

STATE OF NEW YORK

STATE TAX COMMISSION

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In the Matter of the Petition :  
of  
Patrick J. Crowe :

AFFIDAVIT OF MAILING

for Redetermination of a Deficiency or Revision :  
of a Determination or Refund of Personal Income  
Tax under Article(s) 22 of the Tax Law for the :  
Years 1980 & 1981.  
\_\_\_\_\_ :

State of New York :

ss.:

County of Albany :

David Parchuck/Janet M. Snay, being duly sworn, deposes and says that he/she is an employee of the State Tax Commission, that he/she is over 18 years of age, and that on the 12th day of November, 1986, he/she served the within notice of Decision by certified mail upon Patrick J. Crowe the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Patrick J. Crowe  
195 Elm St.  
Clyde, NY 14433

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  
12th day of November, 1986.

David Parchuck  
Authorized to administer oaths  
pursuant to Tax Law section 174

Janet M. Snay

STATE OF NEW YORK

STATE TAX COMMISSION

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In the Matter of the Petition :  
of  
Patrick J. Crowe :

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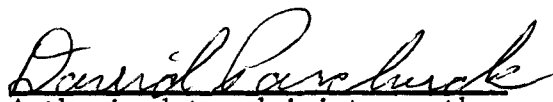
David Parchuck/Janet M. Snay, being duly sworn, deposes and says that he/she is an employee of the State Tax Commission, that he/she is over 18 years of age, and that on the 12th day of November, 1986, he served the within notice of Decision by certified mail upon Karen Schaefer, the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

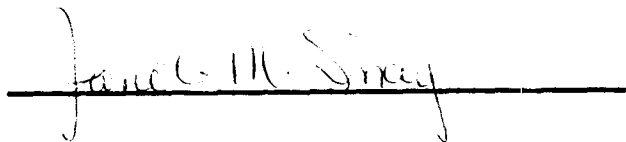
Karen Schaefer  
Lacy, Katzen, Ryen & Mittleman  
228 S. Plymouth Ave.  
Rochester, NY 14608

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  
12th day of November, 1986.

  
Authorized to administer oaths  
pursuant to Tax Law section 174



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

November 12, 1986

Patrick J. Crowe  
195 Elm St.  
Clyde, NY 14433

Dear Mr. Crowe:

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  
Audit Evaluation Bureau  
Assessment Review Unit  
Building #9, State Campus  
Albany, New York 12227  
Phone # (518) 457-2086

Very truly yours,

STATE TAX COMMISSION

cc: Taxing Bureau's Representative

Petitioner's Representative:  
Karen Schaefer  
Lacy, Katzen, Ryen & Mittleman  
228 S. Plymouth Ave.  
Rochester, NY 14608

STATE OF NEW YORK

STATE TAX COMMISSION

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In the Matter of the Petition  
of  
PATRICK J. CROWE  
for Redetermination of a Deficiency or for  
Refund of Personal Income Tax under Article 22  
of the Tax Law for the Years 1980 and 1981.

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DECISION  
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Petitioner, Patrick J. Crowe, 195 Elm Street, Clyde, New York 14433, 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 1980 and 1981 (File No. 44149).

A hearing was held before Arthur Bray, Hearing Officer, at the offices of the State Tax Commission, 259 Monroe Avenue, Rochester, New York, on September 9, 1985 at 2:45 P.M., with all briefs and documents to be submitted by March 20, 1986. Petitioner appeared pro se. The Audit Division appeared by John P. Dugan, Esq. (James Della Porta, Esq., of counsel).

#### ISSUES

I. Whether petitioner is liable for the penalty asserted against him pursuant to section 685(g) of the Tax Law with respect to New York State withholding taxes due from Wayne Pipeline, Inc.

II. Whether the Audit Division properly determined the amount of the penalty asserted to be due.

#### FINDINGS OF FACT

1. On February 28, 1983, the Audit Division issued a Notice of Deficiency to petitioner, Patrick J. Crowe, asserting a deficiency of personal income tax for the years 1980 and 1981 in the amount of \$42,048.17. The Statement of

Deficiency, which was also issued on February 28, 1983, explained that the Audit Division was asserting the deficiency against petitioner as a person required to collect, truthfully account for and pay over the taxes withheld from the wages of the employees of Wayne Pipeline, Inc. ("Wayne Pipeline"). The Statement of Deficiency also explained that the withholding tax periods and the respective amounts asserted to be due were as follows:

<u>Withholding Tax Period</u>	<u>Amount</u>
November 1, 1980 through December 31, 1980	\$ 9,413.57
January 1, 1981 through September 15, 1981	32,634.60
	<u>\$42,048.17</u>

2. Wayne Pipeline commenced business in 1979. Its activity consisted of installing sewer line systems. At the time of its inception and continuing throughout the periods in issue, petitioner served as the corporation's president. He owned fifty percent of the outstanding stock. Raymond Bennett held the position of vice-president.

