

STATE OF NEW YORK
STATE TAX COMMISSION

In the Matter of the Petition :
of :
Seymour Berger :
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 1973, 1974 & 1975. :

AFFIDAVIT OF MAILING

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 12th day of December, 1980, he served the within notice of Decision by certified mail upon Seymour Berger, the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

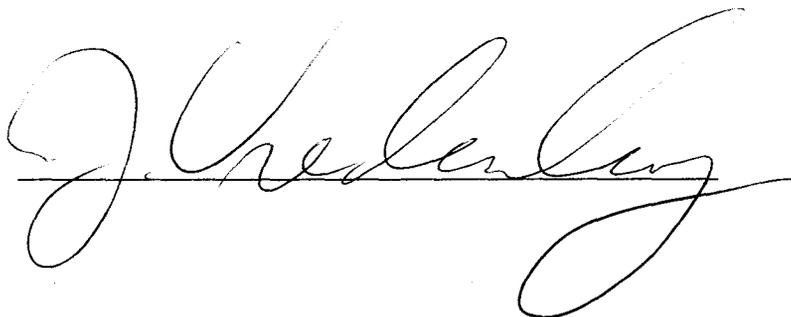
Seymour Berger
2906 Anthony St.
N. Bellmore, NY

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
12th day of December, 1980.





STATE OF NEW YORK
STATE TAX COMMISSION

In the Matter of the Petition :
of :
Seymour Berger :
for Redetermination of a Deficiency or a Revision :
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Personal Income Tax :
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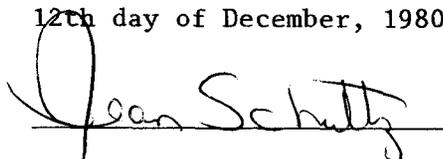
Jay Vredenburg, being duly sworn, deposes and says that he is an employee of the Department of Taxation and Finance, over 18 years of age, and that on the 12th day of December, 1980, he served the within notice of Decision by certified mail upon Selwin Nimaroff the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

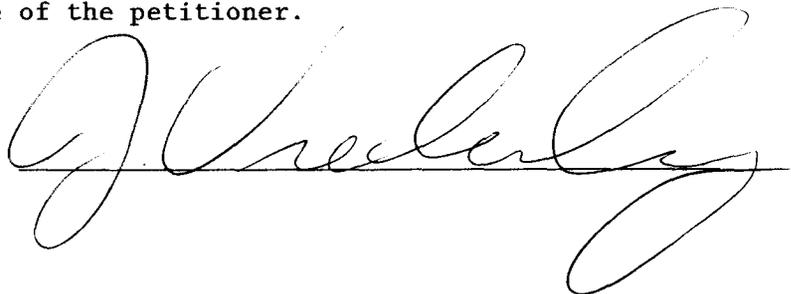
Mr. Selwin Nimaroff
485 Madison Ave.
New York, NY

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
12th day of December, 1980.


Jean Schutt



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

December 12, 1980

Seymour Berger
2906 Anthony St.
N. Bellmore, NY

Dear Mr. Berger:

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
Deputy Commissioner and Counsel
Albany, New York 12227
Phone # (518) 457-6240

Very truly yours,

STATE TAX COMMISSION

cc: Petitioner's Representative
Selwin Nimaroff
485 Madison Ave.
New York, NY
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition
of
SEYMOUR BERGER
for Redetermination of a Deficiency or
for Refund of Personal Income Tax under
Article 22 of the Tax Law for the Years
1973 through 1975.

DECISION

Petitioner, Seymour Berger, 2906 Anthony Street, North Bellmore, New York, 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 through 1975 (File No. 19673).

A formal hearing was held before William J. Dean, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on January 29, 1980 at 9:15 A.M. Petitioner appeared by Selwin Nimaroff, Esq. The Audit Division appeared by Ralph J. Vecchio, Esq. (Abraham Schwartz, Esq., of counsel).

ISSUE

Whether petitioner was a person required to collect and pay over personal income taxes withheld from the employees of McKee-Berger-Mansueto, Inc.

FINDINGS OF FACT

1. By Notice of Deficiency dated April 21, 1977, the Audit Division notified petitioner of a deficiency in the amount of \$104,064.94. The claims against petitioner related to unpaid withholding taxes of McKee-Berger-Mansueto, Inc. (herein "MBM") for various withholding tax periods during the years in question.

2. At the formal hearing, the Audit Division agreed that the deficiency should be reduced from \$104,064.94 to \$59,350.88.

3. MBM was a construction consulting firm performing services for a variety of clients, private, public and institutional, primarily in the United States, but abroad as well. As a construction consulting firm, MBM provided estimating and consulting services to the owner or developer of a project who might not have the in-house ability to monitor the work of the architect and general contractor on the project to insure that the project was brought in on time and within the approved budget.

4. Petitioner was a founder of MBM and a member of the Board of Directors. During the period 1973 through 1975 he served as Vice President and Secretary of MBM. His principal duty at the corporation was to be in charge of estimating project costs. This included estimating cost requirements during the design stages when the architects were designing the facility and also estimating costs during the construction stage. Mr. Berger supervised some fifteen estimators. Staff working under him included electrical and plumbing engineers doing technical estimating work.

5. Petitioner often signed payroll checks. This was as a convenience to the corporation since he was in the MBM headquarters office much of the time while the other principal corporate officers spent much of their time traveling.

6. Petitioner did not have authority to hire or fire employees. While petitioner was aware of the delinquency of MBM to the State of New York, he was not authorized to direct the payment of the tax delinquency. Petitioner's responsibilities did not extend to managing the financial affairs of the corporation.

CONCLUSIONS OF LAW

A. That petitioner was not a person under a duty to collect and pay over

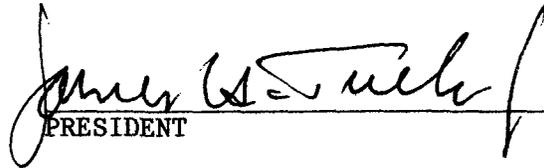
withholding tax within the meaning of subdivisions (g) and (n) of section 685 of the Tax Law. Petitioner's responsibility at MBM was in the area of estimating work on construction projects. While he signed payroll checks, this was as a convenience to MBM since petitioner was in the headquarters office much of the time while the other principal corporate officers spent much of their time traveling. Petitioner's responsibilities did not extend to managing the financial affairs of the corporation. Petitioner did not have responsibility or authority to determine priority of payment to corporate creditors.

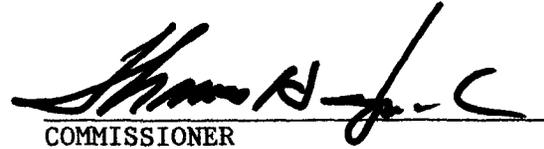
B. That the petition of Seymour Berger is granted and the Notice of Deficiency dated April 21, 1977 is cancelled.

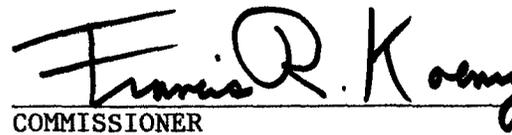
DATED: Albany, New York

STATE TAX COMMISSION

DEC 12 1980


PRESIDENT


COMMISSIONER


COMMISSIONER