

STATE OF NEW YORK  
STATE TAX COMMISSION

In the Matter of the Petition :  
of :  
Fulton National Group, Inc. :  
and Anthony Rosato and Stockton Forrest : 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 6/1/71-2/28/75. :

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 9th day of January, 1981, he served the within notice of Decision by mail upon Fulton National Group, Inc., and Anthony Rosato and Stockton Forrest, the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Fulton National Group, Inc.  
and Anthony Rosato and Stockton Forrest  
25 W. 43rd St.  
New York, NY 10036

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  
9th day of January, 1981.

  
Constance A. Haglund



STATE OF NEW YORK  
STATE TAX COMMISSION

In the Matter of the Petition :  
of :  
Fulton National Group, Inc. :  
and Anthony Rosato and Stockton Forrest : AFFIDAVIT OF MAILING  
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State of New York  
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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 9th day of January, 1981, he served the within notice of Decision by mail upon Larry J. Kushner 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. Larry J. Kushner  
11 Park Place  
New York, NY 10007

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  
9th day of January, 1981.

*Connie A. Haglund*

*J. Vredenburg*

STATE OF NEW YORK  
STATE TAX COMMISSION

In the Matter of the Petition :  
of :  
Fulton National Group, Inc. :  
and Anthony Rosato and Stockton Forrest : AFFIDAVIT OF MAILING  
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Fulton National Group, Inc.  
and Anthony Rosato and Stockton Forrest  
1530 Palisade Ave.  
Ft. Lee, NJ 07024

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.

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Sworn to before me this  
9th day of January, 1981.

*Connie A. Hagelund*

*J. Vredenburg*

STATE OF NEW YORK  
STATE TAX COMMISSION

In the Matter of the Petition :  
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Fulton National Group, Inc. :  
and Anthony Rosato and Stockton Forrest : AFFIDAVIT OF MAILING  
for Redetermination of a Deficiency or a Revision :  
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State of New York  
County of Albany

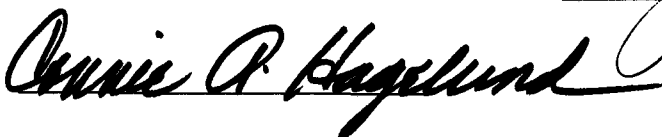
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Fulton National Group, Inc.  
and Anthony Rosato and Stockton Forrest  
20 Retiro Lake  
New Rochelle, NY

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Sworn to before me this  
9th day of January, 1981.

  
Connie R. Hagelund



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

January 9, 1981

Fulton National Group, Inc.  
and Anthony Rosato and Stockton Forrest  
25 W. 43rd St.  
New York, NY 10036

Gentlemen:

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  
Larry J. Kushner  
11 Park Place  
New York, NY 10007  
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

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In the Matter of the Petitions	:	
	:	
of	:	
	:	
FULTON NATIONAL GROUP, INC.	:	DECISION
ANTHONY ROSATO and STOCKTON FORREST	:	
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 June 1, 1971 through February 28,	:	
1975.	:	

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Petitioners, Fulton National Group, Inc., 25 West 43rd Street, New York, New York 10036, and Anthony Rosato, 1530 Palisades Avenue, Fort Lee, New Jersey 07024, and Stockton Forrest, 20 Retiro Lane, New Rochelle, New York, filed petitions 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 June 1, 1971 through February 28, 1975 (File Nos. 14157, 19787 and 19788).

A formal hearing was held before Edward L. Johnson, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on May 18, 1978 at 3:10 P.M., was continued at the same location on February 8, 1979 at 10:45 A.M. and June 19, 1979 at 1:15 P.M. and was concluded on January 31, 1980 at 9:20 A.M. Petitioners Fulton National Group, Inc. and Anthony Rosato appeared by Larry Jay Kushner, Esq. The Audit Division appeared by Peter Crotty, Esq. and Ralph J. Vecchio, Esq. (Samuel Freund and James Morris, Esqs., of counsel).

ISSUES

I. Whether consents dated May 8, 1975 and May 21, 1975 extending the period of limitation for assessment of sales and use taxes for the period June 1, 1971 through February 28, 1975 to March 19, 1976 (signed by Anthony Rosato as president of Fulton National Group, Inc.) were properly admitted

into evidence at the formal hearing.

