

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of :
Joseph D. Agostino, Jr. :

AFFIDAVIT OF MAILING

for Redetermination of a Deficiency or Revision :
of a Determination or Refund of Personal Income Tax :
under Article 22 of the Tax Law for the Years 1975 :
& 1976. :

State of New York }

ss.:

County of Albany }

David Parchuck, being duly sworn, deposes and says that he is an employee of the State Tax Commission, that he is over 18 years of age, and that on the 5th day of October, 1984, he served the within notice of Decision by certified mail upon Joseph D. Agostino, Jr., the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Joseph D. Agostino, Jr.
12 Balmville Lane
Newburgh, NY 12550

and by depositing same enclosed in a postpaid properly addressed wrapper in a post office 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 October, 1984.

David Parchuck

James Arthur Reed
Authorized to administer oaths
pursuant to Tax Law section 174

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

October 5, 1984

Joseph D. Agostino, Jr.
12 Balmville Lane
Newburgh, NY 12550

Dear Mr. Agostino:

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, a proceeding in court to review an adverse decision by the State Tax Commission may be instituted only under Article 78 of the Civil Practice Law 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
Building #9, State Campus
Albany, New York 12227
Phone # (518) 457-2070

Very truly yours,

STATE TAX COMMISSION

cc: Petitioner's Representative
Milton M. Schussheim
2 Mountain Ave.
Highland Falls, NY 10928
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition	:	
of	:	
JOSEPH D. AGOSTINO, JR.	:	DECISION
for Redetermination of a Deficiency or for	:	
Refund of Personal Income Tax under Article 22	:	
of the Tax Law for the Years 1975 and 1976.	:	

Petitioner, Joseph D. Agostino, Jr., 12 Balmville Lane, Newburgh, New York 12550, 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 1975 and 1976 (File No 23185).

A small claims hearing was held before Allen Caplowaith, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on February 6, 1984 at 1:15 P.M., with all briefs to be submitted by March 6, 1984. Petitioner appeared pro se. The Audit Division appeared by John P. Dugan, Esq. (William Fox, Esq., of counsel).

ISSUE

Whether petitioner, Joseph D. Agostino, Jr., is subject to a penalty, pursuant to section 685(g) of the Tax Law, as a person who willfully failed to collect, truthfully account for and pay over the New York State withholding taxes due from Newburgh Nursery, Inc. for the years 1975 and 1976.

FINDINGS OF FACT

1. Newburgh Nursery, Inc., North Plank Rd. (Rt. 32), Newburgh, New York 12550, failed to pay over the New York State personal income taxes withheld from the wages of its employees for the following periods:

<u>Withholding Tax Period</u>	<u>Amount</u>
January 1, 1975 to January 31, 1975	\$ 41.50
January 1, 1976 to January 31, 1976	36.90
April 1, 1976 to April 30, 1976	40.90
May 1, 1976 to May 31, 1976	147.50
June 1, 1976 to June 30, 1976	212.80
July 1, 1976 to July 31, 1976	83.20
August 1, 1976 to August 31, 1976	87.80
September 1, 1976 to September 30, 1976	193.50
October 1, 1976 to October 31, 1976	116.80
November 1, 1976 to November 30, 1976	176.50
December 1, 1976 to December 31, 1976	160.50
Total	<u>\$ 1,297.90</u>

2. On June 26, 1978, the Audit Division issued a Statement of Deficiency in conjunction with a Notice of Deficiency against Joseph D. Agostino, Jr. (hereinafter petitioner) wherein a penalty was asserted pursuant to section 685(g) of the Tax Law for an amount equal to the New York State withholding taxes due from Newburgh Nursery, Inc. for the aforesated periods. Said penalty was asserted on the grounds that petitioner was a person required to collect, truthfully account for and pay over the withholding taxes at issue, and that he willfully failed to do so.

3. During the periods at issue petitioner was the president and sole stockholder of Newburgh Nursery, Inc. He was solely responsible for the day-to-day activities of the corporation.

4. The Audit Division submitted copies of Newburgh Nursery, Inc.'s monthly New York State withholding tax returns filed for the first eight periods listed on the Statement of Deficiency. All such returns were signed by petitioner as president. Additionally, all such returns, with the exception of that filed for the first period at issue, were late filed on December 27, 1976. Most returns were filed with no entry made in the box designated "Total Remittance".

5. On or about January 20, 1977, the Department of Taxation and Finance seized Newburgh Nursery, Inc. and subsequently auctioned its assets in order to satisfy outstanding unrelated tax warrants. As a result of such auction, the outstanding warrants were paid and, according to petitioner, a surplus of approximately \$1,700.00 remained which was held in an escrow account by the attorneys for the creditors. Petitioner argued that this alleged surplus should be used to satisfy the deficiency asserted herein.

CONCLUSIONS OF LAW

A. That section 685(g) of the Tax Law provides that:

"Any person required to collect, truthfully account for, and pay over the tax imposed by this article 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."

B. That section 685(n) of the Tax Law provides that:

"For purposes of subsections (g),(i) and (o), 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."

C. That for the years at issue, petitioner was a person responsible for the collection and payment of the withholding taxes of Newburgh Nursery, Inc. who willfully failed to fulfill this responsibility within the meaning and intent of sections 685(g) and 685(n) of the Tax Law. Accordingly, the penalty asserted against petitioner is hereby sustained.

D. That petitioner has not shown that the liability of Newburgh Nursery, Inc. for withholding taxes for the period at issue has been satisfied. Furthermore, the penalty asserted against petitioner is separate and independent of the

corporation's liability for the unpaid withholding taxes. Matter of Yellin v. N.Y.S. Tax Comm., 81 A.D.2d 196 (3d Dept. 1981).

E. That the petition of Joseph D. Agostino, Jr. is denied and the Notice of Deficiency dated June 26, 1978 is sustained.

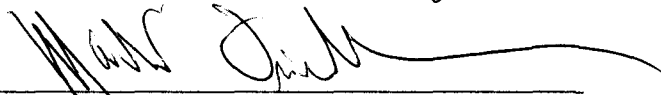
DATED: Albany, New York

STATE TAX COMMISSION

OCT 05 1984


PRESIDENT


COMMISSIONER


COMMISSIONER