

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
 of :
 C. Richard Schine :
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 :
1968. :
_____ :

AFFIDAVIT OF MAILING

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 21st day of May, 1982, he served the within notice of Decision by certified mail upon C. Richard Schine, the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

C. Richard Schine
c/o Sperry, Weinberg, Wels, Waldman & Rubenstein
6 E. 43rd St.
New York, NY 10017

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
21st day of May, 1982.

Donnie D. Hagelund

J. Vredenburg

STATE OF NEW YORK
STATE TAX COMMISSION

In the Matter of the Petition :
of :
C. Richard Schine :

AFFIDAVIT OF MAILING

for Redetermination of a Deficiency or a Revision :
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Tax under Article 22 of the Tax Law for the Year :
1968 :

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 21st day of May, 1982, he served the within notice of Decision by certified mail upon Richard H. Wells the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Richard H. Wells
Sperry, Weinberg, Wells, Waldman & Rubenstein
6 E. 43rd St.
New York, NY 10017

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
21st day of May, 1982.

Barrie A. Haglund

J. Vredenburg

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

May 21, 1982

C. Richard Schine
c/o Sperry, Weinberg, Wels, Waldman & Rubenstein
6 E. 43rd St.
New York, NY 10017

Dear Mr. Schine:

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
Richard H. Wels
Sperry, Weinberg, Wels, Waldman & Rubenstein
6 E. 43rd St.
New York, NY 10017
Taxing Bureau's Representative

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

May 21, 1982

C. Richard Schine
c/o Sperry, Weinberg, Wels, Waldman & Rubenstein
6 E. 43rd St.
New York, NY 10017

Dear Mr. Schine:

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Very truly yours,

STATE TAX COMMISSION

cc: Petitioner's Representative
Richard H. Wels
Sperry, Weinberg, Wels, Waldman & Rubenstein
6 E. 43rd St.
New York, NY 10017
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition	:	
	:	
of	:	
	:	
C. RICHARD SCHINE	:	DECISION
	:	
for Redetermination of a Deficiency or	:	
for Refund of Personal Income Tax under	:	
Article 22 of the Tax Law for the Year	:	
1968.	:	

Petitioner, C. Richard Schine, 43 East Boulevard, Gloversville, 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 1968 (File No. 01864).

A formal hearing was commenced before Nigel G. Wright, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on October 22, 1975 at 2:00 P.M. and continued to conclusion before Frank A. Romano, Hearing Officer, on March 22, 1977 at 9:15 A.M. Petitioner appeared by Moss, Wels & Marcus, Esqs. (Richard H. Wels, Esq., of counsel). The Income Tax Bureau appeared by Peter Crotty, Esq. (Michael Alexander, Esq., of counsel, at the hearing on October 22, 1975 and Louis Senft, Esq., of counsel, at the hearing on March 22, 1977).

ISSUE

Whether petitioner C. Richard Schine was a person required to collect, truthfully account for and pay over the withholding taxes of the employees of Schine Ten Eyck Corp., d/b/a Schine Ten Eyck Hotel, within the meaning and intent of section 685(n) of the Tax Law for 1968 and, if so required, whether petitioner willfully failed to collect, truthfully account for and pay over the

withholding taxes of said corporation, within the meaning and intent of section 685(g) of the Tax Law.

FINDINGS OF FACT

1. Schine Ten Eyck Corp., d/b/a Schine Ten Eyck Hotel (hereinafter "Ten Eyck"), failed to pay over to the New York State Income Tax Bureau personal income taxes withheld from its employees for the period February 1, 1968 through June 6, 1968 in the amount of \$4,561.70, computed as follows:

<u>WITHHOLDING TAX PERIOD (1968)</u>	<u>AMOUNT</u>
February 1 to March 23	\$2,113.20
March 24 to May 25	2,045.60
May 26 to June 6	402.90
Total Amount Due	<u>\$4,561.70</u>

2. On August 26, 1968, the Income Tax Bureau issued a statement of deficiency to petitioner C. Richard Schine, imposing a penalty equal to the amount of the New York State withholding taxes due from Ten Eyck for the period February 1, 1968 through June 6, 1968. This was done on the belief that petitioner was a person required to collect, truthfully account for and pay over said taxes, and that he willfully failed to do so. A Notice of Deficiency dated August 26, 1968 was issued to petitioner in the amount of \$4,561.70.

