

STATE OF NEW YORK

STATE TAX COMMISSION

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In the Matter of the Petition :  
of :  
Joseph Depietro, M.D. :  
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.

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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 27th day of November, 1981, he served the within notice of Decision by certified mail upon Joseph Depietro, M.D., the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

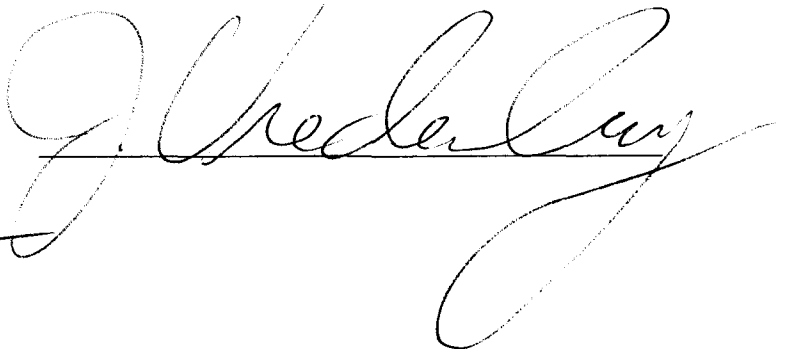
Joseph Depietro, M.D.  
20-29 Whitestone Expressway  
Queens, NY 11357

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  
27th day of November, 1981.

  
Ramon A. Depietro

  
Jay Vredenburg

STATE OF NEW YORK  
STATE TAX COMMISSION

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In the Matter of the Petition :  
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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 27th day of November, 1981, he served the within notice of Decision by certified mail upon Alex E. Nashman the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

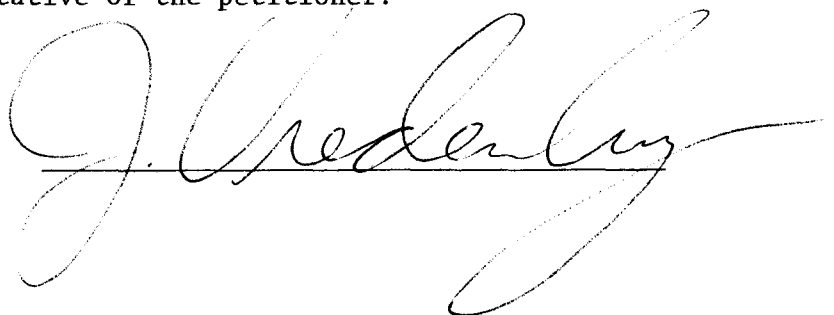
Alex E. Nashman  
325 Broadway  
New York, NY 10007

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  
27th day of November, 1981.





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

November 27, 1981

Joseph Depietro, M.D.  
20-29 Whitestone Expressway  
Queens, NY 11357

Dear Dr. Depietro:

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  
Alex E. Nashman  
325 Broadway  
New York, NY 10007  
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

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|---|---|----------|
| In the Matter of the Petition                 | : |          |
|   | : |          |
| of  | : |          |
|   | : |          |
| JOSEPH DE PIETRO, M.D.                        | : | DECISION |
|   | : |          |
| for Redetermination of a Deficiency or for    | : |          |
| Refund of Personal Income Taxes under Article | : |          |
| 22 of the Tax Law for the Period February 16, | : |          |
| 1972 through May 23, 1973.                    | : |          |

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Petitioner, Joseph DePietro, 20-29 Whitestone Expressway, Queens, New York 11357, filed a petition for redetermination of a deficiency or for refund of personal income taxes under Article 22 of the Tax Law for the period February 16, 1972 through May 23, 1973 (File No. 21492).

A formal hearing was held before Robert A. Couze, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on August 3, 1981 at 1:30 P.M. Petitioner appeared by Alex E. Nashman, Esq. The Audit Division appeared by Ralph J. Vecchio, Esq. (Paul Lefebvre, Esq., of counsel).

ISSUE

Whether petitioner Joseph DePietro, M.D., was a person required to collect, truthfully account for and pay over withholding taxes due from Montwill Corporation d/b/a Wickersham Hospital.

FINDINGS OF FACT

1. On December 19, 1977 the Audit Division issued a Notice of Deficiency and a Statement of Deficiency against petitioner Joseph DePietro, M.D., as follows:

| <u>WITHHOLDING TAX PERIOD</u> | <u>AMOUNT</u>    |
|-------------------------------|------------------|
| 2/16/72 - 12/31/72            | \$52,947.65      |
| 1/1/73 - 2/26/73              | 9,070.00         |
| 2/27/73 - 5/23/73             | <u>13,926.00</u> |
| TOTAL                         | \$75,943.65      |

2. The Audit Division asserted petitioner was a person required to collect, truthfully account for and pay over withholding taxes due from the corporate employer, Montwill Corporation d/b/a Wickersham Hospital, pursuant to the provisions of New York Tax Law, section 685, subsections (g) and (n).

3. The corporate employer was the operator of a private hospital.

4. The petitioner was a medical doctor and, besides using the facilities of Polyclinic Hospital in Manhattan, he used the facilities of the corporate employer for the treatment of his patients.

5. Petitioner stated that although he was listed as a vice president of the corporate employer, it was not a real position but instead it was an honorary one. In fact he testified that he did not even know he was a vice-president of the corporate employer until during a hearing conducted by the New York City Department of Finance for the purpose of ascertaining petitioner's liability for the withholding of city income taxes for the period of time that is in issue herein.

6. Petitioner testified that he never signed anything on behalf of the corporate employer nor did he have any authority to sign anything on behalf of the corporate employer. Likewise he testified that he had nothing to do with the collection of the corporate employer's accounts receivable, the fixing or changing of its fees, nor did he have any responsibility for or knowledge of its financial affairs.

7. Petitioner further testified that he was never involved in the management of the corporate employer in any manner and that he did not have the right to be so involved.

8. Petitioner owned one share of the corporate employer's stock which he purchased for \$5,000.00. The share never paid a dividend nor did he ever expect it to pay a dividend. The corporate employer never had any stockholders' meetings.

9. Petitioner was not a member of the corporate employer's board of directors nor did he ever receive any income from the corporate employer.

10. New York City found petitioner not to be responsible for the collection and turnover the New York City withholding taxes for the period of time in issue herein. (See: Petitioner's Exhibit No. 2).

11. Petitioner testified that the Internal Revenue Service did not find him to be responsible for the collection and turnover the federal withholding taxes for the period of time in issue herein, however no independent evidence was offered to support this fact.

#### 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 personal income tax 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 defines the word "person", for the purpose of section 685(g), and reads as follows:

"For purpose of subsections (g) and (i), the term person includes 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 was not a person required to collect, truthfully account for and pay over the personal income tax in issue herein.


D. That the petition, herein, is granted and that the Notice of Deficiency herein, is cancelled.


DATED: Albany, New York

NOV 27 1981

STATE TAX COMMISSION

  
PRESIDENT

  
COMMISSIONER

  
COMMISSIONER