

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition

of :

DENNIS DWYER : 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, Dennis Dwyer, 3936 Seneca Street, Buffalo, 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 1979 (File No. 34884).

A hearing was held before James J. Morris, Jr., Hearing Officer, at the
offices of the State Tax Commission, State Office Building, 65 Court Street,
Part 1, Buffalo, New York 14202, on February 6, 1985 at 10:45 A.M., and continued
to conclusion on February 26, 1986 at 9:15 A.M. Petitioner appeared pro se.
The Audit Division appeared by John P. Dugan, Esq. (Deborah J. Dwyer, Esq., of
counsel).

ISSUE

Whether petitioner, Dennis Dwyer, is subject to a penalty pursuant to
section 685(g) of the Tax Law, as a person who willfully failed to collect,
truthfully account for and pay over the New York State withholding taxes due
from D & D Technical Detailing, Inc. for the year 1979.

FINDINGS OF FACT

1. D & D Technical Detailing, Inc. ("D & D"), 324 Schenck Street, North
Tonawanda, New York 14120, 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>
June 1, 1979 through September 30, 1979	\$2,348.40
November 1, 1979 through December 31, 1979	704.70
TOTAL	<u>\$3,053.10</u>

2. On March 30, 1981, the Audit Division issued a Statement of Deficiency in conjunction with a Notice of Deficiency against Dennis Dwyer (hereinafter "petitioner") 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 due from D & D for the aforesated periods. Said penalty was asserted on the grounds that petitioner 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.

3. On April 14, 1983, the Audit Division issued a Notice of Claim to petitioner wherein a greater deficiency was asserted than that as stated in the Notice of Deficiency. The greater deficiency was based on additional unpaid withholding taxes due from D & D for the period October 1 through October 31, 1979 in the amount of \$502.30. Accordingly, the deficiency presently at issue is \$3,555.40.

4. D & D filed monthly employer's returns of tax withheld for the periods at issue herein. Each return was signed by petitioner as President. Petitioner, and one Rodney Damon, Vice President of D & D, each owned 50% of the outstanding stock.

5. D & D operated from the upper floor of a two story apartment house owned by Mr. Damon and his wife, Cheryl. The Damons resided on the first floor,

6. Although petitioner was President of D & D, his relationship to the company was that of an investor. He spent virtually no time at D & D's business

premises since he was employed full time during the period at issue by an unrelated company.

7. Petitioner submitted a statement dated March 5, 1984 from J. J. Gutt & Associates, Inc., D & D's former accountant, wherein it was stated:

"Be advised that during our association with a New York Corporation named D & D Technical Detailing, Inc., our only contact was with Rodney and Cheryl Damon. They were the officers who managed the daily activity and paid invoices of the corporation. At no time, to our recollection (sic), did we have contact with any other person."

8. Petitioner received no compensation from D & D.

9. Petitioner signed the withholding tax forms at the request of Mr. & Mrs. Damon.

10. Petitioner was not aware that the withholding taxes at issue were not being paid.

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 section 685(n) of the Tax Law provides that, for purposes of subdivision (g), the term person:

"[I]ncludes 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 the test for determining willfulness is "whether the act, default, or conduct is consciously and voluntarily done with knowledge that as a result, the trust funds belonging to the Government **will** not be paid over but **will** be

used for other purposes [citations omitted]." Matter of Levin v. Gallman, 42 N.Y.2d 32, 34 (1977). A finding of willfulness does not require an intent to deprive the Government of its funds. "{K}nowledge that withholding taxes have not been remitted and a failure to investigate or correct this mismanagement of corporate funds is enough to constitute willful conduct [citations omitted]." Matter of MacLean v. State Tax Commission, 69 A.D.2d 951, aff'd, 49 N.Y.2d 920.

D. That although petitioner may have been a person as defined under Section 685(n) of the Tax Law by virtue of his title and stock ownership, any failure on his part to collect, truthfully account for and pay over the withholding taxes at issue was not willful. Accordingly, petitioner is not subject to the penalty imposed under section 685(g) of the Tax Law.

E. That the petition of Dennis Dwyer is granted and the Notice of Deficiency dated March 30, 1981 and the Notice of Claim dated April 14, 1983 are hereby cancelled.

DATED: Albany, New York

STATE TAX COMMISSION

JUN 19 1986

Rodrichaw Chen
PRESIDENT

Francis Q. Koening
COMMISSIONER

[Signature]
COMMISSIONER