

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of :
Ernest Mattei :

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 Period January 1, 1978 through December 15, :
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 16th day of July, 1985, he served the within notice of Decision by certified mail upon Ernest Mattei, the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Ernest Mattei
59 De Mapolis Ave.
Staten Island, NY 10308

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
16th day of July, 1985.

David Parchuck

Ernest Mattei

Authorized to administer oaths
pursuant to Tax Law section 174

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

July 16, 1985

Ernest Mattei
59 De Mopolis Ave.
Staten Island, NY 10308

Dear Mr. Mattei:

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: Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

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| In the Matter of the Petition | : | |
| | : | |
| of | : | |
| | : | |
| ERNEST MATTEI | : | 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 Period January 1, 1978 | : | |
| through December 15, 1978. | : | |

Petitioner, Ernest Mattei, 59 Demopolis Avenue, Staten Island, New York 10308, 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 period January 1, 1978 through December 15, 1978 (File No. 45493).

A hearing was held before James Hoefer, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on April 25, 1985 at 9:15 A.M. Petitioner Ernest Mattei appeared pro se. The Audit Division appeared by John P. Dugan, Esq. (Irwin Levy, Esq., of counsel).

ISSUE

Whether petitioner was a person who willfully failed to collect, truthfully account for and pay over the New York State and New York City withholding taxes of Jehb's Catch, Inc. and therefore subject to a penalty equal in amount to the unpaid withholding taxes due and owing from said corporation.

FINDINGS OF FACT

1. On May 23, 1983, the Audit Division issued a Statement of Deficiency to petitioner, Ernest Mattei, asserting that he was a person required to collect, truthfully account for and pay over the New York State and City withholding taxes of Jehb's Catch, Inc. (hereinafter "Jehb's") for the period January 1, 1978 through December 15, 1978. The aforementioned Statement further alleged that petitioner willfully failed to collect, truthfully account for and pay over said withholding taxes and that he was therefore subject to a penalty equal in amount to the unpaid withholding taxes of \$3,291.70. Accordingly, on May 23, 1983, the Audit Division issued a Notice of Deficiency to petitioner for the year 1978 asserting a deficiency of \$3,291.70.

2. During the period in question, petitioner was vice-president of Jehb's, a corporation whose main business activity was the operation of a restaurant specializing in seafood entrees. Petitioner was one of the original principals of Jehb's and he and two other individuals, who were also officers, had each provided one-third of the capital necessary to start the business.

3. Petitioner was employed on a full-time basis by Jehb's and his sole source of income was derived from said employment. Petitioner's duties and responsibilities primarily involved the operation of the kitchen, while the administrative end of the business was handled by the two other officers. Petitioner had authority to sign corporate checks; however, he signed checks only on an infrequent basis. Mr. Mattei was also involved in the hiring and firing of employees.

4. At the hearing held herein, petitioner gave testimony to the effect that he did not dispute that he was a responsible person of Jehb's, but that his liability should be limited to only one-third of the withholding taxes due

and owing. Petitioner maintains that the other two-thirds of the withholding taxes due and owing should be the responsibility of the other two officers.

CONCLUSIONS OF LAW

A. That petitioner was a person required to collect, truthfully account for and pay over the New York State and City withholding taxes of Jehb's for the period at issue [Tax Law §§685(g) and (n) and Administrative Code §§T46-185.0(g) and (n)].

B. That petitioner's failure to collect, truthfully account for and pay over the New York State and City withholding taxes of Jehb's for the period January 1, 1978 through December 15, 1978 was willful. Accordingly, petitioner is liable for the penalty asserted in the Notice of Deficiency dated May 23, 1983.

C. That the penalty imposed by section 685(g) of the Tax Law and section T46-185.0(g) of the New York City Administrative Code creates joint and several liability. The penalty in question cannot be reduced by two-thirds on the ground that there may exist two other persons who are equally liable (Matter of Martin J. Kamp, State Tax Commission, May 20, 1983).


D. That the petition of Ernest Mattei is denied and the Notice of Deficiency dated May 23, 1983 is sustained.

DATED: Albany, New York

STATE TAX COMMISSION

JUL 16 1985


PRESIDENT


COMMISSIONER


COMMISSIONER