

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition	:	
of	:	
Gerard Shilling	:	
for Redetermination of a Deficiency or a Revision	:	AFFIDAVIT OF MAILING
of a Determination or a Refund of Personal Income	:	
Tax under Article 22 of the Tax Law for the Years	:	
1969 & 1970.	:	

State of New York  
County of Albany

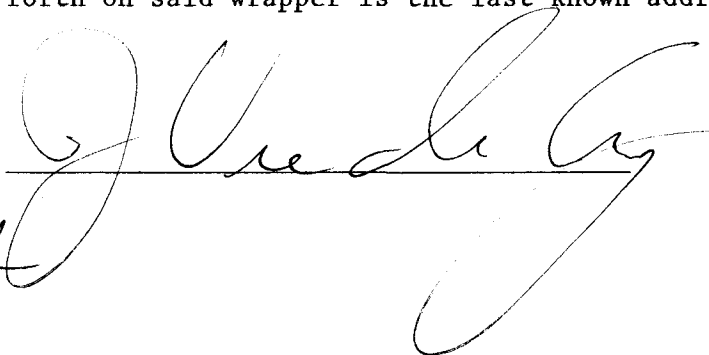
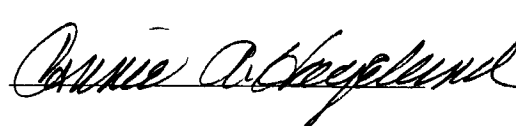
Jay Vredenburg, being duly sworn, deposes and says that he is an employee of the Department of Taxation and Finance, over 18 years of age, and that on the 11th day of June, 1982, he served the within notice of Decision by certified mail upon Gerard Shilling, the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Gerard Shilling  
4 Shepherds Dr.  
Scarsdale, NY 10583

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  
11th day of June, 1982.

STATE TAX COMMISSION

### AFFIDAVIT OF MAILING

State of New York  
County of Albany

Arthur A. J. Weglein  
E. Rampasture Rd.  
Hampton Bays, NY 11946

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.

Connie R. Hagelund

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

June 11, 1982

Gerard Shilling  
4 Shepherds Dr.  
Scarsdale, NY 10583

Dear Mr. Shilling:

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  
Arthur A. J. Weglein  
E. Rampasture Rd.  
Hampton Bays, NY 11946  
Taxing Bureau's Representative

## STATE TAX COMMISSION

In the Matter of the Petition :  
of :  
GERARD SHILLING : DECISION  
for Redetermination of a Deficiency or for :  
Refund of Personal Income Tax under Article 22 :  
of the Tax Law for the Years 1969 and 1970. :

A formal hearing was held before Frank Romano, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on August 12, 1977, at 9:00 A.M. Petitioner appeared by Lang & Nescie, Esqs. (Brian J. McDonnell, Esq., of counsel). The Audit Division appeared by Peter Crotty, Esq. (Laurence Stevens, Esq., of counsel). The hearing was continued and concluded before Archibald F. Robertson, Jr., Hearing Officer, at the same offices on October 30, 1978, at 9:15 A.M. Petitioner appeared by Arthur A.J. Weglein, Esq. The Audit Division appeared by Peter Crotty, Esq. (Bruce M. Zalaman, Esq., of counsel).

Whether petitioner was a person required to collect, truthfully account for, and pay over New York State withholding tax due from Professional Health Services, Incorporated for the periods July 1 through October 31, 1969, and January 1 through December 31, 1970, and willfully failed to do so and is thus liable to a penalty under section 685(g) of the Tax Law.

FINDINGS OF FACT

1. On March 26, 1973, the Audit Division issued a Statement of Deficiency and Notice of Deficiency against petitioner, Gerard Shilling, imposing a penalty under section 685(g) of the Tax Law for the periods July 1, 1969 through October 31, 1969 in the amount of \$3,350.65, January 1, 1970 through March 4, 1970 in the amount of \$1,644.00 and March 4, 1970 through December 31, 1970 in the amount of \$7,618.00, for a total penalty of \$12,612.65. The penalty was equal to the unpaid income taxes withheld from employees of Professional Health Services, Incorporated, (hereinafter "the corporation").

