

STATE OF NEW YORK

STATE TAX COMMISSION

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In the Matter of the Petition :  
of :  
Mar-Ber Enterprises, Inc. :  
and Steven Margolis and Richard Berman, :  
Indiv. & as Officers : 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 - 5/31/76.

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State of New York  
County of Albany

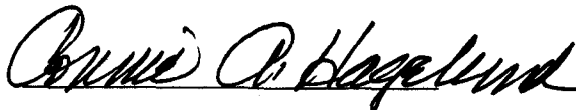
Jay Vredenburg, being duly sworn, deposes and says that he is an employee of the Department of Taxation and Finance, over 18 years of age, and that on the 27th day of November, 1981, he served the within notice of Decision by certified mail upon Mar-Ber Enterprises, Inc., and Steven Margolis and Richard Berman, Indiv. & as Officers the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

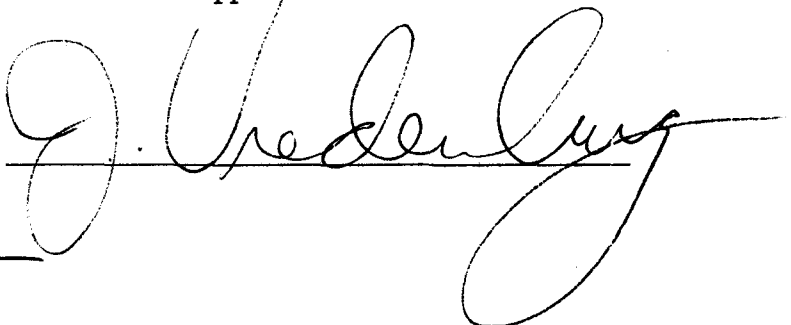
Mar-Ber Enterprises, Inc.  
and Steven Margolis & Richard Berman, Indiv. & as Officers  
13-34 Bay 24th St.  
Far Rockaway, NY 11691

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  
27th day of November, 1981.

  
Commissioner of Taxation and Finance

  
Jay Vredenburg

STATE OF NEW YORK  
STATE TAX COMMISSION

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of :  
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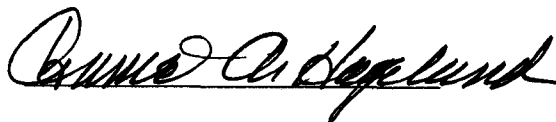
Jay Vredenburg, being duly sworn, deposes and says that he is an employee of the Department of Taxation and Finance, over 18 years of age, and that on the 27th day of November, 1981, he served the within notice of Decision by certified mail upon David S. Jacobs the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

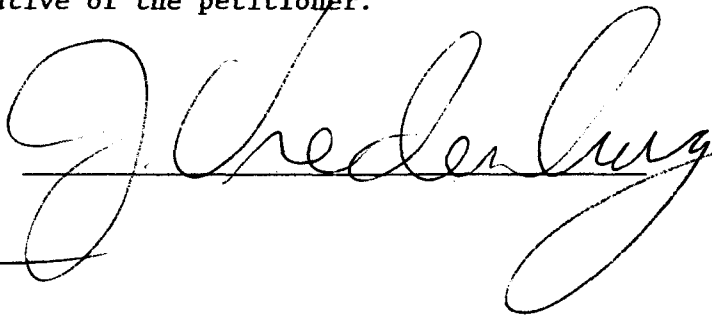
David S. Jacobs  
Schulman & Laifer  
166 Montague St.  
Brooklyn, NY 11201

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  
27th day of November, 1981.





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

November 27, 1981

Mar-Ber Enterprises, Inc.  
and Steven Margolis & Richard Berman, Indiv. & as Officers  
13-34 Bay 24th St.  
Far Rockaway, NY 11691

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  
David S. Jacobs  
Schulman & Laifer  
166 Montague St.  
Brooklyn, NY 11201  
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

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In the Matter of the Petition	:	
of	:	
MAR-BER ENTERPRISES, INC. and	:	
STEVEN MARGOLIS AND RICHARD BERMAN	:	DECISION
Individually and as Officers	:	
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 May 31, 1976.	:	

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Petitioners, Mar-Ber Enterprises, Inc., and Steven Margolis and Richard Berman, individually and as officers of Mar-Ber Enterprises, Inc., 13-34 Bay 24th Street, Far Rockaway, New York 11691, filed a petition for revision of a determination of tax due or for refund of sales and use taxes under Articles 28 and 29 of the Tax Law for the period March 1, 1974 through May 31, 1976 (File No. 17152).

A formal hearing was held before Archibald F. Robertson, Jr., Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on October 31, 1979 at 2:00 P.M. Petitioners Mar-Ber Enterprises, Inc., and Steven Margolis, did not appear nor did anyone appear on their behalf. Petitioner Richard Berman appeared by Schulman & Laifer, Esqs. (David S. Jacobs, Esq., of counsel). The Audit Division appeared by Peter Crotty, Esq. (Frank Levitt, Esq., of counsel).

