

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of :
John Furfaro :
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 :
1976 - 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 4th day of April, 1985, he served the within notice of Decision by certified mail upon John Furfaro, the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

John Furfaro
4D Oakbrier Court, Apt. 21
Penfield, NY 14526

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
4th day of April, 1985.

David Parchuck

Annie A. Hagelund
Authorized to administer oaths
pursuant to Tax Law section 174

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

April 4, 1985

John Furfaro
4D Oakbrier Court, Apt. 21
Penfield, NY 14526

Dear Mr. Furfaro:

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	:	
JOHN FURFARO	:	DECISION
for Redetermination of a Deficiency or for	:	
Refund of Personal Income Tax under Article 22	:	
of the Tax Law for the Years 1976 through 1978.	:	

Petitioner, John Furfaro, 4D Oakbrier Court, Apartment 21, Penfield, New York, 14562, 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 through 1978 (File No. 34364).

A small claims hearing was held before Dennis M. Galliher, Hearing Officer, at the offices of the State Tax Commission, 259 Monroe Avenue, Rochester, New York on December 3, 1984 at 1:15 P.M., with all documents to be submitted by January 11, 1985. Petitioner appeared pro se. The Audit Division appeared by John P. Dugan, Esq. (Thomas C. Sacca, Esq., of counsel).

ISSUE

Whether petitioner was a person required to collect, truthfully account for and pay over withholding tax with respect to Hearth & Embers, Inc., and willfully failed to do so thus becoming liable for a penalty under section 685(g) of the Tax Law.

FINDINGS OF FACT

1. On March 30, 1981, the Audit Division issued a Notice of Deficiency to petitioner, John Furfaro, asserting a penalty due in the aggregate amount of \$5,682.93. A Statement of Deficiency, also issued on March 30, 1981, indicated

that the asserted deficiency was based on unpaid withholding tax owed by
Hearth & Embers, Inc. as follows:

<u>Withholding Tax Period</u>	<u>Amount</u>
7/1/76 through 12/31/76	\$1,899.78
5/1/77 through 7/31/77	1,369.08
1/1/78 through 10/31/78	<u>2,414.07</u>
TOTAL	<u>\$5,682.93</u>

2. Petitioner was, during the periods at issue, the sole shareholder of
Hearth & Embers, Inc., which operated a restaurant known as Hearth & Embers
located at 2833 Monroe Avenue, Rochester, New York. Petitioner concedes and
does not contest the fact that he was a person responsible for collecting and
remitting withholding taxes due on behalf of Hearth & Embers, Inc. during the
periods at issue. However, petitioner asserts that unpaid withholding taxes
due for such periods were in fact paid in connection with the sale of the
business operated by Hearth & Embers, Inc., which sale occurred in or about
November of 1978.

3. In support of the assertion that the taxes at issue have been paid,
petitioner submitted in evidence copies of a satisfied tax warrant and a
release letter pertaining to the sale of Hearth & Embers. These documents, as
their content clearly indicates, pertain only to sales and/or use taxes under
Articles 28 and 29 of the Tax Law discovered to be due (or past due) pursuant
to an audit at the time of the bulk sale of the business operated by Hearth &
Embers, Inc. Petitioner also alleged that certain sums of money were held in
escrow by his attorneys in connection with such sale, and that such sums were
finally disbursed, approximately two years after the sale, to pay taxes owed by
Hearth & Embers, Inc. No other specifics concerning this latter assertion were
offered by petitioner.

4. Petitioner was granted a period of time, specifically until January 11, 1985, to submit affidavits concerning the above noted disbursement of funds by his attorneys and/or cancelled checks evidencing payment of the taxes at issue. No such documents were submitted.

5. Petitioner did submit a copy of an order of the Surrogate's Court, Monroe County (Telesca, J.), in the Matter of the Estate of George L. Staud. This order indicates, inter alia, that all claims for taxes due to New York State from 2833 Monroe Avenue, Inc., the Estate of George L. Staud and/or the Estate of Thelma L. Staud were satisfied.

6. In or about November, 1978, petitioner sold the Hearth & Embers to 2833 Monroe Avenue, Inc., a corporation owned by George L. Staud. Thereafter, the business operated by 2833 Monroe Avenue, Inc. was sold to Clouseau's Restaurant, Inc., on or about April 28, 1980. The aforementioned Surrogate's Court Order pertains, as noted, to liabilities against 2833 Monroe Avenue, Inc., and/or against the Stauds, but does not pertain to or discharge any tax liabilities of Hearth & Embers, Inc., a separate legal entity.¹

CONCLUSIONS OF LAW

A. That petitioner has admitted that he was, during the periods at issue, a person required to collect, truthfully account for and pay over withholding tax due on behalf of Hearth & Embers, Inc., within the meaning of section 685(g) of the Tax Law.

1 It appears from the Court's order that the business name Hearth & Embers was continued in use after the sale from Hearth & Embers, Inc. to 2833 Monroe Avenue, Inc.

B. That the evidence submitted does not prove or even support petitioner's claim that the unpaid withholding tax at issue has been paid. Accordingly, petitioner remains liable for the penalty asserted for such unpaid tax.

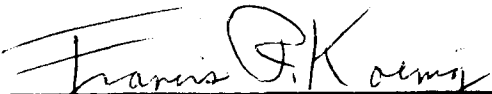
C. That the petition of John Furfaro is hereby denied and the Notice of Deficiency dated March 30, 1981 is sustained.


DATED: Albany, New York

STATE TAX COMMISSION

APR 04 1985


PRESIDENT


COMMISSIONER


COMMISSIONER