

STATE OF NEW YORK
STATE TAX COMMISSION

In the Matter of the Petition :
of :
Durkan Carpet Corp. & Thomas R. Durkan :
William Henry, Assignee : 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 2/28/69-3/26/71. :

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 4th day of April, 1980, he served the within notice of Determination by mail upon Durkan Carpet Corp. & Thomas R. Durkan, William Henry, Assignee, the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Durkan Carpet Corp. & Thomas R. Durkan
William Henry, Assignee
c/o Abraham, Koenig & Silver
New York, NY 10010

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
4th day of April, 1980.

Joanne Knapp

J. Vredenburg

STATE OF NEW YORK
STATE TAX COMMISSION

In the Matter of the Petition :
of :
Durkan Carpet Corp. & Thomas R. Durkan :
William Henry, Assignee : 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 2/28/69-3/26/71. :

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 4th day of April, 1980, he served the within notice of Determination by mail upon Jacob W. Abraham 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. Jacob W. Abraham
Abraham, Koenig & Silver
51 Madison Ave.
New York, NY 10010

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
4th day of April, 1980.

Joanne Knapp

J. Vredenburg

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

April 4, 1980

Durkan Carpet Corp. & Thomas R. Durkan
William Henry, Assignee
c/o Abraham, Koenig & Silver
51 Madison Ave.
New York, NY 10010

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
Jacob W. Abraham
Abraham, Koenig & Silver
51 Madison Ave.
New York, NY 10010
Taxing Bureau's Representative

STATE OF NEW YORK
STATE TAX COMMISSION

In the Matter of the Petition :
of :
Thomas R. Durkan :
c/o Durkan Enterprises, Inc. : 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 2/28/69-3/26/71. :

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 4th day of April, 1980, he served the within notice of Determination by certified mail upon Thomas R. Durkan, c/o Durkan Enterprises, Inc., the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Thomas R. Durkan
c/o Durkan Enterprises, Inc.
209 East 56th Street
New York, NY 10022

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
4th day of April, 1980.

Joanne Knapp

J. Vredenburg

STATE OF NEW YORK
STATE TAX COMMISSION

In the Matter of the Petition :
of
Thomas R. Durkan :
c/o Durkan Enterprises, Inc. : 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 2/28/69-3/26/71. :

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 4th day of April, 1980, he served the within notice of Determination by certified mail upon Edward Sussman 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. Edward Sussman
Goldschmiat, Fredericks, Levinson & Oshatz
655 Madison Ave.
New York, 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
4th day of April, 1980.

Joanne Knapp

J. Vredenburg

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

April 4, 1980

Thomas R. Durkan
c/o Durkan Enterprises, Inc.
209 East 56th Street
New York, NY 10022

Dear Mr. Durkan:

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
Edward Sussman
Goldschmiat, Fredericks, Levinson & Oshatz
655 Madison Ave.
New York, NY
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Application	:	
of	:	
DURKAN CARPET CORP.	:	DETERMINATION
and THOMAS R. DURKAN, 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 Periods Ended February 28,	:	
1969 through March 26, 1971.	:	

Applicants, Durkan Carpet Corp. (William Henry, Assignee), c/o Abraham, Koenig & Silver, 51 Madison Avenue, New York, New York 10010 and Thomas R. Durkan, as Officer, c/o Durkan Enterprises, Inc., 209 East 56th Street, New York, New York 10002, 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 February 28, 1969 through March 26, 1971 (File No. 13028).

A formal hearing was held before Solomon Sies, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York on October 17, 1977 at 1:00 P.M. and on January 17, 1978 at 1:15 P.M. and was continued to conclusion before Edward L. Johnson, Hearing Officer on August 22, 1978 at 1:25 P.M. Applicant Durkan Carpet Corp. (William Henry, Assignee) appeared by Abraham, Koenig & Silver (Jacob W. Abraham, Esq., of counsel) and applicant Thomas R. Durkan appeared by Goldschmidt, Fredericks, Levinson & Oshatz (Edward Sussman, Esq., of counsel). The Audit Division appeared by Peter Crotty, Esq. (Louis Senft and Samuel Freund, Esqs., of counsel).

