

STATE OF NEW YORK

STATE TAX COMMISSION

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In the Matter of the Petition :

of

John San Pietro :

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 1979, 1980 & 1981.

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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 23rd day of December, 1986, he/she served the within notice of Decision by certified mail upon John San Pietro the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

John San Pietro  
191 Frost Street  
Brooklyn, New York 11211

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  
23rd day of December, 1986.

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

Janet M. Snay

STATE OF NEW YORK

STATE TAX COMMISSION

\_\_\_\_\_  
In the Matter of the Petition :  
of  
Kenneth Wise :

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 1979, 1980 & 1981.

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State of New York :

ss.:

County of Albany :

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Kenneth Wise  
314 Sharon Avenue  
Staten Island, New York 10301

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.

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23rd day of December, 1986.

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David Parchuck  
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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 23rd day of December, 1986, he served the within notice of Decision by certified mail upon Charles Jacobson, the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

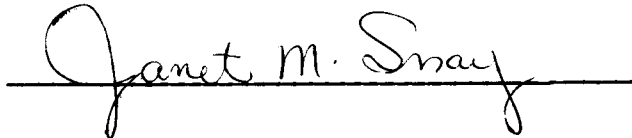
Charles Jacobson  
Dorfman, Jacobson & Nigro  
7600 Jericho Turnpike  
Woodbury, NY 11797

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  
23rd day of December, 1986.

  
\_\_\_\_\_  
Authorized to administer oaths  
pursuant to Tax Law section 174

  
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STATE OF NEW YORK

STATE TAX COMMISSION

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Charles Jacobson  
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7600 Jericho Turnpike  
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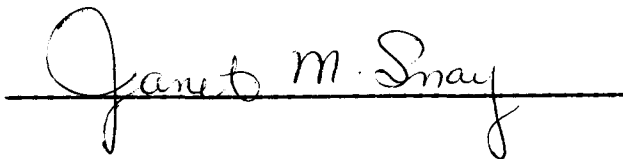
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Sworn to before me this  
23rd day of December, 1986.



Authorized to administer oaths  
pursuant to Tax Law section 174



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

December 23, 1986

John San Pietro  
191 Frost Street  
Brooklyn, New York 11211

Dear Mr. Pietro:

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:  
Charles Jacobson  
Dorfman, Jacobson & Nigro  
7600 Jericho Turnpike  
Woodbury, NY 11797

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

December 23, 1986

Kenneth Wise  
314 Sharon Avenue  
Staten Island, New York 10301

Dear Mr. Wise:

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.

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7600 Jericho Turnpike  
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STATE OF NEW YORK

STATE TAX COMMISSION

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In the Matter of the Petition :  
of :  
KENNETH WISE :  
for Redetermination of a Deficiency or for :  
Refund of Personal Income Tax under Article 22 :  
of the Tax Law for the Years 1979, 1980 and :  
1981.

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DECISION

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In the Matter of the Petition :  
of :  
JOHN SAN PIETRO :  
for Redetermination of a Deficiency or for :  
Refund of Personal Income Tax under Article 22 :  
of the Tax Law for the Years 1979, 1980 and :  
1981.

---

Petitioners, Kenneth Wise, 314 Sharon Avenue, Staten Island, New York 10301, and John San Pietro, 191 Frost Street, Brooklyn, New York 11211, filed petitions for redetermination of deficiencies or for refunds of personal income tax under Article 22 of the Tax Law for the years 1979, 1980 and 1981 (File Nos. 49953 and 49952).

A consolidated 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 13, 1986 at 10:45 A.M. Petitioners appeared by Charles Jacobson, Esq. The Audit Division appeared by John P. Dugan, Esq. (Herbert Kamrass, Esq., of counsel).

ISSUES

I. Whether petitioner Kenneth Wise 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 Video Software & Production Center, Inc. for the years 1979, 1980 and 1981.

II. Whether petitioner John San Pietro 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 Video Software & Production Center, Inc. for the years 1979, 1980 and 1981.

FINDINGS OF FACT

1. Video Software & Production Center, Inc. (hereinafter "VSP"), 380 Walnut Street, Yonkers, New York 10701, 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>
September 1, 1979 through December 31, 1979	\$ 7,273.75
June 1, 1980 through December 31, 1980	9,179.25
January 1, 1981 through December 31, 1981	<u>10,918.90</u>
Total	<u>\$27,371.90</u>

2. On October 24, 1983, the Audit Division issued a Statement of Deficiency in conjunction with a Notice of Deficiency against petitioner Kenneth Wise 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 VSP for the aforestated periods. Such penalty was asserted on the grounds that Kenneth Wise was a person required to collect, truthfully account for and pay over said



taxes, and that he willfully failed to do so. A similar set of documents was issued on the same date against petitioner John San Pietro. The deficiency asserted therein and the Audit Division's grounds for asserting such deficiency were identical to those with respect to petitioner Kenneth Wise.

3. Both petitioners were officers and shareholders of VSP. Kenneth Wise held the office of president and John San Pietro held the office of secretary. Each petitioner was a director and each held approximately 25% of the stock in VSP.

4. As president, Kenneth Wise was solely responsible for the financial affairs of VSP. He was an authorized signatory on the bank accounts of VSP and he signed corporate and other tax returns. Petitioner John San Pietro was also an authorized signatory.

5. In early 1980, VSP was experiencing financial difficulties. In order to remedy the situation VSP retained the services of a financial consultant.

6. On April 18, 1980, VSP entered into an agreement with one Edward J. Kreuter ("EJK"). Said agreement provided in pertinent part as follows:

"That for One Dollar (\$1.00) and other good and valuable consideration, VSP agrees to engage EJK as its Financial Consultant for a period of three years. However, the amount of time and the place of such consulting work shall be at the sole discretion of EJK.

