

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of :
Robert B. Price :
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 Year :
1979. :
:

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 30th day of October, 1985, he served the within notice of Decision by certified mail upon Robert B. Price, the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Robert B. Price
RD #1 Craven Rd.
Delanson, NY 12053

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
30th day of October, 1985.

David Parchuck

Jimmie G. Haglund
Authorized to administer oaths
pursuant to Tax Law section 174

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of :
Robert B. Price :
for Redetermination of a Deficiency or Revision :
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Tax under Article 22 of the Tax Law for the Year :
1979. :
:

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 30th day of October, 1985, he served the within notice of Decision by certified mail upon John P. MacArthur, 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 P. MacArthur
284 State St.
Albany, NY 12210

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
30th day of October, 1985.

David Parchuck

Ann M. P. Hagedorn
Authorized to administer oaths
pursuant to Tax Law section 174

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

October 30, 1985

Robert B. Price
RD #1 Craven Rd.
Delanson, NY 12053

Dear Mr. Price:

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 P. MacArthur
284 State St.
Albany, NY 12210
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition	:	
of	:	
ROBERT B. PRICE	:	DECISION
for Redetermination of a Deficiency or for	:	
Refund of Personal Income Tax under Article 22	:	
of the Tax Law for the Year 1979.	:	

Petitioner, Robert B. Price, RD #1 Craven Road, Delanson, New York 12053, filed a petition for redetermination of a deficiency or for refund of personal income tax under Article 22 of the Tax Law for the year 1979 (File No. 42909).

A formal hearing was held before Brian L. Friedman, Hearing Officer, at the offices of the State Tax Commission, Building #9, State Office Campus, Albany, New York, on April 23, 1985 at 9:15 A.M., with all briefs to be submitted by June 3, 1985. Petitioner appeared by John P. MacArthur, Esq. The Audit Division appeared by John P. Dugan, Esq. (Thomas C. Sacca, Esq., of counsel).

ISSUE

Whether petitioner may properly claim as an itemized deduction on his New York State personal income tax return, an amount paid to the Internal Revenue Service as the result of an assessment of unpaid Federal withholding taxes against a corporation in which petitioner, as a responsible officer, agreed to undertake personal liability therefor.

FINDINGS OF FACT

1. Petitioner, Robert B. Price, filed a New York State Income Tax Resident Return for the year 1979. The return was filed jointly with his wife, Patricia L. Price, who is not a party to this proceeding. On line 15 of his Federal Schedule A, Itemized Deductions and Interest and Dividend Income, petitioner

claimed as an itemized deduction the amount of \$1,200.00 paid to "IRS Re: Numicon, Inc."

2. On November 18, 1982, the Audit Division issued to petitioner a Statement of Audit Changes finding additional personal income tax due in the amount of \$46.85, plus accrued interest. Accordingly, on February 25, 1983, the Audit Division issued a Notice of Deficiency to petitioner in the amount of \$46.85 additional tax due, plus interest of \$15.01, for a total amount due of \$61.86.

3. The Statement of Audit Changes issued to petitioner on November 18, 1982 contained the following explanation and recomputation of personal income tax due:

"You have reported, "IRS Re: Numicon, Inc." in the amount of \$1,200.00 on Federal Schedule A, Line 15, as other taxes. It is an improper itemized deduction. Therefore, the total amount is disallowed.

The maximum tax benefit has been allowed in the computation of your New York State tax liability.

	1979	
	NYS	
	MFS-H	
Total income reported/adj'd	32497.37	
Item'd ded's claimed/adj'd	4232.00	
Adjustment	-1200.00	
Itemized deduction corrected	3032.00	
Exemption(s) claimed/adj'd	1400.00	
Taxable income corrected	28065.37	
Tax on above	2489.15	
Less: maximum tax benefit	-121.30	
Minimum income tax	.00	
Balance	2367.85	
Tax previously stated/adj'd	-2321.00	
Personal income tax due	46.85	
Total interest	13.43	
Total due	60.28	60.28"

4. Petitioner was an executive officer of Numicon, Inc. during a period of time when employee withholding tax liabilities due to the Internal Revenue Service were accruing. When Numicon, Inc. went out of business without having remitted the Federal income taxes withheld from its employees, the Internal Revenue Service turned to the officers of the corporation to satisfy the corporation's liability for the withholding taxes. Petitioner, along with other officers, chose not to contest liability and agreed to undertake personal liability, jointly and severally, on account of the withholding taxes. Petitioner thereupon entered into an Installment Agreement with the Internal Revenue Service, agreeing to pay approximately \$11,224.00 in monthly payments to be made against the outstanding obligation.

5. For the year 1979, petitioner, pursuant to the aforementioned agreement with the Internal Revenue Service, paid the sum of \$1,200.00 on account of the Federal withholding tax liability. As indicated in Finding of Fact "1", supra, petitioner claimed this amount as an itemized deduction, which deduction was subsequently denied by the Audit Division as being an improper itemized deduction.

