

STATE OF NEW YORK

STATE TAX COMMISSION

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In the Matter of the Petition :  
of :  
Harold Schwinger :  
: 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 - 1975

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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 3rd day of April, 1981, he served the within notice of Decision by certified mail upon Harold Schwinger, the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Harold Schwinger  
62-8th Ave.  
Brooklyn, NY 11217

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  
3rd day of April, 1981.

*Annie A. Hageland*

*J. Vredenburg*

STATE OF NEW YORK  
STATE TAX COMMISSION

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of  
Harold Schwinger :

: AFFIDAVIT OF MAILING

for Redetermination of a Deficiency or a Revision :  
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Personal Income Tax :  
under Article 22 of the Tax Law  
for the Years 1973 - 1975 :

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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 3rd day of April, 1981, he served the within notice of Decision by certified mail upon Norman R. Berkowitz 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. Norman R. Berkowitz  
666 5th Ave.  
New York, NY 10019

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  
3rd day of April, 1981.

*James A. Hagelund*

*J. Vredenburg*

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

April 3, 1981

Harold Schwinger  
62-8th Ave.  
Brooklyn, NY 11217

Dear Mr. Schwinger:

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  
Norman R. Berkowitz  
666 5th Ave.  
New York, NY 10019  
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

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|  |   |          |
|--|---|----------|
| In the Matter of the Petition                  | : |          |
| of   | : |          |
| HAROLD SCHWINGER                               | : | DECISION |
| for Redetermination of a Deficiency or for     | : |          |
| Refund of Personal Income Tax under Article 22 | : |          |
| of the Tax Law for the Years 1973, 1974 and    | : |          |
| 1975.  | : |          |

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Petitioner, Harold Schwinger, 62 Eighth Avenue, Brooklyn, New York 11217, 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, 1974 and 1975 (File No. 18939).

A formal hearing was held before Edward L. Johnson, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on May 10, 1979 at 1:15 P.M. Petitioner appeared by Norman R. Berkowitz, Esq. The Audit Division appeared by Peter Crotty, Esq. (Abraham Schwartz, Esq., of counsel).

ISSUE

Whether petitioner is a liable for the penalty imposed upon him as an officer of a corporation which failed to pay over to New York State income taxes withheld from employees.

FINDINGS OF FACT

1. Brooklyn Women's Hospital, Inc., 1395 Eastern Parkway, Brooklyn, New York 11233 failed to pay over to the New York State Income Tax Bureau \$12,607.40 in income taxes withheld from employees in 1973, \$38,692.43 in 1974, and \$3,628.60 in 1975.

2. On January 24, 1977, the Audit Division issued a Notice of Deficiency against petitioner for a penalty equal to the amount of the income taxes withheld and unpaid, i.e. \$54,928.75. On the same date, the Audit Division sent the petitioner a Statement of Deficiency detailing the income taxes withheld from employees by Brooklyn Women's Hospital, Inc. and not paid over to New York State, as follows:

| <u>PERIOD</u>                          | <u>AMOUNT</u>      |
|--|--------------------|
| April 1, 1973 - April 15, 1973         | \$ 2,001.71        |
| April 16, 1973 - April 30, 1973        | 4,669.47           |
| December 1, 1973 - December 15, 1973   | 3,342.04           |
| December 16, 1973 - December 31, 1973  | 2,594.18           |
| January 1, 1974 - January 15, 1974     | 2,008.16           |
| January 16, 1974 - January 31, 1974    | 2,375.00           |
| February 1, 1974 - February 15, 1974   | 2,174.38           |
| February 16, 1974 - February 28, 1974  | 3,372.83           |
| March 1, 1974 - March 15, 1974         | 1,934.66           |
| March 16, 1974 - March 31, 1974        | 2,528.54           |
| April 1, 1974 - April 15, 1974         | 3,589.82           |
| April 16, 1974 - April 30, 1974        | 2,670.70           |
| May 1, 1974 - May 15, 1974             | 1,940.00           |
| May 16, 1974 - May 31, 1974            | 1,970.04           |
| June 1, 1974 - June 15, 1974           | 2,099.72           |
| July 1, 1974 - July 15, 1974           | 2,185.70           |
| August 16, 1974 - August 30, 1974(sic) | 2,679.87           |
| November 16, - November 30, 1974       | 2,646.23           |
| December 1, 1974 - December 15, 1974   | 2,786.69           |
| December 16, 1974 - December 31, 1974  | 1,903.17           |
| January 1, 1975 - January 15, 1975     | 1,611.47           |
| January 16, 1975 - January 31, 1975    | 2,017.15           |
|  | <u>\$54,928.79</u> |

3. Petitioner appeared at the hearing and testified that during 1973, 1974 and 1975, he had been the elected Secretary of the Board of Trustees of Brooklyn Women's Hospital, Inc. He stated that his duties were to attend meetings of the board which occurred about once a month, to review the minutes of such meetings as taken by various persons, to approve such minutes and sign them before they became part of the hospital's permanent records. He was unsalaried and had neither an office nor a desk. He had no authority with

respect to the collection, depositing or disbursements of the funds of the hospital. He had no authority to sign checks for the corporation. Petitioner averred that he first became aware that withholding taxes had not been paid over to New York State when he received the Notice of Deficiency dated January 24, 1977.

4. Petitioner is a radiologist and as Director of Radiology acted as a liason between the medical board and the lay trustees.

5. No evidence was presented to show what income tax returns had been filed or paid during the period under audit.

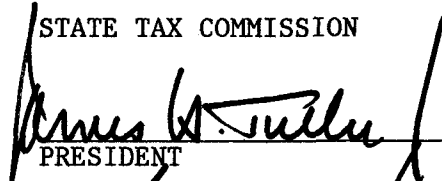


CONCLUSION OF LAW

A. That petitioner, Harold Schinger, was not a person required to collect, truthfully account for and pay over income tax withheld from employees by Brooklyn Women's Hospital, Inc. within the meaning and intent of section 685(g) of the Tax Law, and therefore is not liable for the penalty provided in said section.

B. That the petition of Harold Schinger is granted and the Notice of Deficiency dated January 24, 1977 is cancelled.

DATED: Albany, New York

APR 03 1981

STATE TAX COMMISSION  
  
PRESIDENT  
  
COMMISSIONER  
  
COMMISSIONER