

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition	:	
of	:	
Mathilda Goldberg	:	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	:	
1976 & 1977.	:	

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 29th day of December, 1982, he served the within notice of Decision by certified mail upon Mathilda Goldberg, the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Mathilda Goldberg  
162-27 73rd Ave.  
Flushing, NY 11368

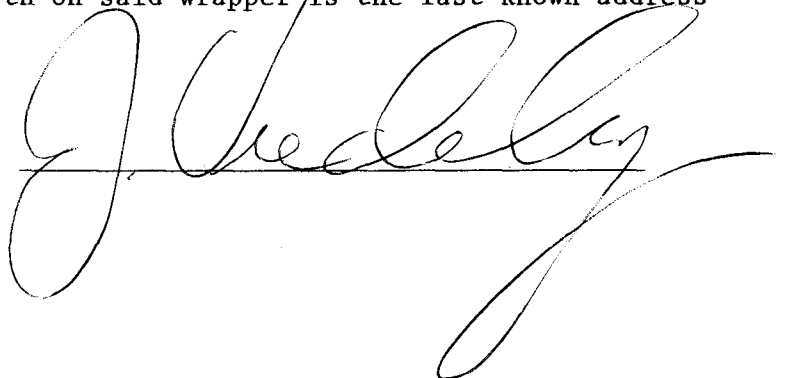
and by depositing same enclosed in a postpaid properly addressed wrapper in a (post office or official depository) under the exclusive care and custody of the United States Postal Service within the State of New York.

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  
29th day of December, 1982.

*Kenny Rappinbach*

AUTHORIZED TO ADMINISTER  
OATHS PURSUANT TO TAX LAW  
SECTION 174



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

December 29, 1982

Mathilda Goldberg  
162-27 73rd Ave.  
Flushing, NY 11368

Dear Ms. Goldberg:

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  
Law Bureau - Litigation Unit  
Albany, New York 12227  
Phone # (518) 457-2070

Very truly yours,

STATE TAX COMMISSION

cc: Petitioner's Representative  
Ira J. Altchek  
Ira J. Altchek & Co., CPA's  
65 S. Route 303  
Blauvelt, NY 10913  
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

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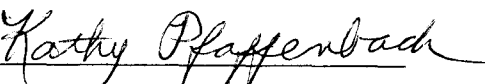
Jay Vredenburg, being duly sworn, deposes and says that he is an employee of the Department of Taxation and Finance, over 18 years of age, and that on the 29th day of December, 1982, he served the within notice of Decision by certified mail upon Ira J. Altchek the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

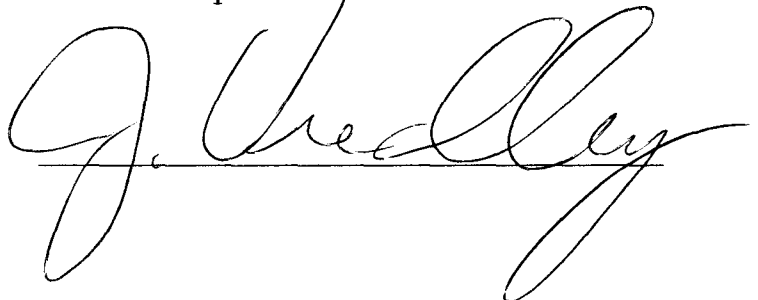
Ira J. Altchek  
Ira J. Altchek & Co., CPA's  
65 S. Route 303  
Blauvelt, NY 10913

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  
29th day of December, 1982.

  
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AUTHORIZED TO ADMINISTER  
OATHS PURSUANT TO TAX LAW  
SECTION 174

  
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STATE OF NEW YORK

STATE TAX COMMISSION

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In the Matter of the Petition	:	
	:	
of	:	
	:	
MATHILDA GOLDBERG	:	DECISION
	:	
for Redetermination of a Deficiency or for	:	
Refund of Personal Income Tax under Articles	:	
22 and 30 of the Tax Law and Chapter 46,	:	
Title T of the Administrative Code of the City	:	
of New York for the Years 1976 and 1977.	:	

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Petitioner, Mathilda Goldberg, 162-27 73rd Avenue, Flushing, New York 11368, filed a petition for redetermination of a deficiency or for refund of New York State and New York City personal income tax under Articles 22 and 30 of the Tax Law and Chapter 46, Title T of the Administrative Code of the City of New York for the years 1976 and 1977 (File No. 24153).

A formal hearing was held before Dennis M. Galliher, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York on May 18, 1982 at 10:45 A.M. Petitioner appeared by Ira J. Altchek & Co. (Ira J. Altchek, C.P.A.). The Audit Division appeared by Paul B. Coburn, Esq., (Irwin Levy, Esq., of counsel).

