

STATE OF NEW YORK
STATE TAX COMMISSION

In theMatter of the Petition
of

THEODORE PRICE DECISION

for Redetermination of a Deficiency or for
Refund of New York State Personal Income Tax
under Article 22 of the Tax Law and New York :
City Personal Income Tax under Chapter 46, :
Title T of the Administrative Code of the City :
of New York for the Periods October 1, 1979 :
through December 31, 1979 and January 1, 1980 :
through January 15, 1980.

Petitioner, Theodore Price, 1802 Park Drive, Seaford, New York 11783,
filed a petition for redetermination of a deficiency or for refund of New York
State personal income tax under Article 22 of the Tax Law and New York City
personal income tax under Chapter 46, Title T of the Administrative Code of the
City of New York for the periods October 1, 1979 through December 31, 1979 and
January 1, 1980 through January 15, 1980 (File No. 47359).

A hearing was held before Frank A. Landers, Hearing Officer, at the
offices of the State Tax Commission, Two World Trade Center, New York, New
York, on October 21, 1986 at 1:15 P.M. Petitioner appeared pro se. The Audit
Division appeared by John P. Dugan, Esq. (Irwin Levy, Esq., of counsel).

ISSUE

Whether petitioner was a person required to collect, truthfully account
for and pay over the New York State and City withholding taxes of Jetway
Courier & International Forwarders, Inc. and who willfully failed to do so,
thus becoming liable for a penalty equal to such unpaid withholding taxes.

FINDINGS OF FACT

1. On June 27, 1983, the Audit Division issued a statement of Deficiency ("statement") to petitioner, Theodore Price, asserting that he was a person required to collect, truthfully account for and pay over the New York State and City withholding taxes of Jetway Courier & International Forwarders, Inc. (hereinafter "the corporation") for the periods October 1, 1979 through December 31, 1979 and January 1, 1980 through January 15, 1980. The aforementioned statement further alleged that petitioner willfully failed to collect, truthfully account for and pay over said withholding taxes and that he was therefore subject to a penalty equal in amount to the unpaid withholding taxes Of \$5,693.19. Accordingly, on June 27, 1983, the Audit Division issued a Notice ~~of~~ Deficiency to petitioner for the years 1979 and 1980 asserting a deficiency ~~of~~ \$5,693.19.

2. During the periods at issue, petitioner was vice-president of Jetway Courier & International Forwarders, Inc. Petitioner together with one Robert Alan Krauss, owned all of outstanding stock of said corporation (50% each).

3. The corporation was in the business of delivering small packages to domestic and foreign destinations. The corporation did not own any airplanes but used commerical airlines and commercial freight services. The petitioner was primarily responsible for soliciting sales which required that he be out of the office most of the time. The day-to-day office functions were primarily the responsibility of ~~Mr.~~ Krauss. The petitioner came into the corporate office about three days per week and communicated with Mr. Krauss concerning corporate matters daily, via telephone.

4. Petitioner had the authority to hire and fire employees, although he did not exercise it. The petitioner signed checks on behalf of the corporation and also withholding tax statements.

5. Petitioner left the corporation in February 1980 when, in his opinion, it was not going to be able to maintain any growth.

CONCLUSIONS OF LAW

A. **That** the personal income tax imposed by Chapter 46, Title T **of** the Administrative Code of the City of New York is by its own terms tied into and contains essentially the same provisions as Article 22 of the Tax Law. Therefore, in addressing the issues presented herein, unless otherwise specified all references to particular sections of Article 22 shall be deemed references **(though uncited) to the corresponding sections of Chapter 46, Title T.**

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

C. That section 685(n) of the Tax Law defines a person, for purposes of section 685(g) of the Tax Law, to include:

"an individual, corporation, or partnership or an officer or employee of any 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."

D. That the question of whether petitioner was a person under a duty to collect and pay over withholding taxes must be determined on the basis of the facts presented. Some of the factors to be considered include whether petitioner signed the corporation's tax returns, possessed the right to hire and discharge employees or derived a substantial portion of his income from the corporation.

sphere of his duties and his authority to pay corporate obligation and/or exercise authority over the assets of the corporation. (Matter of Amenqual v. State Tax Commn., , 95 AD2d 949; McHugh v. State Tax comn. , 70 AD2d 987.) Finally the test of willfulness is whether the act, default or conduct was "voluntarily done with knowledge that, as a result, trust funds of the government will not be paid over; intent to deprive the government of its money need not be shown, merely something more than accidental nonpayment." (Matter of Ragonesi v. New York State Tax Commn., 88 AD2d 707, 708 [citation omitted]).

B. That in the instant matter, petitioner was vice-president of the corporation, a 50% stockholder in said corporation and he also had authority to sign corporate checks. Accordingly, petitioner was a person under a duty to collect and pay over the corporation's withholding taxes.


F. That, under the circumstances herein, petitioner did willfully fail to collect, truthfully account for and pay over the corporation's withholding taxes.


G. That the petition of Theodore Price is denied and the Notice of Deficiency dated June 27, 1983 is sustained.


DATED: Albany, New York

STATE TAX COMMISSION

MAR 13 1987


PRESIDENT


COMMISSIONER


COMMISSIONER