

STATE OF NEW YORK

STATE TAX COMMISSION

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In the Matter of the Petition

of

ANGELO PARISI

for Redetermination of a Deficiency or for  
Refund of Personal Income Tax under Article 22 :  
of the Tax Law for the Years 1979, 1980 and  
1981.

DECISION

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In the Matter of the Petition

*of*

CHARLES BRUNER

for Redetermination of a Deficiency or for  
Refund of Personal Income Tax under Article 22 :  
of the Tax Law for the Years 1979, 1980 and  
1981.

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Petitioners, Angelo Parisi, 11 Birch Street, Mount Vernon, New York 10552, and Charles Bruner, 956 East **84th** Street, Brooklyn, New York 11236, filed petitions for redetermination of deficiencies or for refunds of personal income tax under Article 22 of the Tax Law for the years 1979, 1980 and 1981 (File Nos. 49342 and 49343).

A consolidated 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** May 24, 1985 at 10:00 A.M. Petitioner Angelo Parisi appeared by Dennis E. Glazer, Esq. Petitioner Charles Bruner appeared by Warren **M.** Burd, Esq. The Audit Division appeared by John P. Dugan, **Esq.** (Herbert Kamrass, Esq., of counsel).

ISSUES

I. Whether petitioner Angelo Parisi 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 Video Software & Production Center, Inc. for the years 1979, 1980 and 1981.

II. Whether petitioner Charles Bruner 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 Video Software & Production Center, Inc. for the years 1979, 1980 and 1981.

FINDINGS OF FACT

1. Video Software & Production Center, Inc. (hereinafter "VSP"), 380 Walnut Street, Yonkers, New York 10701, 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>
September 1, 1979 through December 31, 1979	\$ 7,273.75
June 1, 1980 through December 31, 1980	9,179.25
January 1, 1981 through December 31, 1981	<u>10,918.90</u>
Total	<u><u>\$27,371.90</u></u>

2. On October 24, 1983, the Audit Division issued a Statement of Deficiency in conjunction with a Notice of Deficiency against petitioner Angelo Parisi 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 VSP for the aforesated periods. Such penalty was asserted on the grounds that petitioner was a person required to collect, truthfully account for and pay

documents was issued under the same date against petitioner Charles Bruner. The deficiency asserted therein and the Audit Division's grounds for asserting such deficiency were identical to those with respect to petitioner Angelo Parisi.

3. Prior to 1970, petitioners were employed as videotape operators by Video Flight, a wholly-owned subsidiary of Sony Corporation. In or about 1970, petitioners were notified by Sony Corporation of its intent to terminate the operations of Video Flight. Subsequently, petitioners, together with two other individuals, purchased Video Flight from Sony Corporation for a nominal fee and commenced operations **as** VSP.

4. Both petitioners were officers and shareholders of VSP. Angelo Parisi held the office of Vice President and Charles Bruner held the office of Treasurer. The other two officers and shareholders of VSP involved in the purchase were Kenneth Wise, who held the office of President, and John San Pietro, who held the office of Secretary. Petitioners continued to function in their capacity as videotape operators for VSP. Mr. Wise, as President, hired and fired employees; signed tax returns and payroll checks of VPS; and determined which creditors were to be paid.

5. In early 1980, petitioners were advised by Mr. Wise that VSP was experiencing financial difficulties and in order to remedy the situation, he was going to retain the services of a financial consultant.

6. On April 18, 1980, VSP entered into an agreement with Edward J. Kreuter ("EJK"). Said agreement provided in pertinent part as follows:

"That for One Dollar (\$1.00) and other good and valuable consideration, VSP agrees to engage EJK as its Financial Consultant for a period of three years. However, the amount of time and the place of such consulting work shall be at the sole discretion of EJK.

VSP agrees to pay EJK, or his assign, a fee of Seven Hundred Dollars (\$700.00) per week for 156 consecutive weeks, to be paid weekly. Such fee, however, will be exclusive of tax shelters.

