

STATE OF NEW YORK
STATE TAX COMMISSION

In the Matter of the Petition :
of :
Branch & Merritt, Inc. :
c/o Emmett Merritt, 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 Periods 8/72-5/75, 2/73-2/75. :

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 23rd day of May, 1980, he served the within notice of Determination by mail upon Branch & Merritt, Inc., c/o Emmett Merritt, Officer, the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Branch & Merritt, Inc.
c/o Emmett Merritt, Officer
3217 Fish Ave.
Bronx, NY 10466

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
23rd day of May, 1980.

Joanne Knapp

J. Vredenburg

STATE OF NEW YORK
STATE TAX COMMISSION

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of :
Branch & Merritt, Inc. :
c/o Emmett Merritt, Officer : AFFIDAVIT OF MAILING
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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 23rd day of May, 1980, he served the within notice of Determination by mail upon Lawrence R. Bailey 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. Lawrence R. Bailey
360 W. 125th St.
New York, NY 10027

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
23rd day of May, 1980.

Joanne Knapp

J. Vredenburg

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

May 23, 1980

Branch & Merritt, Inc.
c/o Emmett Merritt, Officer
3217 Fish Ave.
Bronx, NY 10466

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 & 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
Lawrence R. Bailey
360 W. 125th St.
New York, NY 10027
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Application	:	
of	:	
EMMETT MERRITT, Officer of	:	DETERMINATION
BRANCH & MERRITT, INC.	:	
for Revision of a Determination or for	:	
Refund of Sales and Use Taxes under	:	
Articles 28 and 29 of the Tax Law for	:	
the Periods Ended August 31, 1972 through	:	
May 2, 1975, and February 28, 1973	:	
through February 28, 1975.	:	

Applicant, Emmett Merritt, 3217 Fish Avenue, Bronx, New York 10466, filed an application for revision of a determination or for refund of sales and use taxes under Articles 28 and 29 of the Tax Law for the periods ended August 31, 1972 through May 2, 1975, and February 28, 1973 through February 28, 1975 (File No. 12916).

A formal hearing was commenced before Frank A. Romano, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on August 23, 1977 at 9:15 A.M. and was continued to conclusion at the same location on October 26, 1977. Applicant appeared by Lawrence R. Bailey, Sr., Esq. The Audit Division appeared by Peter Crotty, Esq. (James J. Morris, Esq., of counsel).

ISSUE

Whether applicant, Emmett Merritt, as an officer of Branch & Merritt, Inc., is a person required to collect sales and use taxes within the meaning and intent of section 1131(1) of the Tax Law and, if so required, whether said applicant is personally liable, within the meaning and intent of section 1133(a) of the Tax Law, for failing to collect sales and use taxes assessed to and unpaid by said corporation for the periods in question.

FINDINGS OF FACT

1. Branch & Merritt, Inc. filed New York State and local sales and use tax returns for the periods ended August 31, 1972 through November 30, 1973, but did not remit the taxes due and owing for such periods.

2. On December 1, 1975, a Notice of Determination and Demand for Payment of Sales and Use Taxes Due (No. 90,776,464) was issued to Branch & Merritt, Inc. in the amount of \$27,853.60 in sales taxes, plus \$10,352.24 in penalties and interest, making a total of \$38,205.84 due and owing for the periods ended August 31, 1972 through May 2, 1975.

3. On December 1, 1975, a Notice of Determination and Demand for Payment of Sales and Use Taxes Due (No. 90,776,464-B) was issued to applicant, Emmett Merritt, in the amount of \$31,960.47 for sales taxes, plus interest and penalty of \$11,009.34, making a total of \$42,969.81 due and owing for the periods ended August 31, 1972 through May 2, 1975, both inclusive, on the grounds that said applicant, as an officer of Branch & Merritt, Inc., was a person required to collect sales and use taxes pursuant to section 1131(1) of the Tax Law and was personally liable for such unpaid taxes assessed against said corporation pursuant to section 1133(a) of the Tax Law.

