

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of :
Merrick Road Auto Clinic, Inc. :
and Allen Lamberg, Indiv. & as Officer :
: 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 :
Periods 3/74-5/75 & 3/76-11/76. :

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 30th day of October, 1981, he served the within notice of Decision by certified mail upon Merrick Road Auto Clinic, Inc. and Allen Lamberg, Indiv. & as Officer the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Merrick Road Auto Clinic, Inc.
and Allen Lamberg, Indiv. & as Officer
1 Lark Place
Hauppauge, NY 11787

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
30th day of October, 1981.

James A. Heglund

J. Vredenburg

STATE OF NEW YORK
STATE TAX COMMISSION

In the Matter of the Petition :
of :
Merrick Road Auto Clinic, Inc. :
and Allen Lamberg, Indiv. & as Officer :
: AFFIDAVIT OF MAILING
for Redetermination of a Deficiency or a Revision
of a Determination or a Refund of Sales & Use Tax :
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State of New York
County of Albany

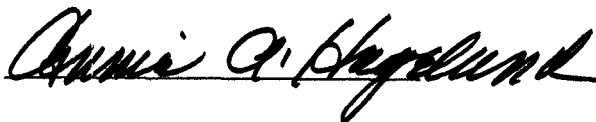
Jay Vredenburg, being duly sworn, deposes and says that he is an employee of the Department of Taxation and Finance, over 18 years of age, and that on the 30th day of October, 1981, he served the within notice of Decision by certified mail upon Michael I. Asen the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

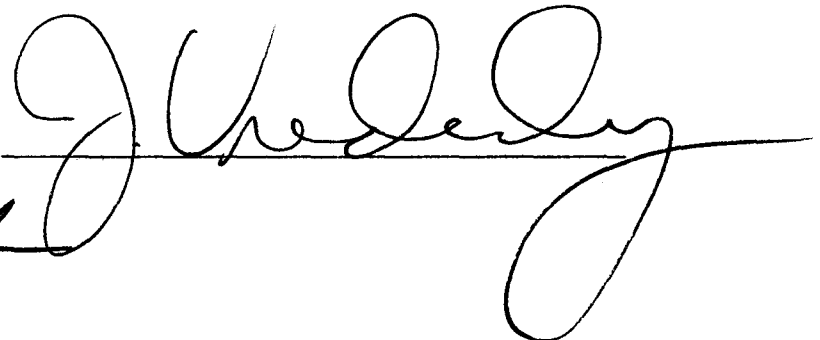
Michael I. Asen
Finger, Goldberg, Zinner & Asen
One Penn Plaza, Suite 5026
New York, NY 10119

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
30th day of October, 1981.


Dennis G. Heglund


Jay Vredenburg

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

October 30, 1981

Merrick Road Auto Clinic, Inc.
and Allen Lamberg, Individ. & as Officer
1 Lark Place
Hauppauge, NY 11787

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
Michael I. Asen
Finger, Goldberg, Zinner & Asen
One Penn Plaza, Suite 5026
New York, NY 10119
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition
of
MERRICK ROAD AUTO CLINIC, INC.
and
ALLEN LAMBERG, INDIVIDUALLY AND AS OFFICER
for Revision of a Determination or for Refund
of Sales and Use Taxes under Articles 28 and
29 of the Tax Law for the Periods March 1,
1974 through May 31, 1975 and March 1, 1976
through November 11, 1976.

DECISION

Petitioners, Merrick Road Auto Clinic, Inc. and Allen Lamberg, 1 Lark Place, Hauppauge, New York 11787, 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 periods March 1, 1974 through May 31, 1975 and March 1, 1976 through November 11, 1976 (File No. 21567).

A small claims hearing was held before Arthur Johnson, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on April 28, 1981, at 1:15 P.M. Petitioners appeared by Michael Ira Asen, Esq. The Audit Division appeared by Ralph J. Vecchio, Esq. (William Fox, Esq., of counsel).

ISSUES

I. Whether the Audit Division properly estimated the taxable sales of Merrick Road Auto Clinic, Inc. for the period March 1, 1974 through May 31, 1975.

II. Whether petitioner, Allen Lamberg, is personally liable for sales taxes due from Merrick Road Auto Clinic, Inc. for the period March 1, 1974 through November 11, 1976.

