

STATE OF NEW YORK

STATE TAX COMMISSION

\_\_\_\_\_  
In the Matter of the Petition :  
                  of :  
                  Eli Rosenblatt :  
  
for Redetermination of a Deficiency or for Refund :  
of Personal Income Tax under Article 22 of the Tax :  
Law for the Years 1976 and 1977, Article 30 of the :  
Tax Law for the Year 1976 and Chapter 46, Title T :  
of the Administrative Code of the City of New York :  
for the Year 1977. :

AFFIDAVIT OF MAILING

\_\_\_\_\_  
In the Matter of the Petition :  
                  of :  
                  Eugene Sole :  
  
for Redetermination of a Deficiency or for Refund :  
of Personal Income Tax under Article 22 of the Tax :  
Law for the Years 1976 and 1977, Article 30 of the :  
Tax Law for the Year 1976 and Chapter 46, Title T :  
of the Administrative Code of the City of New York :  
for the Year 1977. :

State of New York }

ss.:

County of Albany }

David Parchuck, being duly sworn, deposes and says that he is an employee of the State Tax Commission, that he is over 18 years of age, and that on the 21st day of March, 1984, he served the within notice of Decision by certified mail upon Eli Rosenblatt, the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Eli Rosenblatt  
130 Gale Place  
Bronx, NY 10463

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

Page 2  
Affidavit of Mailing

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  
21st day of March, 1984.

David Parokuck

Carmie A. Hupfner  
Authorized to administer oaths  
pursuant to Tax Law section 174

STATE OF NEW YORK

STATE TAX COMMISSION

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In the Matter of the Petition :  
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Eli Rosenblatt :  
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Tax Law for the Year 1976 and Chapter 46, Title T :  
of the Administrative Code of the City of New York :  
for the Year 1977. :

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State of New York }  
ss.:  
County of Albany }

David Parchuck, being duly sworn, deposes and says that he is an employee of the State Tax Commission, that he is over 18 years of age, and that on the 21st day of March, 1984, he served the within notice of Decision by certified mail upon Hyman Bass, the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Hyman Bass  
Roshwald, Bass, Caine & Goldstricker  
165 Front St.  
New York, NY 10038

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

Page 2  
Affidavit of Mailing

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  
21st day of March, 1984.

David Parschuck

James C. Hagedorn  
Authorized to administer oaths  
pursuant to Tax Law section 174

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

March 21, 1984

Eli Rosenblatt  
130 Gale Place  
Bronx, NY 10463

Dear Mr. Rosenblatt:

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 & 1312 of the Tax Law and Chapter 46, Title T of the Administrative Code of the City of New York, a proceeding in court to review an adverse decision by the State Tax Commission may be instituted only 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  
Hyman Bass  
Roshwald, Bass, Caine & Goldstricker  
165 Front St.  
New York, NY 10038  
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

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State of New York }

ss.:

County of Albany }

David Parchuck, being duly sworn, deposes and says that he is an employee of the State Tax Commission, that he is over 18 years of age, and that on the 21st day of March, 1984, he served the within notice of Decision by certified mail upon Eugene Sole, the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Eugene Sole  
99 Ocean Pkwy.  
Brooklyn, NY 11218

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

Page 2  
Affidavit of Mailing

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  
21st day of March, 1984.

David Panchuck

Bonnie R Haglund  
Authorized to administer oaths  
pursuant to Tax Law section 174

STATE OF NEW YORK

STATE TAX COMMISSION

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AFFIDAVIT OF MAILING

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In the Matter of the Petition :  
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for the Year 1977. :  
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State of New York }  
ss.:  
County of Albany }

David Parchuck, being duly sworn, deposes and says that he is an employee of the State Tax Commission, that he is over 18 years of age, and that on the 21st day of March, 1984, he served the within notice of Decision by certified mail upon Ellis Reemer, the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Ellis Reemer  
Gordon, Hurwitz, Butowsky, Baker, Weitzen & Shalov  
299 Park Ave., 5th Fl.  
New York, NY 10171

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



Page 2  
Affidavit of Mailing

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  
21st day of March, 1984.