\* \* \*

VSP agrees to pay EJK, or his assign, a fee of Seven Hundred Dollars (\$700.00) per week for 156 consecutive weeks, to be paid weekly. Such fee, however, will be exclusive of tax shelters.

\* \* \*

EJK further represents to VSP that he has other business interests and VSP hereby agrees to permit EJK to both make and receive telephone calls, as well as permit individuals to contact and visit him while on the premises of VSP, which would be for business purposes other than conducted for VSP.

\* \* \*

VSP hereby gives to EJK, or his assign, an option to purchase for One Dollar (\$1.00), Twenty-Five Percent (25%) of the corporate stock of VIDEO SOFTWARE PRODUCTION CENTER, INC., VIDEO INNOVATIONS, INC. and a corporation to be named, that will hold good title to the property at 380 Walnut Street, Yonkers, New York.

\* \* \*

The stock which EJK has an option to purchase will be endorsed in blank and escrowed to Rueben [sic] Blum, Esq., at 292 Madison Avenue, New York, N.Y., until such time as EJK executes his option.

The foregoing constitutes the only understanding and agreement between the parties hereto and cannot be changed or modified orally."

7. The aforestated agreement was executed by Edward J. Kreuter; VSP by Kenneth Wise, President; Video Innovations, Inc. by Kenneth Wise, President; and by the other shareholders of VSP individually.

8. At the time of Mr. Kreuter's association with VSP he assumed full control of VSP's financial and business affairs, including the payment of taxes.

9. Petitioners contended that Mr. Kreuter took control of VSP prior to execution of the aforestated agreement. However, no documentation was submitted to support such contention.

10. Petitioners testified that during the periods at issue Mr. Kreuter advised them that the withholding taxes at issue were being paid.

11. On July 22, 1980, each petitioner executed a document wherein he resigned as an officer and director of VSP. Said resignations were effective "on the date that I cease to be a stockholder of the Corporation pursuant to a Loan Agreement of even date herewith".

12. Petitioners continued performing services for VSP until December 31, 1981.

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 Kenneth Wise was a person responsible for the collection and payment of withholding taxes of VSP for the periods September 1, 1979 through December 31, 1979 and June 1, 1980 through July 21, 1980. Accordingly, the penalty asserted against him for said periods is sustained.

D. That petitioner Kenneth Wise was not a person responsible for the collection and payment of withholding taxes of VSP for the periods July 22, 1980 through December 31, 1980 and January 1, 1981 through December 31, 1981. Accordingly, the penalty asserted against him for said periods is cancelled.

E. That the petition of Kenneth Wise is granted to the extent provided in Conclusion of Law "D", supra, and except as so granted, said petition is in all other respects denied.

F. That the Audit Division is hereby directed to modify the Notice of Deficiency issued against petitioner Kenneth Wise on October 24, 1983 so as to be consistent with the decision rendered herein.


G. That petitioner John San Pietro was not a person responsible for the collection and payment of withholding taxes of VSP for any of the periods at issue herein. Accordingly, the penalty asserted against him pursuant to section 685(g) of the Tax Law is cancelled.

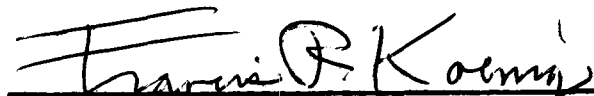
H. That the petition of John San Pietro is granted and the Notice of Deficiency issued against him on October 24, 1983 is cancelled.


DATED: Albany, New York

STATE TAX COMMISSION

DEC 23 1986

  
PRESIDENT

  
COMMISSIONER

  
COMMISSIONER

TA-26 (7/85)  
STATE OF NEW YORK  
State Tax Commission  
TAX APPEALS BUREAU  
W. A. Harriman Campus  
ALBANY, N.Y. 12227

Fold at line over top of envelope to the right  
of the return address.

**CERTIFIED**

P 319 117 235

**MAIL**

Claim Check  
No. 319

☒ Hold

Date

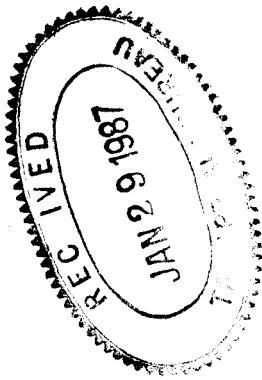
1/2/87  
1ST Notice

2ND Notice

Return

Detached from  
PS Form 3849-A,  
Oct. 1985

John San Pietro  
191 Frost Street  
Brooklyn, New York 11211



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

December 23, 1986

John San Pietro  
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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:  
Charles Jacobson  
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CONCLUSIONS OF LAW

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D. That petitioner Kenneth Wise was not a person responsible for the collection and payment of withholding taxes of VSP for the periods July 22, 1980 through December 31, 1980 and January 1, 1981 through December 31, 1981. Accordingly, the penalty asserted against him for said periods is cancelled.

E. That the petition of Kenneth Wise is granted to the extent provided in Conclusion of Law "D", supra, and except as so granted, said petition is in all other respects denied.

F. That the Audit Division is hereby directed to modify the Notice of Deficiency issued against petitioner Kenneth Wise on October 24, 1983 so as to be consistent with the decision rendered herein.


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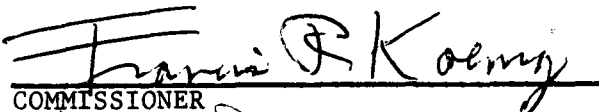
H. That the petition of John San Pietro is granted and the Notice of Deficiency issued against him on October 24, 1983 is cancelled.

DATED: Albany, New York

STATE TAX COMMISSION

DEC 23 1986

  
PRESIDENT

  
COMMISSIONER

  
COMMISSIONER