

STATE OF NEW YORK

STATE TAX COMMISSION

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In the Matter of the Petition :  
of :  
Douglas L. Townley :  
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 :  
1975. :  
\_\_\_\_\_ :

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 18th day of March, 1983, he served the within notice of Decision by certified mail upon Douglas L. Townley, the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Douglas L. Townley  
72 Northwood Dr.  
Buffalo, NY 14223

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  
18th day of March, 1983.

David Parchuck

\_\_\_\_\_  
AUTHORIZED TO ADMINISTER  
OATHS PURSUANT TO TAX LAW  
SECTION 174

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

March 18, 1983

Douglas L. Townley  
72 Northwood Dr.  
Buffalo, NY 14223

Dear Mr. Townley:

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

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In the Matter of the Petition	:	
of	:	
DOUGLAS L. TOWNLEY	:	DECISION
for Redetermination of a Deficiency or for	:	
Refund of Personal Income Tax under Article 22	:	
of the Tax Law for the Year 1975.	:	

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Petitioner, Douglas L. Townley, 72 Northwood Drive, Buffalo, New York 14223, 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 1975 (File No. 32438).

A small claims hearing was held before Dennis M. Galliher, Hearing Officer, at the offices of the State Tax Commission, 65 Court Street, Buffalo, New York on July 13, 1982 at 9:15 A.M. Petitioner appeared pro se. The Audit Division appeared by Paul B. Coburn, Esq. (Patricia L. Brumbaugh, Esq., of counsel).

ISSUE

Whether petitioner was a person required to collect, truthfully account for and pay over withholding tax with respect to Grand National Sports Supply, 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. By a Notice of Deficiency and a Statement of Deficiency, both dated January 28, 1980, the Audit Division notified petitioner, Douglas L. Townley, of a deficiency for the year 1975. This asserted deficiency, totalling \$2,320.00, covered the period January 1, 1975 through November 14, 1975, and related to unpaid withholding tax due from Grand National Sports Supply, Inc.

2. Grand National Sports Supply, Inc., ("Grand National") was, during the period in issue herein, engaged in the wholesale selling of firearms, ammunition and related equipment. Grand National did not sell any items at retail during this period.

3. Grand National had originally been operated as a partnership formed by Mr. David R. Grace and another individual as partners. Subsequently, Mr. Grace's partner withdrew and Grand National was continued as a sole proprietorship operated by Mr. Grace. Prior to the period at issue herein, Grand National was incorporated in order to enable the company to secure certain bank financing for its activities.

4. At the time of incorporation, Mr. Grace took the position of president of Grand National.

5. During the period at issue herein, Grand National employed four persons in addition to Mr. Grace. They included Mr. Grace's wife, who worked as a secretary for the company, and also a salesman, a stockboy, and petitioner, Douglas L. Townley.

6. Petitioner first became employed by Grand National in November, 1974, as the company bookkeeper. Petitioner continued in his employment with Grand National until approximately January 11, 1976, when, due to financial setbacks suffered by Grand National, petitioner was told there would be no more work and his employment was terminated.

7. At the time of incorporation, or soon thereafter, petitioner was informed by Mr. Grace that petitioner was appointed to the position of treasurer of the company. Petitioner testified that he never signed any documents of incorporation or other formal papers naming him as treasurer of Grand National but admitted he acted as the treasurer of Grand National and signed documents using the title of "treasurer" of Grand National.

8. Throughout the period of his employment with Grand National, including the period at issue herein, petitioner's work duties remained essentially the same. Petitioner was responsible for computing and compiling all financial data for the business, which included but was not limited to preparation of all payroll information, checks, and records, as well as all tax returns and reports on behalf of Grand National.

9. According to testimony by petitioner, he computed all payroll accounts according to instructions from Mr. Grace. Petitioner testified he would take the appropriate steps to compute the payroll and would show his results to Mr. Grace for authorization to pay the various amounts.

10. Petitioner was an authorized signatory on Grand National's checkbook and would draw and sign checks in appropriate amounts for payrolls, taxes and bills. Petitioner testified, however, that no payments or other financial actions on behalf of Grand National were ever undertaken without the express permission of Mr. Grace.

11. Petitioner also showed all tax returns and reports he prepared on behalf of Grand National to Mr. Grace for signature and approval.

12. Petitioner did no selling of merchandise for Grand National, but was solely engaged in working as the company's bookkeeper.

13. Petitioner asserted that he had no actual authority to validly act on behalf of Grand National, but rather that all business of Grand National could only be done with notification to and the express assent of Mr. Grace. Petitioner admitted knowledge that withholding taxes were not being paid during the period at issue herein, but stated it was Mr. Grace's decision not to pay such taxes.

#### CONCLUSIONS OF LAW

A. That where a person is required to collect, truthfully account for and pay over withholding taxes 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. (See also MacLean v. State Tax Comm., 69 A.D.2d 951, aff'd 49 N.Y.2d 920, and Malkin v. Tully 65 A.D.2d 228).

D. That petitioner, Douglas L. Townley, was a person under a duty to collect and pay over withholding taxes on behalf of Grand National Sports Supply, Inc. As treasurer of Grand National, petitioner signed checks, prepared tax returns and reports, and had complete knowledge of the financial affairs of the company including the nonpayment of withholding taxes when due.

E. That the petition of Douglas L. Townley is hereby denied and the Notice of Deficiency dated January 28, 1980, is sustained.

DATED: Albany, New York

STATE TAX COMMISSION

MAR 18 1983

ACTING PRESIDENT

COMMISSIONER

COMMISSIONER