EJK further represents to VSP that he has other business interests and VSP hereby agrees to permit EJK to both make and receive telephone calls, as well as permit individuals to contact and visit him while on the premises of VSP, which would be for business purposes other than conducted for VSP.

VSP hereby gives to EJK, or his assign, an option to purchase for One Dollar (\$1.00), Twenty-Five Percent (25%) of the corporate stock of VIDEO SOFTWARE PRODUCTION CENTER, INC., VIDEO INNOVATIONS, INC. and a corporation to be named, that will hold good title to the property at 380 Walnut Street, Yonkers, New York.

The stock which EJK has an option to purchase will be endorsed in blank and escrowed to Reuben Blum, Esq., at 292 Madison Avenue, New York, N.Y., until such time as EJK executes his option.

The foregoing constitutes the only understanding and agreement between the parties hereto and cannot be changed or modified orally."

7. The aforestated agreement was executed by Edward J. Kreuter; VSP by Kenneth Wise, President; Video Innovations, Inc. by Kenneth Wise, President; and by the aforestated shareholders of VSP individually.

8. On July 22, 1980, VSP entered into an agreement with Inex Co., a sole proprietorship owned and operated by Edward J. Kreuter, for the purpose of borrowing \$140,000.00. Said agreement provided, in pertinent part, that:

"WHEREAS, BORROWER (VSP) desires to borrow the sum of One Hundred Forty Thousand (\$140,000.00) Dollars to BORROWER, pursuant to the terms and conditions hereinafter set forth; and

WHEREAS, GUARANTORS (shareholders of VSP) are willing to execute a joint, several and unconditional guaranty of the repayment of the loan to be made by LENDER (Inex Co.) to BORROWER, and BORROWER and GUARANTORS are willing to agree to the terms and conditions of this agreement, as hereinafter set forth,

NOW, THEREFORE, in consideration of Ten (\$10.00) Dollars and other valuable considerations, each to the other in hand paid by the parties hereto, receipt of which is hereby acknowledged it is agreed as follows:

FIRST: LENDER hereby lends to BORROWER the sum of One Hundred Forty Thousand (\$140,000.00) Dollars by the issuance and delivery to BORROWER, of LENDER's good check or checks, payable to BORROWER or BORROWER's designees, aggregating the foregoing amount. The term of the loan shall be for forty-five (45) days from the date of closing with interest at the rate of twenty-four (24%) percent per annum.

SECOND: (A) BORROWER agrees to repay the said loan to the LENDER on September 5, 1980, in the sum of \$144,200.00 consisting of \$140,000.00 in payment of principal together with accrued interest of \$4,200.00.

THIRD: KENNETH G. WISE, JOHN SAN PIETRO, ANGELA PARISI (sic), CHARLES BURNER (sic) and STANLEY ROSENBERG, the holders of all of the issued and outstanding shares of stock of BORROWER (the said persons hereinafter referred to in this paragraph THIRD as "PLEDGORS") hereby pledge to LENDER all of said shares of stock, and PLEDGORS do hereby assign, set over and transfer said shares of stock to LENDER, and hereby appoint LENDER their true and lawful attorney, to hold said shares of stock subject to the following terms and conditions:

a) PLEDGORS hereby deliver all of said shares of stock to LENDER accompanied by appropriate stock transfer powers duly executed in blank with tax transfer stamps attached.

(b) LENDER shall hold the said shares of stock as security for the repayment of the aforescribed loan pursuant to the terms and conditions of the aforementioned promissory note, by BORROWER or by GUARANTORS in accordance with their guaranty, and LENDER shall not, at any time, dispose of such stock or encumber same except as herein otherwise provided.

(c) PLEDGORS herewith deliver their resignations as officers, directors and stockholders of the BORROWER.

(d) While LENDER is the holder of the said stock, PLEDGORS shall have the right to vote the same at meetings of the stockholders so long as BORROWER shall not have received notice of default in the performance of any of the terms of this agreement or of the payment of the principal or interest of the said promissory note and for that purpose LENDER shall execute any and all proxies in favor of the PLEDGORS that may be required, upon PLEDGORS' request. PLEDGORS, however, agree that they shall in no event vote said shares of stock so as to enhance or change the capitalization of BORROWER, without prior written consent of the LENDER.

