

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition
of

Thomas W. Jackson

:

:

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 Years :
1970, 1971 & 1972.

State of New York
County of Albany

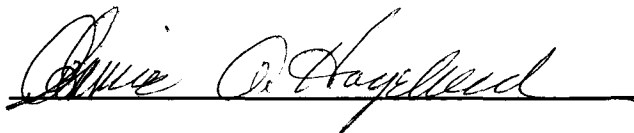
Connie Hagelund, being duly sworn, deposes and says that she is an employee of the Department of Taxation and Finance, over 18 years of age, and that on the 24th day of June, 1983, she served the within notice of Decision by certified mail upon Thomas W. Jackson, the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Thomas W. Jackson
300 Central Park West
New York, NY 10024

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
24th day of June, 1983.



AUTHORIZED TO ADMINISTER
OATHS PURSUANT TO TAX LAW
SECTION 174

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

June 24, 1983

Thomas W. Jackson
300 Central Park West
New York, NY 10024

Dear Mr. Jackson:

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 Law 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
Building #9 State Campus
Albany, New York 12227
Phone # (518) 457-2070

Very truly yours,

STATE TAX COMMISSION

cc: Petitioner's Representative
Martin N. Leaf
Leaf, Duell, Drogin & Kramer
730 Third Ave.
New York, NY 10017
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of

Thomas W. Jackson : 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 Years :
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State of New York
County of Albany

Connie Hagelund, being duly sworn, deposes and says that she is an employee of the Department of Taxation and Finance, over 18 years of age, and that on the 24th day of June, 1983, she served the within notice of Decision by certified mail upon Martin N. Leaf the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Martin N. Leaf
Leaf, Duell, Drogin & Kramer
730 Third 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
24th day of June, 1983.

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition	:	
	:	
of	:	
	:	
THOMAS W. JACKSON	:	DECISION
	:	
for Redetermination of a Deficiency or for	:	
Refund of Personal Income Tax under Article	:	
22 of the Tax Law for the Years 1970, 1971	:	
and 1972.	:	

Petitioner, Thomas W. Jackson, 300 Central Park West, New York, New York 10024, 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 1970, 1971 and 1972 (File No. 25335).

A formal hearing was held before Dennis M. Galliher, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York on May 17, 1982 at 1:15 P.M. Petitioner appeared by Leaf, Duell, Drogin & Kramer, Esqs. (Martin N. Leaf, Esq., of counsel). The Audit Division appeared by Paul B. Coburn, Esq. (Anne Murphy, Esq., of counsel).

ISSUE

Whether the amount of the penalty for unpaid withholding tax asserted against petitioner, who has admitted to having been a person required to collect, truthfully account for and pay over such tax on behalf of National Manpower Register, Inc. within the meaning and intent of sections 685(g) and 685(n) of the Tax Law, is proper.

FINDINGS OF FACT

1. On April 13, 1973, the Audit Division issued to petitioner, Thomas W. Jackson, a Statement of Deficiency and a Notice of Deficiency asserting tax due

in the amounts of \$4,113.15 for 1970, \$7,286.30 for 1971 and \$2,496.54 for 1972. This deficiency, totalling \$13,895.99, pertained to unpaid withholding tax due from National Manpower Register, Inc., for the years 1970, 1971 and 1972, and was broken down as to specific amounts and periods as follows:

<u>WITHHOLDING TAX PERIODS</u>	<u>AMOUNT</u>
1970 - balance due	\$ 4,113.15
January 1, 1971 through August 16, 1971	6,250.00
August 17, 1971 through September 30, 1971	1,036.30
February 1, 1972 through May 16, 1972	2,496.54
<u>Total Due</u>	<u>\$13,895.99</u>

2. The Audit Division calculated the above amount of withholding tax due as follows:

- a) For the year 1970, a reconciliation return of personal income tax withheld (Form IT-2103) submitted by National Manpower Register, Inc., showed a total tax withheld of \$8,624.93, with payments actually made totalling \$4,471.78. Thus, the unpaid amount of \$4,113.15 was asserted as the balance of tax due for 1970.
- b) For the remaining specified periods at issue during the years 1971 and 1972 (see Finding of Fact "1"), no reconciliation returns (Forms IT-2103) had been filed. Accordingly, the Audit Division manually estimated the withholding tax liability for National Manpower Register, Inc. for these periods on the basis of the average tax withheld by National Manpower Register, Inc. for similar periods in 1970 (per the 1970 Form IT-2103).

