

STATE OF NEW YORK

STATE TAX COMMISSION

|   |                            |                      |
|---|----------------------------|----------------------|
| In the Matter of the Petition<br>of<br>Charles Tung   | :<br>:<br>:<br>:<br>:<br>: | AFFIDAVIT OF MAILING |
| for Redetermination of a Deficiency or a Revision<br>of a Determination or a Refund of Personal Income<br>Tax under Article 22 of the Tax Law for the Years<br>1973 - 1975. |                            |                      |

State of New York  
County of Albany

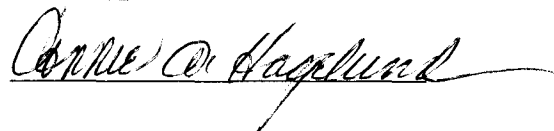
Jay Vredenburg, being duly sworn, deposes and says that he is an employee of the Department of Taxation and Finance, over 18 years of age, and that on the 27th day of August, 1982, he served the within notice of Decision by certified mail upon Charles Tung, the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

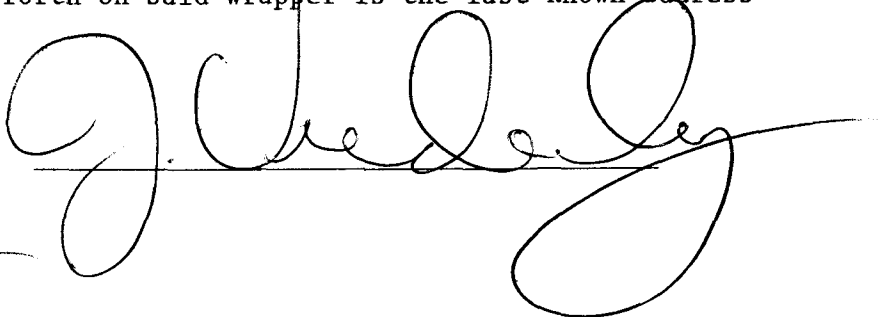
Charles Tung  
11 Bramley Lane  
Dobbs Ferry, NY 10522

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  
27th day of August, 1982.





STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition  
of  
Charles Tung

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 :  
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State of New York  
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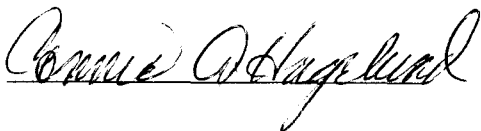
Jay Vredenburg, being duly sworn, deposes and says that he is an employee of the Department of Taxation and Finance, over 18 years of age, and that on the 27th day of August, 1982, he served the within notice of Decision by certified mail upon Herbert Adler the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

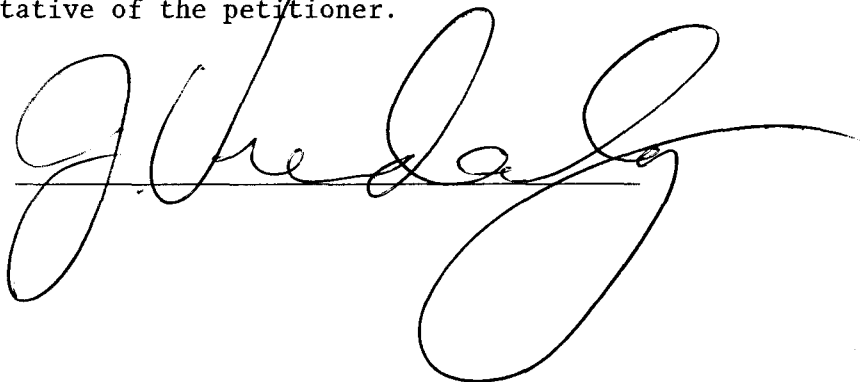
Herbert Adler  
1440 Broadway  
New York, NY 10018

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  
27th day of August, 1982.





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

August 27, 1982

Charles Tung  
11 Bramley Lane  
Dobbs Ferry, NY 10522

Dear Mr. Tung:

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  
Herbert Adler  
1440 Broadway  
New York, NY 10018  
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

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|   |   |          |
|---|---|----------|
| In the Matter of the Petition               | : |          |
|   | : |          |
| of  | : |          |
|   | : |          |
| CHARLES TUNG                                | : | DECISION |
|   | : |          |
| for Redetermination of a Deficiency or for  | : |          |
| Refund of Personal Income Tax under Article | : |          |
| 22 of the Tax Law for the Years 1973, 1974  | : |          |
| and 1975.                                   | : |          |

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Petitioner, Charles Tung, 11 Bramley Lane, Dobbs Ferry, New York 10522, 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 1973, 1974 and 1975 (File No. 19137).

