

STATE OF NEW YORK
STATE TAX COMMISSION

In the Matter of the Petition :
of
Empire Garden Distributors 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 3/1/76-5/31/76. :

State of New York
County of Albany

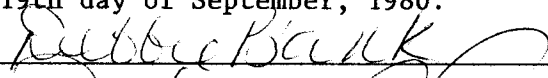
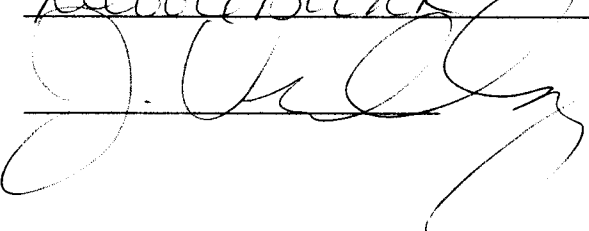
Jay Vredenburg, being duly sworn, deposes and says that he is an employee of the Department of Taxation and Finance, over 18 years of age, and that on the 19th day of September, 1980, he served the within notice of Determination by mail upon Empire Garden Distributors Inc., the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Empire Garden Distributors Inc.
c/o Anthony Cinque, President
225 Sunrise Highway
Lynbrook, NY 11563

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
19th day of September, 1980.

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

September 19, 1980

Empire Garden Distributors Inc.
c/o Anthony Cinque, President
225 Sunrise Highway
Lynbrook, NY 11563

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

Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Application	:	
	:	
of	:	
	:	
EMPIRE GARDEN DISTRIBUTORS, INC.	:	DETERMINATION
	:	
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 March 1, 1976 through May 31,	:	
1976.	:	

Applicant, Empire Garden Distributors, Inc., 225 Sunrise Highway, Lynbrook, New York, 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 period March 1, 1976 through May 31, 1976 (File No. 22385).

A formal hearing was held before William J. Dean, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on July 25, 1979 at 2:45 P.M. Applicant appeared by Anthony Cinque, President. The Audit Division appeared by Peter Crotty, Esq. (Aliza Schwadron, Esq., of counsel).

ISSUE

Whether the late receipt of applicant's sales tax return was excusable.

FINDINGS OF FACT

1. On August 16, 1976, the Audit Division issued to applicant a Notice and Demand for Payment of Sales and Use Taxes Due for the period March 1, 1976 through May 31, 1976, in the amount of \$203.83, for penalty and interest due.

2. Applicant's New York State and Local Sales and Use Tax Return for the period March 1, 1976 through May 31, 1976, was signed by Anthony Cinque, President and was dated June 16, 1976. The return is also signed by Schultz & Gladstone,

accountants to applicant, who prepared the return. Enclosed with the return was a check in the amount of \$3,848.88, payable to the New York State Sales Tax Bureau. The check was dated June 16, 1976.

3. The envelope received from applicant by the Central Returns Processing Unit in Mineola, New York, bears a June 28, 1976 postmark.

4. Applicant's accountant would make a monthly visit to applicant's premises to prepare tax returns. Mr. Cinque would then personally mail the returns and check in a mailbox across the street from his house. At the formal hearing, Mr. Cinque testified that around June 16, 1976, road construction was underway next to the mailbox he used. The street was being torn up and a sewer line put in. He believes that the mailbox was not emptied during the period road construction was taking place.

5. The Postmaster for the United States Post Office in East Rockaway, New York, advised the Department of Taxation and Finance stating that he "had no knowledge of any delay in processing mail during this time period. No such records are kept by the Postal Service. I cannot confirm or deny that there was a delay involving this letter."

6. Subsequent to the formal hearing, Abraham Schultz of Schultz & Gladstone, Certified Public Accountants, wrote "This is to certify that I was the accountant for Empire Garden Distributors, Inc. for the year 1976 and for approximately sixteen years prior thereto, and I personally prepared the returns and made out the checks on a timely basis for all business returns."

7. Applicant submitted check stubs for the period June 15, 1976 through June 20, 1976. Following three entries for checks dated June 15 appears an entry for June 16 referring to payment made to the New York Sales Tax Bureau in the amount of \$3,848.88. Another entry for June 16 follows and then an

entry for June 20.

8. Mr. Cinque stated that applicant had never been late in filing a tax return for the past twenty years.

CONCLUSIONS OF LAW

A. That Tax Law section 1136(b) provides that sales tax returns "shall be filed for quarterly periods ending on the last day of February, May, August and November of each year, and each return shall be filed within twenty days after the end of the quarterly period covered thereby."

B. That section 1145(a)(1) of the Tax Law as amended by Chapter 714 of the Laws of 1979 provides that if the Tax Commission determines that a delay in filing a tax return was due to reasonable cause and not due to willful neglect, then it shall remit the full penalty and interest above the minimum. That 20 NYCRR 536.1(b) states that "Grounds for reasonable cause, where clearly established, may include the following ... (6) any other cause for delinquency which appears to a person of ordinary prudence and intelligence as a reasonable cause for delay in filing a return and which clearly indicates an absence of gross negligence or willful intent to disobey the taxing statutes. Past performance will be taken into account."

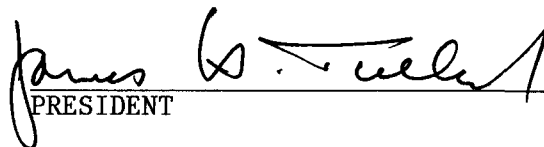
C. That applicant sustained its burden of proof by establishing that the delay in filing the return was due to reasonable cause and not willful neglect; that, therefore, the penalty and interest above the minimum required by law are cancelled.


D. That the petition of Empire Garden Distributors, Inc. is granted to the extent indicated in Conclusion of Law "C"; that the Audit Division is hereby directed to accordingly modify the Notice and Demand for Payment of

Sales and Use Taxes Due issued August 16, 1979, and that, except as so granted, the application is in all other respects denied.

DATED: Albany, New York
SEP 19 1980

STATE TAX COMMISSION


PRESIDENT


COMMISSIONER


COMMISSIONER