

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of :
Lewis DeShane :
d/b/a Arrow Pump and Tank Service :
: 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 :
3/1/69-8/31/77. :

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 25th day of September, 1981, he served the within notice of Decision by certified mail upon Lewis DeShane, d/b/a Arrow Pump and Tank Service the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Lewis DeShane
d/b/a Arrow Pump and Tank Service
206 Main Ave.
Watertown, NY 13601

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
25th day of September, 1981.

Carrie A. Hagelund

J. Vredenburg

STATE OF NEW YORK
STATE TAX COMMISSION

In the Matter of the Petition :
of :
Lewis DeShane :
d/b/a Arrow Pump and Tank Service :
: 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 3/1/69 - 8/31/77. :

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 25th day of September, 1981, he served the within notice of Decision by certified mail upon Matthew V. Byrne the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Matthew V. Byrne
Byrne & Costello, P.C.
499 Warren Bldg.
Syracuse, NY 13202

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
25th day of September, 1981.

Annex P. Hegelund

J. Vredenburg

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

September 25, 1981

Lewis DeShane
d/b/a Arrow Pump and Tank Service
206 Main Ave.
Watertown, NY 13601

Dear Mr. DeShane:

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
Matthew V. Byrne
Byrne & Costello, P.C.
499 Warren Bldg.
Syracuse, NY 13202
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition	:	
of	:	
LEWIS DESHANE	:	DECISION
D/B/A ARROW PUMP AND TANK SERVICE	:	
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 March 1, 1969 through	:	
August 31, 1977.	:	

Petitioner, Lewis DeShane d/b/a Arrow Pump and Tank Service, 206 Main Avenue, Watertown, New York 13601, 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 March 1, 1969 through August 31, 1977 (File No. 22225).

A small claims hearing was held before Judy M. Clark, Hearing Officer, at the offices of the State Tax Commission, 207 Genesee Street, Utica, New York, on July 21, 1980 at 1:15 P.M. Petitioner appeared by Matthew V. Byrne, Esq. The Audit Division appeared by Ralph J. Vecchio, Esq. (Paul Lefebvre, Esq., of counsel).

ISSUE

Whether the statute of limitations bars the assessment of sales and use taxes for the periods prior to December 1, 1974.

FINDINGS OF FACT

1. On March 6, 1978, the Audit Division issued a Notice of Determination and Demand for Payment of Sales and Use Taxes Due against Lewis DeShane d/b/a Arrow Pump and Tank Service ("Arrow") for the period March 1, 1969 through

August 31, 1977. The Notice was issued as a result of a field audit asserting tax due of \$28,101.07 plus penalties and interest.

2. Petitioner's business activity consisted of the installation and repair of gasoline pumps and tanks. Petitioner was also the sole shareholder of Sunset Heating Corporation ("Sunset") which installed heating equipment and air conditioning units. Both businesses were operated from the same location and employees of Sunset also performed the services sold by Arrow.

Periodically, transfers of funds were made from the bank account of Arrow Pump and Tank Service to Sunset Heating Corporation to cover operating expenses and payroll. A separate accounting system was maintained by Arrow from that of Sunset and separate telephone numbers were listed in the telephone directory. Sunset Heating Corporation is a vendor registered to collect tax.

3. Petitioner, Lewis DeShane d/b/a Arrow Pump and Tank Service, was not registered with the Sales Tax Bureau for the collection of tax nor did he notify the Audit Division of a change in business activity under Sunset Heating Corporation.

4. On audit, the Audit Division reviewed monthly summaries of petitioner's business for the period March, 1969 through June, 1977. It determined sales tax collections were made by Arrow in the amount of \$25,349.30 for the audit period. Use tax of \$356.65 was determined on materials used in capital improvements to real property and tax of \$2,395.12 was determined due on trucks and equipment purchases. Total tax of \$28,101.07 was thereby asserted due.

It was the Audit Division's position that Lewis DeShane d/b/a Arrow Pump and Tank Service and Sunset Heating Corporation were separate business

entities and that since no sales and use tax returns were filed by Arrow, the statute of limitations did not apply.

5. Petitioner issued sales invoices in the following manner:

- a. "Arrow Pump & Tank Service Div. Arrow Pump Supply Corporation"
- b. "Sunset Heating Corp." crossed out with "Arrow Pump & Tank Service" written in above
- c. "Arrow Pump & Tank Division" written in above "Sunset Heating Corp."
- d. "Arrow Pump & Tank Service"

6. Sales receipts of Arrow Pump and Tank Service were not included in the receipts of Sunset Heating Corporation's sales and use tax returns or federal income tax returns filed.

7. Petitioner contended that Arrow Pump and Tank Service was a division of Sunset Heating Corporation, a registered vendor; and, therefore, the periods of the assessment should be limited to three years. Petitioner also contended that the omission of Arrow's receipts and taxes from Sunset Heating Corporation's returns was strictly an oversight and not intentional. No substantial evidence was submitted to show the omission was not wilfull.

CONCLUSIONS OF LAW

A. That section 1147(b) of the Tax Law provides that "...except in the case of a wilfully false or fraudulent return with intent to evade the tax, no assessment of additional tax shall be made after the expiration of more than three years from the date of the filing of a return; provided, however, that where no return has been filed as provided by law the tax may be assessed at any time."

B. That petitioner Lewis DeShane, d/b/a Arrow Pump and Tank Service did not file sales and use tax returns nor include the receipts and taxes collected thereon with the returns filed by Sunset Heating Corporation, an "oversight"

that was consistent for a period of more than eight years. Therefore, the Notice of Determination and Demand for Payment of Sales and Use Taxes Due issued on March 6, 1978 was not barred by the three-year statute of limitations set forth in section 1147(b) of the Tax Law.

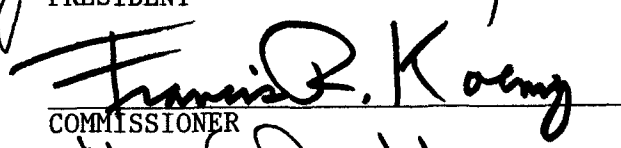
C. That the petition of Lewis DeShane d/b/a Arrow Pump and Tank Service is denied and the Notice of Determination and Demand for Payment of Sales and Use Taxes Due issued March 6, 1978 is sustained with penalties and interest thereon.

DATED: Albany, New York

SEP 25 1981

STATE TAX COMMISSION


PRESIDENT


COMMISSIONER


COMMISSIONER