

STATE TAX COMMISSION

In the Matter of the Petition
of
Joseph A. Alfredo
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
1976 - 1978.

AFFIDAVIT OF MAILING

SS.:

County of Albany }

Joseph A. Alfredo
Kenilworth Rd.
Rye, NY 10577

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.

David Parchurch

Connie Rutledge
Authorized to administer oaths
pursuant to Tax Law section 174

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

May 25, 1984

Joseph A. Alfredo
Kenilworth Rd.
Rye, NY 10577

Dear Mr. Alfredo:

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: Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition	:	
of	:	
JOSEPH A. ALFREDO	:	DECISION
for Redetermination of a Deficiency or for	:	
Refund of Personal Income Tax under Article 22	:	
of the Tax Law for the Years 1976, 1977 and	:	
1978.	:	

Petitioner, Joseph A. Alfredo, Kenilworth Road, Rye, New York 10577, 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 1976, 1977 and 1978 (File No. 35967).

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 November 2, 1983 at 9:15 A.M. with all briefs to be submitted by December 2, 1983. Petitioner appeared pro se. The Audit Division appeared by John P. Dugan, Esq. (Paul Lefebvre, Esq., of counsel).

ISSUE

Whether petitioner, Joseph A. Alfredo, 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 Servo Systems Inc. for the years 1976, 1977 and 1978.

FINDINGS OF FACT

1. Servo Systems Inc., 80 Lincoln Avenue, Purchase, New York 10577, 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>
May 1, 1976 through December 31, 1976	\$1,964.79
July 1, 1977 through December 31, 1977	820.50
January 1, 1978 through December 31, 1978	753.60
Total	<u>\$3,538.89</u>

2. On September 28, 1981, the Audit Division issued a Statement of Deficiency in conjunction with a Notice of Deficiency against Joseph A. Alfredo (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 Servo Systems 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 years at issue petitioner was president of Servo Systems Inc., an agricultural firm which maintained approximately 20,000 square feet of greenhouses under glass in which it grew vegetables, flowers, trees and shrubs. Petitioner owned approximately 32% of the outstanding stock. His brother, Frank Alfredo, owned approximately 28%.

4. Petitioner contended that his responsibilities were basically involved with pursuing business. He alleged that his brother was a trained accountant and always took care of the bookkeeping system of the corporation. Both petitioner and his brother were authorized to sign checks and had access to the corporate bank accounts. The record does not disclose what office petitioner's brother held.

5. Petitioner readily admitted his responsibility for the nonpayment of withholding taxes for the years 1977 and 1978. However, his position is that he would be willing to pay a maximum of 50% of such taxes since, as he alleged, his brother is equally responsible.

6. During 1976 Servo Systems Inc. expanded into the energy conservation field with the formation of a new separate company, Servo Energy Systems.

7. Petitioner alleged that he was not responsible for the withholding taxes due from Servo Systems Inc. for the year 1976 since he was relieved of his responsibilities as president and devoted his full time during said year to the formation of Servo Energy Systems. As evidence thereof, petitioner submitted a copy of the minutes of a special meeting of the Board of Directors of Servo Systems, Inc., held April 1, 1976, wherein it was unanimously voted and approved that:

"The president, Joseph A. Alfredo, take a leave of absence from all corporate responsibilities until the end of the year, March 31, 1977 for the purpose of establishing financing, corporate structure, personnel and marketing as Servo Energy Systems enters the energy conservation field. Any and all matters presently involved with Servo Systems should be assumed by a president temporary to be appointed."

8. Petitioner did not resign his office as president of Servo Systems, Inc. during 1976. The record does not show to what extent, if any, petitioner was involved with corporate matters of Servo Systems, Inc. during his "leave of absence".

9. Petitioner did not recall whether a temporary president had in fact been appointed during his absence.

10. Servo Systems Inc. had its offices on the first floor of a converted barn situated on its business premises at 80 Lincoln Avenue, Purchase, New York. During 1976 Servo Energy Systems was housed on the second floor of the structure.

11. Subsequent to the years at issue herein, Servo Systems, Inc. was sold and reincorporated in 1980 under a new business name, Servoil Industries Inc. Petitioner alleges that the new corporation should be held responsible for the

withholding taxes at issue. Although he contended that as a term of the sale, the purchaser agreed to assume the outstanding tax liabilities of Servo Systems, Inc., no evidence was introduced to support such contention.

12. Petitioner further alleged that "the State Tax Commission failed to collect the 'withholding tax' from the original taxpayer, Servo Systems Inc.". Accordingly, he contended that he should not be held liable for the penalty asserted for the nonpayment of such tax.

13. Subsequent to the hearing, petitioner submitted a letter wherein he claimed that the withholding tax liability at issue was paid by his brother, Frank Alfredo "a year or two ago". No evidence was submitted to support such claim.

CONCLUSIONS OF LAW

A. That the Audit Division is not required to attempt to collect unpaid withholding taxes from a corporation, or from its trustee in bankruptcy, before imposing on and collecting from responsible officers the penalty imposed by section 685(g) of the Tax Law. Allan I. Jacobson, State Tax Commission, May 21, 1982.

B. 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."

C. That for the years 1977 and 1978 petitioner was, as he readily admitted, a person responsible for the collection and payment of the withholding taxes of Servo Systems Inc. Accordingly, the penalty asserted with respect to said years is sustained.

D. That petitioner has failed to sustain his burden of proof, required pursuant to section 689(e) of the Tax Law, to show that he was not a person responsible for the collection and payment of the 1976 withholding taxes of Servo Systems Inc. Accordingly, the penalty asserted with respect to said year is sustained.

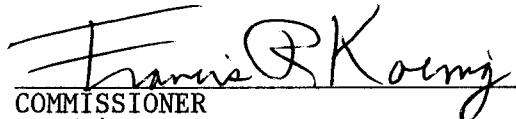
E. That the petition of Joseph A. Alfredo is denied and the Notice of Deficiency dated September 28, 1981 is sustained.

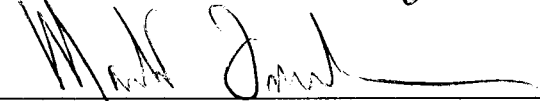
DATED: Albany, New York

STATE TAX COMMISSION

MAY 25 1984


PRESIDENT


COMMISSIONER


COMMISSIONER