

STATE OF NEW YORK  
STATE TAX COMMISSION

In the Matter of the Petition :  
of  
Stanley Emerson :

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 1973, 1974 & 1975. :

State of New York  
County of Albany

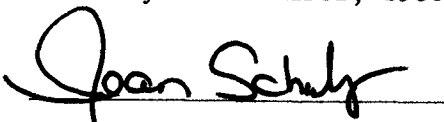
Jay Vredenburg, being duly sworn, deposes and says that he is an employee of the Department of Taxation and Finance, over 18 years of age, and that on the 12th day of December, 1980, he served the within notice of Decision by certified mail upon Stanley Emerson, the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

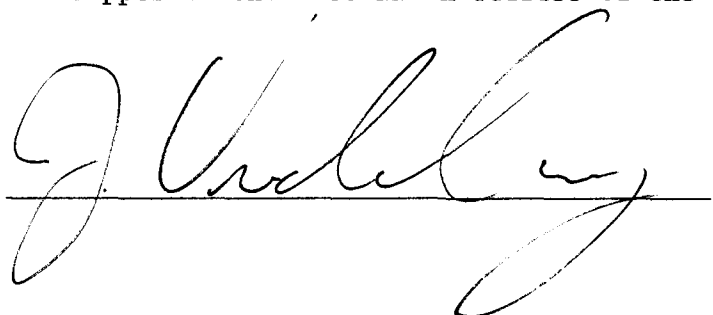
Stanley Emerson  
8 Addison Lane  
Greenvale, NY 11548

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  
12th day of December, 1980.

  
Joan Schulz

  
Jay Vredenburg

STATE OF NEW YORK  
STATE TAX COMMISSION

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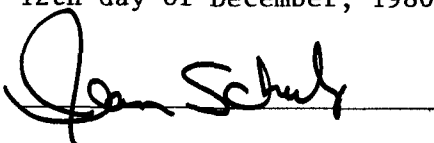
Jay Vredenburg, being duly sworn, deposes and says that he is an employee of the Department of Taxation and Finance, over 18 years of age, and that on the 12th day of December, 1980, he served the within notice of Decision by certified mail upon Alan D. Pekelner the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

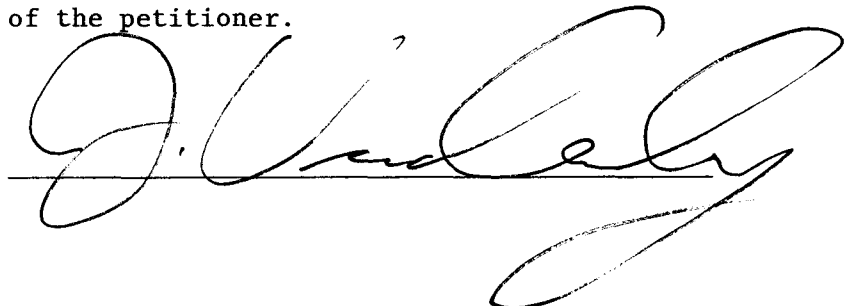
Mr. Alan D. Pekelner  
Blum, Haimoff, Gersen, Lipson & Szabad  
270 Madison Ave.  
New York, NY

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 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 December, 1980.





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

December 12, 1980

Stanley Emerson  
8 Addison Lane  
Greenvale, NY 11548

Dear Mr. Emerson:

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  
Alan D. Pikelner  
Blum, Haimoff, Gersen, Lipson & Szabad  
270 Madison Ave.  
New York, NY  
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

	:	
In the Matter of the Petition	:	
	:	
of	:	
	:	
STANLEY EMERSON	:	DECISION
	:	
for Redetermination of a Deficiency or	:	
for Refund of Personal Income Tax under	:	
Article 22 of the Tax Law for the Years	:	
1973 through 1975.	:	

Petitioner, Stanley Emerson, 8 Addison Lane, Greenvale, 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 1973 through 1975 (File No. 19675).

A formal hearing was held before William J. Dean, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on January 29, 1980 at 9:15 A.M. Petitioner appeared by Blum, Haimoff, Gersen, Lipson & Szabad, Esqs. (Alan David Pekelner, Esq., of counsel). The Audit Division appeared by Ralph J. Vecchio, Esq. (Abraham Schwartz, Esq., of counsel).

#### ISSUE

Whether petitioner was a person required to collect and pay over personal income taxes withheld from the employees of McKee-Berger-Mansueto, Inc.

#### FINDINGS OF FACT

1. By Notice of Deficiency dated April 21, 1977, the Audit Division notified petitioner, Stanley Emerson, of a deficiency in the amount of \$104,064.94. The claims against petitioner related to unpaid withholding taxes of McKee-Berger-Mansueto, Inc. (herein "MBM") for various withholding tax periods during the years in question.

