

STATE OF NEW YORK
STATE TAX COMMISSION

In the Matter of the Petition :
of
Julius Witzer :
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 9/1/73 - 8/31/75. :

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 17th day of October, 1980, he served the within notice of Decision by mail upon Julius Witzer, the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Julius Witzer
A.J. 7 Sonia St.
Villa Rica
Bayamon, Puerto Rico 00619

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
17th day of October, 1980.

Eustach A Bank

J. Vredenburg

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :

of :

JULIUS WITZER :

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 September 1, :
1973 through August 31, 1975.

Petitioner, Julius Witzer, A.J. 7 Sonia Street, Villa Rica, Bayamon, Puerto Rico 00619, 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 September 1, 1973 through August 31, 1975 (File No. 19255).

A small claims hearing was held before Judy M. Clark, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on August 15, 1979, at 1:15 P.M. and continued on November 2, 1979 at 10:45 A.M. Petitioner appeared by David Simon, Esq. The Audit Division appeared by Ralph J. Vecchio, Esq. (Abraham Schwartz and Irwin Levy, Esqs., of counsel).

ISSUE

Whether petitioner, Julius Witzer, was a financially responsible officer of Davarn Luncheonette, Inc. under the provisions of section 1131(1) and 1133(a) of the Tax Law.

FINDINGS OF FACT

1. On September 17, 1976, the Audit Division issued a Notice of Determination and Demand for Payment of Sales and Use Taxes Due against petitioner, Julius Witzer, as an officer of Davarn Luncheonette, Inc. for the period June 1, 1973 through August 31, 1975. The Notice was issued for tax due of \$19,136.94 plus penalties and interest. On February 23, 1977, the Audit Division issued a Notice of Assessment Review to the petitioner cancelling the tax due for the period June 1, 1973 through August 31, 1973.

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2. Petitioner filed a timely protest to the above Notice on September 22, 1976.

3. It was the Audit Division's position that since petitioner, Julius Witzer, purchased all the shares of stock of Davarn Luncheonette, Inc., he was personally liable for taxes asserted against the corporation.

4. On September 18, 1973, petitioner, Julius Witzer, entered into an agreement to purchase all outstanding shares of stock of Davarn Luncheonette, Inc. The purchase was made in behalf of Alan Witzer, petitioner's son, who was to be the manager of the business. All arrangements for the purchase were made by Alan Witzer.

5. On the day of purchase, authorization was given by petitioner, Julius Witzer, as President of Davarn Luncheonette, Inc. to Alan Witzer to singly sign checks, drafts, notes, acceptances and other instruments with Chemical Bank for and in the name of Davarn Luncheonette, Inc. All sales tax returns filed for the period at issue were signed by Alan Witzer.

6. Petitioner's sole dealings with the corporation were at the time of initial purchase in signing any documents necessary to facilitate the transfer. He did not participate in any of the activities of the business or receive any compensation from the business operation. Petitioner was employed as a full-time window cleaner until he retired in 1976.

CONCLUSIONS OF LAW

A. That Julius Witzer was not a person required to collect tax within the meaning and intent of section 1131(1) of the Tax Law; therefore, he is not personally liable for the taxes assessed Davarn Luncheonette, Inc. under the provisions of section 1133(a) of the Tax Law.

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B. That the petition of Julius Witzer is granted and the Notice of Determination and Demand for Payment of Sales and Use Taxes Due issued September 17, 1976 is cancelled.

DATED: Albany, New York

OCT 17 1980

STATE TAX COMMISSION

James H. Tuel
PRESIDENT

Thomas H. Hufsch
COMMISSIONER

Francis R. Koenig
COMMISSIONER

James H. ...
[Signature]
James H. ...

OCT 17 1980