

STATE OF NEW YORK
STATE TAX COMMISSION

In the Matter of the Petition :
of :
Foster-Lipkins Corp. :

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 1969 - 1971. :

State of New York
County of Albany

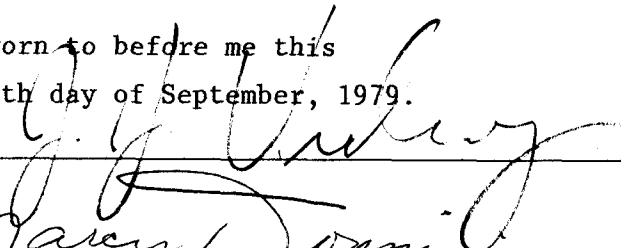
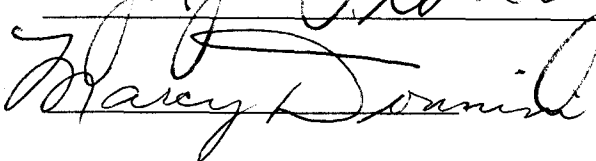
Jay Vredenburg, being duly sworn, deposes and says that he is an employee of the Department of Taxation and Finance, over 18 years of age, and that on the 28th day of September, 1979, he served the within notice of Decision by certified mail upon Foster-Lipkins Corp., the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Foster-Lipkins Corp.
22-09 Bridge Plaza North
Long Island City, NY

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 September, 1979.

STATE OF NEW YORK
STATE TAX COMMISSION

In the Matter of the Petition :
of :
Foster-Lipkins Corp. :
for Redetermination of a Deficiency or a Revision :
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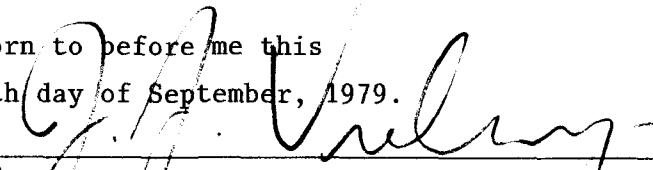
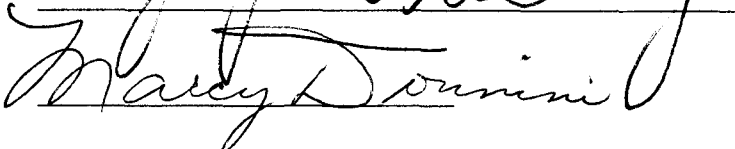
Jay Vredenburg, being duly sworn, deposes and says that he is an employee of the Department of Taxation and Finance, over 18 years of age, and that on the 28th day of September, 1979, he served the within notice of Decision by certified mail upon Charles Becker the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Mr. Charles Becker
P.O. Box 1185
Fort Lee, NJ 07024

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 September, 1979.

JAMES H. TULLY JR., PRESIDENT
MILTON KOERNER
THOMAS H. LYNCH

JOHN J. SOLLECITO
DIRECTOR

Telephone: (518) 457-1723

September 28, 1979

Foster-Lipkins Corp.
22-09 Bridge Plaza North
Long Island City, NY

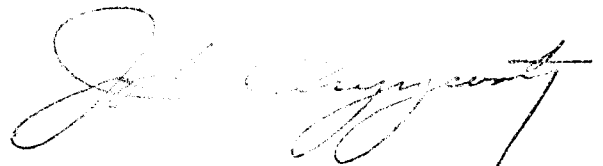
Gentlemen:

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 the Deputy Commissioner and Counsel to the New York State Department of Taxation and Finance, Albany, New York 12227. Said inquiries will be referred to the proper authority for reply.

Sincerely,



cc: Petitioner's Representative
Charles Becker
P.O. Box 1185
Fort Lee, NJ 07024
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of :
FOSTER-LIPKINS CORP. : DECISION
for Redetermination of a Deficiency or :
for Refund of Personal Income Tax under :
Article 22 of the Tax Law for the Years :
1969, 1970 and 1971. :
:

Petitioner, Foster-Lipkins Corp., 22-09 Bridge Plaza North, Long Island City, New York, 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 1969, 1970 and 1971 (File No. 00677).

