

STATE OF NEW YORK  
STATE TAX COMMISSION

In the Matter of the Petition :

of

Morley P. Davies :

AFFIDAVIT OF MAILING

for Redetermination of a Deficiency or a Revision :  
of a Determination or a Refund of  
Personal Income Tax :  
under Article 22 of the Tax Law  
for the Years 1972 - 1973. :

State of New York

County of Albany

Jay Vredenburg, being duly sworn, deposes and says that he is an employee of the Department of Taxation and Finance, over 18 years of age, and that on the 28th day of November, 1980, he served the within notice of Decision by certified mail upon Morley P. Davies, the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:


Morley P. Davies  
260 Aero Drive  
Cheektowaga, NY 14225

and by depositing same enclosed in a postpaid properly addressed wrapper in a (post office or official depository) 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  
28th day of November, 1980.

Deborah A Bank



STATE OF NEW YORK  
STATE TAX COMMISSION

In the Matter of the Petition :  
of  
Morley P. Davies :

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for Redetermination of a Deficiency or a Revision :  
of a Determination or a Refund of  
Personal Income Tax :  
under Article 22 of the Tax Law  
for the Years 1972 - 1973. :

State of New York  
County of Albany

Jay Vredenburg, being duly sworn, deposes and says that he is an employee of the Department of Taxation and Finance, over 18 years of age, and that on the 28th day of November, 1980, he served the within notice of Decision by certified mail upon Julius M. Ramm, Esq. the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

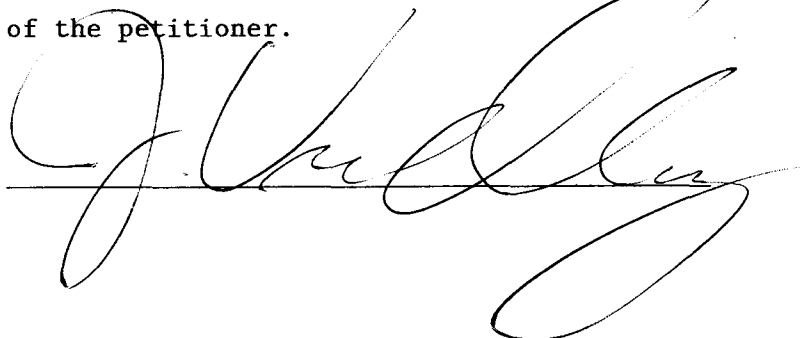
Mr. Julius M. Ramm, Esq.  
1330 Statler Hilton Hotel  
Buffalo, NY 14202

and by depositing same enclosed in a postpaid properly addressed wrapper in a (post office or official depository) 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  
28th day of November, 1980.

Deborah A. Bank



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

November 28, 1980

Morley P. Davies  
260 Aero Drive  
Cheektowaga, NY 14225

Dear Mr. Davies:

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, any proceeding in court to review an adverse decision by the State Tax Commission can only be instituted under Article 78 of the Civil Practice Laws 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  
Deputy Commissioner and Counsel  
Albany, New York 12227  
Phone # (518) 457-6240

Very truly yours,

STATE TAX COMMISSION

cc: Petitioner's Representative  
Julius M. Ramm, Esq.  
1330 Statler Hilton Hotel  
Buffalo, NY 14202  
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

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In the Matter of the Petition	:	
	:	
of	:	
	:	
MORLEY P. DAVIS	:	DECISION
	:	
for Redetermination of a Deficiency or	:	
for Refund of Personal Income Tax under	:	
Article 22 of the Tax Law for the Years	:	
1972 and 1973.	:	

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Petitioner, Morley P. Davis, 260 Aero Drive, Cheektowaga, New York 14225, 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 1972 and 1973 (File No. 12589).

A small claims hearing was held before Carl P. Wright, Hearing Officer, at the offices of the State Tax Commission, One West Genesee Street, Buffalo, New York, on November 2, 1979 at 9:15 A.M. Petitioner, Morley P. Davis, appeared with Julius M. Ramm, Esq. The Audit Division appeared by Ralph J. Vecchio, Esq. (Paul A. Lefebvre, Esq., of counsel).

ISSUE

Whether petitioner, Morley P. Davis, is liable for a penalty equal to the amount of unpaid New York State withholding taxes due from Modulex Enterprises, Inc. for 1972 and 1973.

