

STATE OF NEW YORK

STATE TAX COMMISSION

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In the Matter of the Petition

of

PATRICK J. CROWE

DECISION

for Redetermination **of** a Deficiency or for  
Refund of Personal Income Tax under Article 22 :  
of the Tax Law for the Years 1980 and 1981.

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**Petitioner, Patrick J. Crowe, 195 Elm Street, Clyde, New York 14433, 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 1980 and 1981 (File No.  
44149).

A hearing was held before Arthur Bray, Hearing Officer, at the offices of  
the State Tax Commission, 259 Monroe Avenue, Rochester, New York, on September 9,  
1985 at 2:45 P.M., with all briefs and documents to be submitted by March 20,  
1986. Petitioner appeared pro se. The Audit Division appeared by John P.  
Dugan, **Esq.** (James Della Porta, Esq., of **counsel**).

#### ISSUES

I. Whether petitioner is liable for the penalty asserted against him  
pursuant to section 685(g) of the Tax Law with respect to New York State  
withholding taxes due from Wayne Pipeline, Inc.

11. Whether the Audit Division properly determined the amount of the  
penalty asserted to be due.

#### FINDINGS OF FACT

1. On February 28, 1983, the Audit Division issued a Notice of Deficiency  
to petitioner, Patrick J. Crowe, asserting a deficiency **of** personal income tax

Deficiency, which was also issued on February 28, 1983, explained that the Audit Division was asserting the deficiency against petitioner as a person required to collect, truthfully account for and pay over the taxes withheld from the wages of the employees of Wayne Pipeline, Inc. ("Wayne Pipeline"). The Statement of Deficiency also explained that the withholding tax periods and the respective amounts asserted to be due were as follows:

<u>Withholding Tax Period</u>	<u>Amount</u>
November 1, 1980 through December 31, 1980	\$ 9,413.57
January 1, 1981 through September 15, 1981	32,634.60
	<u>\$42,048.17</u>

2. Wayne Pipeline commenced business in 1979. Its activity consisted of installing sewer line systems. At the time of its inception and continuing throughout the periods in issue, petitioner served as the corporation's president. He owned fifty percent of the outstanding stock. Raymond Bennett held the position of vice-president.

3. As president, petitioner had the authority to sign corporate checks. On occasion, petitioner signed the payroll checks. Either petitioner or Raymond Bennett would sign the corporation's tax returns.

4. In or about November, 1980, Wayne Pipeline began experiencing substantial difficulty in receiving payments on its accounts receivable resulting in a shortage of cash. Consequently, the corporation began delaying payments to its creditors.

5. In or about late 1980, creditors began imposing liens on Wayne Pipeline's accounts receivable and on Wayne Pipeline's bank accounts. As a result of these liens, Wayne Pipeline began experiencing additional delays in receiving funds. Further, at some point in 1981, a majority of the funds due the corporation would be made payable by check instead of cash.

creditor which imposed the lien. The foregoing resulted in additional shortages of cash.

6. In 1980 and 1981, the corporation made the decision to use those funds which were available to pay wages and make material purchases. Petitioner did not understand at this time the seriousness of being delinquent in withholding tax obligations.

7. During 1981, Wayne Pipeline's performance was bonded by the Aetna Casualty and Surety Company ("Aetna"). In or about November, 1981, Aetna began providing funds so that the corporation could continue operating. During this period, petitioner would discuss the corporation's liabilities, including withholding tax, with representatives of Aetna. However, Aetna made the final decision as to who would be paid.

8. On September 25, 1981, petitioner, as president of Wayne Pipeline, entered into a deferred payment agreement with the Tax Compliance Bureau of the Department of Taxation and Finance. The agreement provided for a downpayment of \$2,000.00 and monthly payments of \$3,030.00. At the time the deferred payment agreement was entered into, the Tax Compliance Bureau determined that the corporation's withholding tax liability was as follows:

Total tax due	\$46,183.34
Total penalty and interest	9,375.57
Additional penalty and interest accruing during life of deferred payment agreement	8,313.00
Total liability	<u>\$63,871.91</u>

9. The penalty and interest calculated on the first two payments were, respectively, \$305.93 and \$588.90.

10. On September 25, 1981, the downpayment of \$2,000.00 was tendered and on October 15, 1981, an additional payment of \$3,030.00 was submitted on behalf

withholding tax asserted to be due was correct except for the failure to take into account the payments referred to above.

11. On or about January 25, 1982, i.e., approximately four months after the last withholding tax period in issue, a court appointed a receiver to operate Wayne Pipeline. The record does not disclose whether the receiver assumed his court-appointed functions.

#### CONCLUSIONS OF LAW

A. That where a person is required to collect, truthfully account for and pay over withholding taxes and willfully fails to collect and pay over such taxes, section 685(g) of the Tax Law imposes on such person "...a penalty equal to the total amount of the tax evaded, or not collected, or not accounted for and paid over,"

B. That "...the question of whether or not someone is a 'person' required to collect and pay **over** withholding taxes **is** a factual one. Factors determinative of the issue can include whether petitioner owned stock, signed the tax returns, or exercised authority over employees and the assets of the corporation (citations omitted)." (Matter of McHugh v. State Tax Comm., 70 AD2d 987, 988).

C. That since petitioner was the president of Wayne Pipeline, owned fifty percent of the outstanding stock, signed tax returns and exercised authority **over the assets of Wayne Pipeline, petitioner was a "person" within the meaning of Tax Law §685(n).**

D. That the term "willful" as used in Tax Law §685(g) "...means an act, default, or conduct voluntarily done with knowledge that, as a result, trust funds belonging to the government will be used for other purposes (Matter of Levin v. Gallman, 42 NY2d 32)." (Matter of McHugh v. State Tax Comm., supra,

p. 989). "Knowledge that withholding taxes have been collected and not paid over to the government is a necessary element of willfulness."

failure to investigate or correct this mismanagement of corporate funds is enough to constitute willful conduct (citations omitted)." (Matter of MacLean v. State Tax Comm., 69 AD2d 951, 952, ~~affd~~ 49 NY2d 920).

E. That since petitioner was aware that the withholding taxes due were not being paid and made the decision to prefer other creditors over the obligation to pay the withholding taxes due, petitioner's action was "willful" within the meaning of Tax Law §685(g). It is noted that Aetna's influence regarding who would be paid is of no consequence since Aetna did not assert control until after the withholding tax periods in issue.

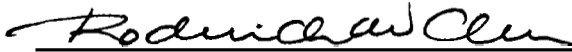
F. That a comparison of the amount of tax currently asserted to be due with the amount of tax paid, less the penalty and interest imposed against Wayne Pipeline in the deferred payment agreement, shows that the Audit Division took into account the payments referred to in Finding of Fact "10" when it issued the Notice of Deficiency.

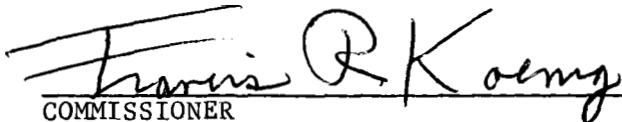
G. That the petition of Patrick J. Crowe is denied and the Notice of Deficiency, issued February 28, 1983, is sustained.


DATED: Albany, New York

STATE TAX COMMISSION

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PRESIDENT

  
COMMISSIONER

  
COMMISSIONER