

STATE OF NEW YORK
STATE TAX COMMISSION

In the Matter of the Petition :
of
Maurice W. Andrews, Sr. :

AFFIDAVIT OF MAILING

for Redetermination of a Deficiency or a Revision :
of a Determination or a Refund of
Sales & Use Tax :
under Article 28 of the Tax Law
for the Years 1974 - 1976. :

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 30th day of January, 1981, he served the within notice of Decision by mail upon Maurice W. Andrews, Sr., the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Maurice W. Andrews, Sr.
7148 High St.
Lima, NY 14485

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
30th day of January, 1981.

Connie A. Hagelund

J. Vredenburg

STATE OF NEW YORK
STATE TAX COMMISSION

In the Matter of the Petition :
of
Maurice W. Andrews, Sr. :

AFFIDAVIT OF MAILING

for Redetermination of a Deficiency or a Revision :
of a Determination or a Refund of
Sales & Use Tax :
under Article 28 of the Tax Law
for the Years 1974 - 1976. :

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 30th day of January, 1981, he served the within notice of Decision by mail upon John M. Regan 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. John M. Regan
1000 Crossroads Bldg.
Rochester, NY 14614

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
30th day of January, 1981.

Connie A. Hagelund

J. Vredenburg

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

January 30, 1981

Maurice W. Andrews, Sr.
7148 High St.
Lima, NY 14485

Dear Mr. Andrews:

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 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
John M. Regan
1000 Crossroads Bldg.
Rochester, NY 14614
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of :
MAURICE W. ANDREWS, SR. : DECISION
for a Revision of a Determination or for :
Refund of Sales and Use Tax under Article :
28 of the Tax Law for the Years 1974, 1975 :
and 1976. :

Petitioner, Maurice W. Andrews, Sr., 7148 High Street, Lima, New York 14485, filed a petition for revision of a determination or for refund of sales and use tax under Article 28 of the Tax Law for the years 1974, 1975 and 1976 (File No. 22394).

A formal hearing was held before Julius E. Braun, Hearing Officer, at the offices of the State Tax Commission, One Marine Midland Plaza, Rochester, New York, on July 25, 1979 at 2:45 P.M. Petitioner appeared by John M. Regan, Esq. The Audit Division appeared by Peter Crotty, Esq. (Barry Bresler, Esq., of counsel).

ISSUE

Whether petitioner is personally liable for sales and use taxes due from Maurice W. Andrews, Inc. for the years 1974, 1975 and 1976.

FINDINGS OF FACT

1. On January 20, 1978 the Audit Division issued a Notice of Determination and Demand for Payment of Sales and Use Taxes Due against Maurice W. Andrews, Sr. for the years 1974, 1975 and 1976 in the amount of \$41,018.66, plus penalty and interest of \$19,589.19, for a total of \$60,607.85.

2. Sales tax returns were filed for Maurice W. Andrews, Inc. for part of the period in issue. No remittance was made. No return was filed for the

period ending August 31, 1975 for which the Audit Division estimated the amount due. Maurice W. Andrews, Jr., president, signed all the tax returns.

3. Petitioner, Maurice W. Andrews, Sr., operated a Ford dealership for over thirty-six years with a partner whom he bought out in 1966. In 1966 he incorporated the business with his son, Maurice W. Andrews, Jr., who became president and owned 101 shares out of 200 authorized value stock without par value. Maurice W. Andrews, Sr. with 99 shares became vice-president and Mrs. Maurice W. Andrews, Jr. was the secretary-treasurer of the corporation. In 1970, petitioner, who was 73 years old, retired from the business. He received no salary and was no longer active in the business. He did not sell his stock in the corporation because it was worth nothing nor did it ever pay any dividends. He received no pension from the corporation. He owned the land and building on which the business was located and received a rental therefrom. His son, Maurice W. Andrews, Jr., operated the business until he became terminally ill. The business filed for bankruptcy in October 1975. On December 30, 1977, Maurice W. Andrews, Jr. died. The business was liquidated in a bankruptcy sale by order of the District Court to satisfy creditors. Petitioner took no part in these proceedings. The records of the business were strewn about the office and were carted to the dump after the liquidation. Petitioner did not prepare any corporate books or records and did not sign any checks subsequent to retiring in 1970. His name was then removed from the signature card. Whenever petitioner went into the office, his son Maurice W. Andrews, Jr. would walk out. No business was ever discussed, nor advice sought from petitioner. While Maurice W. Andrews, Jr. was in the hospital, a manager ran the business. The petitioner did not know that sales taxes were not paid. He did, however, know that the business was in financial trouble because creditors informed him that bills were not paid.

CONCLUSIONS OF LAW

A. That section 1133(a) of the Tax Law provides in pertinent part:

..."[E]very person required to collect any tax imposed by this article shall be personally liable for the tax imposed, collected or required to be collected under this article."

A definition of said "person" is found in section 1131 (subdivision 1) which provides:

"'Persons required to collect tax' or 'person required to collect any tax imposed by this article' shall include: ...any officer or employee of a corporation or of a dissolved corporation who as such officer or employee is under a duty to act for such corporation in complying with any requirement of this article..."

B. That whether petitioner Maurice W. Andrews, Sr. is "a person required to collect tax" is a factual question. (Stacy v. State, 82 Misc. 2d 181, Matter of McHugh v. State Tax Commission, 70 A.D.2d 987.)

C. That the holding of corporate office does not, per se, impose liability upon the office holder. (Monday v. United States, 421 F.2d 1210, cert. den. 400, U.S. 821, 27 L.ed. 48, 91 S. Ct. 38; Matter of Levin v. Gallman, 49 A.D.2d 434; and MacLean v. Procaccino, 80 Misc. 2d 931, rev'd. 53 A.D.2d 965.)

D. That Maurice W. Andrews, Sr. was not a person required to collect tax; therefore, the petition of Maurice W. Andrews, Sr. is granted and the Notice of Determination and Demand for Payment of Sales and Use Taxes Due issued on January 20, 1978 is cancelled.

DATED: Albany, New York
JAN 30 1981

STATE TAX COMMISSION


PRESIDENT


COMMISSIONER


COMMISSIONER