II. Whether the Audit Division properly determined the amount of sales and use tax liability of the corporation for the period under review.

III. Whether petitioner Anthony Rosato is personally liable under the Tax Law, for sales and use taxes owed by the corporation.

IV. Whether the Audit Division improperly and arbitrarily selected petitioners for assessment of sales and use taxes.

#### FINDINGS OF FACT

1. Anthony Rosato, as president of Fulton National Group, Inc., executed a Consent Extending Period of Limitation for Assessment of Sales and Use Taxes under Articles 28 and 29 of the Tax Law, which extended the time for determination of taxes due for the period June 1, 1971 through February 28, 1975, to March 19, 1976.

2. On January 9, 1976, the Audit Division issued a Notice of Determination and Demand for Payment of Sales and Use Taxes against petitioners after audit for the period June 1, 1971 through February 28, 1975. The notice delineated the amount due as follows:

<u>Period Ended</u>	<u>Tax Due</u>	<u>Penalty &amp; Interest</u>	<u>Total Due</u>
8/31/71	\$ 454.08	\$ 254.28	\$ 708.36
11/30/71	379.97	201.38	581.35
2/29/72	786.63	393.32	1,179.95
5/31/72	615.53	289.30	904.83
8/31/72	759.29	334.09	1,093.38
11/30/72	1,623.95	665.83	2,289.77
2/28/73	1,209.00	495.42	1,668.42
5/31/73	2,065.58	722.95	2,788.53
8/31/73	1,644.48	526.23	2,170.71
11/30/73	2,556.64	1,278.32	3,834.96
2/28/74	1,859.63	874.03	2,733.66
5/31/74	1,965.08	825.33	2,790.41
8/31/74	2,045.45	736.36	2,781.81
11/30/74	2,571.79	771.54	3,343.33
2/28/75	3,504.06	840.97	4,345.03
Total	\$24,041.16	\$9,173.34	\$33,214.50

3. Fulton National Group, Inc. ("Fulton") was a New York corporation organized by petitioner Anthony Rosato in 1970 to purchase equipment and lease it to customers. The leases were financed through various banks which collected monthly payments from the lessees. If a lessee defaulted in his payments, the bank had recourse to Fulton for the unpaid balance.

4. Some banks collected sales tax on monthly installments and remitted the tax separately to Fulton. Others, such as Chase Manhattan, collected sales tax from lessees, but remitted only the net rent payment to Fulton. At the conclusion of the term of a lease, the lessee could obtain title by making a residual payment to Fulton. The audit disclosed that these residual payments had not been reported as sales by Fulton on its filed sales tax returns.

5. Both the auditor for the Audit Division and a certified public accountant who testified as to his audit of Fulton's business found that there were many errors and inconsistencies in its books. There were references to a complete lease register containing all the basic information concerning each lease -- such as what the equipment was, its cost, the amount due from the bank on the funding, the residuals held by the bank, if any, the note payable to the bank, the investment tax credit passed through, if any, the term of the lease and the advance lease payments. Neither the lease register nor transcripts from it were introduced in evidence at the hearing.

6. On audit, the auditor examined Fulton's workpapers in which it kept a running balance of taxable leases. For the test quarter ending May 31, 1974, the auditor examined all closed and current leases in Fulton's files. He computed an error rate of underreported taxable sales to reported sales. The error rate was applied to reported sales for the entire audit period. This procedure resulted in additional tax due of \$18,136.39.



The auditor found that payments on residuals had not been reported as taxable sales during the audit period. The amount of residual payments was \$33,147.10. The amount of additional tax determined due thereon was \$1,883.54.

Several lease agreements were found by the auditor in which the lessees were over-charged one percent in sales taxes. In those instances, Fulton had remitted the amount due in accordance with the statutory rate. One lessee had paid the correct sales tax due to Fulton, but Fulton had failed to report the amount. Sales taxes collected and not remitted to the State were assessed at \$1,575.34.

All fixed asset additions per Fulton's books were examined in detail for the entire audit period. The auditor found \$31,750.60 subject to unpaid sales or use tax amounting to \$2,222.55.