3. At petitioner's request the hearing in this matter was held concurrently with the hearing on the matter of a petition filed by one George Sadek pertaining to a deficiency in withholding tax due from National Manpower Register, Inc. for the same periods as are at issue herein.

4. National Manpower Register, Inc. ("NMR") was, until the time it was adjudicated bankrupt, engaged in the business of providing professional placement services primarily for engineers and scientists through affiliation with various engineering and other professional societies. NMR utilized computer

systems as a means of assisting in and accelerating the process of finding employment for its clients. NMR had offices located on Madison Avenue in New York City.

5. Petitioner, Thomas W. Jackson, was the founder, president and chief operating officer of NMR throughout the entire period at issue herein. At the hearing, Mr. Jackson admitted that he was a person under a duty to collect, truthfully account for and pay over withholding taxes on behalf of NMR, and that he did not do so during the periods at issue herein. Accordingly, Mr. Jackson does not contest the imposition of a penalty under sections 685(g) and 685(n) of the Tax Law, but rather contests only the correctness of the amount of the penalty so imposed.

6. NMR was incorporated in or about early 1966, and in its first years of operation was quite successful. In or about 1967, the controlling interest (approximately 80%) of NMR was acquired by National Student Marketing Corporation ("NSMC"). NSMC owned this controlling interest and provided certain financing to NMR until approximately late 1970.

7. NSMC experienced certain financial difficulties of its own (unrelated to its ownership of NMR) and was unable to provide continued funding to NMR. As a result of this difficulty, NMR reacquired the shares of its stock from NSMC and, in late 1970, severed its ties to NSMC.

8. At about the same time that NMR reacquired its shares and severed its ties to NSMC, there was a sharp reduction in the availability of jobs for engineers and thus a concomitant reduction in NMR's business, due ostensibly to funding cutbacks in the aerospace industry. NMR was unable to meet many of its creditors' demands, and on August 16, 1971 filed for protection under

Chapter XI of the Federal Bankruptcy Code (arrangement proceedings). NMR was allowed to continue operation of its business as a debtor in possession.

9. NMR's business continued to decline throughout late 1971 and early 1972. On May 16, 1972, NMR was adjudicated bankrupt. Its offices were padlocked and access to these offices was denied to petitioner Thomas W. Jackson.

10. Within two or three weeks of the adjudication of bankruptcy, an auction was held at which NMR's physical assets (i.e. desks, chairs, furniture, etc.) were sold. Included among those assets sold were file cabinets containing NMR corporate records.

11. According to testimony at the hearing by one George Sadek, a former officer of NMR who was present as a bidder at the auction, the file cabinets were sold, emptied of their contents and physically removed from the premises. The contents of the files, presumably including NMR corporate records, were left "...strewn about the floors..." of NMR's former offices. These file contents were later gathered and disposed of as part of the general cleanup of the premises by the landlord.

12. Petitioner, Thomas Jackson, testified that he was denied access to NMR's former offices during the period following adjudication of bankruptcy and prior to the auction, and further that he was "...under the impression he should not attempt to enter the premises..." and "...did not believe the records or files were in danger of being removed.".

13. In an effort to cut its costs, NMR was forced to reduce the number of its employees from a peak of approximately 35 to 38 employees in mid to late 1969, down to approximately 7 to 10 employees in August, 1971 when NMR entered arrangement proceedings under Chapter XI of the Bankruptcy Code. Also in August, 1971, pursuant to an order by the referee in bankruptcy, the salaries

of NMR officers George Thatcher, George Sadek and petitioner, Thomas Jackson, were reduced.

14. As NMR's business further declined so did the number of its employees, such that its work force, numbering from 7 to 10 employees in August, 1971 was reduced to zero employees, with only Thomas Jackson remaining, at the time NMR was adjudicated bankrupt on May 16, 1972.

