

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of :
Saul Trachtenberg : 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 :
1969 - 1971.

State of New York
County of Albany

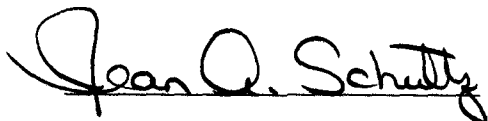
Connie Hagelund, being duly sworn, deposes and says that she is an employee of the Department of Taxation and Finance, over 18 years of age, and that on the 22nd day of July, 1983, she served the within notice of Decision by certified mail upon Saul Trachtenberg, the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

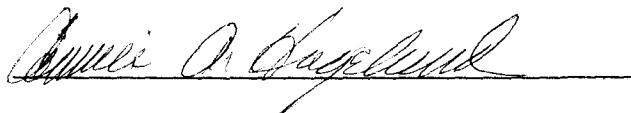
Saul Trachtenberg
211 E. 18th St.
New York, NY 10003

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
22nd day of July, 1983.





AUTHORIZED TO ADMINISTER
OATHS PURSUANT TO TAX LAW
SECTION 174

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of :
Saul Trachtenberg : 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 :
1969 - 1971.

State of New York
County of Albany

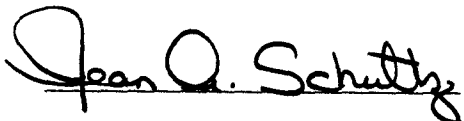
Connie Hagelund, being duly sworn, deposes and says that she is an employee of the Department of Taxation and Finance, over 18 years of age, and that on the 22nd day of July, 1983, she served the within notice of Decision by certified mail upon Sigmund S. Semon the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

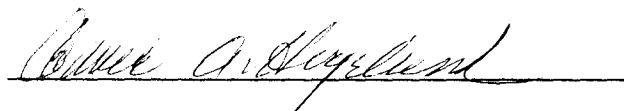
Sigmund S. Semon
Semon & Mondschein
333 Broadway, P.O. Box 250
Jericho, NY 11753

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
22nd 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 22, 1983

Saul Trachtenberg
211 E. 18th St.
New York, NY 10003

Dear Mr. Trachtenberg:

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
Sigmund S. Semon
Semon & Mondschein
333 Broadway, P.O. Box 250
Jericho, NY 11753
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

| | | |
|--|---|----------|
| In the Matter of the Petition | : | |
| of | : | |
| SAUL TRACHTENBERG | : | DECISION |
| for Redetermination of a Deficiency or for | : | |
| Refund of Personal Income Tax under Article 22 | : | |
| of the Tax Law for the Years 1969, 1970 and 1971.: | : | |

Petitioner, Saul Trachtenberg, 211 East 18th Street, New York, New York 10003, 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 1969, 1970 and 1971 (File No. 26080).

A small claims hearing was held before Allen Caplowaith, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, Room 65-51, New York, New York, on November 15, 1982 at 9:15 A.M. Petitioner appeared with Sigmund S. Semon, Esq. The Audit Division appeared by Paul B. Coburn, Esq. (Michael Gitter, Esq., of counsel).

ISSUES

I. Whether the deficiency asserted against petitioner pursuant to section 685(g) of the Tax Law, properly reflects the outstanding liability of Banner Manufacturing Company, Inc. for New York State personal income taxes withheld from its employees during the periods at issue and not turned over to the State.

II. Whether the Notice of Deficiency is barred by the period of limitations on assessment.

FINDINGS OF FACT

1. Banner Manufacturing Company, Inc. (hereinafter Banner), Building 127, Brooklyn Navy Yard, Brooklyn, New York, failed to pay over the New York State personal income taxes withheld from the wages of its employees for the periods as follows:

| <u>WITHHOLDING TAX PERIOD</u> | <u>AMOUNT</u> |
|---------------------------------|--------------------|
| December 1 to December 31, 1969 | \$ 1,163.80 |
| January 1 to September 30, 1970 | 8,386.60 |
| October 1 to December 31, 1970 | 2,413.00 |
| January 1 to February 17, 1971 | 1,950.00 |
| TOTAL | <u>\$13,913.40</u> |