The auditor examined all expense purchases for the fiscal year December 1, 1973 through November 30, 1974 and found that expenses subject to sales or use tax amounted to \$1,211.15. This was .105 percent of sales for the period. Applying this error rate to gross sales reported on sales tax returns for the period June 1, 1971 through February 28, 1975, the auditor calculated that \$3,073.53 was subject to use tax amounting to \$223.34 in unpaid tax. Copies of the auditor's workpapers were given to Fulton's then secretary treasurer, Leonard Weiner. Where additional information and substantiation of claims of exemption were produced, the auditor's findings were adjusted to those set out hereinabove.

7. Petitioner Anthony Rosato had been an equipment leasing salesman for a number of years before he organized Fulton in 1970. Shortly after he organized the firm, he brought in Norman Siegal and Edward Fitzgerald as stockholders and officers. In 1973, Fulton made a public offering of capital stock. At that time, the seventy percent share of petitioner Anthony Rosato was diminished

to about thirty percent. He remained president and a director of the corporation.

Prior to the public offering of capital stock, checks signed by any one of the officers listed above were valid. After the company went public, the signatures of two of the three officers were required to issue a valid check. Petitioner Anthony Rosato had the authority to sign checks throughout the audit period.

8. Petitioner Anthony Rosato acted primarily as a salesman bringing in business; Norman Siegal was the accountant who handled payroll taxes, sales taxes and books of account; Edward Fitzgerald was the financial officer who dealt with banks in obtaining the necessary credit. While petitioner Anthony Rosato opened the mail, he distributed all credit matters to Fitzgerald and all tax matters to Siegal. Creditors to be paid and the amount and time of payment were left largely to Norman Siegal. Chase Manhattan Bank, which financed a major portion of the leases sold by petitioners, forced the resignation as officer of petitioner Anthony Rosato in September, 1975. Petitioner Anthony Rosato testified that he agreed with Chase Manhattan that he was a poor administrator. He did not know what taxes were owed or paid.

9. Notices of hearings held on the various continued dates were sent to all available addresses for Stockton Forrest. All were returned undelivered. He did not appear personally or by representative in the proceedings.

#### CONCLUSIONS OF LAW

A. That the Consent Extending the Period of Limitation for Assessment of Sales and Use Taxes under Articles 28 and 29 of the Tax Law executed by Anthony Rosato, as president of Fulton National Group, Inc. was valid to extend the period for making determination of sales and use tax for the period June 1, 1971 through February 28, 1975 to March 19, 1976. It was properly received in evidence at the formal hearing. The Notice of Determination and Demand for

Payment of Sales and Use Taxes Due was issued January 9, 1976, well within the time allowed.

B. That evidence presented at the hearing by the auditor from the Audit Division and a certified public accountant called by petitioners showed that Fulton's books and records were so full of errors and inadequacies as to provide an unreliable basis for determination of the tax due for the period under review. The auditor utilized Fulton's own records and sales tax returns filed to the extent possible, and applied the error rate derived from detailed audit of selected periods. This is within the mandate of section 1138 of the Tax Law that:

"(a) If a return required by this article is not filed, or if a return when filed is incorrect or insufficient, the amount of tax due shall be determined by the tax commission from such information as may be available."

The Audit Division properly determined the amount of sales and use tax liability of petitioners for the period under review.

C. That petitioner Anthony Rosato was the organizer of petitioner Fulton National Group, Inc; was president and a director during the entire audit period; was an authorized signatory on checks throughout the period; and as such was an officer under a duty to act for the corporation in collecting and paying over the tax required. He was a person required to collect the tax within the meaning of section 1131(1) of the Tax Law and was personally liable for the tax under section 1133(a) of the Tax Law. His selection by the Audit Division for assessment of unpaid sales and use taxes was proper and not arbitrary.

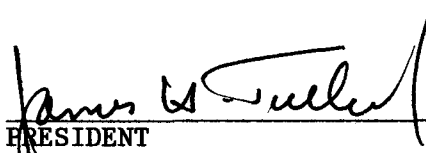
D. That petitioner Stockton Forrest did not answer or appear in the proceeding. The Notice of Determination No. 90,758,031 dated January 9, 1976 is sustained upon default.


