

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition
of
James Allocca

AFFIDAVIT OF MAILING

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 Chapter 46, Title T of the :
Administrative Code of the City of New York for :
the Year 1980. :

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 15th day of April, 1985, he served the within notice of Decision by certified mail upon James Allocca, the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

James Allocca
68-36 61st Rd.
Middle Village, NY 11379

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
15th day of April, 1985.

David Parchuck

Barbara A. Hagedorn
Authorized to administer oaths
pursuant to Tax Law section 174

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of :
James Allocca :

AFFIDAVIT OF MAILING

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 Chapter 46, Title T of the :
Administrative Code of the City of New York for :
the Year 1980. :

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 15th day of April, 1985, he served the within notice of Decision by certified mail upon Thomas A. Pepe, the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Thomas A. Pepe
85 Kingsland Ave.
Brooklyn, NY 11222

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 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
15th day of April, 1985.

David Parchuck

Conrad A. Haggan
Authorized to administer oaths
pursuant to Tax Law section 174

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

April 15, 1985

James Allocca
68-36 61st Rd.
Middle Village, NY 11379

Dear Mr. Allocca:

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 and Chapter 46, Title T of the Administrative Code of the City of New York, 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
Thomas A. Pepe
85 Kingsland Ave.
Brooklyn, NY 11222
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition	:	
of	:	
JAMES ALLOCCA	:	DECISION
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 Chapter 46,	:	
Title T of the Administrative Code of the City	:	
of New York for the Year 1980.	:	

Petitioner, James Allocca, 68-36 61st Road, Middle Village, New York 11379, 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 Chapter 46, Title T of the Administrative Code of the City of New York for the year 1980 (File No. 36390).

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 October 3, 1984 at 2:45 P.M. Petitioner appeared by Thomas A. Pepe, Esq. The Audit Division appeared by John P. Dugan, Esq. (Irwin Levy, Esq. of counsel).

ISSUE

Whether petitioner, James Allocca, is subject to penalties pursuant to section 685(g) of the Tax Law and section T46-185.0(g) of the Administrative Code of the City of New York, as a person who willfully failed to collect, truthfully account for and pay over the New York State and City withholding taxes purportedly due from F.A.B. Distributing Corp. for the year 1980.

FINDINGS OF FACT

1. The Audit Division alleged that F.A.B. Distributing Corp. (hereinafter "F.A.B."), 61 Wythe Avenue, Brooklyn, New York 11222, failed to pay over the New York State and New York City personal income taxes withheld from the wages of its employees for the entire calendar year 1980. Pursuant to a New York State and City of New York Employer's Return of Tax Withheld, which was prepared as a "dummy return" by the Audit Division, rather than being a return as filed by F.A.B., the total tax withheld by F.A.B. and not paid over for the year 1980 was \$2,220.00. Such amount was, pursuant to said return, comprised of New York State tax of \$1,608.00 and New York City tax of \$612.00. During the hearing held herein, the Audit Division was unable to provide information with respect to its basis for the use of the aforestated amounts on said return.

2. On November 30, 1981, the Audit Division issued a Statement of Deficiency in conjunction with a Notice of Deficiency against James Allocca (hereinafter "petitioner") wherein penalties were asserted for the periods as follows:

<u>WITHHOLDING TAX PERIOD</u>	<u>AMOUNT</u>
February 1, 1979 through December 31, 1979	\$1,673.65
January 1, 1980 through December 31, 1980	\$2,220.00

Said penalties were asserted pursuant to sections 685(g) of the Tax Law and T46-185.0(g) of the Administrative Code of the City of New York for an amount equal to the total New York State and City withholding taxes allegedly due from F.A.B. for the above stated periods. The grounds for assertion of said penalties were 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. On July 22, 1983, petitioner executed a Withdrawal of Petition and Discontinuance of Case form wherein he consented to the penalties of \$1,673.65 asserted for the year 1979. Accordingly, only the year 1980 remains at issue

herein. The record is devoid of information with respect to whether petitioner had paid that portion of the deficiency relating to 1979.

4. During the period F.A.B. was engaged in business, petitioner held the office of Vice President. His argument with respect to the year 1980 was that F.A.B., which was engaged in the business activities of "warehousing and trucking", ceased doing business in or about August, 1979 and accordingly, had no employees or payroll during 1980.

5. In support of his position that F.A.B. was not engaged in business during 1980, petitioner submitted documentation evidencing that:

- a. F.A.B.'s payroll ceased in May, 1979.
- b. F.A.B. sold its two vans (which were the only ones it owned and were not replaced) on April 12, 1979.
- c. F.A.B.'s account with Chemical Bank became inactive during the latter part of 1979.
- d. F.A.B. filed a New York State and City of New York Employer's Return of Tax Withheld for the period January 1, 1979 through June 30, 1979 which was marked "Final Return".

6. Petitioner was employed on a full time basis by Galbreath - Ruffin Corporation from October 3, 1979 through March 19, 1980. Subsequently, he was employed on a full time basis by Astorill Associates from the latter part of March 1980 through the balance of said year.

CONCLUSIONS OF LAW

A. That F.A.B. ceased doing business prior to the year 1980. Accordingly, since there was no payroll or payroll taxes withheld by F.A.B. during said year, no New York State or City withholding taxes were due from F.A.B. for 1980.


B. That the portion of the deficiency asserted against petitioner for the year 1980 was erroneous and is hereby cancelled.

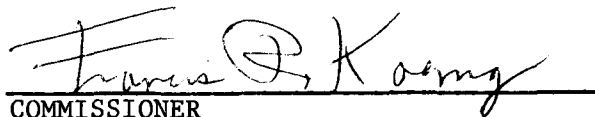
C. That the petition of James Allocca is granted with respect to the year 1980 and the Notice of Deficiency issued November 30, 1981 is to be modified so as to be consistent with the decision rendered herein.

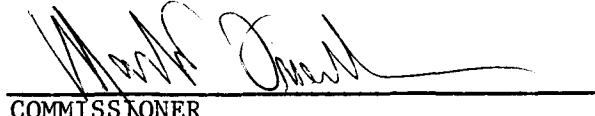
DATED: Albany, New York

STATE TAX COMMISSION

APR 15 1985


PRESIDENT


COMMISSIONER


COMMISSIONER