

STATE OF NEW YORK

STATE TAX COMMISSION

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In the Matter of the Petition :  
of :  
Harry Goldenberg :  
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 Year :  
1972.

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State of New York  
County of Albany

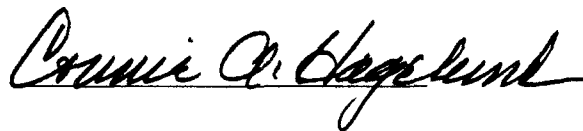
Jay Vredenburg, being duly sworn, deposes and says that he is an employee of the Department of Taxation and Finance, over 18 years of age, and that on the 30th day of October, 1981, he served the within notice of Decision by certified mail upon Harry Goldenberg, the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

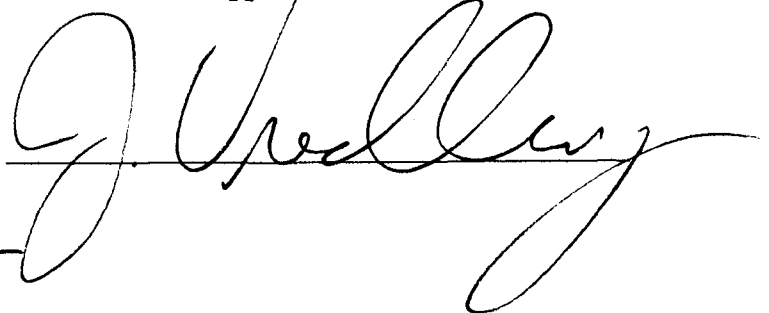
Harry Goldenberg  
2665 Homecrest Ave.  
Brooklyn, NY 11235

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  
30th day of October, 1981.

  
Connie A. Hagelund



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

October 30, 1981

Harry Goldenberg  
2665 Homecrest Ave.  
Brooklyn, NY 11235

Dear Mr. Goldenberg:

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

Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

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In the Matter of the Petition	:	
	:	
of	:	
	:	
HARRY GOLDENBERG	:	DECISION
	:	
for Redetermination of a Deficiency or	:	
for Refund of Personal Income Tax under	:	
Article 22 of the Tax Law for the Year	:	
1972.	:	

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Petitioner, Harry Goldenberg, 2665 Homecrest Avenue, Brooklyn, New York 11235, filed a petition for redetermination of a deficiency or for refund of personal income tax under Article 22 of the Tax Law for the year 1972 (File No. 19659).

A small claims hearing was held before Samuel Levy, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on November 20, 1980 at 9:15 A.M. Petitioner, appeared pro se. The Audit Division appeared by Ralph J. Vecchio, Esq. (Angelo Scopellito, Esq., of counsel).

ISSUES

I. Whether petitioner Harry Goldenberg is subject to a penalty under section 685, subdivisions (g) and (n) of the Tax Law, as a person who wilfully failed to collect, account for and pay over withholding tax due and owing from North American Planning Corp. (hereinafter "North American") for 1972.

II. Whether the Notice of Deficiency issued against petitioner, Harry Goldenberg, for 1972 is barred by the statute of limitations.

FINDINGS OF FACT

1. On January 30, 1973, a Form IT-2103, Reconciliation of Personal Income Tax Withheld for the calendar year 1972, was filed with the Audit Division by

North American which showed income tax collected from its employees of \$4,870.91. The form was signed by Joseph Ellison, Trustee.

On April 15, 1975, a Notice and Demand for Unpaid Withholding Tax Due (Form IT-2103.20) was sent to North American which showed tax paid or previously assessed of \$3,981.90 against amount withheld of \$4,870.91, supra, leaving a balance due of \$889.01. The unpaid balance was incurred for the period July 1, 1972 through July 31, 1972.

2. On February 28, 1977, the Audit Division issued a Notice of Deficiency and Statement of Deficiency against petitioner, Harry Goldenberg, imposing a penalty against him equal to the amount of New York withholding tax due and owing from North American in the amount of \$889.01. The penalty was issued on the ground that petitioner was a person required to collect, truthfully account for and pay over tax at issue and that he wilfully failed to do so.

3. Petitioner was an honorary, unpaid director of North American, a publicly held corporation, from October 1971 to July 1972. The purpose of listing petitioner as a director was to add prestige to North American.

Petitioner performed no services for, nor was an authorized signatory of checks and tax returns of North American. That for the period in issue petitioner was employed full time by Metropolitan Life Insurance Company as a special consultant.

4. On July 25, 1972, Mr. Joseph D. Ellison was appointed as Temporary Receiver for North American by the United States District Court for the Southern District of New York.

Under date of September 12, 1972, an order was issued by the United States District Court for the Southern District of New York entered on

August 8, 1972, wherein Joseph D. Ellison was appointed trustee for the liquidation of the business of North American.

5. Petitioner contends that Joseph D. Ellison assumed management and control of North American under date of July 12, 1972, as temporary trustee. That under same date he tendered his resignation as director of North American to the National Association of Securities Dealers, Inc.

Petitioner's contention that the trustee appointed under date of July 12, 1972 is in direct conflict with court order which indicates that the trustee was appointed July 25, 1972.

6. At the hearing, the attorney for the Bureau stipulated that based on his examination of documents submitted by petitioner, that at the time the trustee assumed control over North American, there were sufficient funds set aside by it in a trust account earmarked for payment of tax at issue. Further, that petitioner had no control and authority over any of North American's activities.

7. The trustee for North American failed to make payment of tax at issue, although funds to pay same were available, because he had not been authorized by the court to pay any payroll taxes accruing prior to his appointment.

8. Petitioner sets forth as an affirmative defense the statute of limitation with respect to the Notice of Deficiency for 1972.

#### CONCLUSIONS OF LAW

A. That since a withholding tax return (Form IT-2101) was not filed by North American for the month of July 1972, the three (3) year statute of limitation for assessment had not run for said month in accordance with the meaning and intent of section 683(c)(1)(A) of the Tax Law.

B. That petitioner, Harry Goldenberg, was not a person required to collect, truthfully account for and pay over unpaid New York State personal income tax withheld by North American within the meaning of section 685(n) of the Tax Law. Accordingly, petitioner is not subject to a penalty in an amount equal to the unpaid withholding tax for North American under section 685(g) of the Tax Law.

C. That the petition of Harry Goldenberg is granted and the Notice of Deficiency issued February 28, 1977 is cancelled.

DATED: Albany, New York

OCT 30 1981

STATE TAX COMMISSION

*Arnes W. Tuller*  
PRESIDENT

*Francis D. Koenig*  
COMMISSIONER

*W. J. J. J. J.*  
COMMISSIONER