

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition
of
John J. Elacqua

:

: 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
1977 & 1978.

:

:

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 February, 1985, he served the within notice of Decision by certified mail upon John J. Elacqua, the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

John J. Elacqua
4 Dawn Dr.
Latham, NY 12110

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 February, 1985.

David Parchuck

James A. [Signature]
Authorized to administer oaths
pursuant to Tax Law section 174

STATE TAX COMMISSION

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 :
1977 & 1978.

State of New York :
County of Albany : ss.:

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 February, 1985, he served the within notice of Decision by certified mail upon John H. Dennis, the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

John H. Dennis
90 State Street
Albany, NY 12207

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 February, 1985.

David Parshuck

Bernie A. O'Keefe
Authorized to administer oaths
pursuant to Tax Law section 174

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

February 15, 1985

John J. Elacqua
4 Dawn Dr.
Latham, NY 12110

Dear Mr. Elacqua:

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
John H. Dennis
90 State Street
Albany, NY 12207
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition	:	
	:	
of	:	
	:	
JOHN J. ELACQUA	:	DECISION
	:	
for Redetermination of a Deficiency or for	:	
Refund of Personal Income Tax under Article 22	:	
of the Tax Law for the Years 1977 and 1978.	:	

Petitioner, John J. Elacqua, 4 Dawn Drive, Latham, New York 12110, 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 1977 and 1978 (File No. 33766).

A formal hearing was held before Anthony J. Ciarlone, Jr., Hearing Officer, at the offices of the State Tax Commission, Building #9, State Office Campus, Albany, New York, on September 19, 1984 at 9:15 A.M. and continued to conclusion on November 14, 1984 at 9:30 A.M. Petitioner appeared by John H. Dennis, Esq. The Audit Division appeared by John P. Dugan, Esq. (Kevin A. Cahill, Esq., of counsel).

ISSUE

Whether petitioner 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 Cozzolino Construction Corp. for the years 1977 and 1978.

FINDINGS OF FACT

1. On February 23, 1981, the Audit Division issued to petitioner, John J. Elacqua, a Notice of Deficiency for \$19,512.57 for the years 1977 and 1978. The Notice of Deficiency was based on a Statement of Deficiency which imposed a

penalty, pursuant to section 685(g) of the Tax Law, equal in amount to the unpaid New York State withholding taxes due and owing from Cozzolino Construction Corp. (hereinafter "Cozzolino"). The aforementioned Statement of Deficiency was issued on the grounds that petitioner was a person required to collect, truthfully account for and pay over the withholding tax due and owing from Cozzolino and that he willfully failed to do so. The withholding tax periods in question, as listed on the Statement of Deficiency, were April 1, 1977 through December 31, 1977 and January 1, 1978 through December 31, 1978 and the alleged withholding taxes not paid by Cozzolino amounted to \$13,118.06 and \$6,394.51, respectively.

2. Cozzolino was engaged in commercial and industrial construction. Petitioner, John J. Elacqua, was vice president of Cozzolino. Mr. Elacqua's duties included purchasing material, negotiating subcontractor contracts, signing tax returns and checks.

3. In April, 1975, petitioner formed BerTanJ Corp. (hereinafter "BerTanJ") to carry on business as a general contractor for small to medium size construction projects. BerTanJ was inactive until 1976 at which time it functioned as a general contractor for several enterprises. In the fall of 1976, BerTanJ was awarded a contract by the Veterans Administration Hospital in Albany, New York, for a gross sum of \$310,000.00.

4. After the contract was awarded, John H. Dennis, Esq., petitioner's representative, prepared a participation loan application for petitioner with the Small Business Administration. The participating bank and Mr. Dennis insisted that Mr. Elacqua resign his position with Cozzolino in order to avoid a conflict of interest between BerTanJ and Cozzolino.

5. On January 15, 1977, Mr. Elacqua resigned as vice president of Cozzolino, Mr. Bert J. Cozzolino, president of Cozzolino, accepted petitioner's written resignation on the same date.

6. Cozzolino had been having severe difficulties with its cash flow and asked for assistance from Peerless Insurance Company, the surety on its performance bond. Therefore, after Mr. Elacqua resigned, Cozzolino retained him as a consultant between itself and Peerless Insurance Company. This was done because he had been involved with the construction projects which Peerless Insurance Company had bonded.

CONCLUSIONS OF LAW

A. That section 685(n) of the Tax Law defines the term person for the purposes of section 685(g) of the Tax Law as including an officer or employee of any corporation who as such officer or employee is under a duty to perform the act in respect of which the violation occurs.


B. That after January 15, 1977, petitioner was not a person, as defined in section 685(n) of the Tax Law, under a duty to collect, truthfully account for and pay over the New York State withholding taxes of Cozzolino Construction Corp.

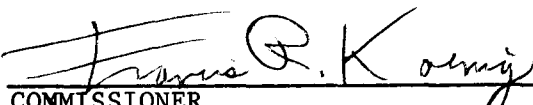
C. That the petition of John J. Elacqua is granted and the Notice of Deficiency dated February 23, 1981 is cancelled.


DATED: Albany, New York

STATE TAX COMMISSION

FEB 15 1985


PRESIDENT


COMMISSIONER


COMMISSIONER