

STATE OF NEW YORK

STATE TAX COMMISSION

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In the Matter of the Petition  
of  
STEVEN SINGER  
for Redetermination of a Deficiency or for  
Refund of Personal Income Tax under Article  
22 of the Tax Law for the Year 1976.

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DECISION

Petitioner, Steven Singer, 212 East 35th Street, New York, 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 year 1976 (File No. 21367).

A small claims hearing was held before William Valcarcel, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on October 28, 1980 at 2:45 P.M. Petitioner, Steven Singer, appeared with Sidney Eagle, Esq. The Audit Division appeared by Ralph J. Vecchio, Esq. (Abraham Schwartz, Esq., of counsel).

ISSUES

I. Whether the Notice of Deficiency issued by the Audit Division was arbitrary and capricious, and if not;

II. Whether petitioner is subject to a penalty under section 685(g) of the Tax Law.

FINDINGS OF FACT

1. On January 30, 1978, the Audit Division issued a Notice of Deficiency for \$713.00 against petitioner, Steven Singer, for the year 1976. Attached thereto was a Statement of Deficiency, which indicated that petitioner, Steven Singer, was held subject to a penalty under section 685(g) of the Tax Law as a person who willfully failed to collect or truthfully account for and pay over

personal income taxes withheld from the employees of Vidicom Systems, Inc., during the period November 1, 1976 to December 14, 1976.

2. Petitioner, Steven Singer, requested that a Notice of Deficiency issued January 30, 1978, be cancelled in full, since the Audit Division failed to establish a prima facie case. Other than the petition, the Law Bureau's answer and a power of attorney, the sole acceptable items of evidence introduced by the Audit Division were the Notice of Deficiency and the Statement of Deficiency (See Findings of Fact #1). The Audit Division did not reveal any information in its possession, used as a basis for the issuance of the Notice of Deficiency.

3. Petitioner, Steven Singer, rendered sworn testimony that he was president and the primary stockholder of Vidicom Systems, Inc., which was bankrupt, inactive and without any employees after November 1, 1976.

#### CONCLUSIONS OF LAW

A. That section 681(a) of the Tax Law provides that a Notice of Deficiency may be issued upon examination of a taxpayers return, or if a return was not filed, a Notice of Deficiency may be issued "from any information in its possession". Accordingly, while it is recognized that the burden of proof is upon the petitioner (section 689(e) of the Tax Law) the Audit Division has a statutory responsibility of establishing a basis for the issuance of a Notice of Deficiency. Also, once a deficiency is shown to be arbitrary and excessive, it becomes incumbent upon the taxing agency to prove the precise deficiency at issue. (Guy T. Helvering, Commissioner of Internal Revenue, Petitioner v. Walter W. Taylor, 293 U.S. 507-516.)

B. That the Audit Division did not submit and the record does not contain, the result of an examination, if conducted, of the employer's (Vidicom Systems,

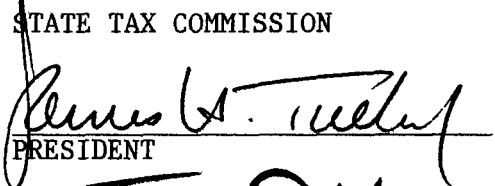
Inc.) withholding tax returns filed for the year 1976; or if not filed, the nature of any information in its possession used as a basis for the issuance of the deficiency. Accordingly, the Notice of Deficiency issued January 30, 1978 is arbitrary, capricious and contrary to the meaning and intent of section 681(a) of the Tax Law.

C. That the petition of Steven Singer is granted and the Notice of Deficiency issued January 30, 1978 is cancelled.

DATED: Albany, New York

NOV 06 1981

STATE TAX COMMISSION

  
PRESIDENT

  
COMMISSIONER

  
COMMISSIONER

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition  
of  
Steven Singer

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: 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 :  
1976.

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 6th day of November, 1981, he served the within notice of Decision by certified mail upon Steven Singer, the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Steven Singer  
212 East 35th St.  
New York, NY 10016

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  
6th day of November, 1981.

*Cornie A. Hagelberg*

*J. Vredenburg*

STATE OF NEW YORK  
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for Redetermination of a Deficiency or a Revision :  
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Tax under Article 22 of the Tax Law for the Year :  
1976

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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 6th day of November, 1981, he served the within notice of Decision by certified mail upon Sidney Eagle the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Sidney Eagle  
Eagle & Fein  
363 Seventh Ave.  
New York, NY 10001

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  
6th day of November, 1981.

*Annex A Hagerman*

*J. Vredenburg*

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

November 6, 1981

Steven Singer  
212 East 35th St.  
New York, NY 10016

Dear Mr. Singer:

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  
Sidney Eagle  
Eagle & Fein  
363 Seventh Ave.  
New York, NY 10001  
Taxing Bureau's Representative