

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of :
Retail Marine Corporation :
and Edward Spano, Jr., Individ. & as Officer :
: AFFIDAVIT OF MAILING
for Redetermination of a Deficiency or a Revision
of a Determination or a Refund of Sales & Use Tax :
under Article 28 & 29 of the Tax Law for the Period :
6/1/76-8/31/76. :

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 11th day of December, 1981, he served the within notice of Decision by certified mail upon Retail Marine Corporation, and Edward Spano, Jr., Individ. & as Officer the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Retail Marine Corporation
and Edward Spano, Jr., Individ. & as Officer
5730 N. Federal Hwy.
Ft. Lauderdale, FL

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
11th day of December, 1981.

Connie A. Haglund

Jay Vredenburg

STATE OF NEW YORK
STATE TAX COMMISSION

In the Matter of the Petition :
of :
Retail Marine Corporation :
and Edward Spano, Jr., Individ. & as Officer :
: AFFIDAVIT OF MAILING
for Redetermination of a Deficiency or a Revision
of a Determination or a Refund of Sales & Use Tax :
under Article 28 & 29 of the Tax Law for the
Period 6/1/76 - 8/31/76.

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 11th day of December, 1981, he served the within notice of Decision by certified mail upon Allen Michelson the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Allen Michelson
210 Old Country Rd.
Mineola, NY 11501

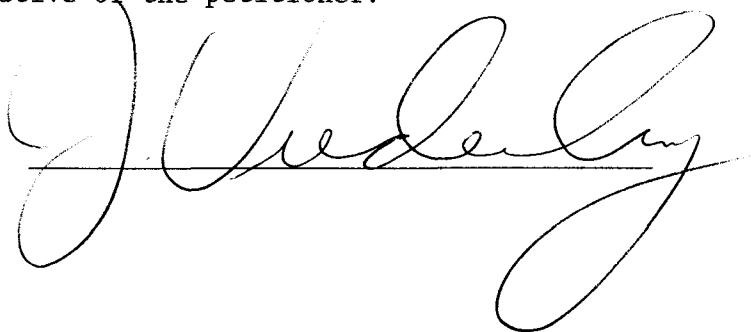
and by depositing same enclosed in a postpaid properly addressed wrapper in a (post office or official depository) under the exclusive care and custody of the United States Postal Service within the State of New York.

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
11th day of December, 1981.



Connie A. Hagelland



Jay Vredenburg

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

December 11, 1981

Retail Marine Corporation
and Edward Spano, Jr., Individ. & as Officer
5730 N. Federal Hwy.
Ft. Lauderdale, FL

Dear Mr. Spano:

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) 1138 & 1243 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
Allen Michelson
210 Old Country Rd.
Mineola, NY 11501
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition	:	
	:	
of	:	
	:	
RETAIL MARINE CORPORATION and	:	DECISION
EDWARD SPANO, JR.	:	
Individually and as Officer	:	
	:	
for Revision of a Determination or for	:	
Refund of Sales and Use Taxes under	:	
Articles 28 and 29 of the Tax Law for the	:	
Period June 1, 1976 through August 31,	:	
1976.	:	

Petitioners, Retail Marine Corporation and Edward Spano, Jr., 5730 North Federal Highway, Fort Lauderdale, Florida, filed a petition for revision of a determination or for refund of sales and use taxes under Articles 28 and 29 of the Tax Law for the period June 1, 1976 through August 31, 1976 (File No. 25567).

A formal hearing was held before Doris Steinhardt, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on December 9, 1980 at 9:15 A.M. Petitioners appeared by Allen Michelson, Esq. The Audit Division appeared by Ralph J. Vecchio, Esq. (Frank Levitt, Esq., of counsel).

ISSUES

I. Whether petitioner Edward Spano, Jr. was a person required to collect tax on behalf of Retail Marine Corporation, and was thus personally liable for sales taxes unpaid by the corporation for the period June 1, 1976 through August 31, 1976.

II. If petitioner Edward Spano, Jr. is so personally liable, the amount of his liability.

III. Whether petitioner Edward Spano, Jr. is liable for the penalty imposed under section 1145 of the Tax Law for failure to file a return and to pay over taxes due to the State Tax Commission.

IV. Whether the presence of an income tax auditor at the formal hearing was so prejudicial as to necessitate dismissal of the proceeding.

