

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of :
Peter J. Kenny :
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 Period :
1/1/77 - 6/30/77. :
_____ :

AFFIDAVIT OF MAILING

State of New York
County of Albany

David Parchuck, 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 27th day of April, 1983, he served the within notice of Decision by certified mail upon Peter J. Kenny, the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Peter J. Kenny
946 High St.
Victor, NY 14564

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
27th day of April, 1983.

David Parchuck

James R. Hogehead

AUTHORIZED TO ADMINISTER
OATHS PURSUANT TO TAX LAW
SECTION 174

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

April 27, 1983

Peter J. Kenny
946 High St.
Victor, NY 14564

Dear Mr. Kenny:

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	:	
PETER J. KENNY	:	DECISION
for Redetermination of a Deficiency or for	:	
Refund of Personal Income Tax under Article 22	:	
of the Tax Law for the Period January 1, 1977	:	
through June 30, 1977.	:	

Petitioner, Peter J. Kenny, 946 High Street, Victor, New York 14564, filed a petition for redetermination of a deficiency or for refund of personal income tax under Article 22 of the Tax Law for the period January 1, 1977 through June 30, 1977 (File No. 32415).

A formal hearing was held before James Hoefer, Hearing Officer, at the offices of the State Tax Commission, One Marine Midland Plaza, Rochester, New York, on August 20, 1982 at 9:00 A.M. Petitioner appeared pro se. The Audit Division appeared by Paul B. Coburn, Esq., (Thomas Sacca, Esq., of counsel).

ISSUES

I. Whether petitioner is a person who willfully failed to collect, truthfully account for and pay over the New York State withholding taxes due from Spezio General Associates, Inc. and thus, subject to a penalty equal in amount to said past due corporate withholding taxes.

II. Whether the failure on the part of the Audit Division to file a claim in Bankruptcy Court against Spezio General Associates, Inc. or a claim against a corporation which issued surety bonds for Spezio General Associates, Inc., precludes the Audit Division from proceeding against petitioner individually.

III. Whether the Notice of Deficiency dated August 25, 1980 was timely issued.

FINDINGS OF FACT

1. On August 25, 1980, the Audit Division issued a Statement of Deficiency to petitioner, Peter J. Kenny, imposing a penalty, pursuant to section 685(g) of the Tax Law, equal in amount to the unpaid New York State withholding taxes due and owing from Spezio General Associates, Inc. (hereinafter "Spezio") for the period January 1, 1977 through June 30, 1977. Said statement was issued on the grounds that petitioner was a person required to collect, truthfully account for and pay over said past due withholding taxes and that he willfully failed to do so. Accordingly, on August 25, 1980 a Notice of Deficiency was issued against petitioner for the period January 1, 1977 through June 30, 1977 in the amount of \$9,180.71.

2. During the period January 1, 1977 through June 30, 1977 Spezio had approximately 60 to 70 employees working on various construction jobs in the Rochester, New York vicinity. Form IT-2103, Reconciliation of Tax Withheld, Semi-Monthly Filer, submitted by Spezio, indicated that a total of \$9,180.71 of New York State income tax was withheld from its employees during the period January 1, 1977 through June 30, 1977. Spezio did not pay over to the Department of Taxation and Finance the \$9,180.71 of tax withheld from its employees. Spezio did not file the semi-monthly withholding tax returns (Forms IT-2101) for the period January 1, 1977 through June 30, 1977.

3. During the period at issue petitioner Peter J. Kenny was secretary-treasurer of Spezio. Petitioner's primary function or duty for Spezio was of an accounting nature, e.g. maintain general ledger, bank reconciliations,

supervision of a small office staff, etc. Petitioner was neither a stockholder nor director of Spezio and had no voice in Spezio's policy or decision making process.

4. Petitioner was an authorized signatory on the corporate checking account of Spezio and on numerous occasions signed corporate checks, including payroll checks. Petitioner did not have the independent authority to authorize payment to creditors. On a daily basis petitioner would prepare a list of all creditors who were due payment and present said list to Mr. Leo Spezio, president and sole stockholder of Spezio. Mr. Spezio would instruct petitioner as to which creditors were to be paid. The list presented to Mr. Spezio included the withholding taxes due New York State. Petitioner had no authority to deviate from or otherwise alter the instructions received from Mr. Spezio.

5. On November 30, 1977, a plan was adopted for the complete liquidation and dissolution of Spezio General Associates, Inc. Said plan provided for the establishment of a reserve fund sufficient to pay unpaid taxes and further provided that if said fund proved to be insufficient, that any excess liability was to be paid by Leo Spezio. Also, the plan provided that all corporate assets, subject to all liabilities, were to be transferred and assigned to Leo Spezio.

6. Leo Spezio has been held personally liable for the past due Federal and New York State withholding taxes from Spezio. Mr. Spezio has entered into a payment agreement with the Department of Taxation and Finance wherein the withholding taxes due from Spezio and four related corporations are to be paid in full.

7. Petitioner did not receive a salary directly from Spezio but did receive weekly wages of approximately \$400.00 from one of four related corporations. The 1976 New York State Corporation Franchise Tax Report filed by Spezio on January 27, 1978 was signed by petitioner as secretary-treasurer.

8. On June 30, 1977 Spezio filed for bankruptcy under Title 11, Chapter 11 of the United States Code. The Audit Division did not file a claim with the Bankruptcy Court for the withholding taxes due from Spezio. Also, when Spezio filed for bankruptcy, its bonding company took over the remaining projects and proceeded to pay all current and pre-existing debts. The Audit Division did not file a claim with the bonding company for the withholding taxes due from Spezio. Petitioner asserts that the Audit Division's failure to file claims has unduly prejudiced him and prevents the Audit Division from proceeding against him individually.

CONCLUSIONS OF LAW

A. That petitioner was not a stockholder in or director of Spezio, was not involved in Spezio's decision and policy making process and did not have the authority or capacity to make decisions as to what creditors and what taxes were to be paid. Petitioner was a subordinate officer whose activities were subject to the dictates of Leo Spezio, the president and sole stockholder of Spezio. Accordingly, petitioner was not a person required to collect, truthfully account for and pay over the New York State withholding taxes of Spezio for the period January 1, 1977 through June 30, 1977 within the meaning and intent of subsection (g) of section 685 of the Tax Law (Sherwood v. U.S., 246 F. Supp. 502).


B. That the remaining issues are rendered moot in light of Conclusion of Law "A", supra.

C. That the petition of Peter J. Kenny is granted and the Notice of Deficiency dated August 25, 1980 is hereby cancelled.

DATED: Albany, New York

STATE TAX COMMISSION

APR 27 1983


PRESIDENT


COMMISSIONER


COMMISSIONER