

STATE OF NEW YORK

STATE TAX COMMISSION

\_\_\_\_\_  
In the Matter of the Petition :  
of :  
Harry Nappi, Jr. :  
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. :  
\_\_\_\_\_ :

AFFIDAVIT OF MAILING

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 5th day of May, 1982, he served the within notice of Decision by certified mail upon Harry Nappi, Jr., the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

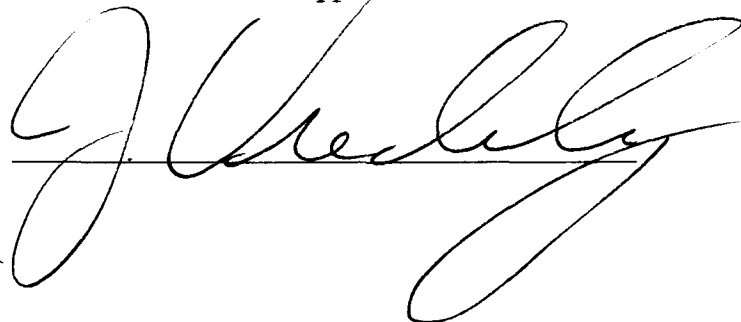
Harry Nappi, Jr.  
34 Executive Drive  
Hauppauge, NY 11787

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  
5th day of May, 1982.





STATE OF NEW YORK  
STATE TAX COMMISSION

In the Matter of the Petition :  
of :  
Harry Nappi, Jr. :

AFFIDAVIT OF MAILING

for Redetermination of a Deficiency or a Revision :  
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Tax under Article 22 of the Tax Law for the Year :  
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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 5th day of May, 1982, he served the within notice of Decision by certified mail upon Burton Cohen the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Burton Cohen  
535 Fifth Ave.  
New York, NY 10017

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 representative of the petitioner herein and that the address set forth on said wrapper is the last known address of the representative of the petitioner.

Sworn to before me this  
5th day of May, 1982.

*James A. Hapland*

*J. Vredenburg*

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

May 5, 1982

Harry Nappi, Jr.  
34 Executive Drive  
Hauppauge, NY 11787

Dear Mr. Nappi:

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  
Burton Cohen  
535 Fifth Ave.  
New York, NY 10017  
Taxing Bureau's Representative

## STATE TAX COMMISSION

for Redetermination of a Deficiency or for  
Refund of Personal Income Tax under Article 22 :  
of the Tax Law for the Year 1976.

## DECISION

A formal hearing was held before Arthur Bray, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on April 29, 1981 at 2:45 P.M. Petitioner appeared by Burton Cohen, Esq. The Audit Division appeared by Ralph J. Vecchio, Esq. (Angelo A. Scopellito, Esq., of counsel).

1. Shorterm International, Inc. ("Shorterm") failed to pay New York State personal income tax withheld from the wages of its employees in the amount of \$11,878.32 for the period January 1, 1976 through September 30, 1976. The

Audit Division computed the amount of tax withheld based upon the withholding tax returns filed with the Department of Taxation and Finance. Six of the nine returns filed for the period in issue were signed by an assignee in bankruptcy.

2. On January 30, 1978, the Audit Division issued a Notice of Deficiency and Statement of Deficiency against petitioner asserting a penalty equal to the amount of unpaid New York State withholding tax due from Shorterm for the period January 1, 1976 through September 30, 1976.

3. Petitioner first became associated with Shorterm in February, 1973. Shorterm was a subsidiary of Short Loan and Mortgage Co., Ltd. of London, England ("Short Loan"). Initially, Short Loan owned 51 percent of Shorterm.

4. Shorterm was established primarily to trade in federal funds and secondarily to trade in the Eurodollar market. Shorterm would receive a brokerage commission for the services it rendered. Short Loan was a Eurodollar brokerage firm.

5. Shorterm was financed through a line of credit from the New York branch of National Westminster Bank Limited guaranteed by Short Loan. This line of credit was secured by certificates of deposit held in Short Loan's portfolio.

6. Petitioner owned 2,500 shares of Shorterm which constituted 25 percent of Shorterm's outstanding stock and had the title of president. Petitioner was also a director of Shorterm, although Shorterm never had a board of directors' meeting. As the president of Shorterm, petitioner signed checks, paid bills, signed tax returns, and hired and fired employees. Petitioner would consult with Short Loan insofar as the amount of expenditures were concerned because petitioner needed Short Loan's approval to draw down on the line of credit. In addition to his function as an office manager supervising the operation of

Shorterm, petitioner performed services as a broker of Eurodollars and federal funds.

7. The accounting services for Shorterm were performed by an accountant engaged by Short Loan. In addition to preparing Shorterm's tax returns, this accountant would prepare Shorterm's books and records and monthly financial reports. These monthly financial reports would be submitted to Short Loan. Shorterm also utilized the services of a bookkeeper who was hired by the accountant who had been engaged by Short Loan.

