

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of
Daryl Squires :

AFFIDAVIT OF MAILING

for Redetermination of a Deficiency or Revision :
of a Determination or Refund of Withholding Tax
under Article(s) 22 of the Tax Law :
for the Years 1981 - 1984.

State of New York :

ss.:

County of Albany :

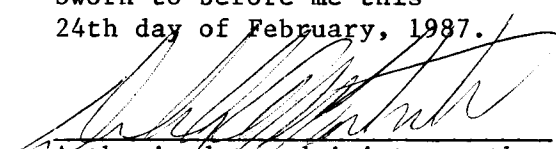
David Parchuck/Janet M. Snay, being duly sworn, deposes and says that he/she is an employee of the State Tax Commission, that he/she is over 18 years of age, and that on the 24th day of February, 1987, he/she served the within notice of decision by certified mail upon Daryl Squires the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Daryl Squires
1060 Argo Blvd.
Schenectady, New York 12303

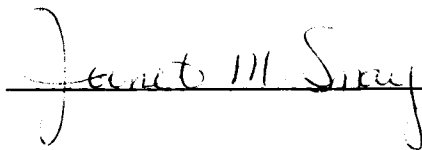
and by depositing same enclosed in a postpaid properly addressed wrapper in a post office under the exclusive care and custody of the United States Postal Service within the State of New York.

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
24th day of February, 1987.



Authorized to administer oaths
pursuant to Tax Law section 174



Janet M. Snay

STATE OF NEW YORK

STATE TAX COMMISSION

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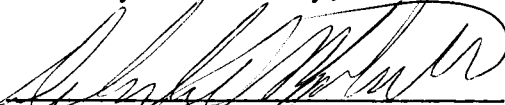
David Parchuck/Janet M. Snay, being duly sworn, deposes and says that he/she is an employee of the State Tax Commission, that he/she is over 18 years of age, and that on the 24th day of February, 1987, he served the within notice of decision by certified mail upon William J. Dreyer, the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

William J. Dreyer
Harvey & Harvey, Mumsford & Kingsley
29 Elk Street
Albany, NY 12207

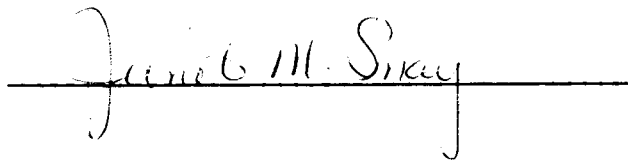
and by depositing same enclosed in a postpaid properly addressed wrapper in a post office under the exclusive care and custody of the United States Postal Service within the State of New York.

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
24th day of February, 1987



Authorized to administer oaths
pursuant to Tax Law section 174



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

February 24, 1987

Daryl Squires
1060 Argo Blvd.
Schenectady, New York 12303

Dear Mr. Squires:

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:
William J. Dreyer
Harvey & Harvey, Mumsford & Kingsley
29 Elk Street
Albany, NY 12207

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition

of

DARYL SQUIRES

DECISION

for Redetermination of a Deficiency or for
Refund of Personal Income Tax under Article
22 of the Tax Law for the Years 1981 through
1984.

Petitioner, Daryl Squires, 1060 Argo Boulevard, Schenectady, New York 12303, 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 1981 through 1984 (File No. 58711).

A hearing was held before Arthur Bray, Hearing Officer, at the offices of the State Tax Commission, W.A. Harriman State Office Campus, Albany, New York on October 22, 1986 at 9:15 A.M. Petitioner appeared by Harvey & Harvey, Mumsford & Kingsley (William J. Dreyer, Esq., of counsel). The Audit Division appeared by John P. Dugan, Esq. (Thomas C. Sacca, Esq., of counsel).

ISSUE

Whether petitioner is liable for the penalty asserted against her pursuant to section 685(g) of the Tax Law with respect to New York State withholding taxes due from V.A.P. Masons and Contractors, Inc.

FINDINGS OF FACT

1. V.A.P. Masons and Contractors, Inc. ("V.A.P.") failed to pay New York State personal income tax withheld from the wages of its employees as follows:

<u>Withholding Tax Period</u>	<u>Amount</u>
April 8, 1981 - June 30, 1981	\$ 2,215.53
October 1, 1982 - December 31, 1982	14,406.40
July 1, 1983 - December 31, 1983	12,792.80
January 1, 1984 - March 31, 1984	<u>757.50</u>
Total	\$30,172.23

2. On December 17, 1984, the Audit Division issued a Notice of Deficiency and Statement of Deficiency to Daryl Squires asserting a penalty equal to the amount of unpaid withholding tax due from V.A.P.

