

STATE OF NEW YORK

STATE TAX COMMISSION

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In the Matter of the Petition

of

DAVID J. JACOBSON

DECISION

for Redetermination of a Deficiency or for  
Refund of Personal Income Tax under Article 22  
of the Tax Law for the Years 1977 and 1980.

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Petitioner, David J. Jacobson, 811 The Parkway, Mamaroneck, New York 10543, filed a petition for redetermination of a deficiency or for refund of personal income tax under Article 22 of the Tax Law for the years 1977 and 1980 (File No. 44147).

A hearing was held before Allen Caplowaith, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on September 10, 1986 at 11:00 A.M. Petitioner appeared by John M. Voetsch, Esq. The Audit Division appeared by John P. Dugan, Esq. (Angelo Scopellito, Esq., of counsel).

#### ISSUE

Whether petitioner, David J. Jacobson, 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 Oberly & Newell, Inc. for the years 1977 and 1980.

#### FINDINGS OF FACT

1. Oberly & Newell, Inc. (hereinafter "O & N") 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>
December 16, 1977 through December 31, 1977	\$7,997.77
July 1, 1980 through December 31, 1980	<u>739.46</u>
TOTAL	<u>\$8,737.23</u>

2. On April 25, 1983, the Audit Division issued a Statement of Deficiency in conjunction with a Notice of Deficiency against David J. Jacobson (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 O & N for the aforestated 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. Prior to 1977, petitioner personally worked for O & N as an employee for a brief time. He alleged that in early 1977 he advised O & N that if it still desired his services, he would continue to render such services only if O & N became a client of his corporation, Gamma Merchandising & Marketing Corp. ("Gamma"), which he claims it did.

4. Gamma was engaged in business as a marketing and merchandising consulting firm. Petitioner was president of Gamma. He and his wife were the sole shareholders of Gamma.

5. Petitioner alleged that from 1977 to mid-July 1979 his services were rendered to O & N solely in his capacity as an employee of Gamma and that all fees for his services were paid to Gamma.

6. In mid-July 1979, petitioner and Gamma ceased rendering services for O & N.

7. Petitioner alleged that the services he rendered to O & N consisted of securing new business, dealing with O & N's creditors for the purpose of obtaining time agreements for the payment of O & N's debts, and rendering consulting services respecting proper organization.

8. Petitioner claimed that he was neither an officer, director or stockholder of O & N. However, the record shows that O & N provided him with the title of vice president and business cards listing him as vice president. Petitioner claims this was a fictitious title used solely in dealing with O & N's clients.

9. Petitioner claimed that O & N was owned and operated solely by three individuals: one Edward K. Whitmore, one Edward K. Whitmore, Jr. and one Joy Israel.

10. A written contract was not entered into between O & N and Gamma

11. Petitioner, at times, signed corporate tax returns of O & N.

12. Petitioner was an authorized signatory to the bank accounts of O & N.

13. O & N provided petitioner with an office, which he personally furnished with valuable antique furniture.

14. For 1979, O & N reported the consulting fees paid to Gamma on a Federal Form 1099-Misc. Gamma's address was listed on said form as 811 The Parkway, Mamaroneck, New York, 10543. Said address is that of petitioner's personal residence.

15. No documentation was provided to show the nature of payments to petitioner or Gamma in 1977.

#### 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 with respect to the deficiency asserted for 1977, petitioner has failed to sustain his burden of proof, imposed pursuant to section 689(e) of the Tax Law, to show that he was not a person who was responsible for the collection and payment of the withholding taxes of O & N for said year. Accordingly, he is properly subject to the penalty imposed for said year of \$7,997.77 within the meaning and intent to sections 685(g) and 685(n) of the Tax Law.

D. That since petitioner ceased rendering services for O & N in 1979, he is not subject to the penalty imposed for 1980 of \$739.46. Accordingly, such penalty is hereby cancelled.


E. That the petition of David J. Jacobson is granted to the extent provided in Conclusion of Law "D", supra, and except as so granted, said petition is in all other respects denied.

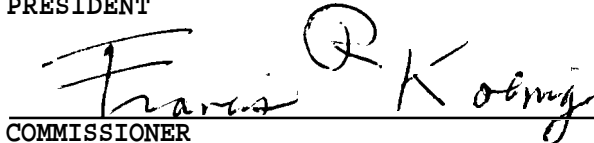
F. That the Notice of Deficiency issued April 25, 1983 is to be modified so as to be consistent with the decision rendered herein.

DATED: Albany, New York

STATE TAX COMMISSION

FEB 03 1987

  
PRESIDENT

  
COMMISSIONER

  
COMMISSIONER