3. Ten Eyck, a New York corporation, was a wholly-owned subsidiary of Schine Chain Theatres, Inc. (hereinafter "Schine Theatres") which operated a hotel together with a restaurant and bar at the corner of State and Pearl Streets, Albany, New York.

4. Ten Eyck had as its officers and directors the following persons:

J. Myer Schine	- President and Chairman of Board
C. Richard Schine	- Vice-President and Director
Eugene Tannen	- Vice-President and Director
Byron S. Miller	- Vice-President and Secretary
John W. Hamill	- Treasurer and/or Controller

5. Schine Theatres had as its officers the following persons:

J. Myer Schine	- President
Eugene Tannen	- Vice-President
Byron S. Miller	- Secretary
John W. Hamill	- Treasurer

6. By written agreement dated February 5, 1968, Schine Theatres agreed to sell all of its shares of Ten Eyck stock to Dellwood Realty Corp., in consideration of the sum of \$450,000.00, payable by sixty (60) promissory notes, each for \$7,500.00, and bearing 8% interest per annum. The February 5, 1968 agreement was signed on behalf of Schine Theatres by Eugene Tannen, vice-president, and on behalf of Dellwood Realty Corp. by Berne A. Watkins, vice-president. Pursuant to the February 5, 1968 agreement, Dellwood Realty Corp. issued 60 promissory notes which were executed by Berne A. Watkins, and which were held in escrow by Schine Theatres' attorneys.

The February 5, 1968 agreement contained a provision that Schine Theatres assumed all existing liabilities as of January 5, 1968 except, inter alia, payables in excess of \$60,000.00 and "Federal or State payroll taxes"; further, Dellwood Realty Corp. was granted an indemnification as to the assumption of such liabilities.

7. Simultaneously with the execution of the February 5, 1968 agreement, John W. Hamill, J. Myer Schine, C. Richard Schine and Eugene Tannen executed and delivered letters of resignation dated February 5, 1968 as officers and/or directors of Ten Eyck.

8. Shortly thereafter, the February 5, 1968 agreement was rescinded by the parties, apparently because of Berne A. Watkins' connection with Dellwood Realty Corp., and his alleged prior criminal charges or convictions, which would endanger the issuance of a liquor license to Dellwood Realty Corp.

9. By written agreement dated February 9, 1968, Schine Theatres agreed to sell all of its shares of stock in Ten Eyck to Unek Builders Supplies, Inc. (hereinafter "Unek"). The February 9, 1968 agreement was signed on behalf of Schine Theatres by Eugene Tannen, vice-president, and on behalf of Unek by Allan I. Jacobson, president. The closing of this transaction apparently took place on the same date as the execution of the February 9, 1968 agreement. That agreement was identical in language to the February 5, 1968 agreement with Dellwood Realty Corp., except with regard to the parties and the inclusion in the February 9, 1968 agreement of the following clause:

"4. Escrow for Liquor License Approval

Notwithstanding anything contained in this Agreement or the Exhibits made a part hereof, the stock described herein shall be held in escrow by the Escrow Agent described in the Escrow Agreement annexed hereto, pending the approval by the State Liquor Authority of the corporate change of ownership application submitted by the Purchaser, to be released to Purchaser even in the event of disapproval." (Emphasis added.) 1

10. At the closing and simultaneously with the execution of the February 9, 1968 agreement, the parties executed a separate, written agreement dated February 9, 1968. By this agreement, Schine Theatres' attorneys were to hold the shares of stock of Ten Eyck in escrow, pending Unek's payment in full of the promissory notes constituting the consideration for the transfer of the shares.² Eugene Tannen and Allan I. Jacobson signed the Escrow Agreement as vice-president of Schine Theatres and as president of Unek, respectively.

