

STATE OF NEW YORK

STATE TAX COMMISSION

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In the Matter of the Petition :  
of :  
Ellis P. Eisenstein :  
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 Period :  
1/1-12/31/75 & 7/1-9/30/76. :  
\_\_\_\_\_

AFFIDAVIT OF MAILING

State of New York  
County of Albany

Connie Hagelund, being duly sworn, deposes and says that she is an employee of the Department of Taxation and Finance, over 18 years of age, and that on the 8th day of July, 1983, she served the within notice of Decision by certified mail upon Ellis P. Eisenstein, the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

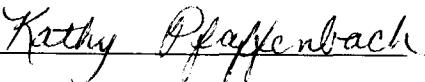
Ellis P. Eisenstein  
715 Park Ave.  
New York, NY 10021

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  
8th day of July, 1983.

  
\_\_\_\_\_

  
\_\_\_\_\_

AUTHORIZED TO ADMINISTER  
OATHS PURSUANT TO TAX LAW  
SECTION 174

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

July 8, 1983

Ellis P. Eisenstein  
715 Park Ave.  
New York, NY 10021

Dear Mr. Eisenstein:

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 Law 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  
Building #9 State Campus  
Albany, New York 12227  
Phone # (518) 457-2070

Very truly yours,

STATE TAX COMMISSION

cc: Petitioner's Representative

Taxing Bureau's Representative

## STATE TAX COMMISSION

In the Matter of the Petition                                 :

of   :

ELLIS P. EISENSTEIN   :                                 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.                         :

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 April 22, 1982 at 1:15 P.M. Petitioner appeared pro se. The Audit Division appeared by Paul B. Coburn, Esq. (Michael Gitter, Esq., of counsel).

II. Whether the Notice of Deficiency dated February 26, 1979 was issued within the statute of limitations for assessment.

1. On February 26, 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 Hemisphere Pictures, Inc. (hereinafter "Hemisphere"), for the periods January 1, 1975 to December 31,

1975 and July 1, 1976 to September 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 Hemisphere and that he willfully failed to do so. The total penalty asserted due in the Notice of Deficiency amounted to \$2,158.60, said amount broken down in a Statement of Deficiency as follows:

<u>PERIOD</u>	<u>AMOUNT</u>
1/1/75 - 12/31/75	\$1,477.70
7/1/76 - 9/30/76	680.90
Total	<u>\$2,158.60</u>

2. On January 30, 1976, Hemisphere filed Form IT-2103, Reconciliation of Personal Income Tax Withheld, for the year 1975. Said form was signed by Roger Cahn, President and indicated that \$1,477.70 of New York State personal income tax had been withheld from Hemisphere's employees during the calendar year 1975. Hemisphere did not remit the \$1,477.70 in tax withheld to the Audit Division. Hemisphere also filed three (3) forms IT-2101, Employer's Return - Personal Income Tax Withheld, for the months of July, August and September, 1976. All three (3) forms IT-2101 were signed by Roger Cahn, President and indicated that withholding tax was due in the amount of \$200.00 for July, 1976, \$210.00 for August, 1976 and \$270.90 for September, 1976. The tax withheld shown on each form IT-2101 was not remitted by Hemisphere.

3. During the periods in question petitioner was neither a stockholder or officer of Hemisphere. Additionally, petitioner did not have authority to sign corporate checks and hire or fire employees. At some undetermined date in late September or early October, 1975, petitioner became a director of Hemisphere, however, he received no director's fee.

4. In July, 1975, petitioner entered into a consulting agreement with Hemisphere whereby for a monthly fee of \$1,500.00 he would provide Hemisphere with financial advice. From July, 1975 to March 1, 1976, petitioner was employed full time by Donald Sheldon & Co., as a bond salesman.

5. Effective March 1, 1976, petitioner took a leave of absence from Donald Sheldon & Co., entered into a revised consulting agreement with Hemisphere and "...made it my business to be at Hemisphere every day". Petitioner further testified that "I was not active in the operation of the company (Hemisphere) except insofar as I was concerned with the cash flow and to see to it that the weekly payments to the Chase Bank were made on a timely basis". Although petitioner could suggest to the principals of Hemisphere which creditors should be paid, he had no authority to direct payment to creditors during the years at issue.

6. Petitioner became Chairman of the Board of Directors of Hemisphere at the end of 1976 and also obtained authority to sign corporate checks effective March 31, 1977.

7. At the hearing held herein, Mr. Gitter, representing the Audit Division, stated that "...when reviewing the file I found a payment of \$41.79 that was not reflected in the personal assessment issued against the petitioner for the period January, 1975". Accordingly, he conceded that the Notice of Deficiency issued to petitioner should be reduced by \$41.79.

#### 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 employees of Hemisphere

(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 during the periods in question petitioner was not an officer or stockholder of Hemisphere, could not sign corporate checks, did not hire or fire employees, could not direct payment of creditors and did not sign the withholding tax forms IT-2103 and IT-2101. That petitioner has established by a fair preponderance of all the evidence that he was not a person required to collect and pay over the withholding taxes of Hemisphere for the periods January 1, 1975 to December 31, 1975 and July 1, 1976 to September 30, 1976.

C. That the issue concerning the expiration of the statute of limitations for assessment is rendered moot in light of Conclusion of Law "B", supra.


D. That the petition of Ellis P. Eisenstein is granted and the Notice of Deficiency dated February 26, 1979 is cancelled.


DATED: Albany, New York

STATE TAX COMMISSION

JUL 08 1983

  
PRESIDENT

  
COMMISSIONER

  
COMMISSIONER