

STATE OF NEW YORK
STATE TAX COMMISSION

In the Matter of the Petition :
of
R & H Garage Corp. :

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 - 8/31/75. :

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 R & H Garage Corp., the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

R & H Garage Corp.
c/o Heller & Heller
509 Madison Ave.
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
14th day of November, 1980.

Deborah A. Bank

J. Vredenburg

STATE OF NEW YORK
STATE TAX COMMISSION

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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 Hugh M. Heller the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

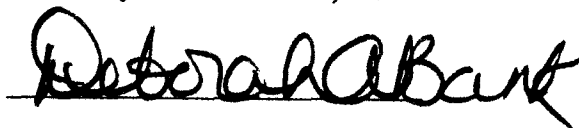
Mr. Hugh M. Heller
Heller & Heller
509 Madison Ave.
New York, NY 10022

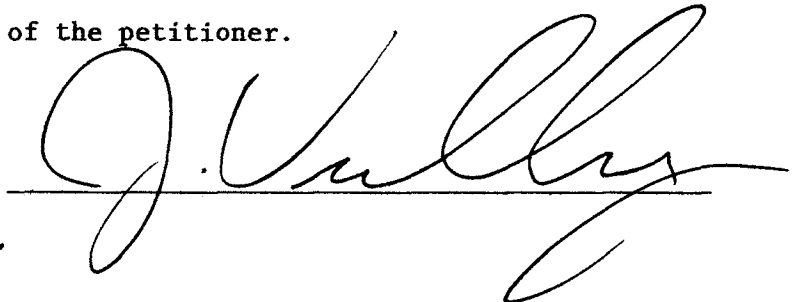
and by depositing same enclosed in a postpaid properly addressed wrapper in a (post office or official depository) under the exclusive care and custody of the United States Postal Service within the State of New York.

That deponent further says that the said addressee is the 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.





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

November 14, 1980

R & H Garage Corp.
c/o Heller & Heller
509 Madison Ave.
New York, NY 10022

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) 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
Hugh M. Heller
Heller & Heller
509 Madison Ave.
New York, NY 10022
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition
of
R & H GARAGE CORP.
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 August 31,
1975.

DECISION

Petitioner, R & H Garage Corp., c/o Heller & Heller, 509 Madison Avenue, New York, New York 10022, 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 August 31, 1975 (File No. 16540).

A formal hearing was held before Harvey B. Baum, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on July 11, 1978 at 2:45 P.M. Petitioner appeared by Heller & Heller, Esqs. (Hugh M. Heller, Esq., of counsel). The Audit Division appeared by Peter Crotty, Esq. (Irwin A. Levy, Esq., of counsel).

ISSUES

I. Whether the assignment or "sale" of a leasehold to a parking garage is such a taxable event within the meaning of the Sales Tax Law, Articles 28 and 29, as to hold the purchaser-assignee liable for alleged sales taxes due from the seller-assignor, pursuant to section 1141(c) of the Tax Law.

II. Whether the Audit Division properly determined the amount of taxes due.

FINDINGS OF FACT

1. The Audit Division issued a Notice and Demand for Payment of Sales and Use Taxes Due, dated February 2, 1976, against petitioner, R & H Garage

Corp., as purchaser, and located at 340 East 64th St., New York, New York, for the period of June 1, 1972 through August 31, 1975 inclusive. In conjunction therewith, there had been filed with the Audit Division a form ST-274, entitled Notification of Sale, Transfer, or Assignment in Bulk, dated August 14, 1975, indicating that on August 14, 1975 there had been a sale, transfer or assignment of the subject garage, by assignment of leasehold thereto, from one G & G Parking Systems, Inc., to petitioner herein, for the price of \$45,000.

2. Thereupon, the Audit Division issued a field audit report, dated May 20, 1976, and signed by a Mr. Yasnow, Examiner, indicating that the Seller/Assignor's principal was not locatable, and that access to current books and records had been denied by the petitioner herein. Said report further indicated that a Notice and Demand for Payment of Sales and Use Taxes Due had been issued against petitioner, for taxes allegedly due for the 13 taxable quarters under review in the amount of \$29,884.58, plus penalty and interest of \$10,442.65, for a total assessment purportedly due of \$40,326.78. Apparently the said notice had upwardly revised the taxes allegedly due, with penalty and interest from the figures given in the aforesaid field audit report, based on estimates taken of taxes due in addition to the taxes already paid.

3. Petitioner timely filed a petition seeking redetermination, etc. of the sales tax allegedly due, contending that the assignment of a leasehold (actually a sub-leasehold) and interest therein is not such a "bulk sale" as to render petitioner liable for taxes due within the meaning of section 1141(c) of the Tax Law, and further challenging the methodology used by the Division in estimating sales taxes allegedly due from the seller-assignor's business receipts. Issue was joined by respondent Audit Division's filing of an answer, which affirmatively alleged that the assignment of a leasehold constituted the "sale, transfer or assignment in bulk---of his business assets", within the

meaning of section 1141(c) of the Tax Law, so that applicant is liable for the taxes allegedly due for failure to timely give notice of the assignment as required by the statute.

4. Petitioner's business is that of a parking garage that, for a set fee, permits automobiles to park and occupy space therein for a period of time. Conceivably, other than the physical structure of the garage itself, there are little or no assets or inventory involved in the business and the tax charged therein by the City has historically always been deemed or defined as a parking or garage tax, rather than as a sales or use tax.

CONCLUSIONS OF LAW

A. That a leasehold is a business asset and the sale thereof constitutes a bulk sale within the meaning and intent of section 1141(c) of the Tax Law.

B. That petitioner failed to give the State Tax Commission timely notification of the proposed sale and is therefore liable for taxes determined to be due from the seller-assignor.

C. That the petitioner failed to sustain the burden of proof required to show that the Audit Division's determination of taxes due was not proper. That absent books and records, the Audit Division determined the amount of tax due from such information as was available in accordance with section 1138(a) of the Tax Law.

D. That the petition of R & H Garage Corp. is denied and the Notice and Demand for Payment of Sales and Use Taxes Due issued February 2, 1976 is sustained.

DATED: Albany, New York
NOV 14 1980

STATE TAX COMMISSION

James W. Keller
PRESIDENT

Thomas H. [unclear]
COMMISSIONER

Frank R. Kolm
COMMISSIONER