

STATE OF NEW YORK  
STATE TAX COMMISSION

In the Matter of the Petition

of  
STEWART M. LEVY,  
as President of STEWART MILFORD CORP.  
For a Redetermination of a Deficiency or  
a Revision of a Determination or a Refund  
of Sales & Use  
Taxes under Article(s) 28 & 29 of the  
Tax Law for the ~~XXXXXX~~ Period ~~(s)~~  
February 28, 1966 - August 31, 1966.

AFFIDAVIT OF MAILING

State of New York  
County of Albany

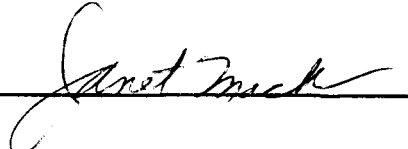
Catherine Steele, being duly sworn, deposes and says that  
she is an employee of the Department of Taxation and Finance, over 18 years of  
age, and that on the 24th day of August, 1976, she served the within  
Notice of Determination by ~~(certified)~~ mail upon Stewart M. Levy

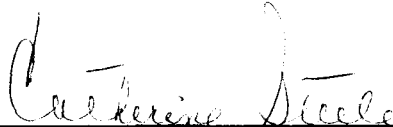
~~(representative of)~~ the petitioner in the within proceeding,  
by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed  
as follows: Stewart M. Levy, President  
Stewart Milford Corp.  
302 Middlesex Road  
Buffalo, New York 14202  
and by depositing same enclosed in a postpaid 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)~~  
~~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

24th day of August, 1976

  
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Notice of Determination by ~~certified~~ mail upon Ralph J. Gregg, Esq.

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by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed  
as follows: Ralph J. Gregg, Esq.  
Albrecht, Maguire, Heffern & Gregg  
Suite 2110 - Main Place Tower  
Buffalo, New York 14202  
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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

24th day of August, 1976.

Janet Mack

Catherine Steele



STATE OF NEW YORK  
DEPARTMENT OF TAXATION AND FINANCE

STATE TAX COMMISSION

TAX APPEALS BUREAU  
STATE CAMPUS  
ALBANY, N.Y. 12227

ADDRESS YOUR REPLY TO

August 24, 1976

TELEPHONE: (518) **457-3850**

Stewart M. Levy, President  
Stewart Milford Corp.  
302 Middlesex Road  
Buffalo, New York 14202

Dear Mr. Levy:

Please take notice of the **DETERMINATION**  
of the State Tax Commission enclosed herewith.

Please take further notice that pursuant to  
Section(s) **1138 & 1243** of the Tax Law, any  
proceeding in court to review an adverse deci-  
sion must be commenced within **4 months**  
from the date of this notice.

Inquiries concerning the computation of tax  
due or refund allowed in accordance with this  
decision or concerning any other matter relative  
hereto may be addressed to the undersigned. They  
will be referred to the proper party for reply.

Very truly yours,

**Paul B. Coburn**  
Supervising Tax  
Hearing Officer

Enc.

cc: Petitioner's Representative:

Taxing Bureau's Representative:

STATE OF NEW YORK

STATE TAX COMMISSION

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In the Matter of the Application :  
of :  
STEWART M. LEVY, :  
as President of STEWART MILFORD CORP. : DETERMINATION  
for a Revision of a Determination or :  
for Refund of Sales and Use Taxes under :  
Articles 28 and 29 of the Tax Law for :  
the Period 2/28/66 - 8/31/66. :

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Applicant, Stewart M. Levy, as President of Stewart Milford Corp., 302 Middlesex Road, Buffalo, New York 14202, applied for a revision of a determination or for refund of sales and use taxes under Articles 28 and 29 of the Tax Law for the period 2/28/66 through 8/31/66. Notice No. 90707108.

A formal hearing was held at the offices of the State Tax Commission, State Office Building, Buffalo, New York, on June 11, 1975, before L. Robert Leisner, Hearing Officer. The taxpayer was represented by Ralph J. Gregg, Esq. and the Sales Tax Bureau was represented by Saul Heckelman, Esq., (Alexander Weiss, Esq., of counsel).

