

STATE OF NEW YORK
STATE TAX COMMISSION

In the Matter of the Petition :
of
Melcin Baths 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 3/1/73-2/28/77. :

State of New York
County of Albany

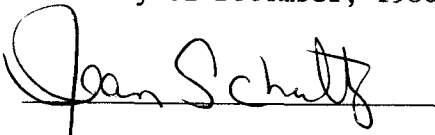
Jay Vredenburg, being duly sworn, deposes and says that he is an employee of the Department of Taxation and Finance, over 18 years of age, and that on the 12th day of December, 1980, he served the within notice of Decision by mail upon Melcin Baths Inc., the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

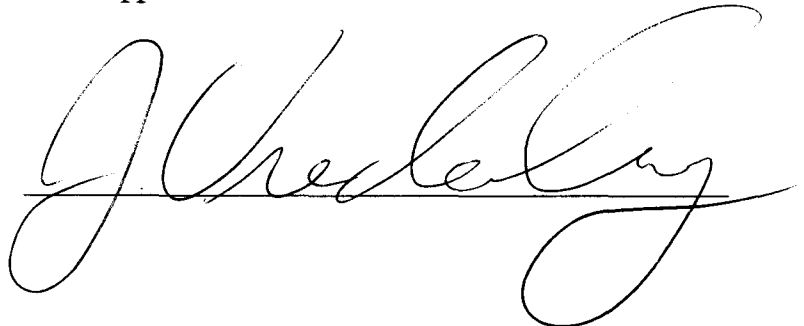
Melcin Baths Inc.
2461 E. 29th St.
Brooklyn, NY 11235

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
12th day of December, 1980.


Jean Schults


Jay Vredenburg

STATE OF NEW YORK
STATE TAX COMMISSION

In the Matter of the Petition :
of
Melcin Baths 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 3/1/73-2/28/77. :

State of New York
County of Albany

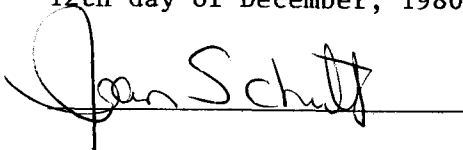
Jay Vredenburg, being duly sworn, deposes and says that he is an employee of the Department of Taxation and Finance, over 18 years of age, and that on the 12th day of December, 1980, he served the within notice of Decision by mail upon Myron Moscovitz the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

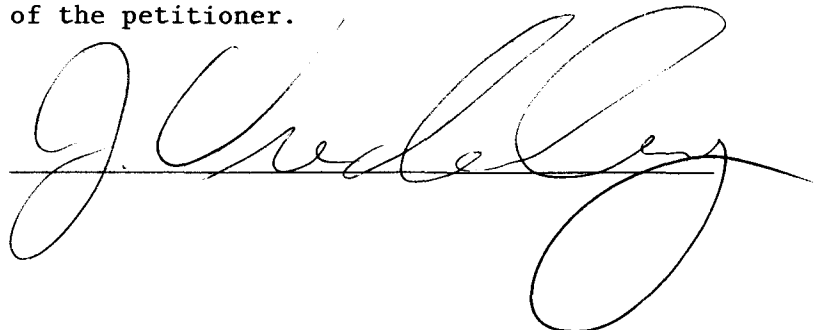
Mr. Myron Moscovitz
150 Broadway
New York, NY 10038

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
12th day of December, 1980.


Jean Schutt


Jay Vredenburg

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

December 12, 1980

Melcin Baths Inc.
2461 E. 29th St.
Brooklyn, NY 11235

Gentlemen:

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) 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
Myron Moscovitz
150 Broadway
New York, NY 10038
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition	:	
	:	
of	:	
	:	
MELCIN BATHS, INC.	:	DECISION
	:	
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, 1973 through February 28,	:	
1977.	:	

Petitioner, Melcin Baths, Inc., 2461 East 29th Street, Brooklyn, New York 11235, 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, 1973 through February 28, 1977 (File No. 19731).

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 November 28, 1979 at 2:45 P.M. Petitioner appeared by Myron Moscovitz, Esq. The Audit Division appeared by Ralph J. Vecchio, Esq. (Irwin Levy, Esq., of counsel).

ISSUE

Whether petitioner's charges to patrons were for the use of its facilities or whether such charges were for storing tangible personal property.

FINDINGS OF FACT

1. On April 15, 1976, petitioner, Melcin Baths, Inc., filed an application for credit or refund for sales taxes of \$6,748.66 covering the period March 1, 1973 through February 29, 1976. The amount of the refund claim represents sales taxes paid by petitioner to the Tax Commission on its charges to patrons. The application was filed based on petitioner's position that it operated a

steam bath and that its charges for the use thereof were not subject to tax prior to March 1, 1976, the effective date of a local tax imposed by New York City on the use of such a facility.