A small claims hearing was held before Robert F. Mulligan, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on February 9, 1978 at 10:45 A.M. Petitioner appeared by Charles Becker. The Income Tax Bureau appeared by Peter Crotty, Esq. (Bruce Zalaman, Esq., of counsel).

ISSUE

Whether amounts other than wages paid by petitioner to its employer constituted supplementary income subject to withholding tax.

FINDINGS OF FACT

1. During the years at issue, petitioner, Foster-Lipkins Corp., was a contractor engaged in the construction of the "South Mall" project in Albany, New York.

2. The Income Tax Bureau investigated all New York City metropolitan area-based contractors working on the South Mall project. In the course of this investigation, the Bureau conducted an audit of petitioner's books and records. As a result of said audit, it found that petitioner made payments to its employees for "lodging, meals, subsistence and mileage," and that the employees did not submit itemized vouchers to the petitioner for said items. The Bureau also found that the payments were made in accordance with the union contract and that the payments were not reflected on wage and tax statements (i.e., Federal Form W-2), nor reported on Federal Form 1099.

3. The Bureau determined that although most of the employees lived outside the Albany area, Albany was their tax home; thus the payments made to the employees constituted supplemental income. It also determined that petitioner did not withhold taxes on such income, although it was required to do so and was liable for the tax under section 675 of the Tax Law. Accordingly, the Bureau issued a Notice of Deficiency pertaining to petitioner's employees and its "Swan Street" construction site on February 26, 1973, for \$6,351.50, plus interest, based on the following computation:

	<u>1969</u>	<u>1970</u>	<u>1971</u>				
Supplemental income paid	\$72,548.79	\$28,763.17	\$25,718.00				
N. Y. Tax Due at 5%	\$3,627.44	+	\$1,438.16	+	\$1,285.90	=	\$6,350.00
Interest							+ 850.57
TOTAL DUE							<u>\$7,202.07</u>

(It is noted that although petitioner was also involved in another aspect of the project, the "Tower Job", only the supplemental payments to employees on the Swan Street job are at issue in this proceeding.)

4. The majority of petitioner's employees on the Swan Street job resided in the New York metropolitan area and commuted to Albany at the beginning of each week, returning to their homes at the end of each week. Most of the other employees resided in Albany, or within daily commuting distance of Albany.

5. The additional payments petitioner made to its employees varied, for the most part, from employee to employee. One employee was paid more in expenses (\$9,353.73) than in wages (\$8,411.60) and in many cases, expenses were in excess of 50 percent of the wages paid. Expenses paid to employees residing in the Albany area were, for the most part, negligible. The great bulk of expense payments were made to employees who resided in the New York City metropolitan area.

6. A detailed analysis for 1969 (the year in which most of the supplemental payments were made) shows that some employees regularly received fixed amounts per week (e.g., \$50.00, \$75.00, \$125.00, \$150.00, \$250.00, \$262.48, etc.) , while others received payments which varied from week to week but which were still within an identifiable range. Petitioner could offer no explanation for the variations in expense

payments. The analysis also showed that the payments continued during a four-week period when the employees were not working.

CONCLUSIONS OF LAW

A. That whether or not payments are taxable to, or deductible by the employee is immaterial with regard to whether the payments are subject to withholding by the employer.

B. That petitioner has failed to sustain the burden of proof required to show that supplemental payments were advances or reimbursements for ordinary and necessary expenses incurred or reasonably expected to be incurred by the employees, even though said payments were segregated from wages. Accordingly, the supplemental payments constituted additional remuneration under section 3401(a) of the Internal Revenue Code.

C. That the payments made by petitioner to its employees were supplemental wages subject to withholding at the rate of 5 percent, within the meaning and intent of section 671 of the Tax Law and 20 NYCRR 160.4(b); thus petitioner is liable for the tax which should have been withheld, pursuant to section 675 of the Tax Law and 20 NYCRR 160.31(a).

D. That the petition of Foster-Lipkins Corp. is denied and the Notice of Deficiency issued February 26, 1973 is sustained.

DATED: Albany, New York

SEP 28 1973

STATE TAX COMMISSION


PRESIDENT


COMMISSIONER


COMMISSIONER