

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter **of** the Petition
of

WILLIAM **G.** VAN DEWEGHE

DECISION

for Redetermination of a Deficiency or for
Refund of Personal Income Tax under Article **22**
of the TaxLaw for the Year 1975.

Petitioner, William G. Van DeWeghe, 886 Peck Road, Hilton, New York 14468, filed a petition for redetermination of a deficiency or for refund of personal income tax under Article **22** of the Tax Caw for the year 1975 (File No. 51183).

A formal hearing was held before Timothy Alston, Hearing Officer, at the offices of the State Tax Commission, 259 Monroe Avenue, Rochester, New York, on September **15, 1986** at 1:15 P.M. Petitioner appeared by Michael A. Rose, **Esq.** The Audit Division appeared by **John P.** Dugan, **Esq.** (James Della Porta, **Esq.**, of counsel) ■

ISSUES

I. Whether the Tax Commission has jurisdiction to conduct a hearing and render a decision herein.

II. Whether the Notice of Deficiency herein **is** barred by the relevant Statute of Limitations.

III. Whether the issuance of the Notice of Deficiency herein was premised upon a factual basis.

IV. Whether petitioner was a person required to collect, truthfully account for any pay over withholding taxes on behalf of Dutchman's Bar & Grill, Inc., and whether petitioner willfully failed to **do so**.

FINDINGS OF FACT

1. On November 28, 1983, the Audit Division issued to petitioner, William G. Van DeWeghe, a Notice of Deficiency asserting penalty of \$1,200.40 for the year 1975 pursuant to section 685(g) of the Tax Law. The notice was premised upon the Audit Division's assertion that petitioner was a responsible officer of Dutchman's Bar & Grill, Inc. ("the corporation") during the year at issue and that the corporation had failed to pay over to the Audit Division \$1,200.40 in New York personal income taxes withheld from its employees during that year.

2. The Audit Division's records revealed that the corporation did not file returns for income tax withheld (Form IT-2101) for the year 1975. The corporation did file a reconciliation of income tax withheld (Form IT-2103) for the year at issue, which indicated that the corporation had withheld \$1,200.40 in income tax for 1975. The corporation did not remit any part of the \$1,200.40 which it had withheld during the year.

3. The corporation's filed franchise tax report for 1975, signed on the corporation's behalf by Richard Neitz, listed petitioner as its president and treasurer. The report indicated that Mr. Neitz was the corporation's vice-president. The corporation's filed franchise tax report for 1976 indicated that petitioner had resigned as of June 30, 1976.

4. In June 1974 petitioner and Richard Neitz formed Dutchman's Bar & Grill, Inc., and in July 1974 the corporation commenced operation of a bar located at 7 Main Street, Hilton, New York. Both petitioner and Mr. Neitz were 50 percent shareholders of the corporation at its inception and also jointly operated the business. Petitioner held the titles of president and treasurer and Mr. Neitz held the titles of vice president and secretary at the corporation's

5. Both petitioner and Mr. Neitz were also employees of the corporation from the time it began doing business. The two shared bartending duties and divided other duties, with petitioner handling maintenance and Mr. Neitz handling the corporation's bookkeeping and tax matters. Petitioner and Mr. Neitz each had authority to sign checks on the corporation's behalf. Petitioner also had authority, along with Mr. Neitz, to hire other employees, although Mr. Neitz took care of firing employees. At all times during his association with the corporation petitioner had access to the corporation's books and records.

6. Petitioner did not deny that he was a responsible officer of the corporation from its inception through April or May of 1975. Petitioner contended that he terminated his relationship with the corporation at that time, although he was uncertain of which month, and that he subsequently obtained employment elsewhere. Petitioner contended that he had submitted a letter of resignation to the corporation's attorney at the time of his separation from the corporation. Neither an original nor a copy of any such letter was produced at the hearing. Petitioner also failed to produce any documentation regarding his employment subsequent to his departure from the corporation, such as income tax returns or W-2 forms, which documentation might establish when petitioner terminated his relationship with the corporation.

CONCLUSIONS OF LAW

A. That during the year at issue, section 685(g) of the Tax Law provided, in pertinent part, the following:

"Willful failure to collect and pay over tax. - 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 penalties asserted pursuant to section 685(g) of the Tax Law are "separate and independent of the corporate liability for the unpaid withholding taxes." (Matter of Yellin v. State Tax Commission, 81 AD2d 196, 198.) According: the Commission has jurisdiction to determine petitioner's liability herein, regardless of whether or not the corporation had filed a correct return for the period at issue. In this regard it **is** noted that the corporation herein did not file a return for the year at issue; for the reconciliation form (Form IT-2103) which was filed does not constitute a return for purposes **of** section 685(a) of the Tax Law (see Matter of Ronald Talbot, State Tax Commission, April 23 1982).

C. That the assertion of penalty pursuant to section 685(g) of the Tax Law **is** not limited by the three year period set forth **in** section 683 of the Tax Law and a notice of deficiency issued pursuant to section 685(g) **is** not subject to any period **of** limitations in the Tax Law (see Matter of Wolfstitch v. State Tax Commission 106 AD2d 745, 747). Accordingly, the Notice **of** Deficiency herein was timely issued. Moreover, it **is** noted that the corporation did not file a return for the year at issue (Conclusion **of** Law **B"**). Consequently, even if the Notice of Deficiency herein were subject to the 3 year period of limitations set forth in section 683, section 683(c) (1)(A) **of** the Tax Law would allow issuance **of** a Notice of Deficiency at any time.

D. That the issuance of a Notice of Deficiency must be premised upon a factual basis (see Matter of Joseph and Jeannette Friedberg, State Tax Commission, January 3, 1983). In view **of** Findings **of** Fact "2" and "3", the Audit Division had such a factual basis.

E. 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."


F. That petitioner has not sustained his burden of proof imposed under section 689(e) of the Tax Law to show that he was not a person required to collect, truthfully account for, and pay over the withholding taxes of Dutchman's Bar & Grill, Inc. **for** the year at **issue** and who willfully failed to do so. In this regard **it** is noted that petitioner failed to submit any documentary evidence in support of his position.


G. That the petition of ~~Wim~~ Van DeWeghe **is** in all respects denied and the Notice of Deficiency issued November 28, 1983 **is** sustained.

DATED: Albany, New York

STATE **TAX** COMMISSION

FEB 10 1987


PRESIDENT


COMMISSIONER


COMMISSIONER