3. Petitioner graduated from a high school in Schenectady, New York. Thereafter she began working for the New York State Department of Labor as a typist. Petitioner's employment as a typist lasted for a couple of years.

4. V.A.P. was a construction company formed in 1979 by petitioner's father, Thomas J. Picozzi. The company engaged in masonry activity involving brick and stone. The office was located in a converted garage that was in back of Mr. Picozzi's home.

5. In or about 1980, petitioner began working for V.A.P. on a part-time basis. Petitioner would work for approximately three or four hours each day. Her duties consisted of answering the telephone, filing mail and preparing payroll forms. Petitioner was the only employee who worked exclusively in the office. In addition, it was Mr. Picozzi's practice to spend a couple of hours in the office each morning and then proceed to job sites.

6. At the time petitioner began working for V.A.P. she believed she was a secretary and employed to perform basic office duties.

7. Petitioner had the authority to sign checks on V.A.P.'s checking account. Periodically the company foreman would either telephone or appear in person at the office to advise petitioner of the hours which the company's employees had worked. Petitioner would then multiply the number of hours by

the wage rate, subtract deductions and draft a check to each employee for the net pay.

8. Petitioner was authorized to prepare payroll checks because many times her father was unavailable. Therefore, petitioner would sign the checks to insure that the payroll was prepared in a timely manner. After the payroll checks were prepared and signed, petitioner's father would usually examine and disburse them.

9. When Mr. Picozzi was in the office, he would normally sign the checks to suppliers.

10. On occasion, when petitioner went to the office she would find a list, prepared by her father, of checks she was expected to draft. On other occasions, her father would give her instructions over the telephone with respect to checks. Petitioner did not have any authority with respect to which creditors would be paid and, therefore, never wrote a check on the V.A.P. checking account that was not authorized or directed by her father.

11. In or about the beginning of 1981, petitioner and her husband separated. Thereafter, she began working full time for V.A.P. in order to provide support for her son and herself.

12. As a part-time employee, petitioner received a salary of \$40.00 a week. As a full-time employee she received a salary of approximately \$120.00 a week.

13. As a full-time employee, petitioner continued to perform the same duties she had previously performed as a part-time employee.

14. She did not have any contact with the employees who were located outside of the office, did not hire and fire employees and did not exercise any control over the employees of the corporation.

15. Petitioner held the office of secretary of V.A.P. She first learned that she was the secretary of V.A.P. when she was asked to sign a resolution in 1984 enabling V.A.P. to file for bankruptcy.

16. As secretary of the corporation, petitioner never attended a board of directors meeting or meeting of shareholders. Moreover, she never saw the corporation's records.

17. Petitioner did not have any functions with respect to the preparation or signing of tax returns for V.A.P.

18. The New York State withholding tax returns were prepared by Mr. Picozzi's accountant and signed by Mr. Picozzi. Mr. Picozzi would sign the checks when such checks were sent. Petitioner did not know that taxes which were withheld were not paid over.

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 tax evaded, or 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 factors relevant to the determination of whether petitioner was a person required to collect, truthfully account for and pay over withholding taxes during the period in issue include whether the individual signed the

company's tax returns and possessed the right to hire and fire employees (Matter of Amengual v. State Tax Commn., 95 AD2d 949, 950; Matter of Malkin v. Tully, 65 AD2d 228). Other factors considered are the amount of stock owned, the authority to pay corporate obligations and the individual's official duties (Matter of Amengual v. State Tax Commn., *supra*).


D. That in view of the fact that petitioner had only ministerial duties and did not have the authority to direct the payment of corporate obligations, petitioner was not a person required to collect, truthfully account for and pay over withholding taxes within the meaning of section 685(g) of the Tax Law.

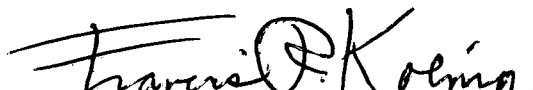
E. That the petition of Daryl Squires is granted and the Notice of Deficiency, issued December 17, 1984, is cancelled.


DATED: Albany, New York

STATE TAX COMMISSION

FEB 24 1987


PRESIDENT


COMMISSIONER


COMMISSIONER