11. At the closing of the February 9, 1968 transaction, the books and records of Ten Eyck were delivered into the possession of Unek's principals. All taxes outstanding as of February 9, 1968 were paid or to be paid by the issuance of and deposit into certain Ten Eyck accounts, three checks drawn by or charged to Schine Industries, Inc., an affiliated corporation. Thus, funds

sufficient in amount were turned over to Unek to pay all outstanding taxes prior to February 9, 1968, but the officers and principals of Unek (Berne A. Watkins, Sondra Jacobson and Allan I. Jacobson) diverted such funds to other purposes.³

After the closing, no former officer of Ten Eyck had the authority to sign and issue Ten Eyck checks and, in fact, did not do so. All funds, accounts receivable, and inventory passed into the possession and control of Unek. A New York State corporation franchise tax return was filed by Ten Eyck for the fiscal year ended February 28, 1978, showing that the stock of this corporation was sold on February 5, 1978.

12. The same attorney represented both Dellwood and Unek. Allan I. Jacobson was the president of Unek and its principal shareholder. Sondra Jacobson was Ten Eyck's bookkeeper after the closing. Berne A. Watkins took over the actual operation of Ten Eyck as co-manager with Ernest Cohen. Allan I. Jacobson and Berne A. Watkins were on Ten Eyck's payroll after the closing. Allan I. Jacobson filed for a liquor license representing himself as the controlling person of Unek, the purchaser of Ten Eyck. Unek had no assets nor value of any kind, being merely a "dummy" corporation formed to consummate the sale transaction only after it was realized that a liquor license might not be issued in the name of Dellwood, which it should be noted, was a viable corporation with assets.

Allan I. Jacobson was not an officer of Ten Eyck, but was a co-signatory with Ernest Cohen, a manager, on the Ten Eyck payroll account.⁴ Mr. Jacobson had no authority to sign or draw checks upon any general account of Ten Eyck, since Sondra Jacobson and Berne A. Watkins handled the general finances of Ten Eyck. Berne A. Watkins utilized Unek, a dummy corporation, as a shell to operate Ten Eyck. Allan I. Jacobson entered into this transaction with Mr. Watkins,

knowing full well that the notes of Unek were worthless, as an accommodation to Sondra Jacobson.

13. Unek defaulted in the payment of its April 9, 1968 promissory note and Schine Theatres elected to accelerate all of the promissory notes issued by Unek in connection with the February 9, 1968 agreement.

14. An involuntary petition in bankruptcy was filed against Ten Eyck in May or June of 1968 in the District Court for the Northern District of New York. A decree dated December 14, 1972 was filed determining priority claims and directing final distribution of the bankrupt's estate in the total amount of \$26,432.04. A final report of the Trustee in Bankruptcy was filed on or about December 15, 1972. By order dated August 20, 1973, the Trustee was discharged.

15. The New York State Department of Taxation and Finance appeared in the bankruptcy proceeding and filed a claim for sales tax due and owing from Ten Eyck. A final distribution of \$1,933.61 was received by the New York State Tax Commission, on account of said sales tax indebtedness. No claim was made by New York State against Ten Eyck for State withholding taxes.

CONCLUSIONS OF LAW

A. That petitioner C. Richard Schine knew or should have known that Schine Ten Eyck Corp., d/b/a Schine Ten Eyck Hotel, had failed to pay to the Income Tax Bureau the taxes withheld by it for the period prior to February 9, 1968, which taxes constituted trust funds pursuant to section 675 of the Tax Law.

B. That petitioner C. Richard Schine was a person required to collect, truthfully account for and pay over the withholding taxes of the employees of Schine Ten Eyck Corp., d/b/a Schine Ten Eyck Hotel, on behalf of said employer

for the period prior to February 9, 1968, within the meaning and intent of section 685(n) of the Tax Law.