ISSUE

Was the taxpayer liable as a responsible person or officer under sections 1131(1) and 1133 of the Tax Law.

FINDINGS OF FACT

1. Steward Milford Corp., hereinafter referred to as the "Corporation", was a New York corporation.

2. Stewart M. Levy was its president and principal stockholder.

3. On June 10, 1966, the corporation filed a voluntary petition in bankruptcy in the United States District Court for the Western District of New York reciting that the corporation had commenced business in August, 1965, and had terminated its business as of June 10, 1966. The bankruptcy file is identified as File No. B.K. 66-1336.

4. The petition listed assets including stock in trade, trucks and machinery, receivables, cash and unliquidated claims totalling \$76,238.62.

5. The petition identified two creditors as having priority claims, namely, the United States for social security and withholding taxes for the period from January 1, 1966 to June 10, 1966, in the sum of \$2,579.15 and the State of New York for withholding unemployment franchise and sales taxes in the amount of \$3,492.35.

6. The petition set forth a list of secured creditors with claims totalling \$36,092.41 and unsecured creditors having claims totalling \$100,595.52.

7. The total of the claims with priority, the claims secured and the claims unsecured was \$142,759.43.

8. The affidavit of the Clerk of the Bankruptcy Court recorded the fact that he had mailed notices to all creditors advising them that the time for the filing of proofs of claim would expire on December 29, 1966.

9. On July 22, 1966, the proof of claim was filed by the Attorney General of the State of New York for the \$25.00 franchise tax return for each of the years 1965 and 1966. It was signed by E.A. Doran, Deputy Tax Commissioner.

10. On October 17, 1966, a proof of claim was filed by the Attorney General of the State of New York for withholding taxes estimated at \$270.00 for the period from February 1, 1966 to June 10, 1966. This proof of claim was signed by Richard Creegan, Deputy Tax Commissioner.

11. On December 29, 1966, the time expired for the filing of the proofs of claim.

12. On November 3, 1967, a proof of claim was filed by the Attorney General of the State of New York for sales taxes as follows:

<u>Period Ended</u>	<u>Nature of Claim</u>		
2/28/66	Tax (per return)	\$2,225.01	
	Interest	<u>31.02</u>	\$2,256.03
5/31/66	Tax (per audit)	\$1,421.04	
	Interest	<u>- 0 -</u>	1,421.04

<u>Period Ended</u>	<u>Nature of Claim</u>			
8/31/66	Tax (per audit)	\$	33.85	
			<u>- 0 -</u>	<u>33.85</u>
				<u>\$3,710.92</u>

This proof of claim was signed by John G. Roche, Deputy Tax Commissioner,

13. On November 3, 1967, the Clerk of the Bankruptcy Court, Adah Sturm, issued a notice of the State of New York that the claim was not timely filed and would be disallowed, explaining that the time had expired on December 29, 1966, pursuant to section 57 of the Bankruptcy Act.

14. On September 3, 1968, a proof of claim was filed by the Attorney General, also signed by John G. Roche, Deputy Tax Commissioner, amending the claim for withholding taxes to substitute a claim for \$358.08 for the estimated claim of \$275.00 previously filed on October 17, 1966.

15. On June 9, 1969, Leonard J. Brizdle, the trustee in bankruptcy, reported to the referee that as a result of his efforts to reduce the assets of the bankrupt estate to cash he had realized receipts of \$15,471.54, incurred disbursements of \$4,049.77 and

had \$11,421.77 on hand to apply against priority claims. The priority claims that were allowed were as follows:

State Tax Commission, Franchise Tax	\$ 50.00
State Tax Commission, Withholding Tax	358.08
New York Insurance Fund	656.22
Internal Revenue Service	<u>3,214.49</u>
	<u>\$4,278.79</u>

16. The foregoing would have left \$7,142.98 available for payment of the claim of the New York State Sales Tax Bureau if the claim had been timely filed.

17. The said trustee in bankruptcy proposed to disallow the claim of the Sales Tax Bureau in the sum of \$3,710.82 on the grounds that the Attorney General had been delinquent in filing proof of claim within the statutory period.

