

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition
of
Robert Simon

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 :
1975 & 1976. :

State of New York
County of Albany

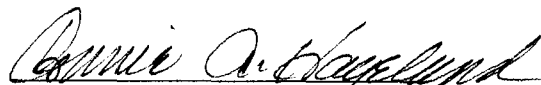
Jay Vredenburg, being duly sworn, deposes and says that he is an employee of the Department of Taxation and Finance, over 18 years of age, and that on the 14th day of December, 1982, he served the within notice of Decision by certified mail upon Robert Simon, the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Robert Simon
217-54 54th Ave.
Bayside, NY 11364

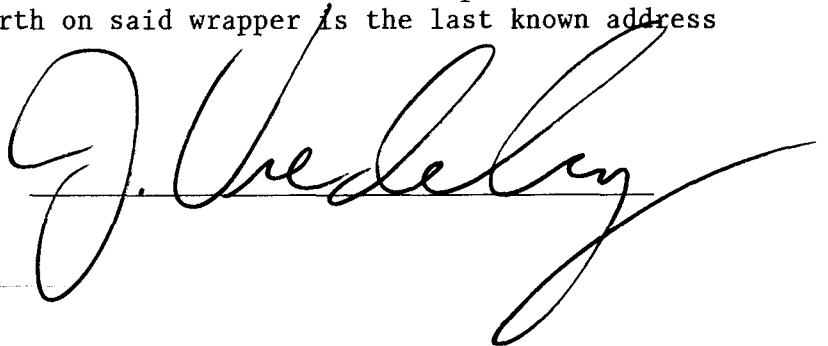
and by depositing same enclosed in a postpaid properly addressed wrapper in a (post office or official depository) under the exclusive care and custody of the United States Postal Service within the State of New York.

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
14th day of December, 1982.



AUTHORIZED TO ADMINISTER
OATHS PURSUANT TO TAX LAW
SECTION 174



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 Years :
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State of New York
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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 14th day of December, 1982, he served the within notice of Decision by certified mail upon Edward M. Cohen the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Edward M. Cohen
475 Fifth Ave., Suite 1210
New York, NY 10017

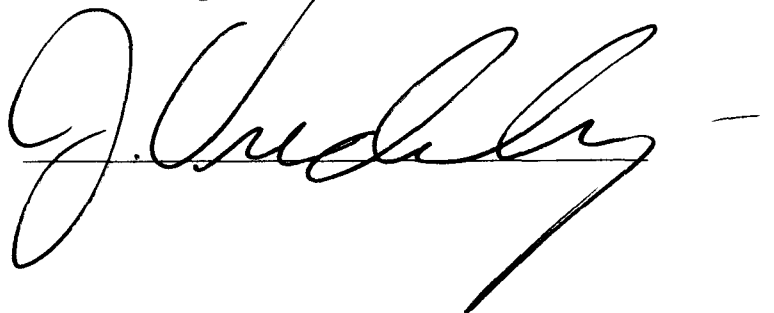
and by depositing same enclosed in a postpaid properly addressed wrapper in a (post office or official depository) under the exclusive care and custody of the United States Postal Service within the State of New York.

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
14th 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 14, 1982

Robert Simon
217-54 54th Ave.
Bayside, NY 11364

Dear Mr. Simon:

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
Edward M. Cohen
475 Fifth Ave., Suite 1210
New York, NY 10017
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition	:	
of	:	
ROBERT SIMON	:	DECISION
for Redetermination of a Deficiency or for	:	
Refund of Personal Income Tax under Article 22	:	
of the Tax Law for the Years 1975 and 1976.	:	

Petitioner, Robert Simon, 217-54 54th Avenue, Bayside, New York 11364, filed a petition for redetermination of a deficiency or for refund of personal income tax under Article 22 of the Tax Law for the years 1975 and 1976 (File No. 26076).

A small claims hearing was held before James Hoefer, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on February 2, 1982 at 9:15 A.M. Petitioner Robert Simon appeared by Edward M. Cohen, Esq. The Audit Division appeared by Paul B. Coburn, Esq. (Paul Lefebvre, Esq., of counsel).

ISSUE

Whether petitioner, Robert Simon, is liable for a penalty equal in amount to the unpaid New York State withholding taxes due from the 2375 Bedford Ave. Realty Corporation.

