

STATE OF NEW YORK
STATE TAX COMMISSION

In the Matter of the Petition :

of

Joseph Bressner :

: 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 9/1/72 - 1/4/73.

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 19th day of June, 1981, he served the within notice of Decision by mail upon Joseph Bressner, the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Joseph Bressner
131 Beach 135th St.
Belle Harbor, 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 petitioner herein and that the address set forth on said wrapper is the last known address of the petitioner.

Sworn to before me this
19th day of June, 1981.

Connie A. Hagelund

J. Vredenburg

STATE OF NEW YORK
STATE TAX COMMISSION

In the Matter of the Petition :
of :
Joseph Bressner :

: 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 9/1/72 - 1/4/73.

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 19th day of June, 1981, he served the within notice of Decision by mail upon Sidney Gelfand 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. Sidney Gelfand
Gelfand & Radler
136 East 57th St.
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
19th day of June, 1981.

Carrie A. Hayland

J. Vredenburg

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

June 19, 1981

Joseph Bressner
131 Beach 135th St.
Belle Harbor, NY

Dear Mr. Bressner:

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
Sidney Gelfand
Gelfand & Radler
136 East 57th St.
New York, NY 10022
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of :
JOSEPH BRESSNER : 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, 1972 :
through January 4, 1973. :
:

Petitioner, Joseph Bressner, 131 Beach 135th Street, Belle Harbor, New York, 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, 1972 through January 4, 1973 (File No. 17514).

A formal hearing was held before William J. Dean, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on April 13, 1978 at 2:45 P.M. Petitioner appeared by Sidney Gelfand, CPA. The Audit Division appeared by Peter Crotty, Esq. (William Fox, Esq. of counsel).

ISSUE

Whether a claim for refund of sales taxes paid will be denied to an officer of various corporations, where the corporations were adjudicated bankrupt and where the State's claim against the corporations was paid, except for penalties and also interest from the date the corporations were placed in receivership to the date of payment by the trustee in bankruptcy to the State.

FINDINGS OF FACT

1. Under date of October 1, 1976, petitioner, Joseph Bressner, filed with the Audit Division an application for credit or refund of state and local sales or use tax in the amount of \$26,269.44. The claim was denied in full by a letter dated December 20, 1976.

2. Under date of December 20, 1976, the Audit Division issued a Notice and Demand for Payment of Sales and Use Taxes Due to petitioner for the period September 1, 1972 through January 4, 1973, in the amount of \$12,580.31. Said amount was designated as "additional penalty and interest due". By Notice of Assessment Review dated January 7, 1977, \$399.59 of this amount was cancelled, reducing the amount claimed to be due to \$12,180.72.

3. Petitioner served as chief executive officer of the following corporations: Bressner Bay Ridge Television Corp. (Bay Ridge), Bressner Appliance, Inc. (Appliance), Bressner Colorvision Corp. (Colorvision), Bressner Flatbush Colorvision Co., Inc. (Flatbush), Bressner Yorkville Colorvision Corp. (Yorkville), Bressner Colorvision Pitkin Co., Inc. (Pitkin), Bressner Brighton Colorvision Corp. (Brighton), Bressner Ridgewood Colorvision Corp. (Ridgewood), Bressner Bensonhurst Colorvision Corp. (Bensonhurst), Bressner Radio, Inc. (Radio), and Bressner Lawrence Colorvision Corp. (Lawrence).

4. According to the Sales Tax Bureau, the various Bressner corporations had sales tax liabilities as follows:

	<u>TAX DUE PERIOD ENDED 11/30/72</u>	<u>TAX DUE PERIOD ENDED 1/4/73</u>
Bay Ridge	\$ 8,724.33	\$ 3,829.21
Appliance	3,891.89	1,413.79
Colorvision	22,188.90	10,833.64
Flatbush	6,611.36	2,272.76
Yorkville	4,877.07	2,191.77
Pitkin	2,756.32	1,009.12
Brighton	2,889.53	559.30
Ridgewood	6,872.24	3,058.16
Bensonhurst	11,207.61	4,266.29
Radio	6,902.28	2,448.39
Lawrence	3,351.25	1,286.39
	<u>\$80,272.78</u>	<u>\$33,168.82</u>

The total tax claimed to be due from the Bressner corporations for these two periods was \$113,441.60.

5. The Bressner corporations were engaged in the business of selling (at retail) television sets, refrigerators, washing machines and appliances. During the summer of 1972, merchandise valued at \$250,000.00 was stolen from the common warehouse for the corporations, located at 610 Williams Avenue, Brooklyn, New York.

6. Until the theft, the Bressner corporations had always timely paid sales taxes due.

7. The Bressner corporations were placed in receivership on January 5, 1973 by creditors' action and adjudicated bankrupt in August of 1973.

8. As a result of the theft of merchandise and because of the bankruptcy proceedings, sales taxes for the periods in question were not paid when due by the Bressner corporations.

9. While the bankruptcy proceedings were still in progress, the Sales Tax Bureau insisted that payments be made against taxes claimed to be due, or warrants would be issued against Mr. Bressner.