15. According to testimony by one Eugene Schuster, an associate in the law firm representing petitioner, a search of the Federal court records in the bankruptcy proceedings involving NMR and of the records of Levin and Weintraub, Esqs., (attorneys for NMR as debtor in possession) revealed only the bankruptcy referee's order dated August 12, 1971, and no payroll or salary records of NMR, nor any records concerning the number of NMR employees during the months of July and December of 1970, and January through August of 1971.

16. At the hearing, Mr. Jackson submitted certain personal records which he had kept in his possession and which he had occasion to review in the course of preparing for legal proceedings between Mr. Jackson (individually) and NSMC. These records included information such as NMR's financial reports which had been submitted to NSMC due to the financial interrelationship of the two corporations, and also various summaries and bookkeeper's workpapers for the periods after NSMC became disassociated from NMR. These records, prepared in the regular course of NMR's business during 1970, 1971 and 1972 under the supervision of Thomas Jackson, together with Mr. Jackson's testimony establish the following information concerning gross salary figures for NMR during the periods at issue:

a)	<u>PERIOD</u>	<u>GROSS SALARY AMOUNT</u>
	June, 1970:	\$21,610.00*
	<u>PERIOD</u>	<u>GROSS SALARY AMOUNT</u>
	July, 1970:	No records were introduced. Petitioner testified July, 1970 gross salary total was approximately equal to June, 1970 gross salary total.
	August, 1970:	\$22,570.00
	September, 1970:	\$20,216.00
	October, 1970:	\$19,427.00**
	November, 1970:	\$18,275.00

The source of the gross salary figures for the above months is a series of NMR financial statements as submitted to NSMC, according to NSMC's format for its consolidated reporting purposes.

b) December, 1970, through August, 1971:

Petitioner testified NMR separated from NSMC after November of 1970, and thereafter NMR had no full time internal accountant or bookkeeper. Petitioner further testified the number of employees and the gross salary figures for December, 1970 were approximately the same as for November 1970 (above), but that several employees were laid off soon thereafter, so that NMR's work force was reduced, as of the beginning of 1971, to approximately 10 employees. According to petitioner's testimony, this reduced work force resulted in a gross salary total of approximately \$7,000.00 to \$8,000.00 per month for each

* The total (\$21,610.00) for June, 1970 does not include \$3,100.00 in salaries listed under Employment Dynamics (presumably one of NMR's wholly-owned subsidiaries). Salary figures for Employment Dynamics are included in other NMR total salary figures testified to by petitioner. Accordingly, the June total salary figure for NMR is revised to be \$24,710.00.

** Petitioner had included an additional \$470.00 as salary expense for temporary help. However, this amount was attributable to "materials and supplies" and should not be included among salaries paid. Accordingly, the total of \$19,427.00 is the proper gross salary figure for October, 1970.

month from January, 1971 through August, 1971. No book-keepers' worksheets or records of any other kind pertaining to these months (other than the August 12, 1971 order reducing officers' salaries) were introduced by petitioner in substantiation of either the claimed reduction in the number of NMR employees or the claimed reduction in its gross monthly salary figures.

c) <u>PERIOD</u>	<u>GROSS SALARY AMOUNT</u>
September, 1971:	\$7,304.00
October, 1971:	\$6,809.00
November, 1971:	\$4,994.00

The source of the gross salary figures for the above periods is a series of bookkeeper's worksheets and summaries.

December, 1971:	No records were introduced. Petitioner testified December, 1971 gross salary total was approximately equal to November, 1971 gross salary total.
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d) <u>PERIOD</u>	<u>GROSS SALARY AMOUNT</u>
January, 1972:	\$4,146.00
February, 1972:	\$3,887.00
March, 1972:	\$3,996.00
April, 1972:	\$1,906.00

The source of the gross salary figures for the above periods is a report of a delinquency investigation of NMR conducted by the New York State Department of Labor; Division of Employment.