E. That the petitions of Fulton National Group, Inc., Anthony Rosato and Stockton Forrest, individually and as officers, are denied in all respects and the Notice of Determination dated January 9, 1976 is sustained.


DATED: Albany, New York

JAN09 1981

STATE TAX COMMISSION

  
\_\_\_\_\_  
PRESIDENT

  
\_\_\_\_\_  
COMMISSIONER

  
\_\_\_\_\_  
COMMISSIONER

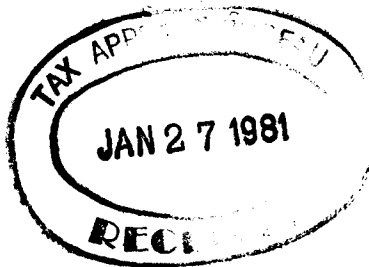
TA 28 (9-79)  
STATE OF NEW YORK  
State Tax Commission  
TAX APPEALS BUREAU  
STATE CAMPUS  
ALBANY, N. Y. 12227

Second Request. MAR 10 1981

B. Address sent  
4-20-81  
DM

Fulton National Group, Inc.  
and Anthony Rosato and Stockton Forrest  
25 W. 43rd St.  
New York, NY 10036

B/A sent  
1-27-81  
JNV.



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

January 9, 1981

Fulton National Group, Inc.  
and Anthony Rosato and Stockton Forrest  
20 Retiro Lake  
New Rochelle, NY

Gentlemen:

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  
Larry J. Kushner  
11 Park Place  
New York, NY 10007  
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

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In the Matter of the Petitions	:	
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FULTON NATIONAL GROUP, INC.	:	DECISION
ANTHONY ROSATO and STOCKTON FORREST	:	
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Refund of Sales and Use Taxes under	:	
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9. Notices of hearings held on the various continued dates were sent to all available addresses for Stockton Forrest. All were returned undelivered. He did not appear personally or by representative in the proceedings.

#### CONCLUSIONS OF LAW

A. That the Consent Extending the Period of Limitation for Assessment of Sales and Use Taxes under Articles 28 and 29 of the Tax Law executed by Anthony Rosato, as president of Fulton National Group, Inc. was valid to extend the period for making determination of sales and use tax for the period June 1, 1971 through February 28, 1975 to March 19, 1976. It was properly received in evidence at the formal hearing. The Notice of Determination and Demand for

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The Audit Division properly determined the amount of sales and use tax liability of petitioners for the period under review.

C. That petitioner Anthony Rosato was the organizer of petitioner Fulton National Group, Inc; was president and a director during the entire audit period; was an authorized signatory on checks throughout the period; and as such was an officer under a duty to act for the corporation in collecting and paying over the tax required. He was a person required to collect the tax within the meaning of section 1131(1) of the Tax Law and was personally liable for the tax under section 1133(a) of the Tax Law. His selection by the Audit Division for assessment of unpaid sales and use taxes was proper and not arbitrary.

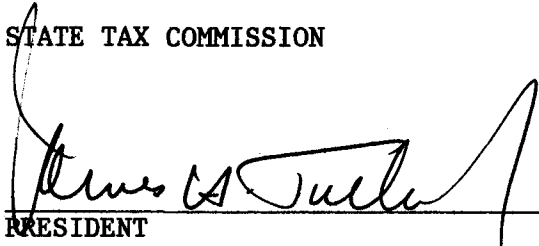
D. That petitioner Stockton Forrest did not answer or appear in the proceeding. The Notice of Determination No. 90,758,031 dated January 9, 1976 is sustained upon default.

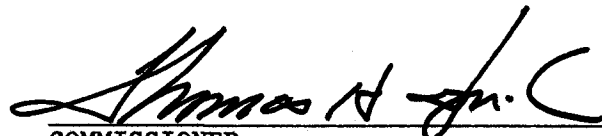
E. That the petitions of Fulton National Group, Inc., Anthony Rosato and Stockton Forrest, individually and as officers, are denied in all respects and the Notice of Determination dated January 9, 1976 is sustained.