David Barabuck

Constance A. Hegelund  
Authorized to administer oaths  
pursuant to Tax Law Section 174

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

March 21, 1984

Eugene Sole  
99 Ocean Pkwy.  
Brooklyn, NY 11218

Dear Dr. Sole:

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 & 1312 of the Tax Law and Chapter 46, Title T of the Administrative Code of the City of New York, a proceeding in court to review an adverse decision by the State Tax Commission may be instituted only 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  
Ellis Reemer  
Gordon, Hurwitz, Butowsky, Baker, Weitzen & Shalov  
299 Park Ave., 5th Fl.  
New York, NY 10171  
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

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In the Matter of the Petition  
of  
ELI ROSENBLATT  
for Redetermination of a Deficiency or for  
Refund of Personal Income Tax under Article 22  
of the Tax Law for the Years 1976 and 1977,  
Article 30 of the Tax Law for the Year 1976 and  
Chapter 46, Title T of the Administrative Code  
of the City of New York for the Year 1977.

DECISION

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In the Matter of the Petition  
of  
EUGENE SOLE  
for Redetermination of a Deficiency or for  
Refund of Personal Income Tax under Article 22  
of the Tax Law for the Years 1976 and 1977,  
Article 30 of the Tax Law for the Year 1976 and  
Chapter 46, Title T of the Administrative Code  
of the City of New York for the Year 1977.

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Petitioner, Eli Rosenblatt, 130 Gale Place, Bronx, New York 10463, 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 1976 and 1977, Article 30 of the Tax Law for the year 1976 and Chapter 46, Title T of the Administrative Code of the City of New York for the year 1977 (File No. 23349).

Petitioner, Eugene Sole, 99 Ocean Parkway, Brooklyn, New York 11218, 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 1976 and 1977, Article 30 of the Tax Law for the year 1976 and Chapter 46, Title T of the Administrative Code of the City of New York for the year 1977 (File Nos. 23350 and 24619).

A consolidated formal hearing was commenced before Doris Steinhardt, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on September 13, 1982 at 1:15 P.M. and continued to conclusion at the same offices on June 20, 1983 at 1:30 P.M., with all briefs to be submitted by September 16, 1983. Mr. Rosenblatt appeared by Roshwald, Bass, Caine & Goldstricker, Esqs. (Hyman Bass, Esq., of counsel). Dr. Sole appeared by Gordon, Hurwitz, Butowsky, Baker, Weitzen & Shalov, Esqs. (Ellis Reemer, Esq., of counsel). The Audit Division appeared at the September 13, 1982 hearing by Paul B. Coburn, Esq. and at the June 20, 1983 hearing by John P. Dugan, Esq. (Kevin Cahill, Esq., of counsel).

#### ISSUE

Whether petitioners were persons responsible for collecting and paying over taxes withheld from the wages of employees of Lefferts General Hospital, Inc., who willfully failed to do so, and are therefore liable for the penalties imposed under section 685(g) of the Tax Law and section T46-185.0(g) of Chapter 46, Title T of the Administrative Code of the City of New York.

#### FINDINGS OF FACT

1. On May 22, 1978, the Audit Division issued to petitioner Eli Rosenblatt two statements of deficiency and a Notice of Deficiency, asserting penalties equal to the New York State withholding tax of Lefferts General Hospital, Inc. which was due and unpaid for the years 1976 and 1977 in the respective amounts of \$44,586.16 and \$42,624.36<sup>1</sup>, plus the New York City withholding tax of said corporation for the year 1976 in the amount of \$57,236.57.

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<sup>1</sup> The Employer's Returns filed by Lefferts General Hospital, Inc. indicate that this amount actually consists of \$30,639.90 in New York State tax and \$11,984.46 in New York City tax. Petitioners have raised no objections to the notices of deficiency as issued.

