

STATE OF NEW YORK  
STATE TAX COMMISSION

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In the Matter of the Petition :  
of :  
Marcos A. Berrios :  
and Michael E. & America McVey : AFFIDAVIT OF MAILING  
for Redetermination of a Deficiency or a Revision :  
of a Determination or a Refund of :  
Sales & Use Tax :  
under Article 28 of the Tax Law :  
for the Years 1973 - 1975. :

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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 21st day of September, 1979, he served the within notice of Determination by mail upon Marcos A. Berrios, and Michael E. & America McVey, the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

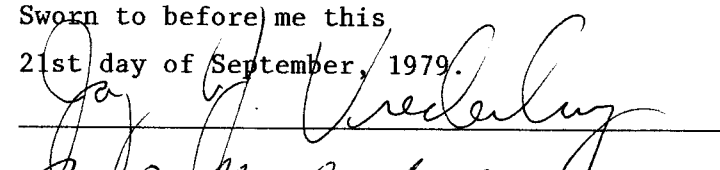

Marcos A. Berrios  
and Michael E. & America McVey  
c/o Manuel Vidal  
Bronx, NY 10459

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

21st day of September, 1979.

STATE OF NEW YORK  
STATE TAX COMMISSION

In the Matter of the Petition :  
of :  
Marcos A. Berrios :  
and Michael E. & America McVey : AFFIDAVIT OF MAILING  
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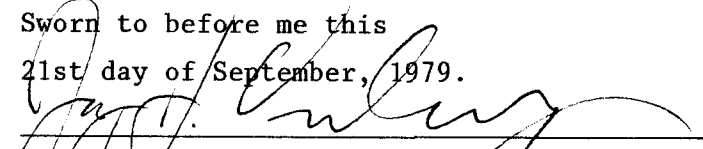

Jay Vredenburg, being duly sworn, deposes and says that he is an employee of the Department of Taxation and Finance, over 18 years of age, and that on the 21st day of September, 1979, he served the within notice of Determination by mail upon Manuel Vidal the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Mr. Manuel Vidal  
1006 E. 163rd St.  
Bronx, 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  
21st day of September, 1979.



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

STATE TAX COMMISSION

JAMES H. TULLY JR., PRESIDENT  
MILTON KOERNER  
THOMAS H. LYNCH

JOHN J. SOLLECITO  
DIRECTOR

Telephone: (518) 457-1723

September 21, 1979

Marcos A. Berrios  
and Michael E. & America McVey  
c/o Manuel Vidal  
1006 E. 163rd St.  
Bronx, NY 10459

Gentlemen:

Please take notice of the Determination of the State Tax Commission enclosed herewith.

You have now exhausted your right of review at the administrative level. Pursuant to section(s) 1138 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 the Deputy Commissioner and Counsel to the New York State Department of Taxation and Finance, Albany, New York 12227. Said inquiries will be referred to the proper authority for reply.

Sincerely,

A handwritten signature in cursive script, appearing to read "Raymond J. Mendez".

cc: Petitioner's Representative  
Manuel Vidal  
1006 E. 163rd St.  
Bronx, NY  
Taxing Bureau's Representative

JAMES H. TULLY JR., PRESIDENT  
MILTON KOERNER  
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cc: Petitioner's Representative  
Manuel Vidal  
1006 E. 163rd St.  
Bronx, NY  
Taxing Bureau's Representative

STATE OF NEW YORK  
STATE TAX COMMISSION

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In the Matter of the Applications :  
of :  
MARCOS A. BERRIOS (Seller) :  
and :  
MICHAEL E. McVey and : DETERMINATION  
AMERICA McVey (Purchaser) :  
: :  
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 December 1, :  
1972 through October 2, 1975. :  
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Applicants, Marcos A. Berrios (c/o Manuel Vidal), 1006 East 163rd Street, Bronx, New York 10459, and Michael E. and America McVey, 500 West 135th Street, New York, New York, filed applications 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 December 1, 1972 through October 2, 1975 (File No. 13849).

A formal hearing was held before Michael Alexander, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on October 3, 1977 at 2:45 P.M. Applicant Marcos A. Berrios appeared by Manuel Vidal, an accountant. Applicants Michael E. McVey and America McVey appeared by Frederick P. Altman, Esq. The Sales Tax Bureau appeared by Peter Crotty, Esq. (Andrew Haber, Esq., of counsel).

ISSUES

I. Whether the audit conducted by the Sales Tax Bureau on the business operated by applicant Marcos A. Berrios and the resulting additional tax liability, were proper and correct.

