

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition

of

BRUCE PETERS

DECISION

for Redetermination of a Deficiency or for
Refund **of** Personal Income Tax under Article 22 :
of the Tax Law for the Periods April 16, 1980
through December 31, 1980 and April 1, 1981
through December 31, 1981.

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Petitioner, Bruce Peters, 191 East 76th Street, New York, New York 10021, filed a petition for redetermination of a deficiency or for refund of personal income tax under Article 22 of the Tax Law for the periods April 16, 1980 through December 31, 1980 and April 1, 1981 through December 31, 1981 (File No. 55787).

A hearing was held before Brian L. Friedman, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, **on** February 25, 1987 at 1:15 P.M., with all briefs to be submitted by June 1, 1987. Petitioner appeared by David H. Singer, Esq. The Audit Division appeared by John P. Dugan, Esq. (AngeloA. Scopellito, Esq., of counsel).

ISSUE

Whether petitioner was a person required to collect, truthfully account for and pay over withholding taxes with respect to Probe Personnel Consultants, Inc. for the periods April 16, 1980 through December **31**, 1980 and April 1, 1981 through December 31, 1981 and willfully failed to do **so**, thereby becoming liable for a penalty imposed pursuant to section 685(g) of the Tax Law.

FINDINGS OF FACT

1. On June 25, 1984, the Audit Division issued a Statement of Deficiency and Notice of Deficiency asserting a penalty pursuant to section 685(g) of the Tax Law against petitioner, Bruce Peters, as a person required to collect, truthfully account for and pay over withholding taxes of Probe Personnel Consultants, Inc. (hereinafter "PPC") in the amount of \$23,209.22 for the period April 16, 1980 through December 31, 1980 and in the amount of \$41,689.22 for the period April 1, 1981 through December 31, 1981, for a total due of \$64,898.44.

2. In 1974, petitioner and Richard DeLorenzo formed PPC, a management recruiting corporation. Each contributed \$5,000.00. Petitioner became the president and Mr. DeLorenzo was the vice-president. Petitioner's duties were to train employees and to generate income for PPC by putting together placement deals, i.e., locating candidates and placing them with companies who were in need of their services. Petitioner had the authority to hire and fire employees, Mr. DeLorenzo was responsible for the financial operations of the business, i.e., sending out billings, paying corporate obligations, preparing and signing tax returns and signing checks. Mr. DeLorenzo had no employees under his immediate supervision.

3. When PPC commenced doing business, its offices were located at 101 Park Avenue in New York City. PPC had one employee (in addition to its two officers) in 1974, but added approximately one employee per year through 1980. In addition, PPC's business had improved to such an extent that, in 1980, its offices were moved to 230 Park Avenue, a location which contained approximately three times the square footage of its previous location. Petitioner's salary

in 1974 was \$75.00 per week, but, by 1981, petitioner and Mr. DeLorenzo were each earning an annual salary of \$71,000.00.

4. PPC's receptionist received and sorted the incoming mail. All resumes and correspondence relating to executive placement were directed to petitioner. All bills, bank statements, tax return information and all mail addressed to PPC which was not addressed to any particular individual was directed to Mr. DeLorenzo.

5. In 1980, Mr. DeLorenzo began taking several hours for lunch and frequently returned to the office in an intoxicated condition. He would absent himself from work for two to three days at a time. During that year there were some occasions when petitioner signed payroll checks due to the absence of Mr. DeLorenzo. Although he was an authorized signatory of corporate checks, petitioner signed only these payroll checks. He determined each employee's paycheck by referring to previous paychecks and not by an examination of the employee's withholding declarations.

