

STATE OF NEW YORK

STATE TAX COMMISSION

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In the Matter of the Petition :  
of :  
Charles F. Vachris :  
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 Years :  
1977 - 1980. :  
\_\_\_\_\_

AFFIDAVIT OF MAILING

State of New York :

ss.:

County of Albany :

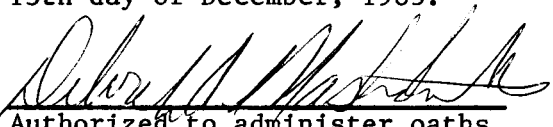
Connie A. Hagelund, being duly sworn, deposes and says that she is an employee of the State Tax Commission, that she is over 18 years of age, and that on the 13th day of December, 1985, she served the within notice of Decision by certified mail upon Charles F. Vachris, the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Charles F. Vachris  
43 Dogwood Lane  
Manhasset, NY 11030

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  
13th day of December, 1985.

  
Authorized to administer oaths  
pursuant to Tax Law section 174

  
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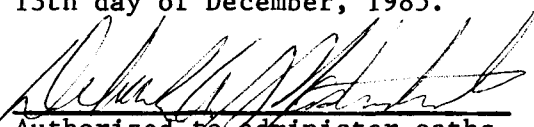
Connie A. Hagelund, being duly sworn, deposes and says that she is an employee of the State Tax Commission, that she is over 18 years of age, and that on the 13th day of December, 1985, she served the within notice of Decision by certified mail upon John J. Howard, the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

John J. Howard  
Putney, Twombly, Hall & Hirson  
250 Park Avenue  
New York, NY 10177

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 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  
13th day of December, 1985.

  
Authorized to administer oaths  
pursuant to Tax Law section 174

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

December 13, 1985

Charles F. Vachris  
43 Dogwood Lane  
Manhasset, NY 11030

Dear Mr. Vachris:

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  
John J. Howard  
Putney, Twombly, Hall & Hirson  
250 Park Avenue  
New York, NY 10177  
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

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| In the Matter of the Petition                  | : |          |
|  | : |          |
| of   | : |          |
|  | : |          |
| CHARLES F. VACHRIS                             | : | DECISION |
| for Redetermination of a Deficiency or for     | : |          |
| Refund of Personal Income Tax under Article 22 | : |          |
| of the Tax Law for the years 1977, 1978, 1979  | : |          |
| and 1980.                                      | : |          |

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Petitioner, Charles F. Vachris, 43 Dogwood Lane, Manhasset, New York 11030, 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 1977, 1978, 1979 and 1980 (File No. 41255).

A 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 April 26, 1985 at 9:00 A.M., with all briefs to be submitted by May 14, 1985. Petitioner appeared by John J. Howard, Esq. The Audit Division appeared by John P. Dugan, Esq. (Herbert Kamrass, Esq. of counsel).

ISSUE

Whether petitioner, Charles F. Vachris, is subject to a penalty pursuant to section 685(g) of the Tax Law, as a person who willfully failed to collect, truthfully account for and pay over the New York State withholding taxes due from Vacar Construction Corporation for the years 1977, 1978, 1979 and 1980.

FINDINGS OF FACT

1. Vacar Construction Corporation, 101 Hillside Avenue, Williston Park, New York 11596, failed to pay over the New York State personal income taxes withheld from the wages of its employees for the following periods:

| <u>Withholding Tax Period</u>               | <u>Amount</u>       |
|---|---------------------|
| July 1, 1977 through September 30, 1977     | \$45,406.07         |
| December 16, 1977 through December 31, 1977 | 8,274.36            |
| January 1, 1978 through December 31, 1978   | 77,576.03           |
| January 1, 1979 through February 9, 1979    | 2,853.11            |
| January 1, 1980 through July 1, 1980        | <u>6,672.00</u>     |
| Total                                       | <u>\$140,781.57</u> |

2. On January 25, 1982, the Audit Division issued a Statement of Deficiency in conjunction with a Notice of Deficiency against Charles F. Vachris (hereinafter "petitioner") wherein a penalty was asserted pursuant to section 685(g) of the Tax Law for an amount equal to the New York State withholding taxes due from Vacar Construction Corporation for the aforesated periods. Said penalty was asserted on the grounds that petitioner was a person required to collect, truthfully account for and pay over the withholding taxes at issue, and that he willfully failed to do so.

3. During the years at issue petitioner was the President of Vacar Construction Corporation ("Vacar"). He was also a director of Vacar and held approximately 45% of the outstanding stock.

4. During the years at issue petitioner was an authorized signatory on all of Vacar's bank accounts, inclusive of the payroll account.