DATED: Albany, New York

JAN 09 1981

STATE TAX COMMISSION

  
RESIDENT

  
COMMISSIONER

  
COMMISSIONER

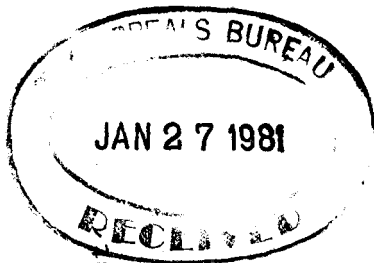
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STATE OF NEW YORK  
State Tax Commission  
TAX APPEALS BUREAU  
STATE CAMPUS  
ALBANY, N. Y. 12227

B. Address sent  
4-20-81  
DM

RETURNED  
TO  
SENDER  
ADDRESS UNKNOWN

Fulton National Group, Inc.  
and Anthony Rosato and Stockton Forrest  
20 Retiro Lake  
~~New Rochelle~~, NY



~~Not over~~ 20 Retiro Lake

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

January 9, 1981

Fulton National Group, Inc.  
and Anthony Rosato and Stockton Forrest  
25 W. 43rd St.  
New York, NY 10036

Gentlemen:

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  
Larry J. Kushner  
11 Park Place  
New York, NY 10007  
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

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In the Matter of the Petitions  
of  
FULTON NATIONAL GROUP, INC.  
ANTHONY ROSATO and STOCKTON FORREST : 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 June 1, 1971 through February 28,  
1975. :

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Petitioners, Fulton National Group, Inc., 25 West 43rd Street, New York, New York 10036, and Anthony Rosato, 1530 Palisades Avenue, Fort Lee, New Jersey 07024, and Stockton Forrest, 20 Retiro Lane, New Rochelle, New York, filed petitions 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 June 1, 1971 through February 28, 1975 (File Nos. 14157, 19787 and 19788).

A formal hearing was held before Edward L. Johnson, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on May 18, 1978 at 3:10 P.M., was continued at the same location on February 8, 1979 at 10:45 A.M. and June 19, 1979 at 1:15 P.M. and was concluded on January 31, 1980 at 9:20 A.M. Petitioners Fulton National Group, Inc. and Anthony Rosato appeared by Larry Jay Kushner, Esq. The Audit Division appeared by Peter Crotty, Esq. and Ralph J. Vecchio, Esq. (Samuel Freund and James Morris, Esqs., of counsel).

ISSUES

I. Whether consents dated May 8, 1975 and May 21, 1975 extending the period of limitation for assessment of sales and use taxes for the period June 1, 1971 through February 28, 1975 to March 19, 1976 (signed by Anthony Rosato as president of Fulton National Group, Inc.) were properly admitted



into evidence at the formal hearing.

II. Whether the Audit Division properly determined the amount of sales and use tax liability of the corporation for the period under review.

III. Whether petitioner Anthony Rosato is personally liable under the Tax Law, for sales and use taxes owed by the corporation.

IV. Whether the Audit Division improperly and arbitrarily selected petitioners for assessment of sales and use taxes.

FINDINGS OF FACT

1. Anthony Rosato, as president of Fulton National Group, Inc., executed a Consent Extending Period of Limitation for Assessment of Sales and Use Taxes under Articles 28 and 29 of the Tax Law, which extended the time for determination of taxes due for the period June 1, 1971 through February 28, 1975, to March 19, 1976.

2. On January 9, 1976, the Audit Division issued a Notice of Determination and Demand for Payment of Sales and Use Taxes against petitioners after audit for the period June 1, 1971 through February 28, 1975. The notice delineated the amount due as follows:

<u>Period Ended</u>	<u>Tax Due</u>	<u>Penalty &amp; Interest</u>	<u>Total Due</u>
8/31/71	\$ 454.08	\$ 254.28	\$ 708.36
11/30/71	379.97	201.38	581.35
2/29/72	786.63	393.32	1,179.95
5/31/72	615.53	289.30	904.83
8/31/72	759.29	334.09	1,093.38
11/30/72	1,623.95	665.83	2,289.77
2/28/73	1,209.00	495.42	1,668.42
5/31/73	2,065.58	722.95	2,788.53
8/31/73	1,644.48	526.23	2,170.71
11/30/73	2,556.64	1,278.32	3,834.96
2/28/74	1,859.63	874.03	2,733.66
5/31/74	1,965.08	825.33	2,790.41
8/31/74	2,045.45	736.36	2,781.81
11/30/74	2,571.79	771.54	3,343.33
2/28/75	3,504.06	840.97	4,345.03
Total	\$24,041.16	\$9,173.34	\$33,214.50