A formal hearing was held before James T. Prendergast, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on July 24, 1979 at 10:45 A.M. and continued before him on January 4, 1980 at 1:30 P.M. and continued to conclusion before Robert A. Couze, Hearing Officer, on October 23, 1980 at 1:15 P.M. Petitioner appeared by Herbert Adler, Esq. The Audit Division appeared on July 24, 1979 by Peter Crotty, Esq., (Irwin Levy and Irving Atkins, Esqs., of counsel) on January 4, 1980 by Ralph J. Vecchio, Esq., (Irwin Levy and Abraham Schwartz, Esqs., of counsel) and on October 23, 1980 by Ralph J. Vecchio, Esq., (Irwin Levy, Esq., of counsel).

ISSUE

Whether petitioner, Charles Tung, was a person required to collect, truthfully account for and pay over withholding taxes due from Omnidata Services, Inc.

FINDINGS OF FACT

1. On January 24, 1977, the Audit Division issued a notice of deficiency and statement of deficiency against petitioner as follows:

|                 | <u>DEFICIENCY</u> | <u>INTEREST</u> | <u>TOTAL</u> |
|-----------------|-------------------|-----------------|--------------|
| 9/1/73-12/31/73 | \$ 397.07         | - 0 -           | \$ 397.07    |
| 1974            | 15,818.84         | - 0 -           | 15,818.84    |
| 1/1/75-8/15/75  | 12,629.71         | - 0 -           | 12,629.71    |
| Total           | \$28,845.62       | - 0 -           | \$28,845.62  |

The statement asserted petitioner was a person required to collect, truthfully account for and pay over withholding taxes due from Omnidata Services, Inc. for the periods September 1, 1973 through December 31, 1973, 1974, and January 1, 1975 through August 15, 1975 pursuant to the provisions of subsections (g) and (n) of section 685 of the New York Tax Law.

2. The corporate employer was Omnidata Services, Inc.

3. Omnidata Services, Inc. ("Omnidata") was a New York corporation formed in 1964. Its business consisted of preparing and supplying computer programming services and programs (commonly known as "software") to the engineering profession.

4. Petitioner was an employee of Omnidata and chairman of its Board of Directors. His responsibilities were for design development and implementation of computer programs for Omnidata's customers.

5. The salient testimony asserted at the hearing herein is as follows:

(a) All of the fiscal activities of Omnidata, including but not limited to the payment of wages to employees, were the responsibility of one Bradford Perkins and were under his control until his resignation in late 1973.

(b) In or around December 1973, all fiscal activities of Omnidata, including the payment of wages, the control, hiring and firing of employees and accounting functions were under the control of McKee-Berger-Mansueto, Inc. ("MBM").

(c) Omnidata operated as an independent enterprise from its incorporation in 1964 until late 1971 or early 1972. At that time, negotiations commenced with MBM. The object of these negotiations was to have Omnidata become an "in-house" computer service division of MBM. Omnidata was to supply all of MBM's computer programming requirements. It was intended that Omnidata would merge with MBM and become in fact and in law, a division of MBM.

(d) In pursuance of this goal, a Memorandum of Understanding was entered into in or about March, 1972. Omnidata in fact, gave up its own offices and moved its operations and personnel into the MBM facilities at Two Park Avenue, New York, New York. Although a more formal merger had not been consummated, from that time on, a de facto merger had taken place and Omnidata was, for all intents and purposes, a division of MBM, the surviving corporate entity.

(e) The original Memorandum of Understanding provided for the exchange of payments between the two businesses in such fashion that Omnidata would receive sufficient funds from MBM to meet its expenses and make its payroll. To this extent, Omnidata operated only as a conduit with funds being controlled and supplied to it by MBM.

(f) MBM's management was in control of Omnidata's fiscal policy and business operations. Omnidata's directors and officers had, for the most part, resigned and those remaining constituted directors and officers in name only. The justification advanced for this situation was always MBM's assurance that the formal merger would take place imminently.

(g) In this manner, Omnidata continued to provide MBM with all of its required computer software services and approximately 80% of Omnidata's work was for MBM alone. Although funds were to be provided by MBM to Omnidata on a regular basis, this obligation of the Memorandum of Understanding was honored

more in the breach. In fact, MBM provided funds to Omnidata irregularly, most often late, and in amounts controlled by MBM.

