

STATE OF NEW YORK

STATE TAX COMMISSION

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In the Matter of the Petition :  
of :  
John Toth : 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 :  
1975 - 1977.

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State of New York  
County of Albany

David Parchuck, 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 18th day of February, 1983, he served the within notice of Decision by certified mail upon John Toth, the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

John Toth  
425 Riverside Dr., Apt. 1C  
New York, NY 10025

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  
18th day of February, 1983.

David Parchuck

Carrie A. Hagelund  
AUTHORIZED TO ADMINISTER  
OATHS PURSUANT TO TAX LAW  
SECTION 174

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

February 18, 1983

John Toth  
425 Riverside Dr., Apt. 1C  
New York, NY 10025

Dear Mr. Toth:

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

Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

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In the Matter of the Petition  
of  
JOHN TOTH  
for Redetermination of a Deficiency or for  
Refund of Personal Income Tax under Articles  
22 and 30 of the Tax Law for the Years 1975,  
1976 and 1977.

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DECISION

Petitioner, John Toth, 425 Riverside Drive, Apartment 1C, New York, New York 10025, 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 for the years 1975, 1976 and 1977 and New York City personal income tax under Article 30 of the Tax Law for the year 1976 (File No. 27160).

A formal hearing was held before Julius E. Braun, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on December 16, 1981 at 10:00 A.M. Petitioner appeared pro se. The Audit Division appeared by Ralph J. Vecchio, Esq. (Thomas Sacca, Esq., of counsel).

ISSUE

Whether petitioner was a person required to collect, truthfully account for and pay over withholding taxes due from H & V Electric Sales & Service Inc. for the years 1975, 1976 and 1977.

FINDINGS OF FACT

1. H&V Electric Sales & Service, Inc., New York, New York (hereinafter "H&V") failed to pay over New York State personal income taxes totaling \$7,140.51 withheld from its employees' wages for the years 1975, 1976 and 1977 and New York City personal income taxes totaling \$69.35 withheld from its employees' wages for the year 1976.

2. On October 30, 1978, the Audit Division issued a Statement of Deficiency and a Notice of Deficiency against petitioner, John Toth, in the sum of \$7,209.86. This constituted a penalty equal to the amount of State and City withholding taxes due from H&V for the years 1975, 1976 and 1977 on the grounds that petitioner was a person required to collect, truthfully account for, and pay over said taxes and that he willfully failed to do so.

3. Petitioner was employed by H&V during the period in issue. He acted as office manager and held the office of secretary-treasurer. As part of his duties he prepared the payroll and was authorized to sign checks. Petitioner did not participate in company business or decision making. His title as officer was for convenience only. It was a two man corporation, controlled by the president (Alphonse Vitale) and the vice president (Frank Vitale). Petitioner had no discretionary authority as to the disbursement of funds and all checks issued had to be authorized by the president of the firm.

4. John Toth owned no stock of H&V and received wages as an employee only. He now works for a similar company in New Jersey.

#### 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 the petitioner's authority to sign checks and his position as secretary-treasurer of H&V were merely perfunctory.

C. That John Toth was not a person required to collect, truthfully account for, and pay over the withholding taxes due from H&V within the meaning and intent of subsection (n) of section 685 of the Tax Law and thus is not liable to a penalty under subsection (g) of section 685 of the Tax Law.

D. That the petition of John Toth is granted and the Notice of Deficiency dated October 30, 1978 is cancelled.

DATED: Albany, New York

FEB 18 1983

STATE TAX COMMISSION

  
ACTING PRESIDENT

  
COMMISSIONER

  
COMMISSIONER