18. On February 25, 1970, Joseph Ricotta, Esq., Assistant Attorney General, appeared at a hearing before the Referee in Bankruptcy on the trustee's proposed allowance of the claim for sales taxes and requested time to submit a brief. A brief was submitted in the name of the Attorney General of the State of New York.

19. On April 7, 1970, Beryle McGuire, Referee in Bankruptcy, disallowed the claim for the sales tax.



20. The Referee in Bankruptcy then authorized an allowance of \$3,500.00 to Jacobsen, Newman & Ferrer, as attorneys for the trustee and an additional allowance to the trustee. The balance of the fund was sufficient to pay about a 7% dividend on the claims having lesser priority than those of the United States and New York State.

21. The bankruptcy file contains no indication that Leonard J. Brizdle, the trustee in bankruptcy, prepared or filed sales tax returns for the quarterly periods ended May 31, 1966 or August 31, 1966.

22. There is nothing in the bankruptcy file to indicate that the Corporation had failed to collect New York State sales taxes on the retailed sales it had made during the quarterly periods ended May 31, 1966 and August 31, 1966, or that it had failed to deliver the proceeds of such sales taxes to the trustee in bankruptcy.

23. On January 6, 1970, the New York State Sales Tax Bureau issued a Notice and Demand No. 90,707,108 to Stewart M. Levy. The Notice and Demand asserted: "You are personally liable as president of Stewart Milford Corp. under sections 1131(1) and 1133 of the Tax Law for the following":

<u>PERIOD ENDED</u>		<u>TAX</u>	<u>PENALTIES &amp; INTEREST</u>	<u>TOTAL</u>
2/28/66	(unpaid \$2,425.01 return)		\$1,188.25	\$3,613.26
5/31/66	(per 1,221.04 audit)		561.66	1,782.70
8/31/66	(per 33.85 audit)		14.62	48.47
		<u>\$3,679.90</u>	<u>\$1,764.53</u>	<u>\$5,444.43</u>

24. On or about April 18, 1972, Robert E. Hall, a member of the staff of the Buffalo District Office of the Sales Tax Bureau, conceded that the claim for sales taxes against Stewart M. Levy for the period ended February 28, 1966, was barred by the Statute of Limitations as of March 20, 1969, and prior to the issuance of the Notice and Demand on Stewart M. Levy on January 6, 1970, by reason of the fact that a tax return had been filed by the Corporation for the period ended February 28, 1966. Mr. Hall said that the demand would be revised to delete the claim for \$3,613.26 of sales taxes, penalties and interest relating to the period ended February 28, 1966.

25. On April 21, 1972, the taxpayer, by his attorney, Ralph J. Gregg, Esq., protested the assessment against Stewart M. Levy, for the periods ended May 31, 1966 and August 31, 1966, on the grounds that the Notice and Demand for payment was defective because the New York State Sales Tax Bureau had not complied with section 1138

of the Sales Tax Law by first issuing a notice of determination and affording Mr. Levy an opportunity to protest its determination as to the amount of tax due. This protest was made to a member of the legal staff of the Sales Tax Bureau at Albany, New York, who said that he was inclined to agree that the Notice and Demand was defective.

26. On May 9, 1972, Arthur M. Raskin, Chief of the Audit and Review Unit of the New York State Sales Tax Bureau, advised by letter, a copy of which is attached hereto as that the correspondence of the taxpayer's representative had been forwarded to their Law Bureau for an interpretation as to whether or not the Notice and Demand for payment of sales and use taxes was defective.

27. Also on May 9, 1972, the New York State Sales Tax Bureau issued a "notice of determination and demand for payment of sales and use taxes due" No. 90707108A stating that "this notice is issued to protect the State's right to collect the taxes due in the event that Notice Number 90707108 is found to be defective".

28. Three days later, on May 12, 1972, the Department of Taxation and Finance, over the signature of Robert E. Hall, Warrant Officer, formally demanded payment within 10 days of the \$1,696.72 of sales tax and interest described in the "notice of determination and demand for payment of sales and use taxes due" dated May 9, 1972.