3. As president, petitioner had the authority to sign corporate checks. On occasion, petitioner signed the payroll checks. Either petitioner or Raymond Bennett would sign the corporation's tax returns.

4. In or about November, 1980, Wayne Pipeline began experiencing substantial difficulty in receiving payments on its accounts receivable resulting in a shortage of cash. Consequently, the corporation began delaying payments to its creditors.

5. In or about late 1980, creditors began imposing liens on Wayne Pipeline's accounts receivable and on Wayne Pipeline's bank accounts. As a result of these liens, Wayne Pipeline began experiencing additional delays in receiving funds. Further, at some point in 1981, a majority of the funds due the corporation would be made payable by check jointly to the corporation and the particular

creditor which imposed the lien. The foregoing resulted in additional shortages of cash.

6. In 1980 and 1981, the corporation made the decision to use those funds which were available to pay wages and make material purchases. Petitioner did not understand at this time the seriousness of being delinquent in withholding tax obligations.

7. During 1981, Wayne Pipeline's performance was bonded by the Aetna Casualty and Surety Company ("Aetna"). In or about November, 1981, Aetna began providing funds so that the corporation could continue operating. During this period, petitioner would discuss the corporation's liabilities, including withholding tax, with representatives of Aetna. However, Aetna made the final decision as to who would be paid.

8. On September 25, 1981, petitioner, as president of Wayne Pipeline, entered into a deferred payment agreement with the Tax Compliance Bureau of the Department of Taxation and Finance. The agreement provided for a downpayment of \$2,000.00 and monthly payments of \$3,030.00. At the time the deferred payment agreement was entered into, the Tax Compliance Bureau determined that the corporation's withholding tax liability was as follows:

Total tax due	\$46,183.34
Total penalty and interest	9,375.57
Additional penalty and interest accruing during life of deferred payment agreement	8,313.00
Total liability	<u>\$63,871.91</u>

9. The penalty and interest calculated on the first two payments were, respectively, \$305.93 and \$588.90.

10. On September 25, 1981, the downpayment of \$2,000.00 was tendered and on October 15, 1981, an additional payment of \$3,030.00 was submitted on behalf of the corporation. Petitioner maintained at the hearing that the amount of

withholding tax asserted to be due was correct except for the failure to take into account the payments referred to above.

11. On or about January 25, 1982, i.e., approximately four months after the last withholding tax period in issue, a court appointed a receiver to operate Wayne Pipeline. The record does not disclose whether the receiver assumed his court-appointed functions.

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 taxes, section 685(g) of the Tax Law imposes on such person "...a penalty equal to the total amount of the tax evaded, or not collected, or not accounted for and paid over."

B. 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 (citations omitted)." (Matter of McHugh v. State Tax Comm., 70 AD2d 987, 988).

C. That since petitioner was the president of Wayne Pipeline, owned fifty percent of the outstanding stock, signed tax returns and exercised authority over the assets of Wayne Pipeline, petitioner was a "person" within the meaning of Tax Law §685(n).

D. That the term "willful" as used in Tax Law §685(g) "...means an act, default, or conduct voluntarily done with knowledge that, as a result, trust funds belonging to the government will be used for other purposes (Matter of Levin v. Gallman, 42 NY2d 32)." (Matter of McHugh v. State Tax Comm., *supra*, p. 989). "Knowledge 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 Comm., 69 AD2d 951, 952, affd 49 NY2d 920).

E. That since petitioner was aware that the withholding taxes due were not being paid and made the decision to prefer other creditors over the obligation to pay the withholding taxes due, petitioner's action was "willful" within the meaning of Tax Law §685(g). It is noted that Aetna's influence regarding who would be paid is of no consequence since Aetna did not assert control until after the withholding tax periods in issue.


F. That a comparison of the amount of tax currently asserted to be due with the amount of tax paid, less the penalty and interest imposed against Wayne Pipeline in the deferred payment agreement, shows that the Audit Division took into account the payments referred to in Finding of Fact "10" when it issued the Notice of Deficiency.

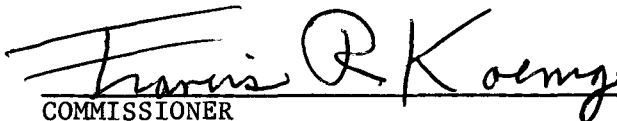
G. That the petition of Patrick J. Crowe is denied and the Notice of Deficiency, issued February 28, 1983, is sustained.


DATED: Albany, New York

STATE TAX COMMISSION

NOV 12 1986

  
PRESIDENT

  
COMMISSIONER

  
COMMISSIONER