10. Subsequently, on October 21, 1974, the following notices and demand for payment of sales and use taxes due were issued to Mr. Bressner as a person required to collect tax for the corporations for the period ending November 30, 1972 and for the period running December 1, 1972 through January 4, 1973:

<u>Petitioner's Exhibit</u>	<u>Corporate Debtor</u>	<u>Tax</u>	<u>Interest</u>
1	Flatbush	\$ 4,200.47	\$ 758.48
2	Bay Ridge	7,840.63	1,258.38
3	Colorvision	32,698.36	4,311.13
4	Ridgewood	5,345.98	924.19
5	Yorkville	5,667.45	817.01
6	Brighton	3,231.25	447.94
7	Appliance	1,692.78	467.25
8	Pitkin	2,589.18	413.21

11. No penalties were assessed at the time these notices were issued. No notices were issued for Radio or Lawrence, and the one issued for Bensonhurst was subsequently cancelled on May 29, 1975.

12. Mr. Bressner made payments from his own personal funds totaling \$26,269.40 against these assessments, while the bankruptcy proceedings of the Bressner corporations were still in progress.

13. On August 20, 1976, the bankruptcy court made payment to the Audit Division of the obligations of the Bressner corporations, except for penalties and interest from the date the corporations were placed in receivership (January 5, 1973) to the date the Audit Division received payment (August 20, 1976).

CONCLUSIONS OF LAW

A. That section 1131(1) of the Tax Law provides that "any officer... of a corporation or of a dissolved corporation who as such officer ... is under a duty to act for such corporation in complying with any requirement" of Article 28 is a person required to collect sales tax. Mr. Bressner, as chief executive officer of the Bressner corporations, was such a person.

B. That section 1133(a) of the Tax Law provides that "every 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."

C. That Ruhter v. Internal Revenue Service, 339 F.2d 575, holds that tax claims and interest until the date of bankruptcy are allowable, but tax claims based on penalties and generally interest after bankruptcy are not allowed; however, the court's interpretation of the Federal bankruptcy law does not excuse an officer of a corporation under a duty to act from personal liability for interest or penalties due New York State under Article 28.

D. That section 1145(a) of the Tax Law authorizes the State Tax Commission to remit all penalties and "that portion of such interest that exceeds the interest that would be payable if such interest were computed at the rate set by the Tax Commission pursuant to section eleven hundred forty-two..." if "the delay [in paying sales tax] was excusable."

E. That the penalties are remitted. The delay in paying sales tax was excusable. From January 5, 1973 onward, the assets of the Bressner corporations were under the sole control of a receiver or trustee in bankruptcy.

F. That petitioner is liable for interest for the period from the date the Bressner corporations were placed in receivership (January 5, 1973) to the date payment was received by the Audit Division (August 20, 1976). Interest shall be computed at the rate of 7.5 percent per annum. (20 NYCRR 603.3). Interest shall run from "twenty days after the end of the quarterly period covered thereby." (Tax Law section 1136(b)).

G. That the Sales Tax Bureau's computation of interest includes interest on tax deficiencies of Radio, Lawrence and Bensonhurst. Yet no Notice and Demand for Payment of Sales and Use Taxes Due was ever issued against petitioner for Radio or Lawrence, since by October 21, 1974, the date the other personal assessments were issued, these deficiencies had already been satisfied. Also, the notice issued for Bensonhurst was cancelled on May 29, 1975. No interest should be charged on the Radio and Lawrence deficiencies from October 21, 1974 to August 20, 1976, and on the Bensonhurst deficiency from May 29, 1975 to August 20, 1976.

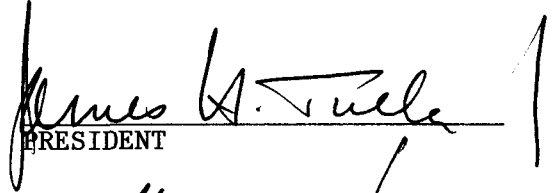
H. That the application of Joseph Bressner is granted to the extent that (1) penalties are remitted (2) interest due for the period from January 5, 1973 to August 20, 1976 shall be at the rate of 7.5 percent per annum (3) interest shall not begin to run until twenty days after the end of the quarterly period covered thereby, and (4) no interest shall be charged on the Radio and Lawrence deficiencies from October 21, 1974 to August 20, 1976, and on the Bensonhurst deficiency from May 29, 1975 to August 20, 1976; that the Audit Division is hereby directed to modify accordingly the Notice and Demand for

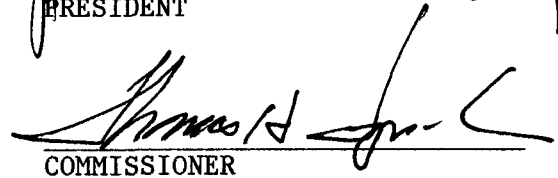
Payment of Sales and Use Taxes Due issued December 20, 1976, and to modify accordingly the denial of petitioner's Application for Credit or Refund of State and Local Sales or Use Tax dated October 1, 1976; and that, except as so granted, the petition is in all other respects denied.

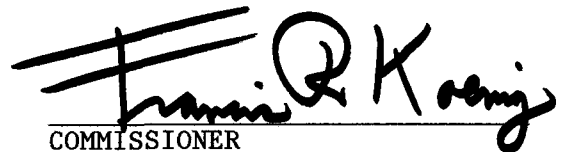
DATED: Albany, New York

JUN 19 1981

STATE TAX COMMISSION


PRESIDENT


COMMISSIONER


COMMISSIONER