29. The taxpayer, having protested the earlier assessment, did not make further application for a hearing within 90 days after May 9, 1972, because of the statement by Arthur M. Raskin, Chief of the Audit and Review Unit, that the Law Bureau had been requested to give an interpretation of whether the notice of demand for payment of sales and use taxes was defective, an interpretation that was never supplied to the taxpayer or his legal representative and for the further reason that the Department of Taxation and Finance had turned over the file to a warrant officer for collection on May 12, 1972, and thereby effectively deprived him of a hearing on the matter.

30. On May 29, 1973, the Department of Taxation and Finance notified the Stewart Milford Corporation that a judgment had been taken against it in the sum of \$1,847.30 for sales taxes for the quarterly periods ended May 31, 1966 and August 31, 1966. The taxpayer took no action with reference to this because this was the same claim against the corporation that had been barred in the Bankruptcy Court and it merely constituted notice that judgment had been taken against a defunct corporation.

31. At the hearing the taxpayer asserted the illegality of the notices, the denial of a hearing before judgments and warrants,

the illegality of the warrants, and a deliberate bypassing of the bankruptcy court to proceed against a principal officer.

32. The Sales Tax Bureau asserted that the assessment was a little out of the ordinary because there were really two assessment notices; one dated January 6, 1970, which was reduced to \$1,831.17 because the statute of limitations had expired on the quarter ended 2/28/66 but that the subsequent notice issued on May 9, 1972, for later quarters based on the earlier notice was still valid. The Sales Tax Bureau asserted that the sales tax liabilities and warrant against Stewart M. Levy are valid.

#### OPINION

The question really revolves around (Notice No. 90,707,108) the quarters ended 2/28/66 (unpaid return), 5/31/66 (per audit) and 8/31/66 (per audit) for \$3,613.26, \$1,782.70 and \$48.47, respectively. The assessment for the quarter 2/28/66 is concededly barred by the statute of limitations. The taxes per audit of the corporation for the quarters ended 5/31/66 and 8/31/66 which are asserted against Stewart Levy were not due until June 15, 1966, and September 15, 1966, respectively. But the Stewart Milford Corp. filed a voluntary petition in bankruptcy and terminated its business on June 10, 1966, in Case No. BK-66-1366. Not only were there sufficient assets to pay the taxes in full, but Stewart M. Levy was no longer a responsible officer after June 10, 1966,

but also the Sales Tax Bureau failed to properly assert its claim in the bankruptcy.

CONCLUSIONS OF LAW

A. The assessment for the quarter ended 2/28/66 for \$3,613.26 is barred by the statute of limitations. In the matter of the assessments for the quarters ended 5/31/66 and 8/31/66 for \$1,782.70 and \$48.47 respectively for the Stewart Milford Corp., the returns and taxes were not due until June 15, 1966, and September 15, 1966. Additionally, the bankruptcy estate had sufficient money to pay all taxes. After June 10, 1966, the date of the bankruptcy, Stewart M. Levy, as a matter of law, could not make the return or pay the tax and an assessment against him personally as an officer is not lawful.

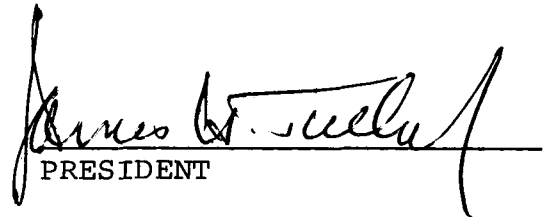
B. All of the sales tax assessments herein for the periods 2/28/66, 5/31/66 and 8/31/66 against Stewart M. Levy are cancelled.

C. The warrant filed in the Erie County Clerk's office against Stewart M. Levy for \$1,847.30 sales taxes, penalties and interest for the periods 5/31/66 and 8/31/66 shall be vacated.

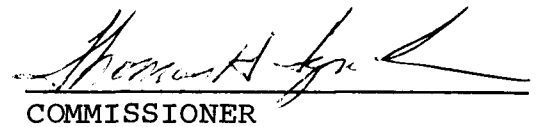
D. Stewart M. Levy's name shall be cleared of all sales taxes, penalties and interest of Stewart Milford Corp. for the year 1966.

DATED: Albany, New York  
August 24, 1976

STATE TAX COMMISSION

  
PRESIDENT

  
COMMISSIONER

  
COMMISSIONER