FINDINGS OF FACT

1. Modulex Enterprises, Inc. failed to pay over to the Income Tax Bureau New York State personal income taxes withheld from its employees during the period July 1, 1972 through June 30, 1973.

2. On October 28, 1974, the Income Tax Bureau issued a Statement of Deficiency against petitioner, Morley P. Davis, imposing a penalty equal to

the amount of New York State withholding taxes due from Modulex Enterprises, Inc. during the period for July 1, 1972 through June 30, 1973. The deficiency was issued on the grounds that petitioner was required to collect, truthfully account for and pay over said taxes and that he willfully failed to do so. In accordance with the aforesaid Statement of Deficiency, the Income Tax Bureau issued a Notice of Deficiency for \$5,996.32.

3. Movable Homes, Inc. was a company equally owned by petitioner and three other people. This company erected modular homes in North Tonawanda, New York. Its major supplier of modular homes was a company called Mighty Mobile, Inc. who went bankrupt. In order to keep a supplier of modular homes, in April, 1972, Modulex Enterprises, Inc. was formed and it purchased the assets of Mighty Mobile, Inc. Fifty percent of the stock of Modulex Enterprises, Inc. was owned by Movable Homes, Inc. and the remaining fifty percent was equally owned by the four owners of Movable Homes, Inc. who made up the Board of Directors for Modulex Enterprises, Inc.

4. Mr. Robert Given was office manager of Mighty Mobile, Inc. When Modulex Enterprises, Inc. was formed, Mr. Given was made General Manager of Modulex Enterprises, Inc. to run the day-to-day affairs of the company. In his capacity as General Manager, he controlled the books and records of the corporation, signed checks, prepared the payroll and signed tax returns. A bookkeeper, Kay Miggins, under the direction of Mr. Given also signed State tax returns. Mr. Given, by memorandum dated October 2, 1972, informed the Board of Directors, that starting with the first week of October 1972, an Escrow Tax Account in Marine Midland Bank was being set up for taxes. The petitioner and the three other members of the Board of Directors were not authorized to sign checks against the Escrow Tax Account. The petitioner was authorized to sign checks in the general checking account of Modulex Enterprises,

Inc., but did not. Marine Midland Bank was also engaged to provide payroll service for Modulex Enterprises, Inc. Petitioner contended that he relied on Mr. Given and Marine Midland Bank to make timely payments of New York withholding taxes and had no knowledge that they were not being paid.

5. The four members of the Board of Directors of Modulex Enterprises, Inc. were also officers of the corporation. They were Mr. Morley P. Davis, President; Ernest G. Fekete, Vice President, Jerome C. Rosenthal, Secretary and Leonard Morris, Treasurer. All four officers were not involved with the day-to-day-operation of Modulex Enterprises, Inc., but relied on Mr. Given's expertise however they had knowledge of liquidity and federal withholding tax problems during the period at issue. The petitioner did not know of the New York State withholding tax liability until sometime after all four officers tendered their resignation as officers on May 24, 1973. The resignations were effective immediately in order to give Robert M. Potteiger (a new investor) a free hand as to choice of officers and other management matters.

6. Mr. Potteiger was brought in as an investor and principal stockholder (60 percent) after a hard search for additional capital by the original Board of Directors. Mr. Potteiger was brought to the attention of the Board of Directors by Mr. Given, who also worked part time for Mr. Potteiger.

7. It was determined later by the petitioner and the other original stockholders that shortly after Mr. Potteiger became involved, he deposited in a separate checking account, titled "R. M. Potteiger agent for Modulex Enterprises, Inc.", the sum of \$30,000.00 to provide additional working capital. From then on this checking account was used for the business purposes of Modulex Enterprises, Inc., for which the petitioner was not authorized to sign checks. From this account, delinquent Federal payroll taxes for 1972 were paid.

8. The petitioner argued that at the time the New York State Income Tax Bureau issued the notice and demands for payment of withholding tax due (from

June 1973 on) to Modulex Enterprises, Inc., the corporation had the funds to pay liabilities if the State had tried to collect. Petitioner further argued that even if he had known about the notice and demands at the time of issuance, he could have done nothing since he no longer controlled corporate affairs.

9. The Internal Revenue Service never found the petitioner liable for the Federal 100 Percent Penalty for the period April 1, 1973 through June 30, 1973, which is also at issue herein.

