

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition	:	
of	:	
David B. Amster	:	AFFIDAVIT OF MAILING
for Redetermination of a Deficiency or a Revision	:	
of a Determination or a Refund of Personal Income	:	
Tax under Article 22 of the Tax Law for the Year	:	
1976.	:	

State of New York
County of Albany

Jay Vredenburg, being duly sworn, deposes and says that he is an employee of the Department of Taxation and Finance, over 18 years of age, and that on the 29th day of December, 1982, he served the within notice of Decision by certified mail upon David B. Amster, the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

David B. Amster
41 Douglas Dr.
Enfield, CT 06082

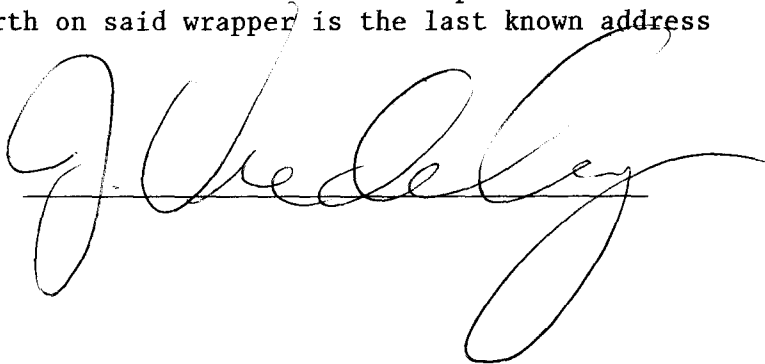
and by depositing same enclosed in a postpaid properly addressed wrapper in a (post office or official depository) under the exclusive care and custody of the United States Postal Service within the State of New York.

That deponent further says that the said addressee is the petitioner herein and that the address set forth on said wrapper is the last known address of the petitioner.

Sworn to before me this
29th day of December, 1982.

Kathy Pappas

AUTHORIZED TO ADMINISTER
OATHS PURSUANT TO TAX LAW
SECTION 174



STATE OF NEW YORK
STATE TAX COMMISSION
ALBANY, NEW YORK 12227

December 29, 1982

David B. Amster
41 Douglas Dr.
Enfield, CT 06082

Dear Mr. Amster:

Please take notice of the Decision of the State Tax Commission enclosed herewith.

You have now exhausted your right of review at the administrative level. Pursuant to section(s) 690 of the Tax Law, any proceeding in court to review an adverse decision by the State Tax Commission can only be instituted under Article 78 of the Civil Practice Laws and Rules, and must be commenced in the Supreme Court of the State of New York, Albany County, within 4 months from the date of this notice.

Inquiries concerning the computation of tax due or refund allowed in accordance with this decision may be addressed to:

NYS Dept. Taxation and Finance
Law Bureau - Litigation Unit
Albany, New York 12227
Phone # (518) 457-2070

Very truly yours,

STATE TAX COMMISSION

cc: Petitioner's Representative

Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition	:	
of	:	
DAVID B. AMSTER	:	DECISION
for Redetermination of a Deficiency or for	:	
Refund of Personal Income Tax under Article 22	:	
of the Tax Law for the Year 1976.	:	

Petitioner, David B. Amster, 41 Douglas Drive, Enfield, Connecticut 06082, filed a petition for redetermination of a deficiency or for refund of personal income tax under Article 22 of the Tax Law for the year 1976 (File No. 26173).

A small claims hearing was held before James Hoefer, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on May 19, 1982 at 2:45 P.M. Petitioner appeared pro se. The Audit Division appeared by Paul B. Coburn, Esq. (William Fox, Esq., of counsel).

ISSUE

Whether petitioner, David B. Amster, is liable for a penalty equal in amount to the unpaid New York State withholding taxes due from National Profit Planners, Inc.

FINDINGS OF FACT

1. On January 29, 1979, the Audit Division issued a Notice of Deficiency to petitioner, imposing a penalty, under section 685(g) of the Tax Law, in an amount equal to the unpaid withholding taxes due from National Profit Planners, Inc. (hereinafter "NPPI"), for the period October 1, 1976 to December 31, 1976. Said Notice was issued on the grounds that petitioner was a person required to collect, truthfully account for and pay over the New York State withholding

taxes of NPPI and that he willfully failed to do so. The total penalty asserted due in the Notice of Deficiency amounted to \$1,625.70.

2. Prior to the period at issue, petitioner and one David Basem were equal partners and the sole shareholders, officers and directors of NPPI. In August, 1976, petitioner and Mr. Basem's business relationship deteriorated due to irreconcilable differences of opinion. The two partners worked out a verbal agreement, effective on or about October 1, 1976, whereby Mr. Basem bought petitioner's interest in NPPI.

3. Pursuant to the aforementioned verbal agreement, petitioner severed his relationship with NPPI effective on or about October 1, 1976. After this date, petitioner had no authority to sign NPPI checks, did not direct payment of creditors, did not hire or fire employees and was not active in the day-to-day business affairs of NPPI. After October 1, 1976, petitioner was involved on a full-time basis in the development of his own company which was incorporated on October 29, 1976.

4. The verbal agreement dissolving petitioner's relationship with Mr. Basem and NPPI was reduced to written form in an agreement dated December 28, 1976. Petitioner testified that the written agreement was not signed until December 28, 1976 due to the complexities of the dissolution and the fact that the attorneys representing himself and Mr. Basem were slow and methodical. Said testimony is found to be credible.

5. The Internal Revenue Service found petitioner liable for the past due Federal withholding taxes of NPPI for the period January 1, 1976 to September 30, 1976. Petitioner was not assessed for any past due Federal withholding taxes of NPPI for periods subsequent to September 30, 1976.

CONCLUSIONS OF LAW

A. That in determining whether petitioner is liable for the penalty asserted against him pursuant to subdivision (g) of section 685 of the Tax Law, the threshold question is whether he was a person required to collect, truthfully account for and pay over taxes withheld from the wages of employees of NPPI. Section 685(n). Relevant factors include whether petitioner signed tax returns, derived a substantial portion of his income from the corporation and exercised authority over the employees and assets of the corporation. Matter of MacLean v. State Tax Commission, 69 A.D.2d 951, affd., 49 N.Y.2d 920 (1980); Matter of McHugh v. State Tax Commission, 70 A.D.2d 987 (1979); Matter of Malkin v. Tully, 65 A.D.2d 228 (1978).

B. That during the period in question, petitioner was not an officer or employee of NPPI, could not sign corporate checks, did not hire or fire employees, could not direct or control payments to creditors and was not involved in the day-to-day affairs of NPPI. That petitioner has established by a fair preponderance of all the evidence that he was not a person required to collect and pay over the past due New York State withholding taxes of NPPI for the period October 1, 1976 to December 31, 1976.

C. That the petition of David B. Amster is granted and the Notice of Deficiency dated January 29, 1979 is cancelled.

DATED: Albany, New York

DEC 29 1982

STATE TAX COMMISSION

ACTING

PRESIDENT

COMMISSIONER

COMMISSIONER