ISSUE

Whether petitioner was a person required to collect, truthfully account for and pay over withholding tax with respect to A. Sterling Gold Ltd. and willfully failed to do so, thus becoming liable for a penalty under section 685(g) of the Tax Law.

FINDINGS OF FACT

1. By a Notice of Deficiency and two (2) Statements of Deficiency all dated July 31, 1978, the Audit Division notified petitioner, Mathilda Goldberg, of a deficiency for the years 1976 and 1977 in the following amounts:

<u>YEAR</u>	<u>NEW YORK STATE</u>	<u>NEW YORK CITY</u>
1976	\$1,583.00	\$ 870.00
1977	1,953.85	144.00
Total	\$3,536.85	\$1,014.00

This asserted deficiency, totalling \$4,550.85, covered various withholding tax periods during 1976 and 1977 and related to unpaid withholding taxes due from A. Sterling Gold Ltd.

2. A. Sterling Gold Ltd. ("Gold") was a corporation engaged in purchasing the motion picture rights to books and in the production and distribution of motion pictures.

3. Petitioner was one of the original incorporators and was the sole stockholder of Gold. She had provided the money needed to form Gold.

4. At the time of incorporation, petitioner was listed as an officer of Gold and also as a person authorized to sign checks, in cases of emergency, on behalf of Gold.

5. During the years at issue, petitioner was a clerical employee of an artificial plant company. Petitioner's role with Gold was as its sole stockholder and source of initial financing. Petitioner was not employed by Gold nor did she receive any salary from Gold. She neither prepared nor signed tax returns for Gold nor did she sign checks on behalf of Gold. She was not active in its management or operation. She neither hired nor fired employees or officers of Gold. It is unclear whether or not petitioner was actually an officer of Gold during the years at issue herein.

6. Gold was operated by petitioner's son, one Leonard Goldberg, now deceased, who had a background in the theatre and entertainment industry.

7. Several of the copies of Form IT-2103 (Reconciliation of Personal Income Tax Withheld) and IT-2101 (Employer's Return - Personal Income Tax Withheld), submitted at the hearing and pertaining to withholding tax of Gold, bore the signature of Leonard Goldberg. No such forms bearing petitioner's signature were introduced at the hearing.

#### CONCLUSIONS OF LAW

A. That the personal income tax imposed by Article 30 of the Tax Law for the year 1976 and also by Chapter 46, Title T of the Administrative Code of the City of New York for the years beginning after December 31, 1976, is by its own terms tied into and contains essentially the same provisions as Article 22 of the Tax Law. Therefore, in addressing the issues presented herein, unless otherwise specified, all references to particular sections of Article 22 shall be deemed references (though incited) to the corresponding sections of Article 30 and Chapter 46, Title T, respectively.

B. That where a person is required to collect, truthfully account for and pay over withholding taxes and willfully fails to collect and pay over such taxes, section 685(g) of the Tax Law imposes on such person "a penalty equal to the total amount of tax evaded, not collected, or not accounted for and paid over."

C. That section 685(n) of the Tax Law defines a person, for purposes of section 685(g) of the Tax Law, to include:

"an individual, corporation, or partnership or an officer or employee of any corporation...who as such officer, employee or member is under a duty to perform the act in respect of which the violation occurs."

D. That the question of who is a "person" required to collect and pay over withholding taxes is to be determined on the basis of the facts presented. Some of the factors to be considered include whether petitioner owned stock, signed tax returns, or exercised authority over the employees and the assets of the corporation. (McHugh v. State Tax Comm., 70 A.D.2d 987.) Other factors to be considered are whether the person derived a substantial part of his income from the corporation or had the right to hire and fire employees. (MacLean v. State Tax Comm., 69 A.D.2d 951, aff'd. 49 N.Y.2d 920. See also Malkin v. Tully, 65 A.D.2d 228.)

E. That petitioner, Mathilda Goldberg, was not a person under a duty to collect and pay over withholding taxes on behalf of A. Sterling Gold Ltd. Although she invested her money in Gold and was its sole stockholder, she exercised no control over the affairs or operation of Gold or its employees, did not sign checks or tax returns on behalf of Gold and was neither an employee of nor received a salary from Gold.

F. That the petition of Mathilda Goldberg is granted and the Notice of Deficiency dated July 31, 1978 is cancelled.


DATED: Albany, New York

DEC 29 1982

STATE TAX COMMISSION

  
ACTING PRESIDENT

  
COMMISSIONER

  
COMMISSIONER