

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of
Niles A. Flanzraich :

: AFFIDAVIT OF MAILING

for Redetermination of a Deficiency or Revision :
of a Determination or Refund of Personal Income :
& NYC Tax under Article 22 & 30 of the Tax Law :
for the Year 1980. :

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 15th day of February, 1985, he served the within notice of Decision by certified mail upon Niles A. Flanzraich, the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Niles A. Flanzraich
340 West Fulton Street
Long Beach, NY 11561

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
15th day of February, 1985.

David Parchuck

Conne A. [Signature]
Authorized to administer oaths
pursuant to Tax Law section 174

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

February 15, 1985

Niles A. Flanzraich
340 West Fulton Street
Long Beach, NY 11561

Dear Mr. Flanzraich:

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 & 1312 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: Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition

of

NILES A. FLANZRAICH

DECISION

for Redetermination of a Deficiency or for
Refund of New York State Personal Income Tax
under Article 22 of the Tax Law and New York
City Personal Income Tax under Chapter 46,
Title T of the Administrative Code of the City
of New York for the Year 1980.

Petitioner, Niles A. Flanzraich, 340 West Fulton Street, Long Beach, New York 11561, filed a petition for redetermination of a deficiency or for refund of New York State personal income tax under Article 22 of the Tax Law and New York City personal income tax under Chapter 46, Title T of the Administrative Code of the City of New York for the year 1980 (File No. 40494).

A small claims hearing was held before Allen Caplowaith, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on May 9, 1984 at 9:15 A.M., with all briefs to be submitted by June 9, 1984. Petitioner appeared pro se. The Audit Division appeared by John P. Dugan, Esq. (Angelo Scopellito, Esq., of counsel).

ISSUE

Whether petitioner, Niles A. Flanzraich, is subject to penalties pursuant to section 685(g) of the Tax Law and section T46-185.0(g) of the Administrative Code of the City of New York, as a person who willfully failed to collect, truthfully account for and pay over the New York State and City withholding taxes due from D.G.P.I., Inc. for the year 1980.

FINDINGS OF FACT

1. D.G.P.I., Inc., 333 East 49th Street, New York, New York 10017, failed to pay over \$646.08 in New York State personal income taxes withheld and \$260.55 in New York City personal income taxes withheld from the wages of its employees for the period February 1, 1980 through March 31, 1980.

2. On June 28, 1982, the Audit Division issued a Statement of Deficiency in conjunction with a Notice of Deficiency against petitioner, Niles A. Flanzraich, wherein penalties were asserted pursuant to sections 685(g) of the Tax Law and T46-185.0(g) of the Administrative Code of the City of New York for an amount equal to the New York State and City withholding taxes due from D.G.P.I., Inc. for said period. Such penalties were asserted on the grounds that Niles A. Flanzraich (hereinafter petitioner) was a person required to collect, truthfully account for and pay over said taxes and that he willfully failed to do so.

3. Petitioner contended that he was employed by D.G.P.I., Inc. from the spring of 1978 until the first week of February, 1980. At the time he commenced employment with D.G.P.I., Inc., the company operated as a detective agency from the aforestated Manhattan address.

4. Subsequently, D.G.P.I., Inc. expanded its operation to include an escort car service, which operated from an office located at 5002 7th Avenue, Brooklyn, New York. David Greenberg, the majority stockholder at that time, placed petitioner in charge of the car service operation. Petitioner, in said capacity, "did everything" with respect to the car service operation, including the hiring and firing of drivers. His compensation consisted of a percentage of the proceeds from the car service operation.

5. For a period of time prior to November, 1979, Mr. Greenberg was absent from the business. During this period, his wife, Irene Greenberg, operated the business.

6. In November, 1979, Mr. Greenberg returned to the business and transferred petitioner to D.G.P.I., Inc.'s car service operation in Manhattan.

7. Petitioner claimed that in early February, 1980, he terminated his relationship with and ceased all activities for D.G.P.I., Inc. His reason for leaving D.G.P.I., Inc. was that there were no funds available for the continuation of his salary.

8. At the time he left D.G.P.I., Inc., petitioner returned to his former occupation as an electrician.

9. Petitioner submitted a letter dated February 1, 1984, from the Joint Industry Board of the Electrical Industry, wherein it was stated that "the records at this office indicate you (petitioner) were working out of the industry from September 5, 1979 until February 13, 1980 when you reported available for employment".

10. During the period petitioner was with D.G.P.I., Inc. he made a total contribution to capital of \$13,000.00, which he claimed was never recovered.

11. Petitioner contended that Mr. and Mrs. Greenberg managed the company and were responsible for the maintenance of books and records and the payment of taxes.

12. Petitioner alleged that he was not an authorized signatory to the company's checking account. In support of this allegation, he submitted a subpoenaed copy of the corporate resolutions for the account of D.G.P.I., Inc. dated October 9, 1979. Said resolution, filed with the European American Bank,

shows the authorized signatories to be Irene Greenberg, as President and Secretary, and Joseph Scannapielo, for whom no title was given.

13. The Corporate Franchise Tax Report of D.G.P.I., Inc., filed for the fiscal year May 1, 1979 through April 30, 1980, shows the following:

a) that Irene Greenberg held 51 shares of stock, received \$7,700.00 compensation and devoted 100 percent of her time to the business;

b) that Steven Cantor held 24.5 shares of stock, received no compensation and devoted no time to the business;

c) that petitioner held 24.5 shares of stock, received \$17,200.00 compensation and devoted 100 percent of his time to the business.

Said return was signed by Irene Greenberg as President.

14. Petitioner was an officer of D.G.P.I., Inc. The record does not show, and petitioner does not recall what office he held.

15. Petitioner's 1980 wage and tax statements show that he received wages during said year from the following sources:

<u>Employer</u>	<u>Wages</u>
Robert S. Samuels, Inc.	\$12,523.96
Vacation - Holiday Expense Fund of the Joint Industry Board of the Electrical Industry	615.30
D.G.P.I., Inc.	1,550.00
Al Smith Electrical Contractors, Inc.	11,024.24
Total 1980 Wages	<u>\$25,713.50</u>

16. Petitioner's pay stub from D.G.P.I., Inc. for the period ending January 29, 1980 shows that his year-to-date gross pay was \$1,300.00.

CONCLUSIONS OF LAW

A. That sections 685(g) of the Tax Law and T46-185.0(g) of the Administrative Code of the City of New York provide that:

"Any person required to collect, truthfully account for, and pay over the tax imposed by this (article/part) 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 sections 685(n) of the Tax Law and T46-185.0(n) of the Administrative Code of the City of New York provide that, for purposes of subdivision (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 for the period at issue, February 1, 1980 through March 31, 1980, petitioner was not a person required to collect, truthfully account for and pay over the New York State and City withholding taxes of D.G.P.I., Inc. Accordingly, the penalties asserted pursuant to sections 685(g) of the Tax Law and T46-185.0(g) of the Administrative Code of the City of New York are hereby cancelled.

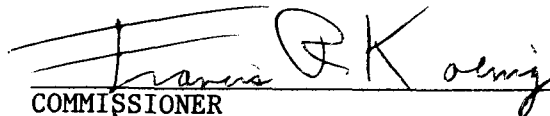
D. That the petition of Niles A. Flanzraich is granted and the Notice of Deficiency dated June 28, 1982 is hereby cancelled.



DATED: Albany, New York

STATE TAX COMMISSION

FEB 15 1985


PRESIDENT


COMMISSIONER

 
COMMISSIONER