On May 22, 1978, the Audit Division issued to petitioner Eugene Sole a Statement of Deficiency and a Notice of Deficiency, asserting penalties equal to the New York State withholding tax of Lefferts General Hospital, Inc. which was due and unpaid for the years 1976 and 1977 in the respective amounts of \$44,586.16 and \$42,624.36<sup>1</sup>, plus the New York City withholding tax of said corporation for the year 1976 in the amount of \$57,236.57. On September 25, 1978, the Audit Division issued to Dr. Sole a Statement of Deficiency and a Notice of Deficiency, asserting an additional penalty for 1976 New York State withholding tax in the amount of \$3,327.58. The Statement of Deficiency explained, "This is in addition to and in no way affects the Statement of Deficiency mailed to you on May 22, 1978."

2. In May, 1959, a group of physicians, comprised of Dr. Eugene Sole, Dr. Carl Baron, Dr. Philip Cohen, Dr. Milton Cantor, Dr. Justin Rosenbush, Dr. I. Charles Zuckerman, Dr. Nathan Reibstein and a Dr. Diamond, purchased Lefferts General Hospital, Inc. Dr. Baron held the office of president of the corporation; Dr. Cohen, the office of secretary; and Dr. Sole, the office of treasurer. The administrator and the comptroller of the hospital continued in their positions after the purchase. In 1962, Mr. Seymour Reid was engaged by the board of directors as administrator. In 1974, Mr. Reid hired Mr. Eli Rosenblatt as comptroller upon the recommendation of Jay Zimmet, the independent certified public accountant for the hospital.

3. The corporation maintained a payroll account and an operating account from which funds could be withdrawn on the signatures of any two of the following persons: the corporate president, the secretary, the treasurer, Mr. Reid or

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<sup>1</sup> See footnote "1" on page 2.

Mr. Rosenblatt. No separate account was established for the deposit of taxes withheld from employee wages.

4. As administrator, Mr. Reid was responsible for (among other things) hiring and firing personnel, fixing salaries and ensuring the supply of goods and equipment necessary for the hospital's daily operation. He also acted as chairman of meetings of the board of directors.

5. Mr. Rosenblatt's duties as comptroller included keeping the books and records, rendering financial statements, preparing cost analyses, filing tax returns and reorganizing departmental activities for the purpose of reducing costs. He conferred with the corporate officers on a regular basis and attended board meetings to present whatever financial data the board required in its decision-making. Mr. Rosenblatt signed withholding tax returns and checks for the payment of bills (including taxes) "as a matter of convenience", that is, when the corporate officers were unavailable to do so. Mr. Rosenblatt owned no stock in the corporation.

6. The payroll department was separate from Mr. Rosenblatt's office and responsibilities. Payroll checks were machine-signed with the signatures of Drs. Baron and Sole.

7. Dr. Sole practiced medicine at the hospital and also, supervised the maintenance of the hospital's physical plant. He held nine percent of the outstanding shares of the corporation.

8. Shortly after his hiring, Mr. Rosenblatt became aware of the corporation's financial difficulties and its failure to timely meet its withholding tax liabilities. The financial problems were attributable to the demographic changes in the area which caused the hospital census to decline, and continued through 1976 and 1977.

9. The board considered and discussed the hospital's financial problems at its meetings, and from time to time, the directors made loans to the corporation. In order to permit the hospital to continue to operate, employees and certain vendors, especially pharmaceutical companies, were paid throughout the period in question until the hospital's closing in November, 1977.

10. Lefferts General Hospital, Inc. filed returns of personal income tax withheld on a semi-monthly basis. For the periods February 1 through February 15, February 16 through February 29, March 1 through March 15, March 16 through March 31, April 1 through April 15, April 16 through April 30 and May 1 through May 15 of 1976 and the periods August 1 through August 15, August 16 through August 31, September 1 through September 15, September 16 through September 30, October 16 through October 31, and November 1 through November 15 of 1977, the returns reflected taxes withheld, but no remittances were enclosed therewith. The returns were signed by Mr. Rosenblatt, Dr. Baron, Dr. Cohen or Dr. Sole.

