

STATE OF NEW YORK
STATE TAX COMMISSION

In the Matter of the Petition :
of
Schwalb Coal & Oil Co., 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 8/1/65 - 8/31/67. :

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 2nd day of January, 1980, he served the within notice of Determination by mail upon Schwalb Coal & Oil Co., Inc., the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Schwalb Coal & Oil Co., Inc.
92 Portland Ave.
Rochester, NY 14605

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
2nd day of January, 1980.

Joanne Knapp

J. Vredenburg

STATE OF NEW YORK
STATE TAX COMMISSION

In the Matter of the Petition :
of :
Schwalb Coal & Oil Co., Inc. :
for Redetermination of a Deficiency or a Revision :
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Sales & Use Tax :
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AFFIDAVIT OF MAILING

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 2nd day of January, 1980, he served the within notice of Determination by mail upon James M. Iannuzo 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. James M. Iannuzo
Di Gaetano, Dorsey & Iannuzo
154 Fitzhugh St.
Rochester, NY

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
2nd day of January, 1980.

Joanne Knapp

J. Vredenburg

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

January 2, 1980

Schwalb Coal & Oil Co., Inc.
92 Portland Ave.
Rochester, NY 14605

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
James M. Iannuzo
Di Gaetano, Dorsey & Iannuzo
154 Fitzhugh St.
Rochester, NY
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Application	:	
of	:	
SCHWALB COAL & OIL COMPANY, INC.	:	DETERMINATION
(Purchaser)	:	
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 August 1, 1965 through	:	
August 31, 1967.	:	

Applicant, Schwalb Coal & Oil Company, Inc., 92 Portland Avenue, Rochester, New York 14605, 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 August 1, 1965 through August 31, 1967 (File No. 01932).

A formal hearing was held before L. Robert Leisner, Hearing Officer, at the offices of the State Tax Commission, 115 Main Street, East Rochester, New York, on November 9, 1971 and was continued November 11, 1971. Applicant appeared by DiGaetano, Dorsey & Iannuzo (James M. Iannuzo, Esq., of counsel). The Sales Tax Bureau appeared by Saul Heckelman, Esq. (Alexander Weiss, Esq., of counsel).

ISSUES

I. Whether the transaction entered into by applicant for the purchase of business assets from Boyce & Allan Heating Sales, Inc. constituted a "bulk sale".

II. Whether the Sales Tax Bureau timely issued the Notice of Determination and Demand for Payment of Sales and Use Taxes Due against applicant.

FINDINGS OF FACT

1. Applicant, Schwalb Coal & Oil Company, Inc., entered into a contractual agreement with Boyce & Allan Heating Sales, Inc. August 16, 1967. Applicant agreed to purchase and Boyce & Allan Heating Sales, Inc. agreed to sell the

following assets of its petroleum business:

- a) A customer account list
- b) Two fully equipped trucks
- c) One 2,500 gallon tank and meter
- d) One Lockheed Meter
- e) Office equipment

2. Applicant placed the sum of \$71,000.00 in escrow for Boyce & Allan Heating Sales, Inc. August 22, 1967. Applicant released these funds in partial fulfillment of its contractual obligation August 25, 1967. The balance owed on the contract (\$12,375.00) was paid June 25, 1968.

3. Applicant sent a Notification of Sale, Transfer, or Assignment in Bulk by registered mail to the Sales Tax Bureau of the Department of Taxation and Finance. The notification, received August 29, 1967, listed September 1, 1967 as the scheduled date of sale.

4. A Judgement was docketed May 6, 1969 in the Monroe County Clerk's office against Boyce & Allan Heating Sales, Inc. for sales and use taxes due. The amount of such warrant so docketed became a lien on the title to, and interest in the real and personal property of Boyce & Allan Heating Sales, Inc.

5. On November 13, 1969, the Sales Tax Bureau issued a Notice of Determination and Demand for Payment of Sales and Use Taxes Due against applicant stating:

"In accordance with the provisions of section 1141(c) of the Tax Law, the following amounts are determined to be due:

<u>PERIOD ENDED</u>	<u>TAX DUE</u>	<u>PENALTY & INTEREST</u>	<u>TOTAL</u>
8/31/65	\$ 204.17	\$ 80.65	\$ 284.82
11/30/65	43.77	16.63	60.40
2/28/66	5,907.72	3,012.92	8,920.64
5/31/66	3,411.54	1,637.54	5,049.08
8/31/66	348.15	156.67	504.82
11/30/66	2,233.41	938.03	3,171.44
2/28/67	6,089.07	2,374.74	8,463.81
5/31/67	3,860.45	1,389.76	5,250.21
8/31/67	557.20	183.88	<u>741.08</u>

TOTAL TAX, PENALTY AND INTEREST DUE: \$32,446.30"

The tax due on the notice had been determined due by the Sales Tax Bureau from a field audit of the books and records of Boyce & Allan Heating Sales, Inc.

6. Applicant relied on the advice of counsel and at all times acted in good faith.

CONCLUSIONS OF LAW

A. That the criteria of whether a transaction is a "bulk sale" subject to the provisions of section 1141(c) are that there be a sale, transfer or assignment in bulk of any part or the whole of one's business assets by a person required to collect the tax and that such transaction be other than in the ordinary course of business.

B. That the transaction whereby applicant, Schwalb Coal & Oil Company, Inc., purchased business assets from Boyce & Allan Heating Sales, Inc. is a "bulk sale" within the meaning and intent of section 1141(c) of the Tax Law.

C. That section 1141(c), as amended by Chapter 998 of the Laws of 1969 (effective May 26, 1969 and retroactive to August 1, 1965), gives the State Tax Commission 180 days from receipt of a notice of sale, transfer or assignment in bulk in which to serve notice upon the purchaser of the taxes claimed to be due from the seller. For pending matters, the 180 days does not commence until 90 days after the effective date of the amendment.

D. That the Notice of Determination and Demand for Payment of Sales and Use Taxes Due issued against applicant, Schwalb Coal & Oil Company, Inc., under the date November 13, 1969 was timely issued by the Sales Tax Bureau.

E. That the penalties and interest in excess of the minimum statutory rate are cancelled.

F. That the application of Schwalb Coal & Oil Company, Inc. is granted to the extent indicated in Conclusion "E". The Audit Division is hereby directed to modify the Notice of Determination and Demand for Payment of Sales and Use Taxes Due issued November 13, 1969. Except as so granted, the application is in all other respects denied.

DATED: Albany, New York

JAN 2 1980

STATE TAX COMMISSION


PRESIDENT


COMMISSIONER


COMMISSIONER