C. That petitioner C. Richard Schine willfully failed to collect, truthfully account for and pay over the taxes withheld by Schine Ten Eyck Corp., d/b/a Schine Ten Eyck Hotel, for the period prior to February 9, 1968, within the meaning and intent of section 685(g) of the Tax Law (Levin v. Gallman, 42 N.Y.2d 32, 396 N.Y.S.2d 623 (1977)).

D. That the Audit Division is not required to attempt to collect unpaid withholding taxes from a corporation, or from its trustee in bankruptcy, before imposing on and collecting from responsible officers the penalty imposed by section 685(g) of the Tax Law. Stanley Yellin, State Tax Commission, June 22, 1979.


E. That the petition of C. Richard Schine is granted to the extent that the deficiency and penalty due with respect to the unpaid withholding taxes of Schine Ten Eyck Corp., d/b/a Schine Ten Eyck Hotel, for the period February 9, 1968 through June 6, 1968 are cancelled; that the Audit Division is hereby directed to accordingly modify the Notice of Deficiency issued on August 26, 1968 against petitioner; but that, except as so modified, said Notice of Deficiency is in all other respects sustained.

DATED: Albany, New York

MAY 21 1982

STATE TAX COMMISSION


PRESIDENT


COMMISSIONER


COMMISSIONER

FOOTNOTES

1. The underlined language appeared to be added to the February 9, 1968 agreement at some time after its original preparation, as evidenced by the following: the period after the word "Purchaser" in the penultimate line appears to be changed to a comma; the underlined language appears entered by a typewriter different from that on which the entire agreement had been typed; the underlined language appears squeezed into the text of the agreement as it is not in keeping with the uniform spacing of lines throughout the body of the agreement; and, the underlined language completely negates the meaning and intention of that which came before it in the same escrow clause. While these circumstances understandably raise doubts as to the authenticity and veracity of the underlined language and its impact upon the escrow clause, it is clear that the February 9, 1968 agreement was admitted into evidence without objection; that Allan I. Jacobson conceded the authenticity of his signature on that agreement; and, that at no time did said petitioner or his representative raise the slightest question as to the validity of that agreement. Surmise and speculation cannot be substituted for that which appears on the record in this proceeding and, in the absence of any credible evidence to the contrary, the agreement must stand in its entirety as the parties' expressed intention. In this regard, the statement of Allan I. Jacobson, that it was his "understanding" that there would be no transfer of interest in Ten Eyck until a liquor license had been approved must, without further evidence which would justify rescission or reformation (such as fraud and unilateral mistake or mutual mistake between the parties) or evidence which might support a charge of tampering with the February 9, 1968 agreement, be dismissed as merely a self-serving declaration of one person's subjective intention which cannot alter the terms of a final and complete, merged written instrument.
2. On February 9, 1968, when Unek's notes were executed and issued to Schine Theatres, the notes issued by Dellwood in the course of the February 5, 1968 transaction were returned to Dellwood's attorneys.
3. It must be noted that the February 9, 1968 transaction was a purchase by Unek of Ten Eyck's stock and, notwithstanding the assumption of liability and indemnification agreements between Unek and Schine Theatres, Unek (and, as here, its officers and principals) must be liable to third parties for the indebtedness of Ten Eyck. While the former officers of Ten Eyck (J. Myer Schine, C. Richard Schine and Eugene Tannen) did take steps to cause the payment of tax indebtedness prior to February 9, 1968 through the issuance and delivery of checks by Schine Theatres to Unek at the closing, such steps were insufficient in the absence of proper safeguards for such payment, such as a insufficient in the absence of proper safeguards for such payment, such as a the handling of such checks for payment to the taxing authority.
4. Cohen used a mechanical device bearing his and Mr. Jacobson's signatures to "sign" payroll checks which were issued weekly.