

STATE OF NEW YORK  
STATE TAX COMMISSION

In the Matter of the Petition :

of

John A. Kalenda :

AFFIDAVIT OF MAILING

for Redetermination of a Deficiency or a Revision :  
of a Determination or a Refund of  
Personal Income Tax :  
under Article 22 of the Tax Law  
for the Year 1970. :

State of New York  
County of Albany

Jay Vredenburg, being duly sworn, deposes and says that he is an employee of the Department of Taxation and Finance, over 18 years of age, and that on the 3rd day of October, 1980, he served the within notice of Decision by certified mail upon John A. Kalenda, the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

John A. Kalenda

151 Main St.

West Seneca, NY 14224

and by depositing same enclosed in a postpaid properly addressed wrapper in a (post office or official depository) 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  
3rd day of October, 1980.

Robert Brink

Jay Vredenburg

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

October 3, 1980

John A. Kalenda  
151 Main St.  
West Seneca, NY 14224

Dear Mr. Kalenda:

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, any proceeding in court to review an adverse decision by the State Tax Commission can only be instituted under Article 78 of the Civil Practice Laws 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  
Deputy Commissioner and Counsel  
Albany, New York 12227  
Phone # (518) 457-6240

Very truly yours,

STATE TAX COMMISSION

cc: Petitioner's Representative

Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

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In the Matter of the Petition	:	
	:	
of	:	
	:	
JOHN A. KALENDA	:	DECISION
	:	
for Redetermination of a Deficiency or	:	
for Refund of Personal Income Tax under	:	
Article 22 of the Tax Law for the Year	:	
1970.	:	

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Petitioner, John A. Kalenda, 151 Main Street, West Seneca, New York 14224, 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 1970 (File No. 13243).

A small claims hearing was held before Carl P. Wright, Hearing Officer, at the offices of the State Tax Commission, Genesee Building, 1 West Genesee Street, Buffalo, New York, on April 22, 1980 at 2:45 P.M. Petitioner appeared pro se. The Audit Division appeared by Ralph J. Vecchio, Esq. (Patricia L. Brumbaugh, Esq., of counsel).

#### ISSUE

Whether petitioner was a person required to collect, truthfully account for and pay over to New York State, income tax withheld from wages of employees of Buffalo Ornamental Iron Works, Inc. during 1970.

#### FINDINGS OF FACT

1. Buffalo Ornamental Iron Works, Inc. failed to pay New York State personal income tax withheld from the wages of that company's employees in the amount of \$1,303.60 for 1970.

2. On July 29, 1974, the Audit Division issued a Notice of Deficiency and a Statement of Deficiency against petitioner, John A. Kalenda, asserting a penalty equal to the amount of unpaid New York State withholding tax due from Buffalo Ornamental Iron Works, Inc. for 1970.

3. During the period at issue, petitioner was employed as a shop foreman with Buffalo Ornamental Iron Works, Inc. Petitioner was not authorized to sign checks. He had no part in determining which creditors would be paid and which would not. He was not permitted to hire or fire employees. He was not a stockholder or officer of the corporation. He did not prepare or sign tax returns and did not have control or possession of the books and records of the corporation.

4. No indication was given by the Audit Division as to the reason petitioner was named as a responsible person.

#### CONCLUSIONS OF LAW

A. That petitioner, John A. Kalenda, was not a person under a duty to perform the task of collecting, truthfully accounting for and paying over the withholding taxes deducted from the wages of employees of Buffalo Ornamental Iron Works, Inc. during 1970, in accordance with the meaning and intent of section 685(n) of the Tax Law.


B. That petitioner did not willfully fail or cause Buffalo Ornamental Iron Works, Inc. to willfully fail to collect, truthfully account for and pay over to New York State withholding taxes due from said corporation for the aforesaid year. Therefore, a penalty equal to the total amount of unpaid withholding taxes was improperly asserted against petitioner in accordance with the meaning and intent of section 685(g) of the Tax Law.

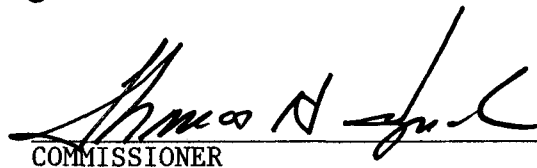
C. That the petition of John A. Kalenda is granted and the Notice of Deficiency issued July 29, 1974 is cancelled.

DATED: Albany, New York

STATE TAX COMMISSION

OCT 03 1980

  
PRESIDENT

  
COMMISSIONER

  
COMMISSIONER