4. On December 1, 1975, an additional Notice of Determination and Demand for Payment of Sales and Use Taxes Due (No. 90,776,465) was issued to applicant, Emmett Merritt, in the amount of \$21,203.87 for sales taxes, plus interest and penalty of \$7,671.90, making a total of \$28,875.77 due and owing for the periods ended February 28, 1973 through February 28, 1975, both inclusive, on the grounds that said applicant, as an officer of Branch & Merritt, Inc., was a person required to collect sales and use taxes pursuant to section 1131(1) of the Tax Law and was personally liable for such unpaid taxes assessed against said corporation pursuant to section 1133(a) of the Tax Law.

5. By letter received by the Department of Taxation and Finance on February 10, 1976, applicant, Emmett Merritt, protested the assessments and requested a hearing. The aforesaid letter shall be deemed herein to be said applicant's perfected petition or application pursuant to section 1138 of the Tax Law and section 601.5 of the Rules of Practice and Procedure of the State Tax Commission

6. Applicant, Emmett Merritt, and the Audit Division stipulated on the record that Notice No. 90,776,464-B was issued to said applicant as the result of an estimated assessment based on the failure of Branch & Merritt, Inc. to submit documentation, that the tax liability reflected on said notice was not warranted, and that the assessment in the amount of \$21,203.87 stated on Notice No. 90,776,465 for the periods ended February 28, 1973 through February 28, 1975, both inclusive, together with the amount assessed thereon for interest and penalty, was the sole tax liability against said applicant to be determined in the instant proceeding. Accordingly, the amount assessed against said applicant as due and owing for sales tax, interest and penalty on Notice of Determination No. 90,776,464-B for the periods ended August 31, 1972 through May 2, 1975, both inclusive, is not at issue in this proceeding.

7. For the periods in question, Branch & Merritt, Inc., a New York corporation, owned and operated a liquor store at 6 West 112th Street, New York, New York, having the following persons as its directors, officers and shareholders:

Emmett Merritt - Director, President, Shareholder

Delores Dickens - Director, Secretary/Treasurer, Shareholder

Eldora Dickens - Director, Shareholder

Lloyd E. Dickens - Director, Shareholder

8. Lloyd E. Dickens owned the building at 6 West 112th Street, and also invested in Branch & Merritt, Inc. Delores Dickens was his daughter.

9. In or about July, 1972, applicant, Emmett Merritt, withdrew from active participation in the business affairs of Branch & Merritt, Inc. for reasons of health. Prior to that time, said applicant was manager of the store, ordering inventory, and drawing checks against the corporate account in payment of purchase invoices, taxes and other indebtedness.

10. Subsequent to the applicant's withdrawal in July, 1972, the operation and management of the liquor store devolved upon Charles Leftwich and Inez Dickens, the latter being another daughter of Lloyd E. Dickens. The applicant visited the store sporadically, occasionally ordering inventory, and, in general, helping out around the store premises.

11. On July 18, 1972, a signature card of ChemBank was issued on the account of Branch & Merritt, Inc., authorizing only Inez Dickens, as Secretary of said corporation, to draw and sign checks against the account. No other officers were noted on that authorization. From that date until the sale of the liquor store on May 2, 1975, Inez Dickens was the only person who drew and signed checks against the account of Branch & Merritt, Inc. in payment of the debts and expenses of that corporation.

12. Subsequent to July, 1972, applicant, Emmett Merritt, did not receive payment from Branch & Merritt, Inc., for wages or dividends, although the cancelled checks of said corporation reflect that Lloyd E. Dickens, Inez Dickens, Charles Leftwich and many others received such payments.

13. Subsequent to July, 1972 and prior to the sale of the liquor store on May 2, 1975, applicant, Emmett Merritt, continued to hold the office of President of Branch & Merritt, Inc. and, in that capacity, executed the following documents (on the dates shown in parentheses): New York State and Local Sales and Use

Tax Return for the period September 1, 1972 to November 30, 1972, both inclusive (12/13/72); New York State Liquor Authority Renewal Application for 1974-1975 (2/14/73); and New York State Liquor Authority Renewal Application for 1975-1976 (2/12/75).

14. On or about May 2, 1975, Branch & Merritt, Inc. sold its assets to Timothy F. Fitzgerald (hereinafter "Fitzgerald") pursuant to contract of sale executed on March 4, 1975 by Fitzgerald, as Transferee, and Delores Dickens, on behalf of Branch & Merritt, Inc., the Transferor. Delores Dickens also executed the New York State Liquor Authority Application for Permit (Liquidator - Sale of Premises) on March 5, 1975 in connection with such sale. Fitzgerald never had any dealings with applicant, Emmett Merritt, thinking that Lloyd E. Dickens was the "real boss". The sale was negotiated solely by Lloyd E. Dickens on behalf of Branch & Merritt, Inc. The attorney representing Fitzgerald had been Lloyd E. Dickens' personal attorney for many years prior to the sale transaction and continued in such capacity thereafter.

