

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of :
Alfred L. Wheeler :
Responsible Officer of :
Burning Springs Construction, Inc. : 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 :
1977. :

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 21st day of August, 1985, he served the within notice of Decision by certified mail upon Alfred L. Wheeler, Responsible Officer of Burning Springs Construction, Inc., the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Alfred L. Wheeler
Responsible Officer of Burning Springs Construction, Inc.
P.O. Box 114
Versailles, NY 14168

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
21st day of August, 1985.

David Parchuck

Arnie G. Hagelberg

Authorized to administer oaths
pursuant to Tax Law section 174

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

August 21, 1985

Alfred L. Wheeler
Responsible Officer of Burning Springs Construction, Inc.
P.O. Box 114
Versailles, NY 14168

Dear Mr. Wheeler:

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	:	
ALFRED L. WHEELER	:	DECISION
for Redetermination of a Deficiency or for	:	
Refund of Personal Income Tax under Article 22	:	
of the Tax Law for the Year 1977.	:	

Petitioner, Alfred L. Wheeler, P.O. Box 114, Versailles, New York 14168, 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 1977 (File No. 43801).

A formal hearing was held before James J. Morris, Jr., Hearing Officer, at the offices of the State Tax Commission, State Office Building, 65 Court Street, Buffalo, New York, on March 14, 1985 at 10:45 A.M. Petitioner appeared pro se. The Audit Division appeared by John P. Dugan, Esq. (Deborah Dwyer, Esq., of counsel).

ISSUES

I. Whether petitioner was a person required to collect, truthfully account for and pay over withholding taxes, who willfully failed to do so and is thus liable to a penalty under section 685(g) of the Tax Law.

II. Whether petitioner's overpayments of personal income tax were or may be applied to reduce or offset personal liability imposed under section 685(g) of the Tax Law for the year 1977.

FINDINGS OF FACT

1. On December 20, 1982, the Audit Division issued a Notice of Deficiency, together with a Statement of Deficiency, asserting a penalty pursuant to section 685(g) of the Tax Law against petitioner, Alfred L. Wheeler, as a

person required to collect, truthfully account for and pay over withholding taxes of Burning Springs Construction, Inc. ("Burning Springs") in the amount of \$1,511.82 for the period April 1, 1977 to December 31, 1977.

2. Petitioner was the president of Burning Springs. He hired and fired employees and he signed the checks of the corporation.

3. Burning Springs withheld New York State income taxes from the wages of its employees for the period April 1, 1977 through December 31, 1977. These taxes were not remitted to New York State, nor were they refunded to the employees from whom such taxes were withheld.

4. Burning Springs was a corporation created by petitioner in order to enter into a construction project with the Department of Housing and Urban Development. Burning Springs performed site development for a federal housing project located on an Indian reservation. The withholding taxes in issue herein relate to wages paid with respect to employment on such construction project.

5. In 1977, the Attorney General of the State of New York issued an opinion ("1977 OPINION") which concluded that:

"Income earned from employment on an Indian reservation by an Indian who resides on such reservation is not subject to New York State personal income tax."

6. Petitioner claimed that the majority of the wages paid by Burning Springs in the year 1977 and subjected by Burning Springs to withholding taxes for such period were wages earned by Indians residing on an Indian reservation from employment on such reservation.

7. Petitioner claims that he personally was an Indian residing on an Indian reservation; that he filed returns and paid New York State personal income taxes for the several years prior to the year 1977; and that significant portions of such income earned in the several years prior to the calendar year

1977 and upon which he paid personal income tax was income which is considered not subject to the income tax pursuant to the 1977 OPINION.

8. Petitioner also asserted that in the years subsequent to 1977 he earned wages which were subject to the income tax and that he had withholding taxes withheld from his wages in amounts in excess of his tax liability in respect of such taxable wages.

9. Petitioner asserted that he timely filed a personal income tax return for the calendar year 1977 upon which he claimed a refund for such year in the amount of \$622.60. Petitioner asserts that he was notified that said amount was being applied in payment of taxes owed by Burning Springs; however, he does not presently recall for which taxes and/or periods such payments were applied. The Audit Division established that such amount was not applied towards the deficiency for withholding taxes at issue herein.

10. Petitioner requested that if it be found that he is liable as an officer of Burning Springs for unpaid withholding taxes, that his overpayments of personal income taxes be applied towards or used as an offset of such liability.

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 personal income tax, 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 section 685(n) of the Tax Law defines the word "person", for the purpose of section 685(g), and reads as follows:

"For purposes of subsections (g)...the term person includes an individual, corporation or partnership or an officer or employee of any corporation (including a dissolved corporation), or a member or employee of any partnership, who as such officer, employee or member is under a duty to perform the act in respect of which the violation occurs."

C. That for the period at issue, petitioner was a person responsible for the collection and payment of the withholding taxes of Burning Springs Construction, Inc., who willfully failed to fulfill this responsibility within the meaning and intent of sections 685(g) and 685(n) of the Tax Law.

