 1970.

B. That section 677 of the Tax Law states in part that the employer for whom such fiduciary, agent, or other person acts shall remain subject to the provisions of law (including penalties) applicable in respect of employers. Without making a determination as to whether Northern Financial corporation would be liable to a penalty under section 685(g) of the Tax Law, based on the designation of third parties to perform acts required of employers, this section of the Tax Law does not apply to petitioner since he was not the employer but was officer of the employer, Buffalo Ornamental Iron Works, Inc. Further, if said section did apply, it does not preclude the Audit Division from imposing a penalty upon petitioner.

C. That petitioner, Arthur J. Kalenda, was a person under a duty to perform the task of collecting, truthfully accounting for and paying over the withholding taxes deducted from the wages of employees of Buffalo Ornamental

Iron Works, Inc. for the year at issue, in accordance with section 685(n) of the Tax Law.

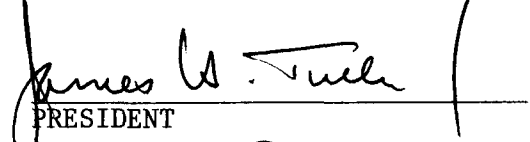
D. That petitioner did willfully fail or cause Buffalo Ornamental Iron Works, Inc. to willfully fail to collect, truthfully account for and pay over to New York State withholding taxes due from said corporation for the year 1970; therefore, a penalty equal to the total amount of unpaid withholding taxes was properly asserted against him, in accordance with section 685(g) of the Tax Law.

E. That the petition of Arthur J. Kalenda is denied and the Notice of Deficiency dated July 29, 1974 is sustained.

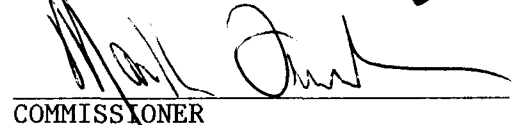
DATED: Albany, New York

MAR 26 1982

STATE TAX COMMISSION


PRESIDENT


COMMISSIONER


COMMISSIONER