3. Fulton National Group, Inc. ("Fulton") was a New York corporation organized by petitioner Anthony Rosato in 1970 to purchase equipment and lease it to customers. The leases were financed through various banks which collected monthly payments from the lessees. If a lessee defaulted in his payments, the bank had recourse to Fulton for the unpaid balance.

4. Some banks collected sales tax on monthly installments and remitted the tax separately to Fulton. Others, such as Chase Manhattan, collected sales tax from lessees, but remitted only the net rent payment to Fulton. At the conclusion of the term of a lease, the lessee could obtain title by making a residual payment to Fulton. The audit disclosed that these residual payments had not been reported as sales by Fulton on its filed sales tax returns.

5. Both the auditor for the Audit Division and a certified public accountant who testified as to his audit of Fulton's business found that there were many errors and inconsistencies in its books. There were references to a complete lease register containing all the basic information concerning each lease -- such as what the equipment was, its cost, the amount due from the bank on the funding, the residuals held by the bank, if any, the note payable to the bank, the investment tax credit passed through, if any, the term of the lease and the advance lease payments. Neither the lease register nor transcripts from it were introduced in evidence at the hearing.

6. On audit, the auditor examined Fulton's workpapers in which it kept a running balance of taxable leases. For the test quarter ending May 31, 1974, the auditor examined all closed and current leases in Fulton's files. He computed an error rate of underreported taxable sales to reported sales. The error rate was applied to reported sales for the entire audit period. This procedure resulted in additional tax due of \$18,136.39.

The auditor found that payments on residuals had not been reported as taxable sales during the audit period. The amount of residual payments was \$33,147.10. The amount of additional tax determined due thereon was \$1,883.54.

Several lease agreements were found by the auditor in which the lessees were over-charged one percent in sales taxes. In those instances, Fulton had remitted the amount due in accordance with the statutory rate. One lessee had paid the correct sales tax due to Fulton, but Fulton had failed to report the amount. Sales taxes collected and not remitted to the State were assessed at \$1,575.34.

All fixed asset additions per Fulton's books were examined in detail for the entire audit period. The auditor found \$31,750.60 subject to unpaid sales or use tax amounting to \$2,222.55.

The auditor examined all expense purchases for the fiscal year December 1, 1973 through November 30, 1974 and found that expenses subject to sales or use tax amounted to \$1,211.15. This was .105 percent of sales for the period. Applying this error rate to gross sales reported on sales tax returns for the period June 1, 1971 through February 28, 1975, the auditor calculated that \$3,073.53 was subject to use tax amounting to \$223.34 in unpaid tax. Copies of the auditor's workpapers were given to Fulton's then secretary treasurer, Leonard Weiner. Where additional information and substantiation of claims of exemption were produced, the auditor's findings were adjusted to those set out hereinabove.

7. Petitioner Anthony Rosato had been an equipment leasing salesman for a number of years before he organized Fulton in 1970. Shortly after he organized the firm, he brought in Norman Siegal and Edward Fitzgerald as stockholders and officers. In 1973, Fulton made a public offering of capital stock. At that time, the seventy percent share of petitioner Anthony Rosato was diminished

to about thirty percent. He remained president and a director of the corporation.

Prior to the public offering of capital stock, checks signed by any one of the officers listed above were valid. After the company went public, the signatures of two of the three officers were required to issue a valid check. Petitioner Anthony Rosato had the authority to sign checks throughout the audit period.

8. Petitioner Anthony Rosato acted primarily as a salesman bringing in business; Norman Siegal was the accountant who handled payroll taxes, sales taxes and books of account; Edward Fitzgerald was the financial officer who dealt with banks in obtaining the necessary credit. While petitioner Anthony Rosato opened the mail, he distributed all credit matters to Fitzgerald and all tax matters to Siegal. Creditors to be paid and the amount and time of payment were left largely to Norman Siegal. Chase Manhattan Bank, which financed a major portion of the leases sold by petitioners, forced the resignation as officer of petitioner Anthony Rosato in September, 1975. Petitioner Anthony Rosato testified that he agreed with Chase Manhattan that he was a poor administrator. He did not know what taxes were owed or paid.