6. The Audit Division contends that the payment of \$1,200.00 represented a penalty for unpaid withholding taxes and, as such, is not an allowable deduction for purposes of the New York State personal income tax. Petitioner, however, contends that the Internal Revenue Service never assessed a penalty and that by his admission of liability for the payment of the withholding taxes, petitioner's payment of the \$1,200.00 constituted payment of tax only. Petitioner further contends that if his \$1,200.00 payment to the Internal Revenue Service is payment of tax and not penalty, that it is deductible on his New York State personal income tax return as an allowable business expense deduction.

7. Petitioner conceded that if his payment of the \$1,200.00 was the payment of a penalty assessed against him, such payment of penalty would not be an allowable deduction on his New York State personal income tax return.

CONCLUSIONS OF LAW

A. That section 6672(a) of the Internal Revenue Code provides as follows:

"(a) GENERAL RULE. -- Any person required to collect, truthfully account for, and pay over any tax imposed by this title 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 any such 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. No penalty shall be imposed under section 6653 for any offense to which this section is applicable."

B. That the fact that petitioner agreed to pay the withholding taxes due rather than contest his liability therefor does not alter the conclusion that his liability arose under section 6672(a) of the Internal Revenue Code.

C. That section 162(a) of the Internal Revenue Code allows as an itemized deduction all the ordinary and necessary expenses paid or incurred during the taxable year in carrying on any trade or business.

D. That section 162(f) of the Internal Revenue Code provides that "[n]o deduction shall be allowed under subsection (a) for any fine or similar penalty paid to a government for the violation of any law."

E. That Treasury Regulation section 1.162-21(b)(1)(ii), in effect for the year at issue, defines the term "fine or similar penalty" to include an amount "[p]aid as a civil penalty imposed by Federal, State or local law, including additions to tax and additional amounts and assessable penalties imposed by Chapter 68 of the Internal Revenue Code of 1954."

F. That the United States Tax Court, in Patton v. Commissioner, 71 T.C. 389, 390 (1978), held, in part:

"Section 6672 is found in Chapter 68. Under the regulations, the 'penalty' imposed by that section clearly is a 'penalty' for purposes of section 162(f)."

(But cf.: United States v. Sotelo, 436 U.S. 268 (1978), reh. den. 438 U.S. 907 (1978), which characterizes funds due under section 6672 of the Internal Revenue Code as "taxes" for purposes of dischargeability in bankruptcy only.)

G. That petitioner is not entitled to a deduction on his New York State personal income tax return for the amount of \$1,200.00, paid to the Internal Revenue Service in the year 1979, on account of the Federal withholding tax liability of Numicon, Inc., a corporation in which petitioner was an executive officer.

H. That even assuming, arguendo, that petitioner's contention that the \$1,200.00 payment to the Internal Revenue Service represented a payment of tax rather than a payment of penalty, this payment would, nonetheless, be nondeductible on his New York State personal income tax return. Section 615(a) of the Tax Law provides that the New York itemized deductions of a resident individual are the same as his Federal itemized deductions, subject to certain modifications. Section 615(d) of the Tax Law, which sets forth the the modifications increasing Federal itemized deductions, contains no provision which permits a taxpayer to increase his Federal itemized deductions by the amount of Federal withholding tax paid.

I. That section 164(a) of the Internal Revenue Code, in setting forth which taxes may be allowable as itemized deductions for individuals and corporations, provides:

"(a) GENERAL RULE. -- Except as otherwise provided in this section, the following taxes shall be allowed as a deduction for the taxable year within which paid or accrued:

(1) State and local, and foreign, real property taxes.

- (2) State and local personal property taxes.
- (3) State and local, and foreign, income, war profits, and excess profits taxes.
- (4) State and local general sales taxes.
- (5) The windfall profit tax imposed by section 4986.

In addition, there shall be allowed as a deduction State and local, and foreign, taxes not described in the preceding sentence which are paid or accrued within the taxable year in carrying on a trade or business or an activity described in section 212 (relating to expenses for production of income)." (Emphasis added.)

J. That section 275(a) of the Internal Revenue Code provides, in part:

"(a) General rule.

No deduction shall be allowed for the following taxes:

- (1) Federal income taxes, including --

* * *

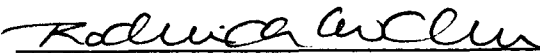
(C) the tax withheld at source on wages under section 3402."

K. That since there is no provision either in the Internal Revenue Code or in the Tax Law which allows petitioner to deduct the amount of Federal withholding tax paid for 1979, his payment to the Internal Revenue Service of the \$1,200.00 on account of Numicon, Inc.'s Federal withholding tax liability, even if construed to be a payment of tax, would not be an allowable deduction on his New York State personal income tax return.

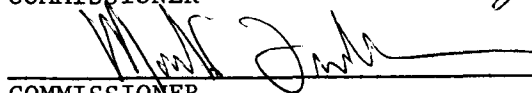
L. That the petition of Robert B. Price is denied and the Notice of Deficiency dated February 25, 1983 is sustained, together with such additional interest as may be lawfully due and owing.

DATED: Albany, New York
OCT 30 1985

STATE TAX COMMISSION


PRESIDENT


COMMISSIONER


COMMISSIONER