(e) Upon the repayment of the entire amount of the loan and interest as herein provided, LENDER shall re-transfer to PLEDGORS the shares of stock herein pledged.

The PLEDGORS agree that said stock certificates, the subject of this transaction, shall be held in escrow by LENDER.

by the promissory note hereinabove described is due and outstanding, as collateral security for the payment of said debt and/or obligation. The PLEDGORS agree that they shall execute any and all documents and agreements reasonably required to effectuate the intent of this provision. Said escrow shall continue until such time as the promissory note of the BORROWER is paid in full. In the event that BORROWER or GUARANTORS shall fail to perform any of the terms of this agreement or to make payment of the principal or interest of the aforementioned promissory note or therein required, or shall otherwise be in default of this agreement, the Escrowee shall turn over the said certificates of shares and endorsements in blank to the Seller or his assigns, as the same may be. The agreement shall further provide that the Escrowee shall not be accountable or liable unless his actions are fraudulent or constitute gross negligence. The PLEDGORS agree not to issue any further and/or additional shares of said Corporation's Stock of any class, until the debt secured thereby is paid. Upon default the LENDER shall have the right at its sole discretion to retain ownership of said shares of stock or to sell any or all of the shares of stock herein mentioned in such manner and for such prices as LENDER may determine. In the event that the proceeds of any such sale are not sufficient to pay the said loan and interest together with expenses of such sale, then GUARANTORS shall remain liable to the LENDER for any deficiency.

FOURTH: The proceeds of this loan shall be used by BORROWER for working capital in connection with its business."

9. Pursuant to said agreement, the officers, directors and shareholders of VSP were as follows:

KENNETH G. WISE	President, Director 23 1/2 shares capital stock
JOHN SAN PIETRO	Secretary, Director 23 1/2 shares capital stock
ANGELO PARISI	Vice-president 23 1/2 shares capital stock
CHARLES BURNER (sic)	Treasurer 23 1/2 shares capital stock
STANLEY ROSENBERG	6 shares capital stock

10. Said agreement was executed by Kenneth G. Wise, President for VSP; Edward J. Kreuter for Inex Co.; and the aforestated shareholders of VSP individually.

11. Pursuant to the terms of the July 22, 1980 agreement, petitioners transferred their stock to Inex Co. and tendered their resignations as officers of VSP. However, they continued to render salaried services in their capacity as vidotape operators.

12. VSP ultimately defaulted on the \$140,000.00 loan in September, 1980. Accordingly, Mr. Kreuter assumed full control of VSP at that time.

13. Petitioners contended that Edward J. Kreuter was the sole person responsible for the collection and payment of the withholding taxes at issue commencing April 18, 1980 and that Kenneth Wise, President of VSP, was the sole person responsible for such taxes prior to said date.

#### 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."

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 petitioner Angleo Parisi was not a person responsible for the collection and payment of withholding taxes of VSP for any of the periods at issue herein. Accordingly, the penalty asserted against him pursuant to section 685(g) of the Tax Law is cancelled.

D. That petitioner Charles Bruner was not a person responsible for the collection and payment of withholding taxes of VSP for any of the periods at issue herein. Accordingly, the penalty asserted against him pursuant to section 685(g) of the Tax Law is cancelled.

E. That the petition of Angelo Parisi is granted and the Notice of Deficiency issued against him on October 24, 1983 is cancelled.

F. That the petition of Charles Bruner is granted and the Notice of Deficiency issued against him on October 24, 1983 is cancelled.

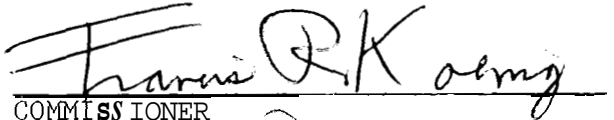
DATED: Albany, New York

STATE TAX COMMISSION


JAN 17 1986



PRESIDENT



COMMISSIONER



COMMISSIONER