

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition	:	
of	:	
Herbert M. Silverman	:	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	:	
1973.	:	

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 Herbert M. Silverman, the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Herbert M. Silverman  
12 Hillside Dr.  
Thiells, NY 10984

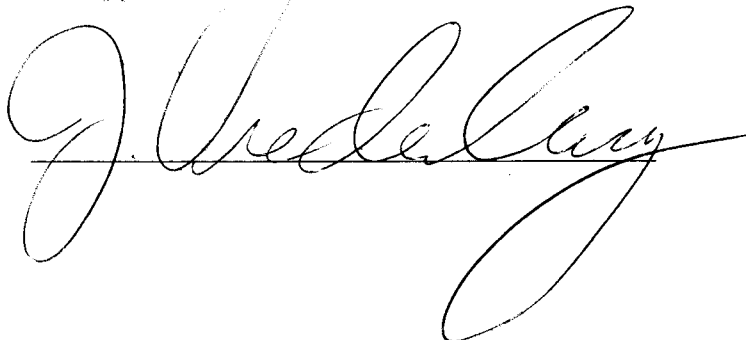
and by depositing same enclosed in a postpaid properly addressed wrapper in a (post office or official depository) under the exclusive care and custody of the United States Postal Service within the State of New York.

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.



AUTHORIZED TO ADMINISTER  
OATHS PURSUANT TO TAX LAW  
SECTION 174



STATE OF NEW YORK

STATE TAX COMMISSION

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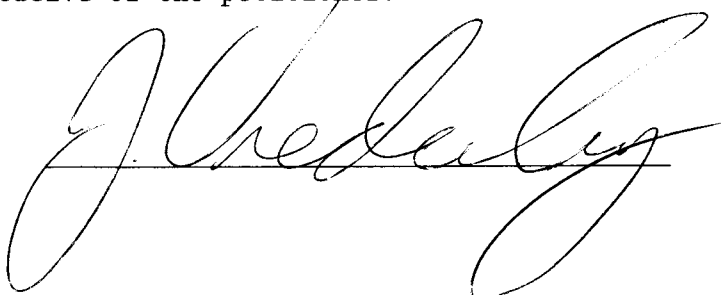
Jay Vredenburg, being duly sworn, deposes and says that he is an employee of the Department of Taxation and Finance, over 18 years of age, and that on the 29th day of December, 1982, he served the within notice of Decision by certified mail upon Jeffrey L. Zivvyak the representative of the petitioner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

Jeffrey L. Zivvyak  
Katz, Robinson, Brog & Seymour  
10 E. 40th 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 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.

  
\_\_\_\_\_  
AUTHORIZED TO ADMINISTER  
OATHS PURSUANT TO TAX LAW  
SECTION 174

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

December 29, 1982

Herbert M. Silverman  
12 Hillside Dr.  
Thiells, NY 10984

Dear Mr. Silverman:

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  
Jeffrey L. Zivjak  
Katz, Robinson, Brog & Seymour  
10 E. 40th St.  
New York, NY 10016  
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

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In the Matter of the Petition  
of  
HERBERT M. SILVERMAN  
for Redetermination of a Deficiency or for  
Refund of Personal Income Tax under Article 22  
of the Tax Law for the Year 1973.

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DECISION

Petitioner, Herbert M. Silverman, 12 Hillside Drive, Thiells, New York 10984, 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 1973 (File No. 25954).

A formal hearing was held before Julius E. Braun, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on February 4, 1982 at 9:35 A.M. Petitioner appeared by Jeffrey L. Zivyak, Esq. The Audit Division appeared by Ralph J. Vecchio, Esq. (Angelo Scopellito, Esq., of counsel).

ISSUE

Whether Herbert M. Silverman was a person required to collect, truthfully account for and pay over New York State withholding taxes of Emerald Green Corporation during the period in issue, who willfully failed to do so, thereby becoming liable for a penalty imposed under section 685(g) of the Tax Law.

FINDINGS OF FACT

1. Emerald Green Corporation ("Emerald") failed to pay New York State personal income tax withheld from wages of its employees in the amount of \$24,172.72 for the year 1973.

2. On October 30, 1978, the Audit Division issued a Notice of Deficiency and a Statement of Deficiency against Herbert M. Silverman asserting a penalty equal to the amount of unpaid New York State withholding tax due from Emerald for the year 1973, i.e., \$24,172.72.

3. Petitioner commenced his association with Emerald, which was then known as Datatron Processing Corp. (Datatron) in 1966, as an assistant to the comptroller. In September 1973, all the managers of Datatron were terminated by the Board of Directors. Petitioner thereupon was assigned the position of comptroller and treasurer. The name of the corporation was changed to Emerald to avoid confusion. Petitioner had authority to sign checks under the direction of either Irwin Ross or John Schlick. He was told what to sign. Signing such checks was part of his duties. He stated that he did absolutely nothing without prior consent and could not operate on his own whatsoever. All the checks presented to him were with instruction to sign them. He admitted signing a reconciliation withholding tax form for 1973, but only on order from his superior. At one time petitioner owned 100 shares of corporate stock which cost about \$500.00 and later sold at a loss for \$100.00. He received an annual salary of about \$20,000.00. When he assumed the position of comptroller and treasurer, he had to take a 30 or 40 percent pay cut. Mr. Ross's salary at the time was \$100,000.00 and Mr. Schlick's was either \$50,000.00 or \$75,000.00.

4. John A. Ciaramella, another officer of Datatron, testified that he was initially employed in personnel in 1969 and let go in May or June of 1973. Mr. Ross asked him to return in August 1973 and to assume the title of president. He stated that he was more in sales than administration. Both Herbert Silverman and he were always instructed on what to do by either Mr. Ross, Mr. Schlick or a Mr. Hankens, who was Ross's brother-in-law. Neither he nor Mr. Silverman had

authority to pay any bills without prior consent. All they had were titles. In April 1974, Emerald ceased doing business.

5. Emerald filed for an arrangement in bankruptcy on May 2, 1974.

CONCLUSIONS OF LAW

A. That petitioner, Herbert M. Silverman, although an officer of Emerald, was not a person required to collect, truthfully account for and pay over withholding taxes within the meaning of sections 685(g) and 685(n) of the Tax Law. Moreover, petitioner did not willfully attempt to evade or defeat the tax or the payment thereof.

B. That the penalty equal to the total amount of withholding tax not paid over in accordance with section 685(g) of the Tax Law was improperly asserted against petitioner.

C. That the petition of Herbert M. Silverman is granted and the Notice of Deficiency issued against him on October 30, 1978 is cancelled.

DATED: Albany, New York

STATE TAX COMMISSION

DEC 29 1982

*Rhett R. R. R.*  
ACTING PRESIDENT

*Francis Q. Kaemy*  
COMMISSIONER

*W. J. J.*  
COMMISSIONER