9. Notices of hearings held on the various continued dates were sent to all available addresses for Stockton Forrest. All were returned undelivered. He did not appear personally or by representative in the proceedings.

#### CONCLUSIONS OF LAW

A. That the Consent Extending the Period of Limitation for Assessment of Sales and Use Taxes under Articles 28 and 29 of the Tax Law executed by Anthony Rosato, as president of Fulton National Group, Inc. was valid to extend the period for making determination of sales and use tax for the period June 1, 1971 through February 28, 1975 to March 19, 1976. It was properly received in evidence at the formal hearing. The Notice of Determination and Demand for

Payment of Sales and Use Taxes Due was issued January 9, 1976, well within the time allowed.

B. That evidence presented at the hearing by the auditor from the Audit Division and a certified public accountant called by petitioners showed that Fulton's books and records were so full of errors and inadequacies as to provide an unreliable basis for determination of the tax due for the period under review. The auditor utilized Fulton's own records and sales tax returns filed to the extent possible, and applied the error rate derived from detailed audit of selected periods. This is within the mandate of section 1138 of the Tax Law that:

"(a) If a return required by this article is not filed, or if a return when filed is incorrect or insufficient, the amount of tax due shall be determined by the tax commission from such information as may be available."

The Audit Division properly determined the amount of sales and use tax liability of petitioners for the period under review.

C. That petitioner Anthony Rosato was the organizer of petitioner Fulton National Group, Inc; was president and a director during the entire audit period; was an authorized signatory on checks throughout the period; and as such was an officer under a duty to act for the corporation in collecting and paying over the tax required. He was a person required to collect the tax within the meaning of section 1131(1) of the Tax Law and was personally liable for the tax under section 1133(a) of the Tax Law. His selection by the Audit Division for assessment of unpaid sales and use taxes was proper and not arbitrary.

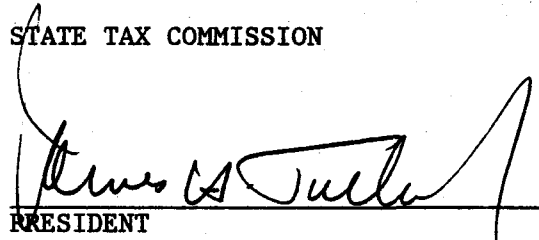
D. That petitioner Stockton Forrest did not answer or appear in the proceeding. The Notice of Determination No. 90,758,031 dated January 9, 1976 is sustained upon default.

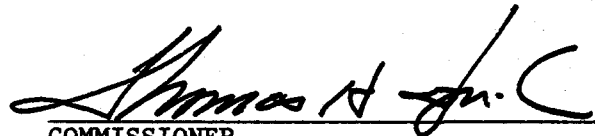
E. That the petitions of Fulton National Group, Inc., Anthony Rosato and Stockton Forrest, individually and as officers, are denied in all respects and the Notice of Determination dated January 9, 1976 is sustained.

DATED: Albany, New York

JAN 09 1981

STATE TAX COMMISSION

  
RESIDENT

  
COMMISSIONER

  
COMMISSIONER

STATE OF NEW YORK  
STATE TAX COMMISSION

In the Matter of the Petition  
of  
J.N. Futia Co., Inc.

:

:

: AFFIDAVIT OF MAILING

for Redetermination of a Deficiency or a Revision :  
of a Determination or a Refund of :  
Sales & Use Tax :  
under Articles 28 & 29 of the Tax Law :  
for the Period 9/1/73 - 11/30/76. :

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 1st day of May, 1981, he served the within notice of Decision by mail upon J.N. Futia Co., Inc., the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

J.N. Futia Co., Inc.  
178 Catherine St.  
Albany, NY 12202

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  
1st day of May, 1981.