15. In connection with the aforesaid sale, applicant, Emmett Merritt, assisted Fitzgerald and Inez Dickens in conducting the inventory of stock at the store but did not attend the formal closing, which was held at the office of Lloyd E. Dickens. The closing statement, prepared by the attorney who handled the sale transaction, discloses that Delores Dickens was now President of Branch & Merritt, Inc. and applicant, its Secretary.

16. Applicant, Emmett Merritt, received no monies from the aforesaid sale, the proceeds thereof being distributed, as follows: (i) the sum of \$4,000.00 placed in escrow with the attorney handling the sale; (ii) an undisclosed sum paid to the broker who introduced Fitzgerald to Lloyd E. Dickens; and (iii) the balance, also undisclosed, paid to Lloyd E. Dickens. The escrow funds were subsequently disbursed, as follows: (i) the sum of \$370.51 to the

New York State Department of Labor, Unemployment Insurance Division; and (ii) the sum of \$3,629.49 to the New York State Tax Commission pursuant to levy of the Sales Tax Bureau.

17. In connection with the aforesaid sale, applicant, Emmett Merritt, either at the request of the attorney handling the sale transaction or Fitzgerald, executed the following documents as an officer of Branch & Merritt, Inc. on May 2, 1975: (i) petition and certification for surrender of liquor license; and (ii) Bill of Sale.

CONCLUSIONS OF LAW

A. That Branch & Merritt, Inc. was a vendor as defined in section 1101(b)(8) of the Tax Law and was subject to the sales tax imposed by section 1105(a) of the Tax Law.

B. That Branch & Merritt, Inc. was required to collect the sales tax on the purchase at the time of sale of its merchandise at retail pursuant to section 1132(a) of the Tax Law.

C. That, for the period up to and including December 13, 1972 (the date on which applicant, Emmett Merritt, had signed a New York State sales tax return on behalf of Branch & Merritt, Inc.), said applicant knew or should have known that Branch & Merritt, Inc. failed to pay to the Sales Tax Bureau the sales taxes due and owing in connection with the operation of its business.

D. That for the period up to and including December 13, 1972, applicant, Emmett Merritt, was a person required to collect sales and use taxes within the meaning and intent of section 1131(1) of the Tax Law and was personally liable for the collection and payment of the same within the meaning and intent of section 1133(a) of the Tax Law.

E. That, subsequent to December 13, 1972, applicant, Emmett Merritt, functioned merely as a nominee, in a ministerial capacity, and solely at the

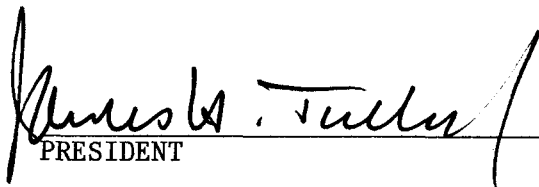
direction of others more closely related to the active operation of the business affairs of Branch & Merritt, Inc. and, in such capacity, had no authority or control over the financial matters of said corporation, including, without limitation, the collection and payment of sales taxes. Accordingly, said applicant was not a person required to collect sales and use taxes for the period subsequent to December 13, 1972 within the meaning and intent of section 1133(a) of the Tax Law.


F. That, in accordance with the stipulation of the parties hereto and consistent with the Conclusions set forth in paragraphs "D" and "E", supra, the application of Emmett Merritt is granted and the notices of determination and demand for payment of sales and use taxes due issued on December 1, 1975 against said applicant (Nos. 90,776,464-B and 90,776,465), are hereby cancelled.

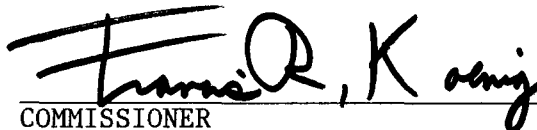
DATED: Albany, New York

STATE TAX COMMISSION

MAY 23 1980


PRESIDENT


COMMISSIONER


COMMISSIONER