

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of :
Anna Manzella (Purchaser) :
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: :
3/1/74 - 2/28/77. :

AFFIDAVIT OF MAILING

State of New York
County of Albany

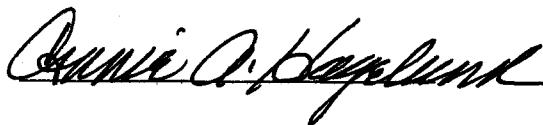
Jay Vredenburg, being duly sworn, deposes and says that he is an employee of the Department of Taxation and Finance, over 18 years of age, and that on the 20th day of November, 1981, he served the within notice of Decision by certified mail upon Anna Manzella (Purchaser), the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

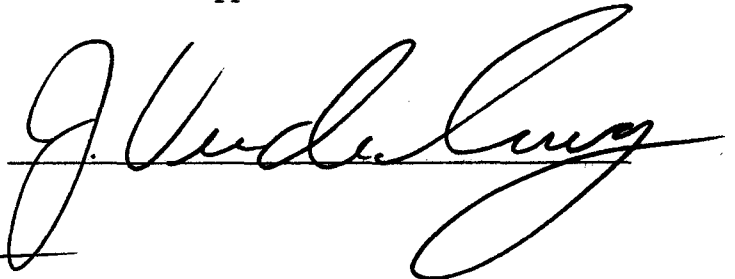
Anna Manzella (Purchaser)
1690 Bushwick Avenue
Merrick, NY 11566

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
20th day of November, 1981.





STATE OF NEW YORK
STATE TAX COMMISSION

In the Matter of the Petition :
of :
Anna Manzella (Purchaser) :
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 3/1/74 - 2/28/77.

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 20th day of November, 1981, he served the within notice of Decision by certified mail upon Morris B. Cohn the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Morris B. Cohn
80-42 168th Street
Jamaica, NY 11432

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
20th day of November, 1981.

Annice P. Hagelund

J. Vredenburg

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

November 20, 1981

Anna Manzella (Purchaser)
1690 Bushwick Avenue
Merrick, NY 11566

Dear Ms. Manzella:

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
Morris B. Cohn
80-42 168th Street
Jamaica, NY 11432
Taxing Bureau's Representative

STATE OF NEW YORK
STATE TAX COMMISSION

In the Matter of the Petition	:	
of	:	
ANNA MANZELLA (Purchaser)	:	
for Revision of a Determination or for Refund	:	CORRECTED
of Sales and Use Taxes under Articles 28 and	:	DECISION
29 of the Tax Law for the Period March 1, 1974	:	
through February 28, 1977.	:	

Petitioner, Anna Manzella (Purchaser), 1690 Bushwick Avenue, Merrick, New York 11566, filed an application 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, 1974 through February 28, 1977 (File No. 21870).

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 August 14, 1979 at 10:45 A.M. Applicant appeared by Morris Cohn, Esq. The Audit Division appeared by Peter Crotty, Esq. (Abraham Schwartz, Esq., of counsel).

ISSUES

- I. Whether payments by petitioner of the debts and taxes owed by the seller constituted part of the purchase price of business assets.
- II. Whether the results of the audit performed on the seller were correct.
- III. Whether the penalties and interest applicable to the seller were properly asserted against the purchaser.
- IV. Whether the State is barred from making an additional assessment against a seller and a purchaser for a period for which a warrant was filed and satisfied.

FINDINGS OF FACT

1. On March 16, 1977, petitioner notified the Audit Division of its purchase on March 9, 1977 of the business known as Jimmy's Stationery sold by Marion E. Braun. The purchase price of the business was stated as \$5,500.00.
2. On August 29, 1977, the Audit Division issued a Notice and Demand for Payment of Sales and Use Taxes Due for the period March 1, 1974 through February 28, 1977 against petitioner, Anna Manzella (Purchaser), for \$4,869.61 tax, plus penalties and interest. The Notice was issued as a result of a field audit of the seller's business and represented petitioner's liability as purchaser under section 1141(c) of the Tax Law.
3. The Notice was reduced by the Audit Division on February 27, 1978 to tax due of \$2,527.11, plus penalties and interest of \$1,611.95. Petitioner protested the initial Notice on November 25, 1977.
4. The seller's records were not sufficient to verify the exact amount of tax; therefore, the Audit Division based its assessment on a markup of the seller's purchases for the test period January 1 through September 15, 1975. The taxable purchases were later adjusted by the Audit Division. The taxable sales reported by the seller were deducted from the audited taxable sales and the difference held subject to tax.
5. Pursuant to an agreement executed by petitioner and the seller, the purchase price of the business (\$5,500.00) was distributed to creditors and the State of New York in payment of debts and taxes owed. Business assets at the time of sale included \$300.00 in inventory and \$600.00 in furniture and fixtures.
6. Petitioner contended that the amount of her liability should be limited to \$900.00 since that was the amount of business assets purchased. She

contended that the distribution of purchase money to the seller's creditors was not for business assets.