ISSUE

Whether sales and use taxes demanded after field audit of Durkan Carpet Corp. from Thomas R. Durkan, as Officer, and from Durkan Carpet Corp. were properly determined by the Sales Tax Bureau for the periods ended February 28, 1969 through March 26, 1971.

FINDINGS OF FACT

1. On April 25, 1972, the Sales Tax Bureau issued a Notice and Demand for Payment of Sales and Use Taxes Due (Notice No. 90,736,909) against Durkan Carpet Corp. (hereinafter "Corp.") stating that sales and use taxes and interest totaling \$38,952.95 had been determined to be due after field audit as follows:

<u>PERIOD ENDED</u>	<u>TAX</u>	<u>INTEREST</u>	<u>TOTAL</u>
2/28/69	\$ 2,726.05	\$ 329.80	\$ 3,055.85
5/31/69	3,102.62	328.82	3,431.44
8/31/69	2,812.38	255.87	3,068.25
11/30/69	3,237.30	245.97	3,483.27
2/28/70	2,782.32	169.67	2,951.99
5/31/70	3,751.62	172.50	3,924.12
8/31/70	3,778.74	117.07	3,895.81
11/30/70	4,042.08	64.59	4,106.67
2/28/71	10,278.12	10.07	10,288.19
3/1/71 to 3/26/71	747.36	-0-	747.36
TOTAL	\$37,258.59	\$1,694.36	

TOTAL TAX AND INTEREST DUE \$38,952.95

2. On July 20, 1972, the Sales Tax Bureau issued a Notice of Determination and Demand for Payment of Sales and Use Taxes Due (Notice No. 90,737,193) against Thomas R. Durkan (Durkan) stating that sales and use taxes and interest amounting to \$34,261.52 had been determined to be due as follows:

<u>PERIOD ENDED</u>	<u>TAX</u>	<u>INTEREST</u>	<u>TOTAL</u>
8/31/69	\$ 2,786.22	\$ 473.66	\$ 3,259.88
11/30/69	3,129.12	485.01	3,614.13
2/28/70	2,764.74	387.06	3,151.80
5/31/70	3,528.48	441.06	3,969.54
8/31/70	3,607.98	396.88	4,004.86
11/30/70	4,013.46	381.28	4,394.74
2/28/71	10,250.58	820.05	11,070.63
3/1/71 to 3/26	747.36	48.58	795.94
TOTAL	\$30,827.94	\$3,433.58	\$34,261.52

The Notice also stated that:

"The within tax has also been determined by Notice No. 90,736,909 dated 4/25/72 against Durkan Carpet Corp., 208 East 60th St., N.Y., N.Y. which is now in assignment, and of which the taxpayer is an officer."

3. Applicant Durkan Carpet Corp. made a general assignment for the benefit of creditors on March 24, 1971 and filed it in the offices of the Clerk of New York County. The Department of Taxation and Finance filed a claim in the proceeding for \$38,952.95, covering sales and use taxes for the period from February 28, 1969 through March 26, 1971. Applicant Durkan Carpet Corp., by its assignee for the benefit of creditors, objected to the claim and sought to have it reduced or withdrawn prior to the filing of the assignee's final accounting in the creditors' proceeding.

4. Applicant Durkan Carpet Corp. ("Corp.") maintained sales rooms and a warehouse in New York City from which it sold carpeting principally through architects and designers. The Corp. had its carpeting manufactured in Georgia and other places.