2. On February 28, 1972 the Audit Division issued a Statement of Deficiency in conjunction with a Notice of Deficiency against Saul Trachtenberg (hereinafter petitioner), wherein a penalty was asserted pursuant to section 685(g) of the Tax Law, for an amount equal to the New York State withholding taxes due from Banner of \$13,913.40. Said penalty was asserted on the ground that petitioner was a person required to collect, truthfully account for and pay over the New York State withholding taxes of Banner, and that he willfully failed to do so.

3. During the periods at issue herein petitioner was an officer of Banner. As such, he was involved in the management of Banner and had authority to sign checks. He also had the authority to hire and fire personnel.

4. Petitioner did not deny that he was a person responsible for the collection and payment of the withholding taxes at issue; however, he contended that the corporate liability was fully satisfied through a negotiated settlement made during the bankruptcy proceeding of Banner.

5. The record contains an Employer's Return of New York State Personal Income Tax Withheld for each period at issue herein. The return for the period January 1 to September 30, 1970 was filed by Banner and signed by petitioner on October 7, 1970. The return for the period October 1 to December 31, 1970,

marked "actual", and the return for the period January 1 to February 17, 1971, marked "estimate", appear to have been prepared by the Income Tax Bureau. It is unclear whether the return for the period December 1 to December 31, 1969 was filed by Banner or prepared by the Income Tax Bureau.

6. During the hearing Mr. Joel Reiss, representative of the trustee for the creditors in said bankruptcy proceeding, testified that during such proceeding he negotiated a settlement with representatives of the State which culminated in reduction of the State's claim to \$7,762.98.

7. On March 16, 1979, a payment of \$7,762.98 was made by the Estate of Banner Manufacturing Company, Bankrupt, In Bankruptcy No. 71-B-145, United States District Court for the Eastern District of New York. The check issued bore the notation "in payment of 1st & final dividend of Estate of Bankrupt". Said payment was applied against the deficiency at issue on May 23, 1979, thereby reducing the deficiency from \$13,913.40 to \$6,150.42.

8. No documentary evidence was offered to support petitioner's contention that the payment of \$7,762.98 was accepted by the State in full settlement of Banner's outstanding liability of \$13,913.40.

9. Petitioner claimed that the deficiency was barred by the period of limitations on assessment; however, no reasonable basis was offered in support of such claim.

CONCLUSIONS OF LAW

A. That petitioner has failed to sustain his burden of proof, required pursuant to section 689(e) of the Tax Law, to show that the payment of \$7,762.98 was accepted in full settlement of the outstanding New York State withholding tax liability of Banner for the periods at issue herein. Accordingly, said

payment is deemed to have been properly applied to reduce the deficiency asserted against petitioner to \$6,150.42.

B. That section 683(a) of the Tax Law provides that:

"Except as otherwise provided in this section, any tax under this Article shall be assessed within three years after the return was filed."

C. That section 683(b)(2) of the Tax Law provides that:

"For purposes of this section, if a return of withholding tax for any period ending with or within a calendar year is filed before April fifteenth of the succeeding calendar year, such return shall be deemed to be filed on April fifteenth of such succeeding calendar year."

D. That section 683(c)(1)(A) of the Tax Law provides that; "The tax may be assessed at any time if -- no return is filed".

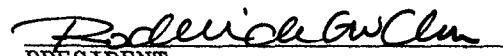
E. That petitioner has failed to sustain his burden of proof required, pursuant to section 689(e) of the Tax Law, to show that the Notice of Deficiency was time barred.

F. That the petition of Saul Trachtenberg is denied and the Notice of Deficiency dated February 28, 1972, in the amount of \$13,913.40, and subsequently reduced to \$6,150.42, is sustained.

DATED: Albany, New York

STATE TAX COMMISSION

JUL 22 1983


PRESIDENT


COMMISSIONER


COMMISSIONER