FINDINGS OF FACT

1. On February 23, 1978, the Audit Division issued to Retail Marine Corporation ("Retail") and Edward Spano, Jr., individually and as a corporate officer, a Notice of Determination and Demand for Payment of Sales and Use Taxes Due for the period June 1, 1976 through August 31, 1976, in the amount \$94,592.46, plus penalty and interest of \$8,829.44. Petitioners' tax liability was estimated, as no return had been filed for the period.

2. Retail was engaged in the sale and servicing of pleasure boats. Mr. Spano was Chairman of the Board and sole shareholder in the corporation. Westinghouse Credit Corporation ("Westinghouse") provided floor-planning: Westinghouse furnished Retail with funds for the purchase of inventory, and upon sale of a boat to the public, Retail undertook to repay the indebtedness with interest accrued thereon.

3. Due to the oil embargo of late 1973 with the resultant downturn in boat sales, and to the escalation of the prime lending rate, Retail became indebted to Westinghouse by June, 1974, in excess of \$500,000.00.

4. In the interests of averting foreclosure and permitting Retail to remain in business, Westinghouse, Retail and Thonob Realty Corporation (of which Mr. Spano was also sole shareholder) entered into an agreement under which Thonob, as owner of the business premises, assigned the realty to Westing-

house as collateral security for payment of Retail's indebtedness to Westinghouse.

The agreement, dated June 20, 1974, also provided, in pertinent part:

"3. That Westinghouse shall be permitted to control the financial operations of Retail...

"4. That Retail shall be permitted to liquidate its existing inventory by sale to the general public in an orderly fashion and the distribution of all proceeds which may be received from such sale to the general public shall be under the control of Westinghouse.

"5. That in addition to this Agreement, Retail...agree[s] to enter into security agreements as additional collateral security on all personal property presently located at the Lindenhurst... facilit[y]..."

Thereafter, Westinghouse monitored all Retail's business transactions; Westinghouse had authority, inter alia, to approve all purchases. Westinghouse personnel telephoned five to six times daily and visited the premises twice weekly.

5. In May, 1976, a boat sold by Retail exploded in Jamaica Bay, causing the death of the owner and injuries to his companions. A lawsuit seeking approximately eleven million dollars in damages was filed against Retail. Retail's insurance policy was subsequently cancelled, and the corporation was compelled to contract for insurance with an overseas firm at a cost approximately four times its former premium.

6. During a conference in early June, Retail and Westinghouse agreed that it was no longer feasible to attempt to salvage the business and make complete repayment of Retail's indebtedness to Westinghouse. On June 17, 1976, Mr. Spano met with Mr. Rowe, a regional manager of Westinghouse, and Mr. Alexander, a divisional manager, at the office of Mr. Spano's attorney. The parties orally agreed at that time that Westinghouse would take over the business and liquidate it as swiftly as possible, and that Mr. Spano would cooperate fully in this effort.

7. Mr. Rowe and Mr. Alexander instructed Mr. Robert Mendell, the local branch manager, to spend whatever time was necessary at Retail in order to monitor the business. All funds collected from the sale of boats or services were to be deposited in the Retail checking account; no bills, except for salaries and C.O.D. parts, were to be paid from the account without prior Westinghouse approval.

8. From mid-June through the closing of Retail in late August or early September, 1976, a Westinghouse representative, either Mr. Mendell or his assistant, was on the premises during business hours. Westinghouse had control over the number of employees and their wages, ordering of merchandise, acceptance of sales contracts and preparation of boats for customers. At the close of each business day, Mr. Mendell tallied payments received from customers and deposited the funds to the Retail checking account. That amount remaining in the account after payment of bills went to Westinghouse for its financing of boats.

9. Mr. Spano continued to function in the day-to-day operations of Retail: Westinghouse wished to utilize his expertise in selling merchandise. As compensation, Mr. Spano received a salary of \$350.00 per week.

10. Mr. Mendell held the checkbook for the Retail account. When a bill came due, Mr. Spano signed a check for payment thereof but otherwise had no checks in his possession nor any authority to draw off funds from the account. As to ordinary expenses, Mr. Mendell was authorized by Westinghouse to approve payment; if a particular expense was without his authority, Mr. Mendell telephoned Westinghouse for approval. On occasion, Mr. Spano signed a block of checks in advance, for example, if he planned to travel out of town.

11. Approximately every two weeks, Westinghouse representatives and Mr. Spano discussed taxes due. Checks were approved and issued for payment of withholding taxes. Sales taxes were collected from customers, but the amounts were deposited in the general Retail account. Mr. Spano pointed out to Messrs. Mendell, Alexander and Rowe the necessity of turning over these amounts to the Tax Commission, but a separate fund was never established nor the monies paid over.