(h) This procedure of passing monies became cumbersome. Omnidata's main obligation, the payment of its employees, became difficult when transfer of MBM funds was late. By November, 1973, virtually all of Omnidata's officers, except petitioner and one Raymond P. Kasbarian had resigned, and its management had long given up independent functioning. Petitioner and Kasbarian, as key technical employees, had remained with Omnidata. To facilitate the flow of funds and to insure that personnel were paid, Kasbarian proposed a change in the procedure previously used for paying personnel.

(i) Kasbarian's proposal was necessitated by the fact that Perkins had resigned as President of Omnidata and that neither petitioner nor Kasbarian had been familiar with or responsible for Omnidata's fiscal operations, including payroll, and were consequently in no position to take over that function. Petitioner was assured by one Donald Zeigler, MBM's Vice President - Finance, that MBM would "take over" Omnidata's employees and be responsible for their wages. This would eliminate unnecessary fund transfers and simplify MBM's bookkeeping.

(j) This procedure was in fact instituted in or around December, 1973. From December, 1973 on, all employees were on the MBM payroll and were paid directly by MBM. The Omnidata "division" personnel were subject to all salary, vacation time and sick pay policies established by MBM and were participating in MBM's health, accident and life insurance programs maintained for MBM's other employees.

(k) Petitioner had no control nor direction over the payment of wages, the deduction of withholding taxes or the remittance thereof. All these functions

were performed by MBM's accounting department. For all intents and purposes, Omnidata had ceased to exist. A de facto merger had taken place between Omnidata and MBM. MBM's management controlled Omnidata and operated it as a "division" and integral part of its business. The former Omnidata personnel were employees of MBM and were then in fact paid by MBM.

(l) During the tax periods in question, MBM had complete control of Omnidata. The Omnidata "division" only supplied all of MBM's computer services requirements.

(m) Neither Omnidata nor petitioner paid the wages of the workers or controlled the funds used for such payment. This was done by MBM and its personnel. Furthermore, MBM and/or its officers had the power to hire and fire such workers. All MBM personnel, including Omnidata division workers, were subject to the employment policies of MBM. These included salary, vacation and sick pay policies. Also, these workers were covered by MBM insurance programs maintained by MBM for all its other employees.

(n) MBM controlled and directed the work of the personnel on whose behalf the withheld taxes were to be remitted.

(o) That although Omnidata continued to maintain a checking account, and made certain payments to creditors, MBM supplied the necessary funds and directed and controlled what creditors were to be paid, when and in what amounts. Any tax or accounting forms required were prepared by MBM or under its authority from books and records kept by MBM's staff. In particular, petitioner did not have authority nor control over tax funds withheld, deposits thereof, or the tax returns and accounting statements. If any forms were required to be filed by Omnidata (because technically it still existed as a

separate corporation), these forms were prepared by MBM for signature by either petitioner or Kasbarian and thereafter filed by MBM.

(p) The completed form would be presented to the petitioner by MBM with directions to sign. In such instances, petitioner's execution of the documents was ministerial only. Petitioner did not have control over the preparation of the documents nor an opportunity to exercise even the slightest input. All documents requiring the signature of a titular officer of Omnidata would be signed by either Petitioner or Kasbarian upon information supplied to them by MBM and in the good faith belief that MBM had accurately prepared them.

6. The petitioner did not offer any real, direct nor independent evidence to support his testimony, except stubs from pay checks issued by MBM on a monthly basis for the months of April, 1974 to March, 1975 and July, 1975 to December, 1975.

7. Petitioner did not have any authority to sign checks on behalf of MBM but did have such authority with respect to Omnidata and in fact did sign checks on their behalf at least until December, 1973.

8. Petitioner did not have any decision-making authority while employed by MBM and he was not an officer of said firm.

#### CONCLUSIONS OF LAW

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

"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 subsection (n) of section 685 of the Tax Law provides, in part, that:

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

C. That petitioner failed to sustain his burden of proving that he was not liable for the taxes herein (section 689 (e) Tax Law) for the period September 1, 1973 through December 31, 1973. However, he did sustain his burden of proof for the year 1974 and for the period January 1, 1975 through August 15, 1975.

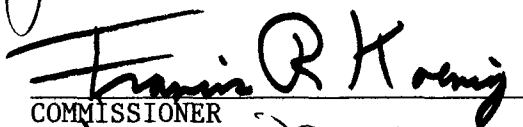
D. That in view of the foregoing, the petition herein is granted to the extent shown in Conclusion of Law "C" supra; and that, except as so granted, the petition is denied.

DATED: Albany, New York

AUG 27 1982

STATE TAX COMMISSION

  
PRESIDENT

  
COMMISSIONER

  
COMMISSIONER