11. Mr. Rosenblatt testified that the board of directors was made aware of the unpaid withholding taxes and the responsibility of the officers for such taxes through his presentation of financial reports, as well as Mr. Zimmet's reports, made at the board meetings. He further testified that the board set the priority for payments as follows: first, payroll; second, vendors of essential supplies; and third, taxes. When a withholding tax return came due and the operating account was depleted, the board instructed him to file the return without any remittance, he testified. He stated, "I can specifically say the doctors were quite clear, sharp and understanding of every point on financial analysis of the condition of the hospital that [was] ever discussed with them by myself, Mr. Reid or the certified public accountant." Mr. Rosenblatt followed the board's directions for fear of losing his job. He attempted to

ensure the payment of taxes "[b]y reporting to the doctors on the circumstances that existed, by pointing to them...their responsibilities and the responsibilities of the board of directors...". Although Mr. Rosenblatt was cognizant that failure to pay over the withholding taxes constituted a violation of the law, he made no effort to leave his position; the board members explained to him that they anticipated receipt by the hospital of large recoveries from pending lawsuits, which amounts would be sufficient to pay all delinquent taxes.

On the other hand, Dr. Sole testified that the corporation's tax liabilities were never discussed at the board meetings, and he was unaware of the withholding taxes due the City and State of New York until shortly before the hospital closed its doors. He testified further that the hospital's day-to-day financial affairs were controlled by Mr. Reid and Mr. Rosenblatt, who determined which creditors were paid. Dr. Sole was aware that some bills were paid in part, while others were left unpaid. He recollected that he may have requested Mr. Zimmet to meet with Internal Revenue Service and Department of Taxation and Finance representatives regarding extensions of time for payment of taxes, and that he himself may have met with an Internal Revenue Service representative.

12. With his brief, petitioner Rosenblatt submitted 20 proposed findings of fact all of which the Commission adopts, except for the following allegations which are not established by the evidence: that Mr. Rosenblatt's beginning salary was \$20,000.00 and his salary at the time his employment ended was \$24,000.00; that Mr. Rosenblatt would generally hand the hospital bills over to the administrator and/or the officers or board of directors, who would instruct him on whom and how much to pay; that Mr. Rosenblatt had no independent authority



to decide which creditors to pay; that decisions on the priorities and payments of the hospital's debts and taxes were made by the officers and directors; and that Drs. Baron and Sole directed him to file the withholding tax returns without payment.

#### CONCLUSIONS OF LAW

A. That Tax Law section 685, subdivision (g) and Chapter 46, Title T of the Administrative Code of the City of New York section T46-185.0, subdivision (g) impose on any person required to collect, account for and pay over the taxes imposed by Article 22 and Title T, respectively, who willfully fails to do so, penalties equal to the amount of the taxes. Subdivision (n) of Tax Law section 685 and subdivision (n) of Title T section T46-185.0 define such a "person" to include, inter alia, "an officer or employee of any corporation... who...is under a duty to perform the act in respect of which the violation occurs".

Section 1309 of Article 30 requires the withholding of personal income tax from the wages of residents and of earnings tax from the wages of nonresidents of the City of New York. Section 1312 makes applicable to the personal income and earnings taxes imposed under the authority of Article 30 all provisions of Article 22 relating to an employer's liability for taxes to be withheld, including section 685.

B. That petitioner Rosenblatt signed withholding tax returns filed during the period at issue and was authorized to withdraw funds from the corporate accounts. In addition to having signed returns and having been an authorized signatory on the hospital's accounts, petitioner Sole was a shareholder and the chief financial officer. Each petitioner points to the other, however, as the person who exercised control over the financial matters and had the final word

regarding which creditors were paid: petitioner Rosenblatt claims the board of directors established the order in which creditors were paid and prescribed the filing of returns without remittance; petitioner Sole claims all bills, including those for taxes, were managed and paid by Mr. Reid and petitioner Rosenblatt. In view of this contradictory testimony, it can only be concluded that each petitioner has failed to carry his burden to establish that he was not a responsible person within the meaning of Tax Law section 685(n) and Title T section T46-185.0(n).

