

STATE OF NEW YORK  
STATE TAX COMMISSION

In the Matter of the Petition :  
of :  
William J. McCord :  
d/b/a Roosevelt Expressway Serv. Station : 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 9/1/71 - 2/28/75. :

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 4th day of April, 1980, he served the within notice of Determination by mail upon William J. McCord, d/b/a Roosevelt Expressway Serv. Station, the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

William J. McCord  
d/b/a Roosevelt Expressway Serv. Station  
c/o Monroe Fink, Esq.  
Glen Cove, NY 11542

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.

Janne Knapp

J. Vredenburg

STATE OF NEW YORK  
STATE TAX COMMISSION

In the Matter of the Petition :  
of :  
William J. McCord :  
d/b/a Roosevelt Expressway Serv. Station : 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 9/1/71 - 2/28/75. :

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 4th day of April, 1980, he served the within notice of Determination by mail upon Monroe Fink 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. Monroe Fink  
147 Glen St.  
Glen Cove, NY 11542

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

William J. McCord  
d/b/a Roosevelt Expressway Serv. Station  
c/o Monroe Fink, Esq.  
147 Glen St.  
Glen Cove, NY 11542

Dear Mr. McCord:

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) 1139 & 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  
Monroe Fink  
147 Glen St.  
Glen Cove, NY 11542  
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

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In the Matter of the Application	:	
	:	
of	:	
	:	
WILLIAM J. McCORD	:	DETERMINATION
D/B/A ROOSEVELT EXPRESSWAY SERVICE STATION	:	
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 September 1, 1971 through	:	
February 28, 1975.	:	

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Applicant, William J. McCord, d/b/a Roosevelt Expressway Service Station, c/o Monroe Fink, 147 Glen Street, Glen Cove, New York 11542, 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 September 1, 1971 through February 28, 1975 (File No. 19812).

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 May 25, 1979 at 10:45 A.M. Applicant appeared by Monroe Fink, Esq. The Audit Division appeared by Peter Crotty, Esq. (Andrew Haber and Irving Atkins, Esqs., of counsel).

ISSUES

I. Whether applicant is entitled to a refund of penalties and interest which were imposed for the late payments of sales tax.

II. Whether the applicant has timely amended its application for refund to include an additional refund for taxes, penalty and interest.

FINDINGS OF FACT

1. On May 25, 1977, applicant, William J. McCord, filed an Application for Credit or Refund of State and Local Sales and Use Tax (ST-137) claiming a

partial refund of penalties and that portion of interest in excess of the minimum statutory rate which were paid because of late payment of sales taxes.

2. On June 29, 1977, the Audit Division denied the refund claim in full based on applicant's previous record of late filing of sales tax returns and filing numerous returns without remittance.

3. Applicant operated a service station from 1965 to 1975 at which time the business was discontinued. During the period September 1, 1972 through February 25, 1975, applicant did not timely file many of its sales tax returns or if such returns were timely, they were without payment of the sales taxes due.

4. The State Tax Commission filed warrants against applicant William McCord, for unpaid sales taxes in the amount of \$15,686.74 plus penalty and interest accrued thereon of \$9,046.66.

5. During March, 1977, applicant sold his personal residence which was owned jointly with his spouse as tenants by the entirety. At the time of the transfer of title to the property, applicant used the proceeds received from the sale to satisfy the warrants in order to remove the lien imposed upon the real property.

The net proceeds derived from the sale amounted to approximately \$26,500.00.

6. Applicant's spouse's earnings from employment as a school teacher from 1964 to 1976 were approximately 5 times greater than his income, thus his wife contributed 80 percent of the monies needed for the downpayment on the house, mortgage payments, taxes and maintenance expenses. Applicant contended that the sales tax liability was solely his indebtedness because his wife was not involved in the business operations. Based on the foregoing, applicant argued that at least 50 percent of the net proceeds from the sale of their

house rightfully belonged to his wife, and therefore, as a matter of equity he requests that the State Tax Commission reduce the penalty and interest.

7. At the hearing, applicant requested that the amount of his original refund claim be amended to include the total amount of taxes, penalty and interest paid which was in excess of his proportionate share of the net proceeds from the sale of their residence. Applicant maintained that the innocent spouse statutes under section 651(b)(5)(i) of the Income Tax Law, prevents the Audit Division from collecting taxes, penalties and interest from his wife's share of the proceeds.

8. The Audit Division argued that the applicant's additional refund claim as set forth in Finding of Fact "7" was barred by the statute of limitations on the grounds that such application was not made within 3 years after the date when such amount was payable or within two years of the date of payment of the amount assessed pursuant to the consent to the fixing of tax.

#### CONCLUSIONS OF LAW

A. That applicant, William J. McCord, failed to pay over sales taxes to the Tax Commission as required by section 1137(a) of the Tax Law and thereby was properly subjected to penalties and interest pursuant to section 1145(a) of the Tax Law, that the Tax Commission is not satisfied that the delay in payment of sales taxes by the applicant was excusable and accordingly the applicant is not entitled to a reduction of penalties and interest and a refund thereof. Moreover, there is no statutory authority under Articles 28 and 29 of the Tax Law to reduce penalties and interest on the basis of equitable relief.

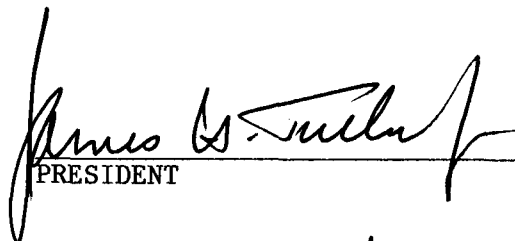
B. That the applicant has not timely amended its application for refund to include an additional refund for taxes, penalty and interest within the meaning and intent of section 1139(a) of the Tax Law.

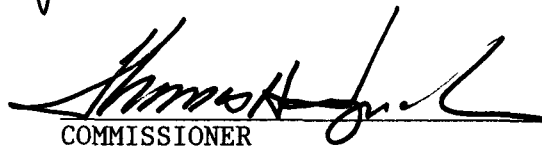
C. That the application of William J. McCord, d/b/a Roosevelt Expressway Service Station is denied and the refund denial by the Audit Division is sustained.

DATED: Albany, New York

APR 4 1980

STATE TAX COMMISSION

  
PRESIDENT

  
COMMISSIONER

  
COMMISSIONER