D. Section 673 of the Tax Law, in pertinent part, provides:

"...any amount of tax actually deducted and withheld under this article in any calendar year shall be deemed to have been paid to the tax commission on behalf of the person from whom withheld, and such person shall be credited with having paid that amount of tax for the taxable year beginning in such calendar year."

Section 675 of the Tax Law, in pertinent part, provided during the applicable periods herein:

"Every employer required to deduct and withhold tax under this article is hereby made liable for such tax... Any amount of tax actually deducted and withheld under this article shall be held to be a special fund in trust for the tax commission."

Section 686 of the Tax Law, in pertinent part, provides:

"(b) Excessive withholding. -- If the amount allowable as a credit for tax withheld from the taxpayer exceeds his tax to which the credit relates, the excess shall be considered an overpayment.

(c) Overpayment by employer. -- If there has been an overpayment of tax required to be deducted and withheld under section six hundred seventy-one, refund shall be made to the employer only to the extent that the amount of the overpayment was not deducted and withheld by the employer.

* * *

(f) Rule where no tax liability. -- If there is no tax liability for a period in respect of which an amount is paid as income tax, such amount shall be considered an overpayment."

Burning Springs Construction, Inc. withheld taxes from the wages of its employees for the period April 1, 1977 through December 31, 1977. Whether the employees from whose wages such taxes were withheld were subject to liability for income taxes does not effect the liability of Burning Springs to the State Tax Commission for such withholding, since, to the extent any overpayment existed within the meaning and intent of section 686 of the Tax Law, such amounts were in fact withheld from the employees' wages and such employees were "credited" such amounts within the meaning and intent of section 673 of the Tax Law.

E. That section 686(a) of the Tax Law, in pertinent part, provides:

"(a) General. -- The tax commission, within the applicable period of limitations may credit an overpayment of income tax and interest on such overpayment against any liability in respect of any tax imposed by the tax law on the person who made the overpayment,..."

Section 687(a) of the Tax Law, in pertinent part, provides:

"(a) General. -- Claim for credit or refund of an overpayment of income tax shall be filed by the taxpayer within three years from the time the return was filed or two years from the time the tax was paid, whichever of such periods expires the later or if no return was filed, within two years from the time the tax was paid."

Section 689 of the Tax Law, concerning petitions to the Tax Commission, in relevant part, states:

"(g) Jurisdiction over other years. -- The tax commission shall consider such facts with relation to the taxes for other years as may be necessary correctly to determine the tax for the taxable year, but in so doing shall have no jurisdiction to determine whether or not the tax for any other year has been overpaid or underpaid."

Section 683 of the Tax Law, in relevant part, provides:

"(a) General. -- Except as otherwise provided in this section, any tax under this article shall be assessed within three years after the return was filed."

5520 INFORMATION SHEET

<u>STOP</u>	<u>DESCRIPTION</u>	<u>INFORMATION</u>	<u>CORRECTION</u>
1	TAB NO	43801	
2	CORP. OR LAST NAME	Wheeler	
3	FIRST NAME	Alfred	
4	MI	L.	
5	SECOND NAME	Responsible Officer of Burning Springs Construction, Inc.	
6	SALUTATION	Dear Mr. Wheeler	
7	STREET	P.O. Box 114	
8	SECOND LINE ADDRESS		
9/10/11	CITY, STATE, ZIP	Versailles, NY 14168	
12	DATE RECEIVED		
13	PETITION DATE		
14	ARTICLE NO	22	
15	ARTICLE NAME	Personal Income Tax	
16	AMT AT ISSUE		
17	YEAR YEARS PERIOD	Year	
18	DATE OF YR OR PERIOD	1977	
19	ID - SS#		
20/21/22	REPS NAME		
23	POWER OF ATTORNEY		
24	TITLE		
25	FIRM NAME		
26	STREET		
27/28/29	CITY STATE ZIP	,	
30	ASSOC CASE		
31	DISTRICT OFFICE	Buffalo	

It appears from the record that petitioner's claimed refund (overpayment) for the year 1977 was applied to liabilities of petitioner not relevant to the matter herein. Whether petitioner was entitled to refunds with respect to overpayments for other years either prior to or after 1977 depends upon whether petitioner made proper application therefor, whether he was entitled thereto, and other factors not before the Tax Commission in this matter nor relevant to the determination of petitioner's liability in this matter. Likewise, section 689 of the Tax Law prohibits determination of same.

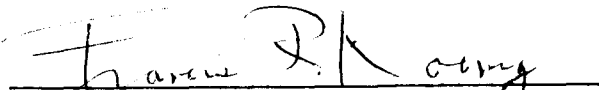
F. That the petition of Alfred L. Wheeler is denied and the Notice of Deficiency dated December 20, 1982 is sustained.

DATED: Albany, New York

STATE TAX COMMISSION

AUG 21 1985


PRESIDENT


COMMISSIONER


COMMISSIONER