

STATE OF NEW YORK

STATE TAX COMMISSION

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In the Matter of the Petition :  
of :  
Arlington Robinson :  
AFFIDAVIT OF MAILING  
for Redetermination of a Deficiency or Revision :  
of a Determination or Refund of Personal Income :  
Tax under Article 22 of the Tax Law for the Year :  
1976. :  
\_\_\_\_\_ :

State of New York }

ss.:

County of Albany }

David Parchuck, being duly sworn, deposes and says that he is an employee of the State Tax Commission, that he is over 18 years of age, and that on the 23rd day of November, 1984, he served the within notice of Decision by certified mail upon Arlington Robinson, the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Arlington Robinson  
1 Kentor Lane  
Monsey, NY 10952

and by depositing same enclosed in a postpaid properly addressed wrapper in a post office 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  
23rd day of November, 1984.

David Parchuck

William A. Haglund  
Authorized to administer oaths  
pursuant to Tax Law section 174

STATE TAX COMMISSION

Edward A. Hargrave  
Authorized to administer oaths  
pursuant to Tax Law section 174

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

November 23, 1984

Arlington Robinson  
1 Kentor Lane  
Monsey, NY 10952

Dear Mr. Robinson:

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, a proceeding in court to review an adverse decision by the State Tax Commission may be instituted only 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  
Irving Anolik  
225 Broadway  
New York, NY 10007  
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

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

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Petitioner, Arlington Robinson, 1 Kentor Lane, Monsey, New York 10952, 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. 32300).

A formal hearing was held before Daniel J. Ranalli, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on May 21, 1984 at 1:15 P.M. Petitioner appeared by Irving Anolik, Esq. The Audit Division appeared by John P. Dugan, Esq. (Irwin Levy, Esq., of counsel).

#### ISSUE

Whether petitioner was a person required to collect, truthfully account for and pay over withholding taxes, who willfully failed to do so and is thus liable to a penalty under section 685(g) of the Tax Law.

#### FINDINGS OF FACT

1. On November 26, 1979, the Audit Division issued a Notice of Deficiency, along with a Statement of Deficiency, asserting a penalty pursuant to section 685(g) of the Tax Law against petitioner, Arlington Robinson, as a person required to collect, truthfully account for and pay over withholding taxes of North Rockland Health Center, Inc. ("NRHC") in the amount of \$25,745.36 for the period March 1, 1976 through December 31, 1976.

2. On or about January 31, 1977 NRHC filed a New York State Form IT-2103, Reconciliation of Personal Income Tax Withheld from employee wages during 1976 showing total tax withheld in the amount of \$29,527.69, and remitted to the Audit Division \$3,782.33. On November 10, 1978, the Audit Division issued a Notice and Demand for Unpaid Withholding Tax Due against NRHC in the amount of \$25,745.36 plus penalty and interest for the year 1976.

3. NRHC opened a health facility in Haverstraw, New York in response to needs asserted by community leaders. Petitioner and several others had invested funds three years earlier in a corporation which built the facility. NRHC leased the building from the corporation. NRHC received a Certificate of Incorporation which was valid for two years commencing March 7, 1975 and ending March 7, 1977. NRHC was a not-for-profit corporation.

4. The combined first meeting of members and directors of the corporation was held on March 19, 1975 at which time the following persons were selected as members of the board of directors: Michael Gionatti, Alan Ritter, Jerry Schulman, Jerry Mastromarino, Raphael Mertz, Michael Prendergast, Dr. Jasper Foresttere and Milton Bondurant. The board then elected the following officers: President - petitioner; First Vice-President - Raphael Mertz; Second Vice-President - Dr. Martin Lorin; Secretary - F. Ramos Yordan; and Treasurer - Alan Ritter. By resolution of the board, it was determined that all checks drawn on the corporate account were to be signed by two officers. Further, it was resolved that all contracts entered into on behalf of NRHC were to be signed by two officers, one of whom was to be a board member. Petitioner was designated executive director of NRHC and, at a board meeting held May 8, 1975, petitioner's annual salary was set at \$37,500.00 plus automobile and entertainment expenses. At the same meeting, petitioner was authorized to set salaries of employees

earning less than \$10,000.00 per annum. Salaries of higher paid employees were to be set by the board of directors.

