

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition

of

DARYL SQUIRES

DECISION

:

for Redetermination of a Deficiency or for
Refund of Personal Income Tax under Article
22 of the Tax Law for the Years 1981 through
1984.

Petitioner, Daryl Squires, 1060 Argo Boulevard, Schenectady, New York
12303, filed a petition for redetermination of a deficiency or for refund of
personal income tax under Article 22 of the Tax Law for the years 1981 through
1984 (File No. 58711).

A hearing was held before Arthur Bray, Hearing Officer, at the offices of
the State Tax Commission, W.A. Harriman State Office Campus, Albany, New York on
October 22, 1986 at 9:15 A.M. Petitioner appeared by Harvey & Harvey, Mumsford
& Kingsley (William J. Dreyer, Esq., of counsel). The Audit Division appeared
by John P. Dugan, Esq. (Thomas C. Sacca, Esq., of counsel).

ISSUE

Whether petitioner is liable for the penalty asserted against her pursuant
to section 685(g) of the Tax Law with respect to New York State withholding
taxes due from V.A.P. **Masons** and Contractors, Inc.

FINDINGS OF FACT

1. V.A.P. **Masons** and Contractors, Inc. ("V.A.P.") failed to pay New York
State personal income tax withheld from the wages of its employees as follows:

<u>Withholding Tax Period</u>	<u>Amount</u>
April 8, 1981 - June 30, 1981	\$ 2,215.53
October 1, 1982 - December 31, 1982	14,406.40
July 1, 1983 - December 31, 1983	12,792.80
January 1, 1984 - March 31, 1984	<u>757.50</u>
Total	\$30,172.23

2. On December 17, 1984, the Audit Division issued a Notice of Deficiency and Statement of Deficiency to Daryl Squires asserting a penalty equal to the amount **of** unpaid withholding tax due from V.A.P.

3. Petitioner graduated from a high school in Schenectady, New York. Thereafter **she** began working for the New York State Department of Labor as a typist. Petitioner's employment as a typist lasted for a couple of years.

4. V.A.P. was a construction company formed **in** 1979 by petitioner's father, Thomas J. Picozzi. The company engaged in masonry activity involving brick and stone. The office was located in a converted garage that was in back of Mr. Picozzi's home.

5. In **or** about 1980, petitioner began working for V.A.P. **on** a part-time basis. Petitioner would work for approximately three or four hours each day. Her duties consisted **of** answering the telephone, filing mail and preparing payroll forms. Petitioner was the only employee who worked exclusively in the office. In addition, it was Mr. Picozzi's practice to spend **a** couple of hours in the office each morning and then proceed to job sites.

6. At the time petitioner began working for V.A.P. she believed she was a secretary and employed to perform basic office duties.

7. Petitioner had the authority to sign checks on V.A.P.'s checking account. Periodically the company foreman would either telephone or appear **in** person at the office to advise petitioner of **the hours which the company's**

the wage rate, subtract deductions and draft a check to each employee for the net pay.

8. Petitioner was authorized to prepare payroll checks because many times her father was unavailable. Therefore, petitioner would sign the checks to insure that the payroll was prepared in a timely manner. After the payroll checks were prepared and signed, petitioner's father would usually examine and disburse them.

9. When Mr. Picozzi was in the office, he would normally sign the checks to suppliers.

10. On occasion, when petitioner went to the office she would find a list, prepared by her father, of checks she was expected to draft. On other occasions, her father would give her instructions over the telephone with respect to checks. Petitioner did not have any authority with respect to which creditors would be paid and, therefore, never wrote a check on the V.A.P. checking account that was not authorized or directed by her father.

11. In or about the beginning of 1981, petitioner and her husband separated. Thereafter, she began working full time for V.A.P. in order to provide support for her son and herself.

12, As a part-time employee, petitioner received a salary of \$40.00 a week. As a full-time employee she received a salary of approximately \$120.00 a week.

13. As a full-time employee, petitioner continued to perform the same duties she had previously performed as a part-time employee.

14. She did not have any contact with the employees who were located outside of the office, did not hire and fire employees and did not exercise any

15. Petitioner held the office of secretary of V.A.P. She first learned that she was the secretary of V.A.P. when she was asked to **sign** a resolution in 1984 enabling V.A.P. to file for bankruptcy.

16. As secretary of the corporation, petitioner never attended a board of directors meeting or meeting of shareholders. Moreover, she never saw the corporation's records.

17. Petitioner did not have any functions with respect to the preparation or signing of tax returns for V.A.P.

18. The New York State withholding tax returns were prepared by **Mr.** Picozzi's accountant and signed by **Mr.** Picozzi. **Mr.** Picozzi would sign the checks when such checks were sent. Petitioner did not know that taxes which were withheld were not paid over.

CONCLUSIONS OF LAW

A. That where a person **is** required to collect, truthfully account for and pay over withholding taxes and willfully fails to collect and pay over such taxes, 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. --

B. 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.., who as such officer, employee, or member is under a duty to perform the act **in** respect of which the violation occurs. "

C. That factors relevant to the determination of whether petitioner was a person required to collect, truthfully account for and pay over withholding taxes during the period **in** issue include whether the individual **signed** the

company's tax returns and possessed the **right** to hire and fire employees (Matter of Amengual v. State Tax Commn., 95 AD2d 949, 950; Matter of Malkin v. Tully, 65 AD2d 228). Other factors considered are the amount of stock owned, the authority to pay corporate obligations and the individual's official duties (Matter of Amengual v. State Tax Commn., *supra*).


D. That in view of the fact that petitioner had only ministerial duties and did not have the authority to direct the payment of corporate obligations, petitioner was not a person required to collect, truthfully account for and pay over withholding taxes within the meaning of section 685(g) of the Tax Law.

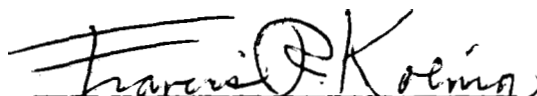
E. That the petition of Daryl Squires **is** granted and the Notice of Deficiency, issued December 17, 1984, **is** cancelled.


DATED: Albany, New York

STATE TAX COMMISSION

FEB 24 1987


PRESIDENT


COMMISSIONER


COMMISSIONER