2. The Audit Division, as a result of petitioner's refund claim, performed an audit of petitioner's books and records. The audit which covered the periods March 1, 1973 through February 28, 1977, disclosed that petitioner remitted sales tax at the combined New York State and local rate for periods prior to March 1, 1976. After this date, petitioner remitted only the New York City local tax. The Audit Division took the position that petitioner's receipts were from locker rentals and that such rentals were subject to the New York State and local sales tax rate. Accordingly, it denied petitioner's refund claim for the period March 1, 1973 through February 29, 1976 and held petitioner liable for the New York State sales tax of \$2,820.52 for periods thereafter. The Audit Division also asserted use taxes of \$857.19 on expense purchases and the acquisition of a fixed asset because the purchase invoices were not available to determine if sales tax was paid.

3. On June 15, 1977, as the result of the aforementioned audit, the Audit Division issued a Notice of Determination and Demand for Payment of Sales and Use Taxes Due against petitioner for taxes due of \$3,677.71, plus penalty and interest of \$805.62, for a total of \$4,483.33.

4. Petitioner operated the Cook Baths located at 2461 East 29th Street, Brooklyn, New York. Petitioner offered the following facilities: a steam room for men and women, sun roof for men and women, showers and lockers. During the period in issue, petitioner had daily rates of \$2.50 or \$3.00 and seasonal rates of \$50.00 to \$85.00. The season began April 1st and ended the first week of November. A seasonal patron retained the same locker throughout

the season and provided his own lock, whereas a daily patron was provided with a lock. Petitioner's premises has access to a public bathing beach. Its daily patrons used the locker facilities to store their personal belongings while at the beach. However, petitioner did not operate the beach nor was any of the charge for the admission to such beach. Petitioner had swimsuits and beach umbrellas available for rent.

5. At the hearing, petitioner requested an additional refund of \$14,214.33 to reflect sales taxes paid for the period December 1, 1965 through February 28, 1973. Counsel for the Audit Division argued that such periods are barred since petitioner failed to file a refund application within the time limitations provided in section 1139(a) of the Tax Law. Petitioner argued that the statute of limitations was not applicable where the tax paid was erroneous.

6. Petitioner submitted purchase invoices which showed that sales tax was paid to vendors at the time of the purchase of the expense items at issue, with the exception of a \$250.00 purchase. Additionally, petitioner paid sales tax on the fixed asset acquired.

7. Petitioner did not separately state sales tax on its invoices nor advertise or hold out to customers that tax was considered an element in the daily or seasonal charge. Petitioner paid, to the Tax Commission, sales tax on its gross receipts.

8. Sixty-five percent of petitioner's receipts were from seasonal charges and such charges were for the use of petitioner's facilities which included a locker; however, the use of the locker was incidental thereto. The remaining thirty-five percent of gross receipts represented charges to daily patrons for use of a locker to store their personal belongings.

CONCLUSIONS OF LAW

A. That petitioner's business activities are two fold; 1) a bath house with locker facilities that patrons primarily used for the storage and safekeeping of their personal property while on the beach and 2) a steam bath that patrons used for health and weight reduction purposes.

B. That petitioner's daily charges for the use of a locker constituted storing tangible personal property, within the meaning and intent of section 1105(c)(4) of the Tax Law and therefore, the receipts therefrom are subject to tax.

C. That petitioner's seasonal charges for the use of its steam room, sun roof and shower (the charge for the locker was incidental) facilities were excluded from the imposition of sales tax prior to March 1, 1976; that effective March 1, 1976, such charges are subject to the New York City local tax in accordance with section 1212-A(b)(1) of the Tax Law.

D. That in accordance with Conclusions of Law "B" and "C", petitioner is entitled to a refund of \$4,386.00 for the period March 1, 1973 through February 29, 1976; that petitioner failed to timely file a refund claim pursuant to section 1139(a) of the Tax Law with respect to the period December 1, 1965 through February 28, 1973.

That for the period March 1, 1976 through February 28, 1977, petitioner is liable for additional New York State sales tax of \$987.00.

E. That the use taxes determined by the Audit Division are reduced to \$20.00 in accordance with Finding of Fact "6".

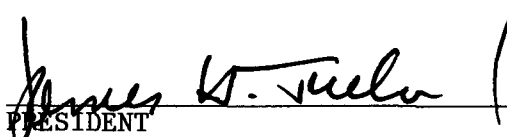
F. That the petition of Melcin Baths, Inc. is granted to the extent indicated in Conclusions of Law "D" and "E"; that the Audit Division is hereby directed to modify the Notice of Determination and Demand for Payment of Sales and Use Taxes Due issued June 15, 1977 and refund the overpayment of sales


taxes together with such interest as may be lawfully owing; and that, except as so granted, the petition is in all other respects denied.

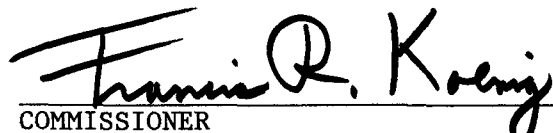
DATED: Albany, New York

STATE TAX COMMISSION

DEC 12 1980


PRESIDENT


COMMISSIONER


COMMISSIONER