C. That turning to the issue of willfulness, petitioners never created a separate trust account for the deposit of taxes withheld, and petitioners applied such funds to other corporate purposes. "Not to set aside tax deductions when made and, further, to use such money for other corporate purposes is a conscious and deliberate act within the meaning of the tax laws that characterizes petitioner's conduct as 'willful'." Matter of Gardineer v. State Tax Comm., 78 A.D.2d 928, 929. Petitioner Rosenblatt admits knowledge that the taxes were accrued but unpaid. Petitioner Sole knew or should have known of the hospital's tax liabilities. "A corporate officer responsible as a fiduciary for tax revenues cannot absolve himself merely by disregarding his duty and leaving it to someone else to discharge (citation omitted)." Id. Consequently, both petitioners were persons responsible for collecting and paying over New York State and New York City taxes withheld from the wages of employees of Lefferts General Hospital, Inc. who willfully failed to do so and are liable for the penalties imposed against them.


D. That the petition of Eli Rosenblatt is hereby denied, and the Notice of Deficiency issued on May 22, 1978 is sustained.

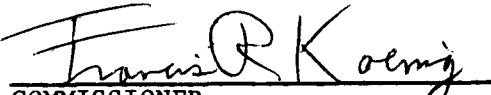
That the petition of Eugene Sole is hereby denied, and the notices of deficiency issued on May 22, 1978 and September 25, 1978 are sustained.


DATED: Albany, New York

STATE TAX COMMISSION

MAR 21 1984

  
PRESIDENT

  
COMMISSIONER

  
COMMISSIONER



New York State Department of  
**TAXATION and FINANCE**

Processing Division  
State Campus, Albany, New York 12227

**WAIVER, MODIFICATION, OR CANCELLATION OF PENALTY AND INTEREST  
REQUIRING APPROVAL OF THE STATE TAX COMMISSION**

SS # OR ID # 13-1662112		
TAXPAYER'S NAME Rosenman Colin Freund Lewis & Cohen		
STREET ADDRESS 575 Madison Avenue		
CITY New York	STATE NY	ZIP CODE 10022

**TAXING APPLICATION:**

- ☐ Corporation Tax  
☐ Personal Income Tax  
☐ Sales Tax  
☒ Withholding Tax  
☐ Miscellaneous Tax:

ASSESSMENT NO. W8309150977
FILING PERIOD 12/16 to 12/31/82

INTEREST AND PENALTY ASSESSED \$ 13,305.91
INTEREST PAID \$ 3,000.23
RECOMMENDED CANCELLATION \$ 10,305.68

In accordance with established policy, approval of the State Tax Commission (*more than one member*) is required where the proposed cancellation of interest and/or penalty is for an amount in excess of \$5,000.00 or for a situation not covered in policy memoranda.

**REASON FOR WAIVER, MODIFICATION OR CANCELLATION:**

Reasonable cause cited is that a check and return were prepared and mailed timely, but were evidently "lost in transit".

Copies of the stop payment order and the check register are attached.

The interest has been paid, the employers filing history is excellent.

Approval Recommended By:			
NAME <i>Emily M. Sloboda</i>	TITLE <i>Chief of Withholding Tax</i>	DATE <i>3/15/84</i>	
Approval Recommended By:			
NAME <i>Francis X. Maloney</i>	TITLE <i>Asst. Dir.</i>	DATE <i>3/31/84</i>	
Commissioner			
<i>Richard A. Chu</i>	DATE: <i>6/11/84</i>	APPROVED <i>[Signature]</i>	DISAPPROVED _____
Commissioner			
<i>Thomas R. Koung</i>	DATE: <i>6/17/84</i>	APPROVED <i>[Signature]</i>	DISAPPROVED _____
Commissioner			
<i>Mark J. Smith</i>	DATE: <i>6/5/84</i>	APPROVED <i>[Signature]</i>	DISAPPROVED _____
Commissioner			