

STATE OF NEW YORK
STATE TAX COMMISSION

In the Matter of the Petition :
of :
William Kunze :
d/b/a William Kunze & Co. : 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 6/1/72-5/31/75. :

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 14th day of November, 1980, he served the within notice of Decision by mail upon William Kunze, d/b/a William Kunze & Co., the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

William Kunze
d/b/a William Kunze & Co.
436 W. 238th St.
Bronx, NY 10463

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
14th day of November, 1980.

Deborah A. Bank

J. Vredenburg

STATE OF NEW YORK
STATE TAX COMMISSION

In the Matter of the Petition :
of :
William Kunze :
d/b/a William Kunze & Co. : AFFIDAVIT OF MAILING
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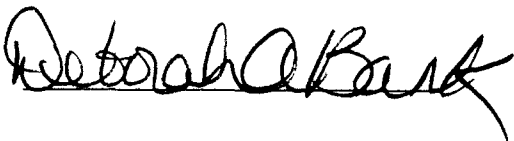
Jay Vredenburg, being duly sworn, deposes and says that he is an employee of the Department of Taxation and Finance, over 18 years of age, and that on the 14th day of November, 1980, he served the within notice of Decision by mail upon Stanley L. Baden the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

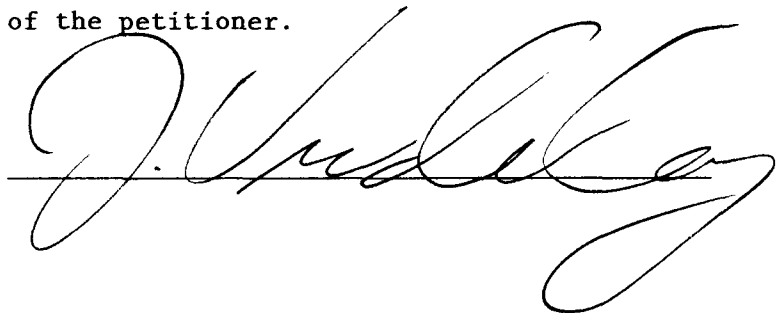
Mr. Stanley L. Baden
105-36 Flatlands 1st St.
Brooklyn, NY 11236

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
14th day of November, 1980.


Notary Public



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

November 14, 1980

William Kunze
d/b/a William Kunze & Co.
436 W. 238th St.
Bronx, NY 10463

Dear Mr. Kunze:

Please take notice of the Decision 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
Stanley L. Baden
105-36 Flatlands 1st St.
Brooklyn, NY 11236
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition	:	
of	:	
WILLIAM KUNZE	:	DECISION
d/b/a WILLIAM KUNZE AND CO.	:	
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 June 1, 1972	:	
through May 31, 1975.	:	

Petitioner, Willaim Kunze d/b/a William Kunze and Co., 436 West 238th Street, Bronx, New York 10463 filed a petition 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 June 1, 1972 through May 31, 1975 (File No. 17888).

A small claims hearing was held before Arthur Johnson, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on February 26, 1980 at 1:15 P.M. Petitioner appeared by Stanley L. Baden, PA. The Audit Division appeared by Ralph J. Vecchio, Esq. (Irwin Levy, Esq., of counsel).

ISSUE

Whether the audit procedures and tests employed by the Audit Division in an examination of petitioner's books and records accurately determined additional sales taxes due for the period June 1, 1972 through May 31, 1975.

FINDINGS OF FACT

1. Petitioner, William Kunze d/b/a William Kunze and Co., operated an interior decorating business. Other activities included custom upholstery, refinishing furniture and cabinet work.

2. On December 6, 1976, as the result of an audit, the Audit Division issued a Notice of Determination and Demand for Payment of Sales and Use Taxes Due against petitioner for the period June 1, 1972 through May 31, 1975 for taxes due of \$3,947.52, plus penalty and interest of \$2,011.50, for a total of \$5,959.02

3. Petitioner executed a consent extending the time within which to issue an assessment of sales and use tax for the period June 1, 1972 through May 31, 1975 to December 19, 1976.

4. On audit, the Audit Division performed a markup test based on five sales invoices for March 1975. The cost of fabric and other materials used by petitioner were obtained from purchase invoices and in some instances were estimated. The average markup determined for the five sales tested was 72.4 percent. The markup was applied to material purchases of \$80,461.00 to arrive at adjusted gross sales of \$138,715.00 for the audit period. Petitioner reported gross sales of \$97,637.00 for the same period leaving additional sales of \$41,078.00. The Audit Division also disallowed reported nontaxable sales of \$13,964.00 because petitioner could not substantiate the reason for exemption. The disallowed nontaxable sales were combined with the additional gross sales to determine additional taxable sales of \$55,042.00 and tax due thereon of \$3,947.52.

5. Petitioner is on the cash basis for accounting purposes. Petitioner receives a deposit on each customer order. The deposit and any subsequent payments on account are recorded in a suspense account until the job is completed and the goods are delivered to the customer. At such time, the deposits are taken out of the suspense account and recorded as a sale along with the customer's final payment. The Audit Division did not attempt to verify petitioner's

method of recording sales or to reconcile sales per books with sales tax returns filed. Petitioner maintained adequate books and records for the Audit Division to perform such auditing procedures.

6. Petitioner contended that the nontaxable sales reported represented sales to exempt organizations and out of state deliveries. However, petitioner offered no evidence to support this contention.

CONCLUSIONS OF LAW

A. That the Audit Division's markup test referred to in Finding of Fact "4" was limited to five sales for the entire audit period and that such sales were not representative of the scope of petitioner's business activities; therefore, the markup resulting from the test of five sales was neither a reasonable nor accurate method of determining petitioner's gross sales. Accordingly, the Audit Division's determination of additional sales taxes due of \$2,946.03 based on increased gross sales is cancelled.

B. That section 1132(c) of the Tax Law specifically provides that it shall be presumed that all receipts for property are subject to tax until the contrary is established and the burden of proving that any receipt is not taxable shall be upon the person required to collect tax; that petitioner has failed to sustain this burden of proof and therefore is liable for the sales taxes imposed on disallowed nontaxable sales in accordance with section 1133(a) of the Tax Law.

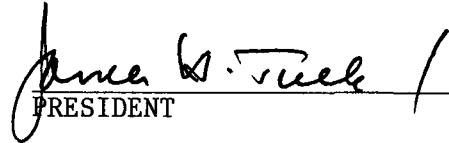
C. That the petition of William Kunze d/b/a William Kunze and Co. is granted to the extent indicated in Conclusion of Law "A"; that the Audit Division is hereby directed to modify the Notice of Determination and Demand

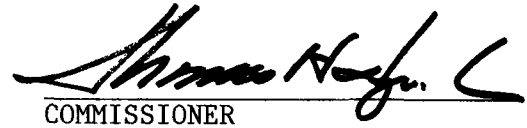
for Payment of Sales and Use Taxes Due issued December 6, 1976; and that, except as so granted, the application is in all other respects denied.

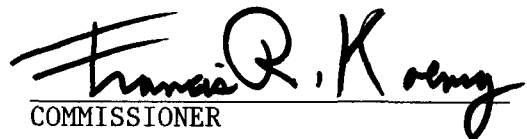
DATED: Albany, New York

NOV 14 1980

STATE TAX COMMISSION


PRESIDENT


COMMISSIONER


COMMISSIONER