2. Petitioner worked for the corporation since its creation in 1967 and held the title of financial vice-president, director, and holder of 16 percent of the stock of the corporation when it became a public company in March, 1969.

3. On October 2, 1969, the petitioner was indicted by a Federal grand jury and pleaded guilty to various Federal securities law violations.

4. Petitioner resigned as director and financial vice-president of the corporation in mid-October, 1969, due to pressure from the Securities and Exchange Commission and to facilitate the take over of the corporation by a new group; called "Medical Facilities, Inc.," in early November, 1969. Petitioner turned over his stock to the new control group. An agreement existed that if the new control group was not satisfied with the performance of the corporation, it would, after a specified period, return the corporation to the original control group. In the later part of November, 1969, the new corporate control group relinquished its control of the corporation.

5. On March 10, 1970, a receiver for the corporation was appointed by the Bankruptcy Court.

6. Petitioner had signatory authority throughout his tenure as vice-president. His signature appears on Form IT-2101-SM, 1969, dated July 24, 1969, which form is the employer's semi-monthly return of New York State personal income tax withheld. Petitioner's signature also appears on Form IT-2103 (BNS) 1969, dated January 31, 1970, which form is the reconciliation of personal income tax withheld for employers filing semi-monthly, monthly and semi-annual returns.

#### CONCLUSIONS OF LAW

A. That section 685(g) of the Tax Law provides:

"Any person required to collect, truthfully account for, and pay over the tax imposed by this article 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 term "person" to include, inter alia, an officer or employee of a corporation who "...is under a duty to perform the act in respect of which the violation occurs."

C. That whether petitioner, Gerard Shilling, is a "person" required to collect and pay over withholding taxes is a factual one (Matter of Malkin v. Tully, 65 A.D. 2d 228, 412 N.Y.S. 2d 188).

D. That the term "willful" as used in section 685(g) of the Tax Law means an "...act, default or conduct is consciously and voluntarily done with knowledge that, as a result, trust funds belonging to the Government will not be paid over but will be used for other purposes. No showing of intent to deprive the Government of its money is necessary but only something more than accidental nonpayment is required" (Matter of Levin v. Gallman, 49 A.D.2d 434, rev'd. 42 N.Y.2d 32).

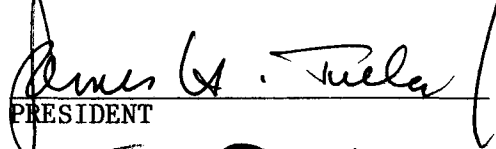
E. That petitioner, Gerard Shilling, was a person required to collect, truthfully account for and pay over New York State withholding tax due from Professional Health Services, Incorporated for the periods July 1 through October 31, 1969 and January 1 through March 10, 1970 and willfully failed to do so, within the meaning of subdivisions (n) and (g) of section 685 of the Tax Law. Accordingly, petitioner is subject to a penalty equal to said sum under subsection (g) of section 685 of the Tax Law.

F. That the petition of Gerard Shilling is granted as to the period subsequent to March 10, 1970; that the Audit Division is hereby directed to accordingly modify the Notice of Deficiency issued March 26, 1973; and that except as so granted, the petition is in all other respects, denied and the Notice of Deficiency as modified is sustained.

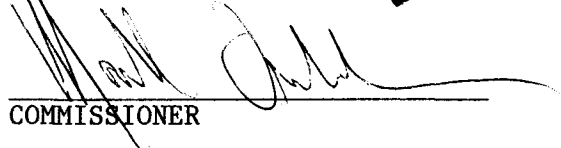
DATED: Albany, New York

JUN 11 1982

STATE TAX COMMISSION

  
PRESIDENT

  
COMMISSIONER

  
COMMISSIONER