II. Whether there was an additional tax liability on the bulk sale of business assets by applicant Marcos A. Berrios to applicants Michael E. and America McVey.

FINDINGS OF FACT

1. On October 2, 1975, applicants Michael E. and America McVey notified the Sales Tax Bureau of their purchase (on that day) of a bar business from applicant Marcos A. Berrios. The total sales price of the business or property was stated on the Notification of Sale, Transfer or Assignment in Bulk to be \$12,000.00. The sales price of the furniture, fixtures, etc. was stated to be \$1,000.00 and the amount of the escrow fund to be \$2,000.00. A check for \$80.00 was forwarded with the Notification, in payment of the sales tax on the \$1,000.00 figure. The Notification was received by the Sales Tax Bureau on October 14, 1975.

2. On March 17, 1976, the Sales Tax Bureau issued notices of determination and demand for payment of sales and use taxes due to both the purchasers and the seller (applicants herein). The Sales Tax Bureau determined that based on an audit of the records of Marcos A. Berrios for the period December 1, 1972 through October 2, 1975, additional taxes were due of \$8,904.48, plus penalty and interest of \$3,103.81, for a total of \$12,008.29.

3. On March 25, 1976, the Sales Tax Bureau issued a Notice of Determination and Demand for Payment of Sales and Use Taxes Due to applicant Marcos A. Berrios for the period ended October 2, 1975. It determined that taxes were due of \$544.00, plus penalty

and interest of \$54.40, for a total of \$598.40 on the bulk sale of the business.

4. On April 15, 1976, the Sales Tax Bureau issued a Notice and Demand for Payment of Sales and Use Taxes Due to applicants Michael E. and America McVey (purchaser). It determined therein that additional tax of \$544.00, plus penalty and interest of \$62.28, for a total of \$609.28, was due on their bulk purchases of tangible personal property.

5. Applicant Marcos A. Berrios was a retired master sergeant in the United States Army, with 25 years of service. He received a monthly pension payment of almost \$900.00. In 1972 he purchased the business property at 118 Featherbed Lane, Bronx, New York, primarily to afford him something with which to occupy his time.

6. Applicant Marcos A. Berrios operated a neighborhood tavern at the premises. The tavern had between eight and eleven stools at the counter, had no tables, and had a maximum capacity of not more than thirty people. The tavern was open from 6 P.M. to midnight.

7. Applicant Marcos A. Berrios was in poor health during the period in question. Accordingly, the tavern was closed for the period September 1, 1973 to August 31, 1974.

8. Applicant Marcos A. Berrios did not make books and records available to the Sales Tax Bureau auditor; thus, the audit conducted was based on information contained in his Federal income tax returns for 1973, 1974 and 1975, and shown on his New York sales and use tax returns. However, the accountant who prepared the sales

tax returns did so from bills of purchase and daily records. The auditor who had visited the premises during the day increased sales by 200%, but proffered no basis for the increase. This resulted in additional tax due in all 12 quarters. With regard to the bulk sale itself, the auditor treated the entire \$12,000.00 sales price as receipts from the sale of tangible personal property, subtracting therefrom \$1,000.00 (on which tax had been paid) and \$4,200.00, the depreciation shown on applicant Marcos A. Berrios' Federal returns for 1972 through 1975. No evidence was adduced by either side to indicate what personal property was sold or what real property was sold.

9. Applicant Marcos A. Berrios' 1973 Federal return indicates (on Schedule "C-2") that an air-conditioner and refrigerator were repaired. Applicant's Schedule C's show gross receipts for 1973, 1974 and 1975 of \$20,837.00, \$10,543.00 and \$22,377.00, respectively, for a total of \$53,757.00. The cost of goods for these years was \$9,290.00, \$3,592.00 and \$10,741.00, respectively. The gross sales (which are the same as the taxable sales on said applicant's sales tax returns for all the quarters in question) total \$53,030.00 and include therein the month of December 1972, which month is not considered in the gross receipts reported for Federal purposes. Gross sales during the quarter December 1, 1972 through February 28, 1973 totalled \$8,650.00.

10. Closing inventory on applicant's 1975 Schedule "C" totalled \$1,110.00. Said applicant also indicated on that schedule



that \$12,000.00 of furniture and fixtures were being depreciated by the straight line method over a period of ten years. The depreciation then totalled \$4,200.00.

11. No sales agreement was offered in evidence, nor were bills or records of the seller offered.

12. Applicants acted in good faith and relied on the advice of their respective accountant and attorney.

CONCLUSIONS OF LAW

A. That the increase of applicant Marcos A. Berrios' sales by 200% for the period in question was arbitrary and unfounded.