ISSUES

I. Whether the perfected petition, which did not refer to petitioner Richard Berman in any way, may, by extrinsic proof, be treated as his petition as well as that of petitioners Steven Margolis and Mar-Ber Enterprises, Inc.,

in which corporation Mr. Berman was alleged by the Audit Division to be an officer.

II. Whether petitioner Richard Berman was the secretary of petitioner Mar-Ber Enterprises, Inc., and liable for the payment of the corporation's sales taxes.

#### FINDINGS OF FACT

1. Petitioners Mar-Ber Enterprises, Inc., ("Mar-Ber") and Steven Margolis failed to appear in person, by representative, or by any communication at any time during the hearing.

2. Mar-Ber operated a retail cigarette, cigar and candy store during the period herein involved. The business was audited for the periods from March 1, 1974 through May 31, 1976, and petitioners were assessed additional sales taxes in the amount of \$22,351.13, exclusive of penalties and interest.

3. Petitioners received at Mar-Ber's business address, 125 Third Avenue, New York, New York 10003, a Notice of Determination and Demand for Payment of Sales and Use Taxes Due dated October 15, 1976, in the basic amount of \$22,351.13, issued to Mar-Ber and Steven Margolis and R. Berman, individually and as officers of Mar-Ber.

4. No issue of fraud has been raised at any stage of the matter involved herein.

5. Petitioner Richard Berman does not question the audit as such but only his inclusion in the notice of determination and demand as one liable for additional taxes.

6. A perfected petition was received by the Tax Appeals Bureau. Said petition indicated the petitioner to be Mar-Ber and was signed by petitioner

Steven Margolis without stating his relationship to Mar-Ber and without mention of petitioner Richard Berman.

7. Petitioner Richard Berman after the filing of the perfected petition, addressed to the Tax Appeals Bureau letters asserting that he had never been an officer, director or stockholder of Mar-Ber.

8. Petitioner Richard Berman testified he was employed as a clerk by Mar-Ber and was paid weekly, on an hourly basis. He was an authorized signatory for a checking account, but the resolution filed with the bank (Exhibit A) did not indicate he was an officer. Steven Margolis signed the resolution as President, Secretary and Treasurer. Mr. Berman testified he signed checks at Mr. Margolis' request, but never signed checks for the corporation in payment of taxes and never signed or filled out tax returns.

9. The Certificate of Incorporation of Mar-Ber was signed by Steven Margolis as the only incorporator, as is authorized by section 401 of the Business Corporation Law.

10. Richard Berman was questioned during cross-examination about a contract of sale of the business operated as Mar-Ber from Jack Radisher to Steven Margolis and Julius H. Berman. Richard Berman stated that Julius H. Berman is his father, that he did not think he was an officer or had an interest in the business, but may have made a loan to Mr. Margolis.

11. No testimony was adduced at the hearing as to the collection of sales tax from customers.

12. Exhibit 14 consists of an unsigned copy of a United States Corporation Tax Return, Form 1120, for 1975, for Mar-Ber. Schedule E of the return lists Richard Berman as Secretary and Steven Margolis as President of the corporation

and indicates a payment to each of \$500.00. The return shows no payment of salaries.

13. Mr. Eugene Reynolds, tax auditor, testified under oath that Form 1120 as described in Finding of Fact "12" was delivered to him by a Mr. Burton Joseph, who identified himself as a Certified Public Accountant and as the auditor of record for Mar-Ber, during the period herein involved, and that Mr. Joseph came to the office of the sales tax auditor following petitioner Steven Margolis' promise that Mar-Ber's accountant would contact Mr. Reynolds. Mr. Joseph, in response to the sales tax auditor's inquiry as to the identity of the executive officers of Mar-Ber, named petitioner Steven Margolis as President and petitioner Richard Berman as Secretary of petitioner Mar-Ber Enterprises, Inc. Mr. Reynolds further testified that the only reasons for listing Mr. Berman as secretary of the corporation on the audit report were the listing on the Federal return and Mr. Joseph's statement.

#### CONCLUSIONS OF LAW

A. That the perfected petition filed was amended by the letters of petitioner Richard Berman. Therefore, petitioner Richard Berman is a party to the proceeding before the Tax Commission,

B. That section 1133(a) of the Tax Law provides, in part, that every person required to collect any tax imposed by this article shall be personally liable for the tax imposed.

C. That section 1131(1) of the Tax Law defines "person required to collect tax:

"to include any officer or employee of a corporation who as such officer or employee is under a duty to act for such corporation in complying with any requirement of this article".

D. That petitioner Richard Berman is not "a person required to collect tax" pursuant to sections 1131(1) and 1133(a) of the Tax Law.

E. That the petition of Richard Berman is granted.

F. That petitioners Mar-Ber Enterprises, Inc., and Steven Margolis defaulted, and, accordingly their petition is denied.

G. That the Notice of Determination and Demand for Payment of Sales and Use Taxes Due issued October 15, 1976, is sustained with respect to Mar-Ber Enterprises, Inc. and Steven Margolis with penalties and interest to the date of payment.

DATED: Albany, New York

NOV 27 1981

STATE TAX COMMISSION

  
PRESIDENT

  
COMMISSIONER

  
COMMISSIONER