

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of :
George Sadek : 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 George Sadek, the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

George Sadek
635 Madison Ave.
New York, NY 10022

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
OATH RELATIVE TO TAX LAW
SECTION 174

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of
George Sadek :

AFFIDAVIT OF MAILING

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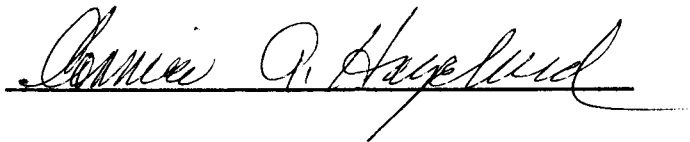
Connie Hagelund, being duly sworn, deposes and says that she is an employee of the Department of Taxation and Finance, over 18 years of age, and that on the 24th day of June, 1983, she served the within notice of Decision by certified mail upon John T. Konther the representative of the petitioner in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

John T. Konther
Conboy, Hewitt, O'Brien & Boardman
20 Exchange Place
New York, NY 10005

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.





AUTHORIZED TO ADMINISTER
OATHS UNDER THE TAX LAW
SECTION 174

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

June 24, 1983

George Sadek
635 Madison Ave.
New York, NY 10022

Dear Mr. Sadek:

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
John T. Konther
Conboy, Hewitt, O'Brien & Boardman
20 Exchange Place
New York, NY 10005
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition	:	
	:	
of	:	
	:	
GEORGE SADEK	:	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, George Sadek, 635 Madison Avenue, New York, New York 10022, 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. 25336).

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 Conboy, Hewitt, O'Brien & Boardman, Esqs. (John T. Konther, Esq., of counsel). The Audit Division appeared by Paul B. Coburn, Esq. (Anne Murphy, Esq., of counsel).

ISSUE

Whether petitioner was a person required to collect, truthfully account for and pay over withholding tax with respect to National Manpower Register, Inc., and willfully failed to do so, thus becoming liable for a penalty under section 685(g) of the Tax Law.

FINDINGS OF FACT

1. On April 13, 1973 the Audit Division issued to petitioner, George Sadek, 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.

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

3. 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.

4. Petitioner, George Sadek, first became employed by NMR in or about early 1966, as a program manager to market a particular NMR program for placing industrial engineers. Mr. Sadek was hired by NMR to market this particular program because he was an industrial engineer and because of his background and experience. The initial program managed by Mr. Sadek involved NMR taking over placement functions for Industrial Engineering Professional Services, a professional society of professional engineers.

5. Mr. Sadek continued to work for NMR and became its marketing development manager. His duties consisted primarily of working with engineers and with professional engineering societies with respect to developing and marketing NMR placement programs related to the field of engineering.

6. Mr. Sadek later became an officer of NMR and continued performing essentially the same job duties as are outlined above. No testimony or other evidence was presented to indicate the specific date when Mr. Sadek became an officer of NMR.

7. Mr. Sadek's official title with NMR was Vice-President of Marketing and Sales. According to testimony by Mr. Sadek and by Thomas W. Jackson, who was president and chief operating officer of NMR, Mr. Sadek was essentially an outside sales and marketing representative of NMR who was made an officer for titular purposes only. According to Mr. Sadek's testimony "[i]t just gave a bit more weight out in the field to be able to sign 'vice president' rather than 'manager'."

8. Mr. Sadek worked exclusively for NMR during the years at issue. He did not prepare payroll records or other financial records, nor did he prepare or sign any payroll or other tax returns on behalf of NMR. He did not perform bookkeeping functions for NMR.

9. Except for certain authority in the area of sales and marketing, Mr. Sadek had no authority over the general affairs of NMR nor authority to bind NMR on any major purchase. He did have authority to purchase office supplies and other items from local suppliers.

10. Mr. Sadek did not have authority to determine which of NMR's creditors, if any, were to be paid, or in what amount or order of preference they would be paid.

11. According to testimony given at the hearing, only Thomas W. Jackson, as president, had authority to issue checks on behalf of NMR which bore only one signature. In his absence, NMR checks could be issued only upon the signatures of two authorized persons.

12. Mr. Sadek was one of several persons, including NMR's bookkeepers, who were given authority as co-signor of checks on behalf of NMR. Mr. Sadek did, along with other NMR employees, co-sign some NMR checks in Thomas Jackson's absence, to pay for items such as trade receivables and stationary. In addition, although petitioner testified he did not sign payroll checks on behalf of NMR, three uncashed NMR payroll checks payable to Thomas W. Jackson and dated during the months of August, October, and December of 1971, bore the signature of George Sadek.

13. Mr. Sadek did purchase approximately six percent (6%) of NMR stock in 1966. He sold this stock in 1967 and neither Mr. Sadek nor any member of his family owned any NMR stock during the years at issue.

CONCLUSIONS OF LAW

A. That where a person is required to collect, truthfully account for and pay over withholding tax and willfully fails to collect and pay over such tax, section 685(g) of the Tax Law imposes on such person "...a penalty equal to the total amount of tax evaded, not collected, or not accounted for and paid over".

B. That section 685(n) of the Tax Law defines a person, for purposes of section 685(g) of the Tax Law, to include:

"...an individual, corporation, or partnership or an officer or employee of any corporation...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 who is a "person" required to collect and pay over withholding taxes is to be determined on the basis of the facts presented. Some of the factors to be considered include whether petitioner owned stock, signed tax returns, or exercised authority over the employees and the assets of the corporation. McHugh v. State Tax Comm., (70 A.D.2d 987). Other factors to be considered are whether the person derived a substantial part of his income

from the corporation or had the right to hire and fire employees. MacLean v. State Tax Comm., (69 A.D.2d 951, aff'd 49 NY2d 920). See also Malkin v. Tully, (65 A.D.2d 228).

D. That petitioner, George Sadek, was not a person under a duty to collect, truthfully account for and pay over withholding taxes on behalf of National Manpower Register, Inc. Mr. Sadek owned no NMR stock during the years at issue and neither prepared nor signed NMR financial records or tax returns. His role at NMR was as a salesman rather than a supervisor, and his appointment as vice-president was for titular purposes only and did not confer upon him the authority to direct the general management or policy making aspects of NMR. Finally, although Mr. Sadek was authorized to sign NMR checks, such authority was limited for the purpose of convenience and he could not have paid the withholding taxes due on his own even if he had been required or had desired to pay such taxes.

E. That the petition of George Sadek is hereby granted in all respects and the Notice of Deficiency issued to petitioner on April 13, 1973 is cancelled.


DATED: Albany, New York

STATE TAX COMMISSION

JUN 24 1983


PRESIDENT


COMMISSIONER


COMMISSIONER