10. Petitioner was on the payroll of Modulex Enterprises but spent all his time selling for Movable Homes, Inc. and trying to get a zoning problem straightened out for Movable Homes, Inc. in North Tonawanda. He was fired when Mr. Potteiger became an investor.

#### CONCLUSIONS OF LAW

A. That petitioner, Morley P. Davis, was a person required to collect, truthfully account for and pay over New York State withholding taxes due from Modulex Enterprises, Inc. for the year 1972 and for the period January 1, through May 24, 1973 in accordance with the meaning and intent of section 685(n) of the Tax Law.

B. That the term "willful" as used in the statute 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 N.Y.2d 32, 396 N.Y.S.2d 623, 364 N.E.2d 1316). Petitioners cannot avoid responsibility by failing to concern themselves and seeing that taxes are being paid when they are obviously in charge of assets of the corporation. McHugh v. State Tax Commission, 417 NYS 2d 799.

C. That since petitioner, Morley P. Davis, failed or caused Modulex Enterprises, Inc. to willfully fail to collect, truthfully account for and pay over New York State taxes due from said corporation for the period July 1,

1972 through May 24, 1973, a penalty equal to the amount of unpaid withholding taxes was properly asserted against him in accordance with section 685(g) of the Tax Law.

D. That the petition of Morley P. Davis is granted to the extent that the penalty imposed in accordance with section 685(g) of the Tax Law for the period May 25, 1973 through June 30, 1973 is cancelled.

E. That the Audit Division is hereby directed to accordingly modify the Notice of Deficiency issued October 28, 1974 to be consistent with the decision rendered herein, and that said petition is, in all other respects denied.

DATED: Albany, New York

NOV 28 1980

STATE TAX COMMISSION

  
PRESIDENT

  
COMMISSIONER

  
COMMISSIONER

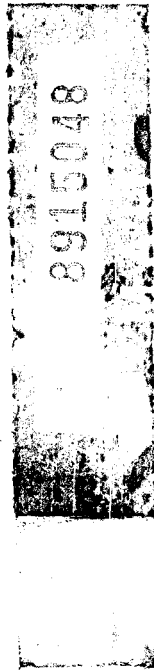
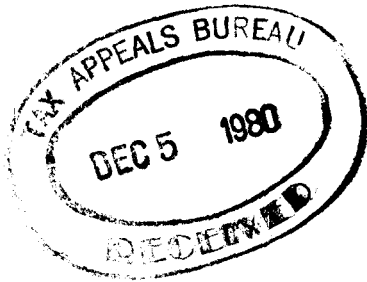


TA 26 (9-79)

STATE OF NEW YORK  
State Tax Commission  
TAX APPEALS BUREAU  
STATE CAMPUS  
ALBANY, N. Y. 12227

MOVED NOT FORWARDED

Julius M. Ramm, Esq.  
1330 Statler Hilton Hotel  
Buffalo, NY 14202



REP. Copy

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

November 28, 1980

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Phone # (518) 457-6240

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STATE TAX COMMISSION

cc: Petitioner's Representative  
Julius M. Ramm, Esq.  
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Buffalo, NY 14202  
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STATE OF NEW YORK

STATE TAX COMMISSION

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In the Matter of the Petition  
of  
MORLEY P. DAVIS  
for Redetermination of a Deficiency or  
for Refund of Personal Income Tax under  
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DECISION

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B. That the term "willful" as used in the statute 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 N.Y.2d 32, 396 N.Y.S.2d 623, 364 N.E.2d 1316). Petitioners cannot avoid responsibility by failing to concern themselves and seeing that taxes are being paid when they are obviously in charge of assets of the corporation. McHugh v. State Tax Commission, 417 NYS 2d 799.

C. That since petitioner, Morley P. Davis, failed or caused Modulex Enterprises, Inc. to willfully fail to collect, truthfully account for and pay over New York State taxes due from said corporation for the period July 1,

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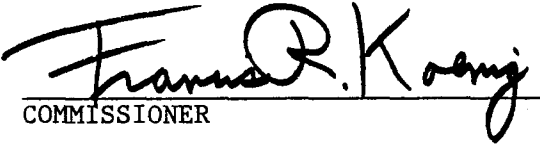
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DATED: Albany, New York  
NOV 28 1980

STATE TAX COMMISSION

  
PRESIDENT

  
COMMISSIONER

  
COMMISSIONER