

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition

of

DANIEL J. PACHOLSKI

DECISION

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

Petitioner, Daniel J. Pacholski, 73 Ellsworth Drive, Cheektowaga, New York 14225, 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 1980 (File No. 46300).

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, Buffalo, New York on April 29, 1986 at 9:15 A.M. Petitioner appeared by Peter S. Aiello, Esq. The Audit Division appeared by John P. Dugan, Esq. (Deborah J. Dwyer, Esq., of counsel).

ISSUE

Whether petitioner, Daniel J. Pacholski, 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 Millwork Services, Inc. for the year 1980.

FINDINGS OF FACT

1. Millwork Services Inc., 4039 Walden Avenue, Lancaster, New York 14086, failed to pay over \$1,617.90 of New York State personal income taxes withheld from the wages of its employees during 1980.

2. On January 31, 1983, the Audit Division issued a Statement of Deficiency in conjunction with a Notice of Deficiency against Daniel J. Pacholsky (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 Millwork Services, Inc. ("Millwork") for the aforestated year. 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. Petitioner alleged in his petition that:

"[I]n reality [he] had no control over the financial aspects of the corporation, including maintenance of tax accounts, preparation of quarterly tax records or income or other tax returns or reports. The responsibility for these matters lay solely in the hands of one Ruth Wysocki, also a corporate officer, member of the corporation Board of Directors and Shareholder.

3) The taxpayer is not a person who is required to collect, truthfully account for and pay over any taxes. The responsibility rested with Ruth Wysocki for the reasons stated above. Even, for the sake of argument, if the taxpayer could be deemed such a "person", he did not willfully fail to fulfill any of the above requirements because as a matter of corporate activities, these responsibilities resided in Ruth Wysocki. The taxpayer had no knowledge, direct or indirect, of any failure to perform these duties imposed by law simply because as a matter of corporate history and procedure these matters were the province solely of Ruth Wysocki."

4. Petitioner subsequently paid the aforestated deficiency asserted against him.

5. On March 22, 1984, petitioner filed a Claim for Credit or Refund of Personal Income Tax whereon he claimed a refund of the \$1,617.90 paid on the same grounds as stated in his petition (see Finding of Fact "3", supra).

6. Since the claim for refund was filed subsequent to the petition, the Audit Division amended its Answer during the hearing to include a general denial of the refund claim.

7. Millwork was engaged in the business of manufacturing wood fixtures, panels, cabinets and showcases. Previous to and during 1980 petitioner managed the day-to-day activities of the shop. All financial and tax matters, he contended, were handled by Ruth Wysocki.

8. Petitioner was initially employed by Millwork in 1961. In the early 1970's he became a shareholder. In 1976 he was elected president and served as a member of the Board of Directors.

9. Petitioner had check signing authority and did, in fact, sign company checks in 1980.

10. Petitioner had a voice in determining who would be hired or fired by Millwork.

11. Petitioner signed the 1980 New York State Reconciliation of Tax Withheld, which was filed by Millwork on December 30, 1980.

12. The 1980 Wage and Tax Statement issued by Millwork to petitioner reported wages of \$4,292.60. However, during the hearing petitioner testified that Millwork paid him "a little under \$300.00 per week" during 1980.

13. Millwork went out of business in April 1980.

14. Petitioner argued that Ruth Wysocki, who was also an officer, stockholder and Board member of Millwork, should properly be held responsible for payment of the withholding taxes at issue. He claimed she had control of the books and records, which she kept locked in a cabinet.

15. Petitioner was not prohibited from reviewing the books and records,

His failure to review such books and records was a negligent failure.

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:

"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 petitioner was a person required to collect, truthfully account for, and pay over the withholding taxes at issue herein.

D. That turning to the question of whether petitioner's failure to collect, account for and pay over the taxes was willful, the test for determining willfulness is "whether the act, default, or conduct is consciously and voluntarily done with knowledge that as a result, 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 NY2d 32,34.) A finding of willfulness does not require an intent to deprive the Government of its funds. "Knowledge 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 AD2d 951, 952, aff'd, 49 NY2d 920.) The evidence presented through petitioner's testimony is insufficient to show that his failure to collect, account for and pay over the taxes due was other than willful

E. That since petitioner, Daniel J. Pacholski, was a person who was under a duty to collect, truthfully account for and pay over the New York State withholdin taxes of Millwork for the year at issue herein and he willfully failed to do so, he is properly subject to the penalty imposed pursuant to section 685(g) of the Tax Law.


F. That the petition of Daniel J. Pacholski is denied and the Notice of Deficiency issued January 31, 1983 is sustained.


G. That petitioner's Claim for Credit or Refund of Personal Income Tax, filed March 22, 1984, is denied in full.

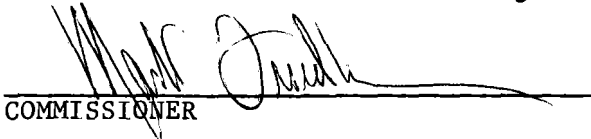
DATED: Albany, New York

STATE TAX COMMISSION

OCT 20 1986


PRESIDENT


COMMISSIONER


COMMISSIONER