

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of :
Mauro & Luz Hernandez :
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, 1980 & 1981. :
:

AFFIDAVIT OF MAILING

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 7th day of November, 1985, he served the within notice of Decision by certified mail upon Mauro & Luz Hernandez, the petitioners in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Mauro & Luz Hernandez
215 West 80 St., Apt. 3C
New York, NY

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
7th day of November, 1985.

David Parchuck

Annunzio P. DiStefano
Authorized to administer oaths
pursuant to Tax Law section 174

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of :
Mauro & Luz Hernandez :
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, 1980 & 1981. :
:

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 7th day of November, 1985, he served the within notice of Decision by certified mail upon Paulette M. Owens, the representative of the petitioners in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Paulette M. Owens
2 West 45 St., Suite 607
New York, NY 10036

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
7th day of November, 1985.

David Parchuck

Carrie A. Hearn
Authorized to administer oaths
pursuant to Tax Law section 174

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

November 7, 1985

Mauro & Luz Hernandez
215 West 80 St., Apt. 3C
New York, NY

Dear Mr. & Mrs. Hernandez:

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
Paulette M. Owens
2 West 45 St., Suite 607
New York, NY 10036
Taxing Bureau's Representative

STATE OF NEW YORK
STATE TAX COMMISSION

In the Matter of the Petition
of
MAURO HERNANDEZ
for Redetermination of a Deficiency or for
Refund of Personal Income Tax under Article 22
of the Tax Law for the Years 1975, 1980 and
1981.

DECISION

In the Matter of the Petition
of
LUZ HERNANDEZ
for Redetermination of a Deficiency or for
Refund of Personal Income Tax under Article 22
of the Tax Law for the Years 1975, 1980 and
1981.

Petitioners, Mauro Hernandez and Luz Hernandez, 215 West 80th Street,
Apt. 3C, New York, New York, 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, 1980 and 1981 (File No. 42944).

A consolidated 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 March 19, 1985 at 2:35 P.M., with all briefs to be submitted by
April 29, 1985. Petitioners appeared by Paulette M. Owens, Esq. The Audit
Division appeared by John P. Dugan, Esq. (Herbert Kamrass, Esq., of counsel).

ISSUE

Whether Azteca Lumber, Inc. ceased conducting business prior to April 1,
1981, thereby rendering the penalties asserted against petitioners pursuant to

section 685(g) of the Tax Law, for periods commencing on or subsequent to said date, erroneous and invalid.

FINDINGS OF FACT

1. According to the Audit Division, Azteca Lumber, Inc., 409 Amsterdam Avenue, New York, New York 10024, 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>
December 1, 1975 through December 31, 1975	\$ 55.90
April 1, 1980 through May 31, 1980	200.00
April 1, 1981 through November 16, 1981	4,500.00
TOTAL	<u>\$4,755.90</u>

The amount of withholding tax stated for the period April 1, 1981 through November 16, 1981 was an estimate made by the Audit Division.

2. On November 29, 1982, the Audit Division issued a Statement of Deficiency in conjunction with a Notice of Deficiency against petitioner Mauro Hernandez, 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 purportedly due from Azteca Lumber, Inc. for the aforestated periods. Said penalty was asserted on the grounds that Mauro Hernandez 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. A similar set of documents was issued against petitioner Luz Hernandez under the same date. The deficiency asserted therein and the Audit Division's grounds for asserting such deficiency were identical to those with respect to petitioner Mauro Hernandez.

3. Petitioners did not argue that they were not persons responsible for the collection and payment of the withholding taxes at issue. Their position in this matter is that Azteca Lumber, Inc. ceased doing business prior to

April 1, 1981 due to destruction of the business premises and inventory by fire and, therefore, the portion of the deficiency asserted for the period subsequent to that date should properly be cancelled.

4. On November 29, 1984, a hearing was held with respect to the instant matter. Said hearing resulted in the matter being adjourned pending a settlement between the parties. The agreement reached at said hearing was that petitioners would pay a total of \$255.90, representing the full deficiency asserted for the first two periods at issue. The portion of the deficiency asserted for the period April 1, 1981 through November 16, 1981 of \$4,500.00 would be cancelled contingent on petitioners' submission of the following:

a - a check in the sum of \$255.90.

b - "a letter requesting the cancellation of the assessment for the 1981 period because the petitioners were not in business then and would not be liable for withholding taxes."

c - "such proof as a fire report and any other documentary evidence to show that the business ceased functioning prior to April 1, 1981."

5. Subsequent to the initial hearing, petitioners submitted the following:

a - Payment of \$255.90.

b - Fire Department's report of structural fire.

c - Petition in Bankruptcy for Azteca Lumber, Inc. under Chapter 7 of the Bankruptcy Law.

6. The report of structural fire establishes that a fire occurred at 409 Amsterdam Avenue on March 22, 1981 at 3:14 A.M. Said fire, which involved property with "commercial occupancy", was for a duration of three hours. Said report described the fire as follows:

"On arrival found alarm medium fire and heavy smoke condition. Fire involved major section of cellar. Fire had extended to involve portion of first floor and into walls of vacant Apt. on the 2nd floor."

Said report also contained the following statement, "Made necessary VES of first floors and upper floors".

7. The aforestated Petition in Bankruptcy was filed in mid-November, 1981. Pursuant to said petition, Azteca Lumber, Inc. was engaged in business as a "cabinet maker" and said business was "destroyed by fire on 3-22-81."

8. Petitioners did not personally appear for the hearing. During the hearing, the Audit Division advised petitioners' representative that it would accept an affidavit from petitioners and a copy of the Order of Discharge in Bankruptcy as evidence that Azteca Lumber, Inc. ceased doing business as of the date of the fire and there were no taxes withheld subsequent to such date.

9. Subsequent to the hearing held herein, petitioners submitted an affidavit wherein they deposed and said, inter alia:

(a) "That on March 22, 1981 our unincorporated business was destroyed by fire as evidenced by a fire report previously submitted to the Commission."

(b) "That we conducted no business thereafter from the premises at which the fire took place nor from any other premises."

(c) "That all records or (sic) our business were destroyed in the fire of March 22, 1981 and we therefore have none of the records which would help support our denial of the deficiency assessment with which we are charged."

10. Petitioners submitted a "Report of Trustee in No-Asset Case" dated January 9, 1982 wherein it indicated that Azteca Lumber, Inc. "had no assets in the estate over and above the exemptions claimed by, and by her (the trustee) allowed to, the debtor."

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 petitioners Mauro Hernandez and Luz Hernandez were persons responsible for the collection and payment of the withholding taxes of Azteca Lumber, Inc. during the periods at issue herein within the meaning and intent of section 685(g) of the Tax Law.


C. That Azteca Lumber, Inc. was not engaged in business subsequent to March 22, 1981. Accordingly, the estimated penalty of \$4,500.00 asserted against each petitioner for the period April 1, 1981 through November 16, 1981 is hereby cancelled.


D. That the petitions of Mauro Hernandez and Luz Hernandez are granted and, since the uncanceled portion of the deficiencies have been previously satisfied, the notices of deficiency issued November 29, 1982 are hereby cancelled.

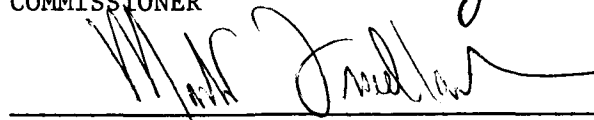
DATED: Albany, New York

STATE TAX COMMISSION

NOV 07 1985


PRESIDENT


COMMISSIONER


COMMISSIONER