7. At the hearing, the seller's representative testified that the business had declined and that the test period used on audit was not indicative of later periods. A purchase invoice and a statement were submitted from two suppliers; however, they were not conclusive as to the seller's overall activity for the period involved.

8. For the period March 1, 1974 through February 29, 1976, the State Tax Commission issued warrants against the seller, Marion Braun d/b/a Jimmy's Stationery. Said warrants, which represented taxes shown due on sales tax returns filed by the seller, were filed with the county clerk for Nassau County and entered into the judgment docket.

All of the above warrants were satisfied including that for the period June 1, 1975 through February 29, 1976 which was satisfied on March 10, 1977 by a check from the petitioner in the amount of \$1,146.90.

9. Petitioner contended that errors existed in the crediting of tax paid through satisfaction of warrants issued against the seller. Petitioner did not submit any documentary evidence to show that the contended errors had any effect on the audit results.

10. Petitioner contended that the penalties and interest were applicable only to the seller.

CONCLUSIONS OF LAW

A. That section 1141(c) of the Tax Law provides that a purchaser may be held liable for the payment of taxes determined due from the seller, limited to an amount not in excess of the purchase price or fair market value of the business assets sold, whichever is higher.

B. That the purchase price of the business known as Jimmy's Stationery was \$5,500.00, regardless of the distribution of the consideration; and that the limitation of the purchaser's liability encompasses intangible, as well as tangible, business assets sold. That, accordingly, payments by petitioner of the debts and taxes owed by the seller constituted part of the purchase price of business assets.

C. That the records of the seller were not adequate for determining an exact amount of tax; and that the audit performed on the seller's books and records by the Audit Division was in accordance with section 1138(a) of the Tax Law.

D. That section 1145(a)(3) of the Tax Law states in part that, "Unpaid penalties and interest may be determined, assessed, collected and enforced in the same manner as the tax imposed by this article." That the petitioner was properly assessed for penalties and interest applicable to the seller in accordance with sections 1141(c) and 1145(a)(3) of the Tax Law.

E. That Articles 28 and 29 of the Tax Law which authorize the imposition of the Sales and Compensating Use Taxes do not bar the State Tax Commission from making an additional assessment against a seller and a purchaser for a period for which a warrant was filed and satisfied.

That section 1138(a) of the Tax Law provides that where a return is not filed or is incorrectly filed, the State Tax Commission may issue a notice of determination to the person liable for the collection or payment of the tax.

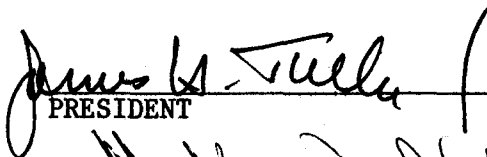
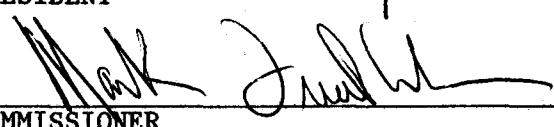
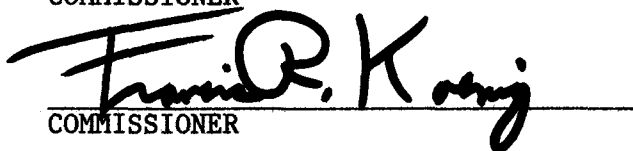
That section 1141(b) of the Tax Law merely provides for an additional or alternate remedy for the State Tax Commission to collect taxes from a person liable for collection or payment thereof by the issuing and filing of a warrant.

F. That the petition of Anna Manzella (Purchaser) is denied; and the Notice and Demand for Payment of Sales and Use Taxes Due issued August 29, 1977 and revised on February 27, 1978 is sustained.

DATED: Albany, New York

STATE TAX COMMISSION

NOV 20 1981


PRESIDENT

COMMISSIONER

COMMISSIONER