2. At the formal hearing, the Audit Division agreed that the deficiency should be reduced from \$104,064.94 to \$59,350.88.

3. MBM was a construction consulting firm performing services for a variety of clients, private, public and institutional, primarily in the United States, but abroad as well. As a construction consulting firm, MBM provided estimating and consulting services to the owner or developer of a project who might not have the in-house ability to monitor the work of the architect and general contractor on the project to insure that the project was brought in on time and within the approved budget.

4. Petitioner began his employment with MBM on July 23, 1973 as Comptroller. Shortly thereafter, for the purpose of signing checks in accordance with the corporate banking resolutions, he was appointed Assistant Treasurer. Petitioner was hired by Donald Zeigler, Vice President of Finance for MBM and reported to him. As Comptroller of MBM, petitioner was not an officer of the corporation. He headed the accounting and bookkeeping section. One of his primary responsibilities was to centralize the accounting system of the corporation at the New York headquarters office. He was also responsible for monitoring the day-to-day accounting operations, the accounts receivable, and the issuance of orders and invoices and purchasing. The accounting department consisted of five to nine employees (the corporation employed over two hundred people.) As Comptroller, petitioner could sign checks singly up to \$5,000. With checks over \$5,000 an additional signature was required. Petitioner did not sign the withholding, corporate franchise, or income tax returns for MBM.

5. Petitioner knew of MBM's tax deficiency to the State of New York. He did not have authority to decide which creditors were to be paid and which creditors were not to be paid. He received instructions from Gerald McKee, President of MBM, and Mr. Zeigler not to pay the withholding taxes.

6. Petitioner subsequently was approached about being elected Treasurer of MBM to help relieve Mr. Zeigler of some of his duties. Petitioner expressed concern over the possibility of his becoming personally liable for withholding taxes due the State of New York if he were to be elected Treasurer. As a result, at the Board of Directors meeting held on July 8, 1975, at which time petitioner was elected Treasurer, the following Board resolutions were passed:

"RESOLVED, that the President of the Company shall be the sole officer authorized and empowered to direct the payment or failure to pay any taxes of the Company, including, but not limited to, any or all amounts withheld by the Company from the employees thereof in respect or on account of the employment of such persons by the Company; and be it further

RESOLVED, that the By-Laws of the Company relating to the duties and powers of the Comptroller and Treasurer of the Company are hereby amended to the extent necessary in order to give effect to the immediately preceding resolution."

7. By letter dated November 20, 1978, Mr. McKee wrote as follows:

"Since July 8, 1975, the date of the Board resolution placing in me responsibility of determining whether or not employee tax withholding payments should be made, I have alone made each of those determinations, and you, either individually or as a company employee, have neither had the responsibility nor discretion to make any of those determinations, to sign employee payroll checks or to perform any act relating thereto except at my specific instruction and order."

8. As Treasurer of MBM, petitioner had no discretion concerning the payment or non-payment of taxes and continued to be subject to the orders of the President.

#### CONCLUSIONS OF LAW

A. That neither as Comptroller nor as Treasurer of MBM was petitioner a person under a duty to collect and pay over withholding tax within the meaning of subdivisions (g) and (n) of section 685 of the Tax Law. During the time petitioner served as Comptroller and Assistant Treasurer of MBM, he did not have the authority to decide which creditors were to be paid. In fact, he was

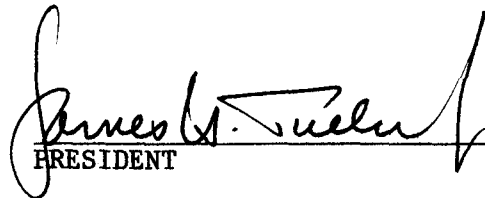
specifically ordered by the President and Vice President of Finance of MBM not to pay withholding taxes. Petitioner did not become a person under a duty to collect and pay over withholding taxes by virtue of his election as Treasurer of MBM on July 8, 1975. Even as Treasurer, petitioner continued to be subject to the orders of the President with regard to issues relating to the payment or non-payment of taxes.

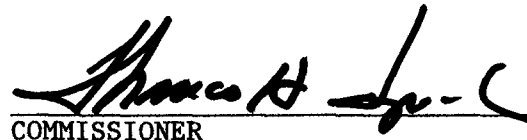
B. That the petition of Stanley Emerson is granted and the Notice of Deficiency dated April 21, 1977 is cancelled.


DATED: Albany, New York

DEC 12 1980

STATE TAX COMMISSION

  
PRESIDENT

  
COMMISSIONER

  
COMMISSIONER