5. As executive director, petitioner's duties involved marketing, public relations and coordinating with the medical director, the board of directors and outside government agencies such as the former Department of Health, Education and Welfare. Petitioner had no experience in financial or accounting matters and was not involved in such activities while employed by NRHC. NRHC hired an accountant and comptroller to handle financial matters including payment of taxes. Petitioner had no policy-making authority with NRHC. He could make recommendations to the board or bring requests from the various departments to the board's attention; however, only the board had final authority for the activities of NRHC. The board also determined which bills were to be paid and in what order. Petitioner could recommend that certain payments be made but he could not overrule the board. Petitioner had no employees whom he directly supervised other than a secretary shared with other department heads. Petitioner, along with other department heads, interviewed non-technical personnel for employment. The interviewers then made recommendations to the board which made the final decision on hiring. Petitioner occasionally attended interviews for professional and technical staff hiring; however, recommendations for such positions usually came from the medical director and other doctors. The board also made the final decision on termination of employment. Although petitioner signed at least one withholding tax return, he had no authority to remit payment of the tax due and he was not made aware that taxes were not being paid until sometime in 1976 when NRHC began to experience financial difficulties.

6. When funds became unavailable, bills went unpaid and the board directed a 50 percent cutback in employees. NRHC fell eighteen months behind in the rental payments to the corporation which owned the building and petitioner lost over \$100,000.00 which he had invested in the structure.

7. In January, 1976, NRHC requested an extension of the life of the corporation from the New York State Public Health Council. The Council delayed action on the request until after March 7, 1977 at which time the corporation went out of existence by operation of law. All activities ended, the staff was released from employment and NRHC ceased doing business.

#### CONCLUSIONS OF LAW

A. That section 685(g) of the Tax Law provides that any person required to collect, truthfully account for and pay over personal income tax, who willfully fails to collect such tax or truthfully account for and pay over such tax or willfully attempts in any manner to evade or defeat the tax or the payment thereof, shall, in addition to other penalties provided by law, be liable to a penalty equal to the total amount of the tax evaded, or not collected, or not accounted for and paid over.

B. That section 685(n) of the Tax Law defines the word "person", for the purpose of section 685(g), and reads as follows:

"For purposes of subsections (g)...the term person includes an individual, corporation or partnership or an officer or employee of any corporation (including a dissolved corporation), or a member or employee of any partnership, who as such officer, employee or member is under a duty to perform the act in respect of which the violation occurs."

C. 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"

(McHugh v. State Tax Commission, 70 A.D.2d 987, 988). The holding of a corporate office is alone insufficient to deem someone a "person" under section 685(n) of the Tax Law (see Amengual v. State Tax Commission, 95 A.D.2d 949). Petitioner had no authority over the payroll or withholding of taxes, no authority to pay corporate obligations and no authority to hire and fire employees other than in an advisory capacity. Petitioner's authority to sign tax returns was virtually meaningless since, although he may have signed a return, he could not authorize payment of the tax. Petitioner's power to co-sign checks was equally meaningless without the discretion to determine to whom the checks would go. Petitioner accordingly cannot be considered a person required to collect, truthfully account for and pay over withholding taxes within the meaning and intent of sections 685(g) and 685(n) of the Tax Law.

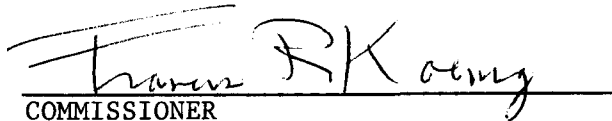
D. That the petition of Arlington Robinson is granted and the Notice of Deficiency issued November 26, 1979 is cancelled.

DATED: Albany, New York

STATE TAX COMMISSION

NOV 23 1984

  
PRESIDENT

  
COMMISSIONER

  
COMMISSIONER