

STATE OF NEW YORK

STATE TAX COMMISSION

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In the Matter of the Petition :  
of :  
Colin Higgins :  
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 Year :  
1977.

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State of New York  
County of Albany

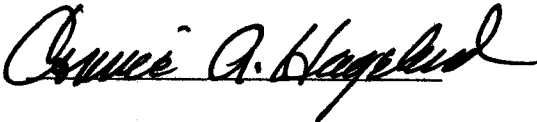
Jay Vredenburg, being duly sworn, deposes and says that he is an employee of the Department of Taxation and Finance, over 18 years of age, and that on the 6th day of November, 1981, he served the within notice of Decision by certified mail upon Colin Higgins, the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

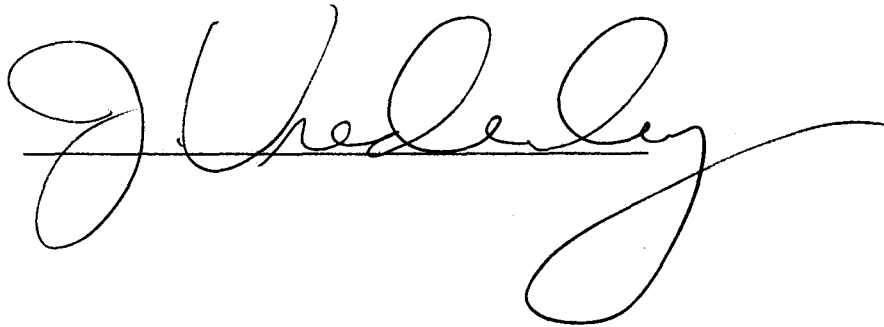
Colin Higgins  
191 Delaware Avenue  
Freeport, NY 11520

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  
6th day of November, 1981.





STATE OF NEW YORK  
STATE TAX COMMISSION

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AFFIDAVIT OF MAILING

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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 6th day of November, 1981, he served the within notice of Decision by certified mail upon Leonard Taubenblatt the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Leonard Taubenblatt  
Taubenblatt and Mopper  
217 Broadway  
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  
6th day of November, 1981.

*Carrie A. Hayward*

*J. Vredenburg*

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

November 6, 1981

Colin Higgins  
191 Delaware Avenue  
Freeport, NY 11520

Dear Mr. Higgins:

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  
Leonard Taubenblatt  
Taubenblatt and Mopper  
217 Broadway  
New York, NY 10007  
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

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In the Matter of the Petition  
of  
COLIN HIGGINS  
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 1977.

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DECISION

Petitioner, Colin Higgins, presently residing at 191 Delaware Avenue, Freeport, New York 11520, 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 1977 (File No. 21772).

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 December 9, 1980 at 9:15 A.M. Petitioner appeared by Leonard Taubenblatt, Esq. The Audit Division appeared by Ralph J. Vecchio, Esq. (Angelo Scopellito, Esq., of counsel).

ISSUE

Whether petitioner, Colin Higgins, was a person required to collect tax under the provisions of section 1131(1) of the Tax Law and therefore personally liable for sales taxes of Scolnick Brothers, Inc. under the provisions of section 1133(a) of the Tax Law.

FINDINGS OF FACT

1. Scolnick Brothers, Inc. filed a sales and use tax return for the period September 1, 1975 through November 30, 1975 showing sales tax due of \$2,451.12. No remittance was sent along with the return filed. A sales and use tax return was filed for the period December 1, 1975 through February 29,

1976 showing sales tax due of \$716.08. The check submitted with the return was later returned unpaid due to insufficient funds. Notices and demand for payment of sales and use taxes due were issued against Scolnick Brothers, Inc. on February 20, 1976 and April 30, 1976 to recover the taxes reported due with penalties and interest.

2. On September 7, 1976, a Notice and Demand for Payment of Sales and Use Taxes Due was issued against petitioner, Colin Higgins, as secretary, Ronald Thomas, president, Francisco Jon, vice-president, and Ewan L. Dawes, treasurer. The Notice was issued for tax due of \$3,167.14, plus penalties and interest, covering the aforesaid periods.

3. On September 28, 1976, a warrant was issued against Colin Higgins, and the other officers, asserting liability for sales taxes, penalty and interest due of \$3,757.60. On March 29, 1977, petitioner sold his property at 1919 Bedford Avenue, Brooklyn, New York, and the lien was satisfied with proceeds from the sale.

4. On July 6, 1977, petitioner filed an Application for Credit or Refund of State and Local Sales or Use Tax in the amount of \$3,757.60 on the grounds that he was an absentee officer of Scolnick Brothers, Inc. and was only an investor.

5. The Audit Division denied petitioner's claim for refund on December 20, 1977 on the grounds that petitioner held the office of secretary of the corporation and was designated as signatory of checks pursuant to the stockholders agreement.

6. Petitioner contributed a total sum of \$4,475.00 for a capital stock interest in Scolnick Brothers, Inc. and Ronnie's Foreign Car Repairs, Inc. on June 10, 1975. His contribution represented an approximate 18 percent interest in the corporations. On that date, he was elected, along with four other

contributing parties, to the Board of Directors and also as secretary of the corporations. Pursuant to the stockholders agreement, the corporations' checks were to be honored over the signatures of any two of the five contributing parties provided that one of the signatures on the checks was either petitioner Colin Higgins or Ewan L. Dawes, the treasurer of the corporations. Petitioner never exercised his right to sign checks.

7. Since 1969, and through the period in issue, petitioner was employed full time as a staff accountant by Superior Printing Ink Company, Inc. Petitioner was not employed by Scolnick Brothers, Inc. nor had any knowledge of its finances. Petitioner did not have any say over the day to day operations of Scolnick Brothers, Inc. nor did he have any say over which bills would be paid. The books and records of Scolnick Brothers, Inc. were kept by Ewan L. Dawes who was also an accountant. The sales and use tax returns filed by Scolnick Brothers, Inc. were signed by Ewan L. Dawes as treasurer.

8. In support of his petition, petitioner submitted a copy of a refund check issued to him by the Internal Revenue Service purported to be withholding taxes seized under the same circumstances.

#### CONCLUSIONS OF LAW

A. That section 1133(a) of the Tax Law provides that every person required to collect tax imposed by Article 28 of the Tax Law shall be personally liable for tax imposed, collected, or required to be collected.

B. That section 1131(1) of the Tax Law in defining persons required to collect tax, includes those corporate officers who are under a duty to act for such corporation in complying with any requirement of Article 28 of the Tax Law.

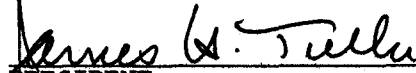
C. That petitioner was not an officer under a duty to act for Scolnick Brothers, Inc. in complying with the requirements of Article 28 of the Tax Law. Petitioner was not involved in the operation and management of Scolnick Brothers, Inc. nor was he employed by said corporation. Further, the holding of corporate office does not, per se, impose liability upon the office holder where that person is not responsible for the payment of tax as a result of having or showing final word as to which bills should or should not be paid. (Chevlowe v. Koerner, 95 Misc 2d 388, 407 N.Y.S.2d 427).


D. That the petition of Colin Higgins is granted, and the Audit Division is hereby directed to refund the amount of \$3,757.60 to petitioner as provided by section 1139 of the Tax Law.


DATED: Albany, New York

NOV 06 1981

STATE TAX COMMISSION

  
PRESIDENT

  
COMMISSIONER

  
COMMISSIONER