5. Vacar was engaged in the business of general heavy construction and contracting. During 1978 Vacar started to encounter severe cash flow difficulties. The books and records of Vacar during this period were in a state of "complete chaos and disarray" as the result of changes in office personnel and layoffs necessitated by Vacar's unfavorable cash flow position.

6. Petitioner contended that on February 9, 1979, Vacar sought the protection of the Bankruptcy Court by filing a petition in the U.S. District Court for the Eastern District of New York in Brooklyn, New York for relief under Chapter XI of the Bankruptcy Act. He claimed that the Chapter XI proceeding was converted to a straight bankruptcy on July 1, 1980.

7. Petitioner argued that the deficiency asserted was overstated. He alleged that the amount asserted for the period January 1, 1980 through July 1, 1980, which was an estimate made by the Audit Division, was erroneous since Vacar was not engaged in business during said period. No books, records or tax returns were produced at the hearing. All such records, petitioner claimed, were being held by the trustee in bankruptcy.

8. Petitioner alleged that during the years at issue his duties and responsibilities consisted of seeking new business, bidding for and supplying estimates for possible jobs, supervision of work on job sites and attempting to collect receivables. He argued that any failure to collect and pay the New York State withholding tax obligations of Vacar was not willful on his part since he wasn't aware that the taxes were not being paid.

9. Petitioner claimed that the Secretary/Treasurer of Vacar was responsible for keeping the books and records. He acknowledged that from time to time the Secretary/Treasurer advised him as to Vacar's financial situation; however, he claimed that he was not involved with handling the books on a day to day basis.

10. A letter written by petitioner dated March 16, 1982 states as follows:

"I, Charles F. Vachris, was President of Vacar Construction Corporation from 1974 until it was declared bankrupt on July 1, 1981. At no time during that period, or at any prior time, did Robert L. Meschi (the Secretary/Treasurer) have authorization to sign any corporation checks or to make any disbursements."

11. Petitioner alleged that the proper forum for collection of the withholding tax at issue is the bankruptcy proceeding.

12. Petitioner alleged that the deficiency was untimely issued since the tax returns for the subject withholding tax periods were filed more than three years preceding the issuance of the Notice of Deficiency; however, such returns were not offered in evidence.

13. Petitioner contended that he resigned from Vacar on July 31, 1979; however, no documentation was offered to support such contention.

#### 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 the tax imposed by this article 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 provides that, for purposes of subdivision (g), the term person:

"[i]ncludes 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 petitioner has failed to sustain his burden of proof, imposed pursuant to section 689(e) of the Tax Law, to show that he was not a person responsible for the collection and payment of the New York State withholding taxes of Vacar for the periods at issue herein.

D. That petitioner has failed to sustain his burden of proof, imposed pursuant to section 689(e) of the Tax Law, to show that the deficiency asserted herein was either overstated or untimely.

E. That turning to the question of whether petitioner's failure to collect, account for and pay over the taxes was willful, the test for determining willfulness is "whether the act, default, or conduct is consciously and voluntarily done with knowledge that as a result, the trust funds belonging to the Government will not be paid over but will be used for other purposes [citations omitted]." Matter of Levin v. Gallman, 42 N.Y.2d 32, 34 (1977). A finding of willfulness does not require an intent to deprive the Government of its funds. "[K]nowledge that withholding taxes have not been remitted and a failure to investigate or correct this mismanagement of corporate funds is enough to constitute willful conduct [citations omitted]." Matter of MacLean v. State Tax Commission, 69 A.D.2d 951, 952, aff'd (on opinion below) (80), 49 N.Y.2d 920. The evidence presented through petitioner's testimony is insufficient to show that his failure to collect, account for and pay over the taxes due was other than willful.

F. That petitioner Charles F. Vachris was a person who was under a duty to collect, truthfully account for and pay over the New York State withholding taxes of Vacar for the periods at issue herein. Since he willfully failed to do so, he is properly subject to the penalty imposed pursuant to section 685(g) of the Tax Law.



G. That the Audit Division is not required to attempt to collect unpaid withholding taxes from a corporation or from its trustee in bankruptcy, before imposing on and collecting from responsible officers the penalty imposed by section 685(g) of the Tax Law. Allan I. Jacobson, State Tax Commission, May 21, 1982.

H. That the petition of Charles F. Vachris is denied and the Notice of Deficiency issued January 25, 1982 is sustained.

DATED: Albany, New York

STATE TAX COMMISSION

DEC 13 1985

*Edmund A. Allen*  
PRESIDENT

*Francis P. Koenig*  
COMMISSIONER

*Mark J. Jank*  
COMMISSIONER