8. In the latter part of 1975 and the beginning of 1976, Shorterm began experiencing financial difficulties due to the prevailing money market conditions. As a result of these financial difficulties, Shorterm had to borrow money. Accordingly, a line of credit, guaranteed by Short Loan, was set up with National Westminster Bank Limited of New York on behalf of Shorterm.

9. Petitioner could not draw down on this line of credit with National Westminster Bank Limited on his own authority. When there were bills that had to be paid, petitioner would call the chairman of the board of Short Loan and apprise him of the details of every bill. Thereafter, petitioner would receive direction as to which bills were to be paid. In order for Shorterm to pay its bills, Short Loan would request National Westminster Bank Limited to credit Shorterm's checking account. In 1976, there was very little revenue coming into Shorterm and most of the funds used by Shorterm to pay its bills were those made available by Short Loan.

10. Petitioner never paid for the shares of Shorterm stock he received. In November, 1976 the shares of Shorterm stock owned by petitioner reverted back to Short Loan pursuant to Short Loan's demand. Short Loan sought to acquire Shorterm's stock in order for Short Loan to obtain certain favorable

tax treatment in the United Kingdom when Shorterm went out of business or was liquidated.

11. Petitioner was aware that taxes were being withheld from the employees of Shorterm and not being paid. Petitioner advised Short Loan that Shorterm had to borrow more money in order to pay the taxes due. Short Loan told petitioner to delay paying the taxes in the hope that Shorterm would eventually become more profitable and that eventually Short Loan would pay the taxes due. If petitioner had drawn a check to pay the taxes there would not have been sufficient funds for the checks to have been honored.

12. Mr. Robert Laidlaw, the chief financial officer of Short Loan, told petitioner on several occasions before Shorterm was liquidated that Short Loan would assume Shorterm's tax liability.

In a letter dated October 31, 1979, Short Loan advised petitioner that it would make a one time ex gratia payment of \$15,000 to assist petitioner in meeting federal and state tax assessments. This payment was expressly conditioned on petitioner's agreeing that Short Loan was not accepting liability and that Short Loan would not consider further assistance. In a check dated November 12, 1979, \$15,000 was paid to the Internal Revenue Service.

13. Petitioner's representative asserted at the hearing that Shorterm was taken over by a trustee in bankruptcy during a portion of the period in issue. No documents were submitted by petitioner either at or after the hearing to substantiate the date that the trustee in bankruptcy assumed control of Shorterm.

CONCLUSIONS OF LAW

A. That "...the question of whether or not someone is a "person" required to collect and pay over withholding taxes is a factual one. Factors determinative of the issue can include whether petitioner owned stock, signed the tax returns, or exercised authority over employees and the assets of the corporation (citations omitted)." Matter of McHugh v. State Tax Comm., 70 A.D.2d 987, 988).

B. That since petitioner was the president of Shorterm and had duties consisting of signing checks, paying bills, signing tax returns, hiring and firing employees, and supervising the operation of Shorterm, petitioner was a "person" within the meaning of Tax Law § 685(g).

C. That the term "willful" as used in the Tax Law §685(g) "...means an act, default, or conduct voluntarily done with knowledge that, as a result, trust funds belonging to the government will be used for other purposes (Matter of Levin v. Gallman, 42 NY2d 32)." (Matter of McHugh v. State Tax Comm., 70 A.D.2d 987,989). "Knowledge that withholding taxes have not been remitted and a failure to investigate or correct this mismanagement of corporate funds is enough to constitute willful conduct (citations omitted)."

(Matter of MacLean v. State Tax Comm., 69 A.D.2d 951, 952 aff'd. 49 N.Y.2d 920).

D. That since petitioner was aware that the withholding taxes due were not being paid, acquiesced in the decision to prefer other creditors over the obligation to pay the withholding taxes due, and failed to take action to correct the mismanagement of corporate funds, petitioner's action was "willful" within the meaning of Tax Law §685(g).



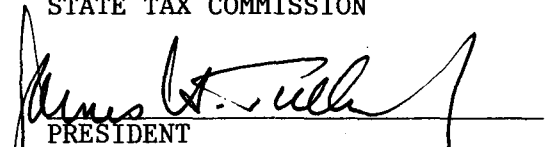
E. That in view of Finding of Fact "1", it is unnecessary to determine whether a penalty based upon an estimated amount of withholding tax may be asserted pursuant to Tax Law §685(g).

F. That the petition of Harry Nappi, Jr. is denied and the Notice of Deficiency dated January 30, 1978 is sustained.

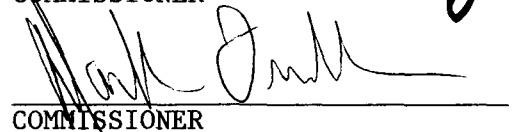
DATED: Albany, New York

MAY 05 1982

STATE TAX COMMISSION

  
PRESIDENT

  
COMMISSIONER

  
COMMISSIONER