17. Introduced at the hearing were several biweekly payroll checks payable to petitioner and covering the months August, September, October, November and December of 1971 in the monthly total amounts of \$464.46, \$745.96, \$408.90, \$385.70 and \$450.70 respectively. These checks, totalling \$2,455.72, were not cashed by petitioner. Petitioner argues there was a lack of funds in NMR's checking account to cover these checks, that these amounts were not actually

paid by NMR and should be subtracted from the gross salary totals for each of the above months August through December of 1971, thus reflecting a lower gross salary figure for each of these months.

18. Petitioner provided no records or other evidence detailing the specific dollar amounts of wages earned by each of the various individuals employed by NMR during the periods at issue, or the number of exemptions claimed for withholding tax purposes by each of the individual employees of NMR.

CONCLUSIONS OF LAW

A. That notwithstanding the gross salary figures for parts of 1970 as submitted by petitioner, the amount of withholding tax due from NMR for the year 1970 (\$4,113.15), as shown on the reconciliation report (Form IT-2103) actually filed by NMR for 1970 [see Finding of Fact "2(a)"] is a proper source for determining the amount of unpaid withholding tax for that year. Accordingly, the amount asserted by the Audit Division for 1970 (\$4,113.15) is sustained.

B. That with respect to the period January 1, 1971 through August 16, 1971, petitioner, Thomas W. Jackson, testified the number of employees and, concomitantly, the gross salaries paid by NMR were much lower for this entire period than for the same period in the previous year. It is possible that such a drastic reduction occurred at the outset of this period rather than in stages of reduction over the length of the period. However, for this entire period (in contrast to most of the other periods at issue herein) no bookkeeping worksheets or records of any kind or description were offered by petitioner to substantiate with any specificity the above claimed reduction in employees and salaries. Accordingly, the amount asserted by the Audit Division for this period (\$6,250.00) is sustained.

C. That for the period August 17, 1971 through September 30, 1971, the Audit Division asserted the tax due at \$1,036.30. Petitioner has submitted records to indicate the gross salaries paid in September totalled \$7,304.00, but has submitted no records for that portion of the period pertaining to August. In addition, computation of withholding tax due for this period by the method of pro-rating the income tax estimated to be due for the portion of the period pertaining to August, (14 days/45 days X \$1,036.30) and adding to that amount the withholding tax due (per monthly withholding tax table and assuming one employee, filing status single with 0 exemptions) on the gross salary figure for September 1971 (\$7,304.00; as submitted by petitioner), yields an amount of tax equal to or greater than the amount of tax estimated as due by the Audit Division. Accordingly, the Audit Division's estimate of tax due for this period is reasonable and is sustained.

D. That for the period February 1, 1972 through May 16, 1972 the Audit Division estimated the tax due at \$2,496.54. Petitioner has submitted information showing the actual gross salaries paid during this period [see Finding of Fact "16(d)"].¹ Accordingly, the tax for this period shall be reduced to the amount of tax due on the gross salary figure for this period (as provided by petitioner) computed per the monthly withholding tax table (assuming one employee, filing status single with 0 exemptions) as follows:

¹ No salaries appear to have been paid during the period from May 1, 1972 through the May 16, 1972 adjudication of bankruptcy.

<u>MONTH</u>	<u>GROSS SALARY AMOUNT</u>	<u>TAX (PER TABLE)</u>	<u>AMOUNT OF TAX DUE</u>
February, 1972	\$3,887.00	\$225.80 plus (15.375% of excess over \$2,520.00)	\$ 435.98
March, 1972	\$3,996.00	\$225.80 plus (15.375% of excess over \$2,520.00)	\$ 452.74
April, 1972	\$1,906.00	\$134.80	\$ 134.80
May, 1972	-0-	-0-	-0-
		<u>Total Due</u>	<u>\$1,023.52</u>

E. That the petition of Thomas W. Jackson is granted to the extent indicated by Conclusion of Law "D", but is in all other respects denied. The Audit Division is hereby directed to recompute the amount of penalty due in accordance with Conclusion of Law "D", and the Notice of Deficiency issued to petitioner on April 13, 1973, as recomputed in accordance herewith, is sustained.

DATED: Albany, New York

JUN 24 1983

STATE TAX COMMISSION

RodrichawChu
PRESIDENT

Francis R Koenig
COMMISSIONER

Mark J. Smith
COMMISSIONER