

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition

of

KENNETH WISE

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

In the Matter of the Petition

of

JOHN SAN PIETRO

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.

Petitioners, Kenneth Wise, 314 Sharon Avenue, Staten Island, New York 10301, and John San Pietro, 191 Frost Street, Brooklyn, New York 11211, 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. 49953 and 49952).

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 13, 1986 at 10:45 A.M. Petitioners appeared by Charles Jacobson, **Esq.** The Audit Division appeared by John P. Dugan, **Esq.** (Herbert Kamrass, **Esq.**, of counsel).

ISSUES

I. Whether petitioner Kenneth Wise 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.

11. Whether petitioner John San Pietro 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>\$27,371.90</u>

2. On October 24, 1983, the Audit Division issued a Statement of Deficiency in conjunction with a Notice of Deficiency against petitioner Kenneth Wise 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 Kenneth Wise was a person required to collect, truthfully account for and pay over **said**

taxes, and that he willfully failed to do so. A similar set of documents was issued on the same date against petitioner John San Pietro. The deficiency asserted therein and the Audit Division's grounds for asserting such deficiency were identical to those with respect to petitioner Kenneth Wise.

3. Both petitioners were officers and shareholders of VSP. Kenneth Wise held the office of president and John San Pietro held the office of secretary. Each petitioner was a director and each held approximately 25% of the stock in VSP,

4. As president, Kenneth Wise was solely responsible for the financial affairs of VSP. He was an authorized signatory on the bank accounts of VSP and he signed corporate and other tax returns. Petitioner John San Pietro was also an authorized signatory.

5. In early 1980, VSP was experiencing financial difficulties. In order to remedy the situation VSP retained the services of a financial consultant.

6. On April 18, 1980, VSP entered into an agreement with one 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 Rueben [sic] 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 other shareholders of VSP individually,

8. At the time of Mr. Kreuter's association with VSP he assumed full control of VSP's financial and business affairs, including the payment of taxes.

9. Petitioners contended that Mr. Kreuter took control of VSP prior to execution of the aforestated agreement. However, no documentation was submitted to support such contention.

10. Petitioners testified that during the periods at issue Mr. Kreuter advised them that the withholding taxes at issue were being paid.

11. On July 22, 1980, each petitioner executed a document wherein he resigned as an officer and director of VSP. Said resignations were effective "on the date that I cease to be a stockholder of the Corporation pursuant to a Loan Agreement of even date herewith".

12. Petitioners continued performing services for VSP until December 31, 1981.

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 petitioner Kenneth Wise was a person responsible for the collection and payment of withholding taxes of **VSP** for the periods September 1, 1979 through December 31, 1979 and June 1, 1980 through July 21, 1980. Accordingly, the penalty asserted against him for said periods is sustained.

D. That petitioner Kenneth Wise was not a person responsible for the collection and payment of withholding taxes of **VSP** for the periods July 22, 1980 through December 31, 1980 and January 1, 1981 through December 31, 1981. Accordingly, the penalty asserted against him for said periods is cancelled.

E. That the petition of Kenneth Wise 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 Audit Division is hereby directed to modify the Notice of Deficiency issued against petitioner Kenneth Wise on October 24, 1983 so as to be consistent with the decision rendered herein.


G. That petitioner John San Pietro 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.

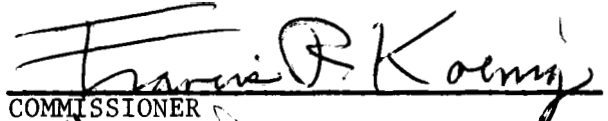
H. That the petition of John San Pietro is granted and the Notice of Deficiency issued against him on October 24, 1983 is cancelled.


DATED: Albany, New York

STATE TAX COMMISSION

DEC 23 1986


PRESIDENT


COMMISSIONER


COMMISSIONER