12. On August 3, 1976, by which time Retail was indebted to Westinghouse in the amount \$2,500,000.00, the parties executed a written agreement, assigning all of the right and interest in the personal property owned by Retail to Westinghouse.

13. The business became defunct in late August or early September, 1976, still in debt to Westinghouse.

14. At the request of the Suffolk County District Office, Mr. Spano submitted a Sales and Use Tax Return for the period June 1, 1976 through August 31, 1976, dated February 15, 1977, which return showed the following amounts of sales and taxes due thereon:

Gross sales and services	\$426,925.00
Taxable sales and services	426,925.00
Sales and use taxes due	29,884.75

Sales contracts and records of sales were, and are, in the custody and control of Westinghouse. Mr. Spano reviewed sales lists maintained by Mr. Mendell in order to prepare the return.

15. Present at the formal hearing with the attorney representing the Department of Taxation and Finance was an income tax auditor with whom the attorney had earlier consulted regarding Mr. Spano's income tax matters. Approximately halfway through the hearing, the hearing officer excluded the

auditor, upon Mr. Michelson's request. Counsel for the Department had not conferred with the auditor during the course of the hearing.

CONCLUSIONS OF LAW

A. That subdivision a of section 1133 of the Tax Law charges every person required to collect any tax imposed by Article 28 with personal liability for the tax imposed, collected or required to be collected.

B. That subdivision 1 of section 1131, in defining persons required to collect tax, includes any corporate officer who is under a duty to act for such corporation in complying with any requirement of Article 28.

C. That the resolution of whether petitioner is a person required to collect tax turns upon a factual determination in each case. Vogel v. Dept. of Taxation and Finance, 413 N.Y.S.2d 862 (Sup. Ct. Monroe Co. 1979); Chevlowe v. Koerner, 407 N.Y.S.2d 427 (Sup. Ct. Queens Co. 1978).

That relevant factors in such a determination include, but are not limited to, the following: the officer's day-to-day responsibilities in the corporation; the officer's involvement in and knowledge of the financial affairs of the corporation; the identity of the officer who prepared and signed Sales and Use Tax Returns; the officer's authority to sign checks on the corporation's bank accounts; and in the case of a closely held corporation, the officer's knowledge of corporate affairs and benefits he received from corporate profits.

D. That for the period June 1, 1976 through June 16, 1976, petitioner Edward Spano, Jr. was an officer under a duty to act for Retail Marine Corporation in complying with the requirements of Article 28 and therefore has personal liability for unpaid sales taxes imposed on the corporation for that period. Mr. Spano was the sole officer and shareholder in the corporation.

E. That for the period June 17, 1976 through August 31, 1976, petitioner Edward Spano, Jr. was not an officer under such a duty to act for Retail and thus bears no personal liability for unpaid sales taxes for that period. As of June 17, Mr. Spano was divested of any and all control over the financial records and affairs of Retail. Mr. Spano signed checks on the corporate account only in obedience to Westinghouse instructions; he exercised no discretion over which creditors were paid. The holding of corporate office during this period (June 17 through August 31) is insufficient in and of itself to impose liability upon him.

F. That the amount of Mr. Spano's liability for June 1 through June 16 shall be calculated in accordance with the information submitted on the Sales and Use Tax Return, filed on February 15, 1977, which information was gleaned from actual sales records.

G. That for the period June 1 through June 16, 1976, petitioner Edward Spano, Jr. has shown no reasonable cause for failure to file a return and remit taxes due. Consequently, he is liable to the penalty imposed under section 1145.

H. That the presence of an income tax auditor at the formal hearing did not result in such prejudice to petitioners as to warrant dismissal of this proceeding.

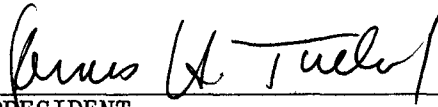
I. That the petition of Retail Marine Corporation and Edward Spano, Jr., individually and as a corporate officer, is granted to the extent indicated in Conclusions of Law "E" and "F"; that the notice of determination and demand for

payment issued on February 23, 1978, is to be modified accordingly; and that except as so modified, the determination is in all other respects sustained.

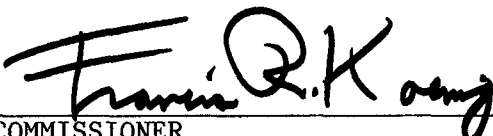
DATED: Albany, New York

DEC 11 1981


STATE TAX COMMISSION



PRESIDENT



COMMISSIONER



COMMISSIONER