FINDINGS OF FACT

1. On January 29, 1979, the Audit Division issued a Notice of Deficiency to petitioner imposing a penalty, under section 685(g) of the Tax Law, in an amount equal to the unpaid withholding taxes due from the 2375 Bedford Ave. Realty Corporation (hereinafter "Bedford") for the period July 1, 1975 through June 30, 1976. Said Notice was issued on the grounds that petitioner was a

person required to collect, truthfully account for and pay over the New York State withholding taxes of Bedford and that he willfully failed to do so. The total penalty asserted due in the Notice of Deficiency was \$412.40, said amount broken down as follows:

<u>PERIOD</u>	<u>AMOUNT</u>
7/1/75 - 12/31/75	\$ 45.10
1/1/76 - 6/30/76	367.30
Total	<u>\$412.40</u>

2. The New York State Corporation Franchise Tax Report filed by Bedford for the fiscal year November 1, 1974 to October 31, 1975 indicated there were two corporate officers: Allan Guild, secretary and Robert Simon, vice-president. Said return was signed by J. Allan Guild, secretary. The return indicated that neither Mr. Guild nor Mr. Simon received any salary from the corporation.

3. For the periods in question, Bedford filed forms IT-2101-SA, Employer's Return - Personal Income Tax Withheld. Both of the forms IT-2101 were signed by J. Allan Guild, secretary.

4. Petitioner did not personally appear at the hearing held herein and no explanation was offered for his absence. Petitioner lives in Bayside, Queens, New York.

5. Petitioner's representative, Mr. Cohen, gave testimony to the effect that petitioner was:

(a) employed as a supervising pharmacist in a medicaid pharmacy in New York City and that petitioner was desirous of leaving said employment;

(b) that petitioner and Mr. Guild met and Mr. Guild, who was attempting to organize a medical center, offered to petitioner the opportunity to operate a pharmacy in the planned medical center;

(c) that petitioner loaned and/or invested an unknown sum of money to Mr. Guild and Bedford;

(d) that petitioner was not involved in Bedford's day-to-day affairs and, in fact, did not even know of Bedford's existence;

(e) that petitioner, when he first became a business associate with Mr. Guild, signed a "group of papers" relating to the planned medical center;

(f) that petitioner may or may not have had authority to sign corporate checks;

(g) that petitioner was naive in connection with business matters, that he did not sign corporate documents for Bedford, and that no stock certificates were ever issued to Mr. Simon.

6. After the close of the hearing held on February 2, 1982, petitioner submitted an affidavit wherein he indicated that he did not have authority to sign corporate checks, was not directly involved in the management of the corporation and relied on Mr. Guild.

CONCLUSIONS OF LAW

A. That in determining whether petitioner is liable for the penalty asserted against him pursuant to subdivision (g) of section 685 of the Tax Law, the threshold question is whether he was a person required to collect, truthfully account for and pay over taxes withheld from the wages of the employees of Bedford (Section 685(n)). Relevant factors include whether petitioner signed tax returns, derived a substantial portion of his income from the corporation and exercised authority over the employees and assets of the corporation. Matter of MacLean v. State Tax Commission, 69 A.D.2d 951, affd., 49 N.Y.2d 920 (1980); Matter of McHugh v. State Tax Commission, 70 A.D.2d 987 (1979); Matter of Malkin v. Tully, 65 A.D.2d 228 (1978).

B. That petitioner's affidavit, sworn to on February 10, 1982, has been accorded no weight. Said affidavit contains statements material to the issue addressed herein and, through the use of an affidavit, the Audit Division did not have the opportunity to cross-examine petitioner. Additionally, it must be noted that petitioner, a resident of New York City, did not appear to offer his testimony and no plausible explanation was given for his absence. Petitioner's failure to testify leads to the inference that his testimony would not have supported his version of the case and authorizes the strongest inference that the opposing evidence supports. (Dowling v. Hastings, 211 N.Y. 199; Isquith v. Isquith, 229 App. Div. 555; Vallee v. Vallee, 154 Misc. 620, aff'd. 247 A.D. 874; Eraser Co. v. Kaufman, 138 N.Y.S.2d 743.)

C. That petitioner has failed to sustain the burden of proof imposed by section 689(e) of the Tax Law to show by a fair preponderance of the evidence that he was not a person required to collect and pay over Bedford's withholding taxes and that his failure to do so was other than willful. The representative's testimony, based primarily on hearsay, falls short of the quantum of evidence needed to sustain the burden of proof.

D. That the petition of Robert Simon is denied and the Notice of Deficiency dated January 29, 1979 is sustained.

DATED: Albany, New York

DEC 14 1982

STATE TAX COMMISSION

ACTING PRESIDENT

COMMISSIONER

COMMISSIONER