B. That the gross sales figures reported by applicant Marcos A. Berrios on his Federal Form 1040 for the period in question shall be considered subject to sales tax. Said reported figure amounted to \$57,372.00, exceeding by \$4,322.00 the sales reported on said applicant's sales tax returns.

C. That the tax imposed on the bulk sale of the tangible personal property purchased by applicants Michael E. and America McVey, in the absence of a contract of sale, evidence of specific property transferred and evidence regarding the disposition of the inventory (as found by the Sales Tax Bureau), must be sustained.

D. That the applications of Marcos A. Berrios and Michael E. and America McVey are granted to the extent that the notices of determination and demand for payment of sales and use taxes due issued to applicants on March 17, 1976 be modified to the extent indicated in Conclusion of Law "B", above; that the sales tax imposed on such increased sales shall be applied proportionately to

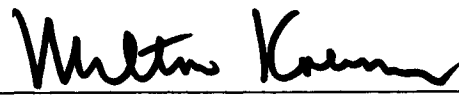
the periods in which applicant Marcos A. Berrios' establishment was open; that the interest in excess of minimum interest and the penalty imposed pursuant to section 1145(a) of the Tax Law is waived in all instances; and that, except as so granted, the applications are in all other respects denied.

DATED: Albany, New York

SEP 21 1979

STATE TAX COMMISSION

  
PRESIDENT

  
COMMISSIONER

  
COMMISSIONER

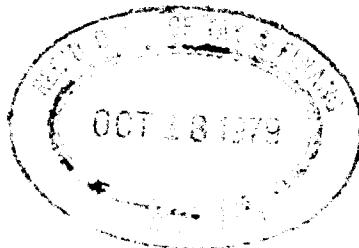


New York State Department of  
**TAXATION and FINANCE**  
TAX APPEALS BUREAU

to.....Paul.Coburn.....

Please file.

October 16, 1979



M-75 (5/76)

From Robert F. Mulligan

RECD. DEPT. OF TA. & T.  
OCT 10 1900  
RECEIVED THE SECRETARY OF THE

TA-26 (4-76) 25M

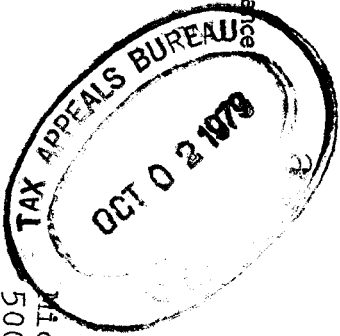
STATE OF NEW YORK

Department of Taxation and Finance

TAX APPEALS BUREAU

STATE CAMPUS

ALBANY, N. Y. 12227



Michael E. and America McVey  
500 West 135th Street  
New York, New York

NEW YORK, N.Y. 10011

3



HAMILTON SPONGE

STATE OF NEW YORK  
STATE TAX COMMISSION

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In the Matter of the Applications :  
of :  
MARCOS A. BERRIOS (Seller) :  
and :  
MICHAEL E. McVey and : DETERMINATION  
AMERICA McVey (Purchaser) :  
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1972 through October 2, 1975. :

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I. Whether the audit conducted by the Sales Tax Bureau on the business operated by applicant Marcos A. Berrios and the resulting additional tax liability, were proper and correct.

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#### CONCLUSIONS OF LAW

A. That the increase of applicant Marcos A. Berrios' sales by 200% for the period in question was arbitrary and unfounded.

B. That the gross sales figures reported by applicant Marcos A. Berrios on his Federal Form 1040 for the period in question shall be considered subject to sales tax. Said reported figure amounted to \$57,372.00, exceeding by \$4,322.00 the sales reported on said applicant's sales tax returns.

C. That the tax imposed on the bulk sale of the tangible personal property purchased by applicants Michael E. and America McVey, in the absence of a contract of sale, evidence of specific property transferred and evidence regarding the disposition of the inventory (as found by the Sales Tax Bureau), must be sustained.

D. That the applications of Marcos A. Berrios and Michael E. and America McVey are granted to the extent that the notices of determination and demand for payment of sales and use taxes due issued to applicants on March 17, 1976 be modified to the extent indicated in Conclusion of Law "B", above; that the sales tax imposed on such increased sales shall be applied proportionately to

the periods in which applicant Marcos A. Berrios' establishment was open; that the interest in excess of minimum interest and the penalty imposed pursuant to section 1145(a) of the Tax Law is waived in all instances; and that, except as so granted, the applications are in all other respects denied.


DATED: Albany, New York

SEP 21 1979

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SEP 21 1979

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