5. At the time the field audit was completed in March, 1972, the original books and records were not available. The last auditor to work on the audit had to rely on transcripts of sales taken from the books of the Corp. by a previous auditor. He had transcribed the entire sales journal for the selected test month of September, 1970 showing invoice number, purchases, total of sale, sales tax, whether installed or not, resale number, whether a sale was considered exempt and recommended assessment. Of the 70 recorded sales in that month, the auditor found five sales where no sales tax had been charged and he questioned the exempt status of the sale. Total gross sales for the month amounted to \$150,147.11. He disallowed \$29,807.00 of the claimed exempt sales. Oral examination of the last auditor at the hearing indicated that \$967.05 in one sale was apparently subject to sales tax and there was no proof

that sales tax had been collected and paid. The percentage of disallowed nontaxable sales to gross sales was $\frac{\$ 967.05}{\$150,147.00}$ for an error percentage (.00644) of .644 percent.

This percentage of error should be applied to gross sales reported per returns of the Corp. for the periods ended February 28, 1969 through November 30, 1970, and estimated gross sales for two unreported periods ended February 28, 1971 and March 26, 1971 of \$346,496.00 and \$25,262.00 respectively. The sales tax returns filed showed:

<u>Period Ended</u>	<u>Gross Sales</u>	<u>Taxable Sales</u>	<u>Net Nontaxable Sales</u>
February 28, 1969	\$230,421.00	\$ 97,700.00	\$132,721.00
	83,439.00	58.068.00	25,371.00
May 31, 1969	\$331,942.00	119,760.00	212,182.00
August 31, 1969	401,210.00	189,502.00	211,708.00
November 30, 1969	367,776.00	125,427.00	242,349.00
February 28, 1970	337,455.00	124,021.00	213,434.00
May 30, 1970	416,038.00	142,830.00	273,208.00
August 31, 1970	461,000.00	183,714.00	277,386.00
November 30, 1970	469,206.00	158,226.00	310,980.00

6. The auditor's worksheets show that he checked applicant Corp.'s records of all non-trade assets purchased in the period from June 1, 1968 through February 28, 1971. There was no record of the payment by Corp. of sales or use taxes on any purchases of assets. The auditor assessed sales and use taxes on all recorded assets purchases. Uncontradicted testimony at the hearing revealed that knitting machinery purchased out of state for \$22,010.40 had never been in New York State. Assets purchased prior to December 1, 1968 are not includable in the period under review (periods ending February 28, 1969 to March 26, 1971). An automobile purchased in October, 1969 was not assessed tax.

7. Applicant Durkan Carpet Corp. timely filed sales tax returns for all but two periods and made a bona fide attempt to pay the sales taxes shown to be due thereon.

CONCLUSIONS OF LAW

A. That except for the correction noted in Findings of Fact "5" and "6", the Sales Tax Bureau properly determined the amount of sales and use taxes due from such information as was available in the absence of the applicant's books of records, as provided for by section 1138(a) of the Tax Law.

B. That the Audit Division is directed to recompute the sales and use tax deficiency based on the error rate of .644 of reported gross sales for each of the periods ended February 28, 1969 through March 26, 1971 (Finding of Fact "5"), and the applicable rate of tax to assets purchased from December 1, 1968 through March 26, 1971, less \$22,010.40.

C. That interest above the statutory rate and penalties be waived.

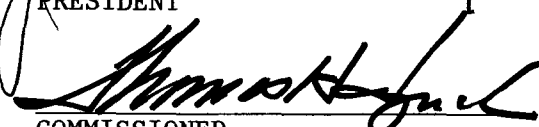
D. That except as modified by Conclusions of Law "B" and "C", the application of Durkan Carpet Corp. and Thomas R. Durkan, as Officer, is denied in all respects and the determinations dated April 25, 1972 and July 20, 1972 are sustained.

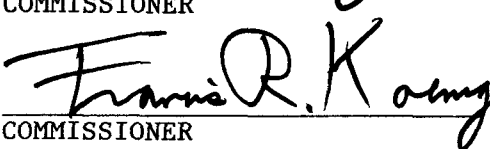
DATED: Albany, New York

APR 4 1980

STATE TAX COMMISSION


PRESIDENT


COMMISSIONER


COMMISSIONER