6. In September or October of 1981, petitioner became aware that Mr. DeLorenzo had charged personal trips and purchases on corporate credit cards. He thereupon contacted PPC's accountant who informed him that PPC had many outstanding debts. Previously, the said accountant had been working with Mr. DeLorenzo. When petitioner confronted Mr. DeLorenzo, he was told that everything would be taken care of. Petitioner's response to PPC's financial situation was to work longer hours in an attempt to generate more income to pay the corporate obligations. Early in 1982, PPC was served with an eviction notice and had its telephone service disconnected. At that time, petitioner learned that Mr. DeLorenzo had entered into a payment arrangement with the Internal Revenue Service which Mr. DeLorenzo subsequently breached. In April

of 1982, petitioner left PPC to start a new business. He took none of the financial records of PPC with him. In June of 1982, petitioner commenced a lawsuit against Mr. DeLorenzo in Supreme Court, County of New York, in which he sought the removal of Mr. DeLorenzo as a director and officer of PPC by reason of gross misconduct in connection with his management of and service to the corporation. Litigation was subsequently discontinued when Mr. DeLorenzo disappeared.

7.. Petitioner contends that he did not become aware that PPC was in any financial difficulty until September or October of 1981. He further contends that it was not until 1982 that he learned that PPC had failed to pay over withholding taxes.

CONCLUSIONS OF LAW

A. 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** the tax evaded, or not collected, or not accounted for and paid over."

B. That section 685(n) of the Tax Law defines the term "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."

C. 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**

Other relevant factors include the amount of stock petitioner held, the actual sphere of his duties and his authority to pay corporate obligations and/or exercise authority over the assets of the corporation. (Matter of Amengual v. State Tax Commn., 95 AD2d 949 [3d Dept 1983]; McHugh v. State Tax Commn., 70 AD2d 987 [3d Dept 1979].) 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 [citation omitted]." (Matter of Ragonesi v. New York State Tax Commn 88 AD2d 707, 707-708 [3d Dept 1982].)

D. That with respect to Probe Personnel Consultants, Inc., petitioner was an officer and fifty percent shareholder, possessed the authority to sign corporate checks and to hire and fire employees and derived a substantial portion of his income from the corporation. He was not relieved of his obligations and responsibilities with respect to the collection and payment of withholding taxes by virtue of his choice to leave the financial management decisions to Mr. DeLorenzo. "[C]orporate officials responsible as fiduciaries for tax revenues cannot absolve themselves merely by disregarding their duty and leaving it **to** someone else to discharge (citation omitted)." (Matter of Ragonesi v. New York State Tax Commn., supra.) He was, therefore, a person required to collect, truthfully account for and pay over withholding taxes of Probe Personnel Consultants, Inc. for the periods at issue.

E. That petitioner has not sustained his burden of proof, imposed pursuant **to section 689(e) of the Tax Law, to show that his failure to collect, truthfully account for and pay over withholding taxes of Probe Personnel Consultants, Inc. was not willful.** PPC was a small corporation. The offices of petitioner and

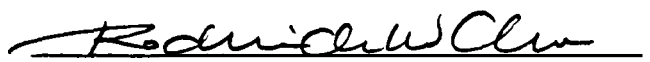
Mr. DeLorenzo were in close proximity. The conduct of Mr. DeLorenzo, commencing in 1980, which resulted in frequent absences from work and neglect of duties should have alerted petitioner that corporate obligations were not being satisfied. Petitioner admits that, in September or October of 1981, he became aware that the corporation was in financial difficulty, but he made no attempt to ascertain the extent of such difficulty even though he was the president and a fifty percent shareholder. His decision to leave the entire financial responsibility to Mr. DeLorenzo was a voluntary one and such decision does not absolve him of his responsibility for collecting, truthfully accounting for and paying over withholding taxes of PPC for the periods at issue. In Capoccia v. New York State Tax Comn., (105 AD2d 528 [3d Dept 1984]) the Court held that the contention of the president and principal shareholder of a small corporation that he concerned himself only with the corporation's field operations and did not understand the corporation's books and records, the maintenance of which was the function of the corporate secretary - treasurer, did not preclude the Tax Commission's finding that the president's management of withholding taxes due from the corporation was "willful" within the meaning of the Tax Law.

F. That the petition of Bruce Peters is denied and the Notice of Deficiency issued June 25, 1984 is sustained.

DATED: Albany, New York

STATE TAX COMMISSION

AUG 14 1987


PRESIDENT


COMMISSIONER


COMMISSIONER