

STATE OF NEW YORK  
STATE TAX COMMISSION

In the Matter of the Petition :  
of :  
Gerald McKee, Jr. :  
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

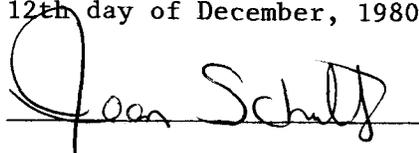
Jay Vredenburg, being duly sworn, deposes and says that he is an employee of the Department of Taxation and Finance, over 18 years of age, and that on the 12th day of December, 1980, he served the within notice of Decision by certified mail upon Gerald McKee, Jr., the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

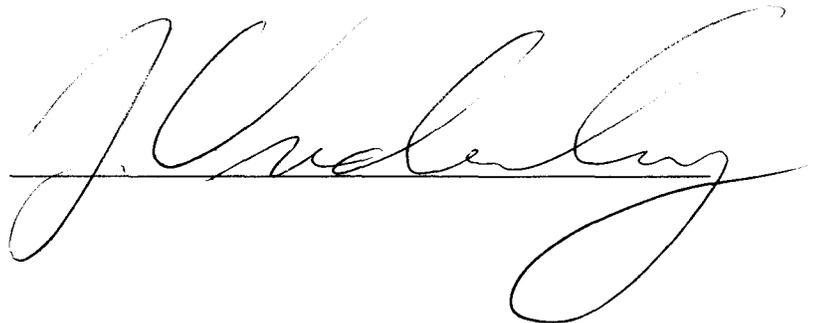
Gerald McKee, Jr.  
981 Orienta Ave.  
Mamaroneck, NY 10543

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.

  
Joan Schultz



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

December 12, 1980

Gerald McKee, Jr.  
981 Orienta Ave.  
Mamaroneck, NY 10543

Dear Mr. McKee:

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  
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

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In the Matter of the Petition :  
of :  
GERALD MCKEE, JR. : DECISION  
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. :

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Petitioner, Gerald McKee, Jr., 981 Orienta Avenue, Mamaroneck, 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. 19677).

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 pro se. 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, Gerald McKee, Jr., 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. During the years in question, he served as Chairman of the Board of Directors. In July, 1973, the MBM Board of Directors fired the then President and petitioner assumed office. The former President had concealed MBM's financial condition from petitioner. Petitioner served as President of MBM from July, 1973 through the period in question.

5. As President of MBM, petitioner was the corporation's chief executive officer with ultimate control over the financial affairs of the corporation. He had authority to hire and fire employees. He had the authority to determine which creditors got paid. Petitioner knew of MBM's tax delinquency to the State of New York and instructed his subordinates not to pay the taxes.

6. The minutes of the joint special meeting in lieu of annual meeting of the shareholders and the Board of Directors of MBM held on July 8, 1975, provide in applicable part as follows:

"The Chairman [petitioner] then advised the meeting that, given the precarious financial condition of the Company, it might be possible that the Company will be required from time to time to withhold the payment of Federal, state and local taxes required to be paid on account of employee wages. While the Chairman stated that he did not anticipate that any such withholding would in fact be required, he believed that that decision should be made by the President of the Company alone, and not by any other officer, particularly the Company's Treasurer.

Upon Motion duly made, seconded and carried, it was

RESOLVED, that the President of the Company shall be the sole officer authorized and empowered to direct the payment or failure to pay any taxes of the Company, including, but not limited to, any or all amounts withheld by the Company from the employees thereof in respect or on account of the employment of such persons by the Company; and be it further

RESOLVED, that the By-Laws of the Company relating to the duties and powers of the Comptroller and Treasurer of the Company are hereby amended to the extent necessary in order to give effect to the immediately preceding resolution."

7. By letter dated November 20, 1978 to Stanley Emerson, who at one time served as Comptroller and then Treasurer of MBM, Mr. McKee wrote as follows:

"Since July 8, 1975, the date of the Board resolution placing in me responsibility of determining whether or not employee tax withholding payments would be made, I have alone made each of those determinations, and you, either individually or as a company employee, have neither had the responsibility nor discretion to make any of those determinations, to sign employee payroll checks or to perform any act relating thereto except at my specific instruction and order."

8. Petitioner concedes personal responsibility for the failure of MBM to pay over withholding taxes to the State of New York for the period subsequent to July 8, 1975 on the basis of the Board resolutions. For the period January-July, 1973, he disclaims responsibility on the basis that he was not President of MBM at the time. For the period July, 1973 through July, 1975, petitioner disclaims responsibility, in part, because he spent considerable time abroad during this time.

#### CONCLUSIONS OF LAW

A. That petitioner was a person under a duty to collect, truthfully account for and pay over personal income taxes withheld from the employees of McKee-Berger-Mansueto, Inc. and willfully failed to do so and is thus liable to a penalty under section 685(g) of the Tax Law. When petitioner assumed the Presidency of MBM, in July, 1973, a delinquency existed for unpaid withholding taxes for the period January 1 through June 30, 1973. Petitioner is liable

for this tax delinquency since at the time he became President the corporation had liquid assets with which the overdue taxes could have been paid. Sledov v. United States, 436 U.S. 238, 57 L.Ed.2d 251 (1978). From July, 1973 on, petitioner served as President of MBM. As chief executive officer of the corporation, petitioner had the ultimate authority to determine which creditors were to be paid and which creditors were not to be paid. Petitioner chose not to pay withholding taxes to the State of New York.

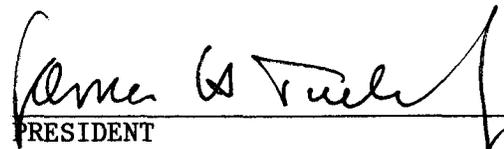
B. That no part of the deficiency is barred by the Statute of Limitations.

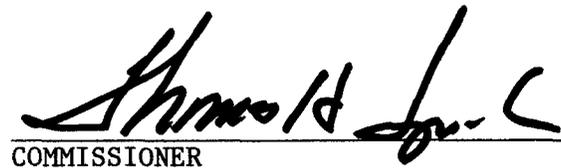
C. That the petition of Gerald McKee, Jr. is denied and the Notice of Deficiency dated April 21, 1977 as modified in accordance with Finding of Fact "2" above is sustained.

DATED: Albany, New York

DEC 12 1980

STATE TAX COMMISSION

  
PRESIDENT

  
COMMISSIONER

  
COMMISSIONER