*Anne A. Hazelund*

*J. Vredenburg*

STATE OF NEW YORK  
STATE TAX COMMISSION

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In the Matter of the Petition :  
of :  
J.N. Futia Co., Inc. :  
: AFFIDAVIT OF MAILING  
for Redetermination of a Deficiency or a Revision :  
of a Determination or a Refund of :  
Sales & Use Tax :  
under Articles 28 & 29 of the Tax Law :  
for the Period 9/1/73 - 11/30/76. :

---

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 1st day of May, 1981, he served the within notice of Decision by mail upon Prescott C. Sook, the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Prescott C. Sook  
35 State Street  
Albany, NY 12207

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  
1st day of May, 1981.

*James R. Haylund*

*J. Vredenburg*



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

May 1, 1981

J.N. Futia Co., Inc.  
178 Catherine St.  
Albany, NY 12202

Gentlemen:

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  
Prescott C. Sook  
35 State Street  
Albany, NY 12207  
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

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In the Matter of the Petition	:	
of	:	
J. N. FUTIA CO., INC.	:	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	:	
November 30, 1976.	:	

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Petitioner, J. N. Futia Co., Inc., 178 Catherine Street, Albany, New York 12202, 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 November 30, 1976 (File No. 19834).

A formal hearing was held before Jerome M. Hesch, Hearing Officer, at the offices of the State Tax Commission, Building 9, State Campus, Albany, New York, on July 9, 1979 at 1:00 P.M. and was continued on July 16, 1979 at 1:00 P.M. Petitioner appeared by Prescott C. Sook, Esq. The Audit Division appeared by Peter Crotty, Esq. (Patricia L. Brumbaugh, Esq., of counsel).

ISSUE

Whether applicant's purchases of materials used in the performance of a capital improvement contract for a tax exempt organization was exempt from the sales tax.

FINDINGS OF FACT

1. Petitioner, J. N. Futia Co., Inc., timely filed New York State sales and use tax returns for the period September 1, 1973 through November 30, 1976.

2. A Consent Extending the Period of Limitation for Assessment was timely executed on December 10, 1976, extending the period for assessment to on or before May 31, 1977.

3. A Notice of Determination and Demand for Payment of Sales and Use Taxes Due for the period September 1, 1973 through November 30, 1976 was issued on May 31, 1977 for taxes due of \$37,950.41, plus penalties and interest.

4. Based on additional information submitted by petitioner, the amounts of \$15,266.40 and \$2,100.98 in sales taxes assessed were cancelled and petitioner agreed to pay \$9,338.59 of the sales taxes assessed. Taxes in the amount of \$11,244.44 remain in issue.

5. Petitioner entered into a contract on April 26, 1974 with the United States Army Engineer District for the renovation of certain barracks at the United States Military Academy at West Point, New York.

6. Petitioner conceded that the contract was for a lump sum and did not separately identify charges for labor and materials.

7. The contract price was formulated as a result of acceptance of a bid submitted by petitioner.

8. The bid price submitted by petitioner was based upon petitioner's estimate of the cost of labor and materials needed to perform the renovation work. Petitioner did not include as a cost in its bid price sales taxes on the materials purchased for incorporation in the capital improvements.

9. Petitioner was not allowed by the tax exempt organization to include sales taxes on materials as a cost of the renovations.

#### CONCLUSIONS OF LAW

A. That an intention by a tax exempt organization to benefit from the exemption from sales taxes provided under section 1115(a) (15) of the Tax Law

in the form of a reduced price for the capital improvement contracted for will exempt the purchase of materials by the contractor from the sales tax if the materials are incorporated into the capital improvement. Matter of Briggs v. Page, 15 A.D.2d 34 (3rd Dept. 1961).

B. That the U.S. Army Engineer District is a tax exempt organization which intended to benefit from the sales tax exemption for the purchase of materials by the contractor because the exemption resulted in a lower cost for the capital improvement. Moreover, the materials at issue were incorporated into the capital improvements. Accordingly, the purchases were exempt from tax.

C. That the petition of J. N. Futia Co., Inc. is granted and the notice of determination, as revised, is cancelled.

DATED: Albany, New York  
MAY 01 1981

STATE TAX COMMISSION

  
PRESIDENT

  
COMMISSIONER

  
COMMISSIONER