FINDINGS OF FACT

1. Petitioner, Merrick Road Auto Clinic, Inc. (Merrick) operated an automobile repair business located at 2345 Merrick Road, Bellmore, New York.

2. On June 2, 1977, the Audit Division issued a Notice of Determination and Demand for Payment of Sales and Use Taxes Due against Merrick Road Auto Clinic, Inc. for the period March 1, 1974 through May 31, 1975 for taxes due of \$4,355.55, plus penalty and interest of \$2,303.76, for a total of \$6,659.31. Said notice was issued as a result of petitioner's failure to respond to a bulk sale questionnaire and was based on a review of sales tax returns filed. On the same date, a notice was issued against petitioner Allen Lamberg and Theodore Kogan and Harry Birch, individually and as officers of Merrick, for taxes due of \$17,500.65, plus penalty and interest of \$5,251.02, for a total of \$22,751.65 covering the period March 1, 1974 through November 11, 1976.

3. On December 3, 1976 the Audit Division received a Notification of Sale, Transfer or Assignment in bulk from Merrick indicating that the business was sold to John Mac's Action Automotive Specials, Inc.

4. The Audit Division sent a Notice to the Seller, dated March 11, 1977 addressed to Merrick's attorney requesting that a questionnaire be completed and returned. When no response was received, the Division issued the notices referred to in Finding of Fact "2". The taxes of \$4,355.55 assessed against Merrick for the period March 1, 1974 through May 31, 1975 were based on estimated taxable sales of \$35,000.00 for each filing period. The Audit Division also estimated the taxes assessed against the individual officers of Merrick for the period March 1, 1976 through November 11, 1976.

5. Merrick leased the business premises from Charles Henning in August, 1973. The lease ran to November, 1980. In March, 1975, Merrick sublet the premises to Sonny Feldman on a month to month basis. Feldman agreed to pay the

rent and the note payments due on the equipment. Feldman defaulted on the payments and was evicted in November, 1975. In December, 1975, Merrick leased the premises to Gene Merkel and Caspar Russo who subsequently formed Great Bay Automotive, Inc. and conducted business on the premises until the business was sold by Merrick. Merrick ceased business operations as an automobile repair shop in March, 1975. Merrick filed a sales tax return for the period ending May 31, 1975 showing taxable sales of \$10,341.00. Thereafter, returns were filed indicating that there were no sales.

6. Petitioner, Allen Lamberg, argued that the books and records of Merrick's business activities could not be furnished to the Audit Division because they were stored on the premises and when he went there in November, 1976 to retrieve the records, they were missing. Subsequent attempts to locate the records were unsuccessful.

7. Petitioner Allen Lamberg was the president of Merrick. He signed the sales tax returns filed by Merrick and was aware that outstanding sales taxes were due New York State. Petitioner Allen Lamberg has personally satisfied the unpaid sales taxes reported on returns filed by Merrick.

8. The Audit Division received a payment of \$640.00 from Frank X. Kilgannon, the attorney for John Mac's Action Automotive Specials, Inc. Said payment was to be applied toward the notice issued to Merrick.

9. Petitioners acted in good faith at all times.

CONCLUSIONS OF LAW

A. That section 1138(a) of the Tax law provides, in part, that 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. If necessary, the tax may be estimated on the basis of external indices... That since books and

records were not available to verify the accuracy of reported sales, the Audit Division's estimate based on previous returns filed was proper in accordance with section 1138(a) of the Tax Law. However, Merrick ceased business operations in March, 1975 and that the return filed for the period ended May 31, 1975 showing sales of \$10,341.00 for the month of March was correct. Accordingly, the additional taxes asserted for said period of \$1,726.13 are cancelled.

B. That petitioner, Allen Lamberg, was a "person required to collect tax" for the period March 1, 1974 through March 31, 1975 within the meaning and intent of section 1131(1) of the Tax Law; therefore, he is personally liable for the tax determined due from Merrick pursuant to section 1133(a) of the Tax Law. However, the taxes assessed against Allen Lamberg for the period March 1, 1976 through November 11, 1976 are cancelled since Merrick was not conducting business during said period.

C. That the petition of Merrick Road Auto Clinic, Inc. and Allen Lamberg is granted to the extent indicated in Conclusions of Law "A" and "B"; that the Audit Division is hereby directed to modify the notices of determination and demand for payment of sales and use taxes due issued June 2, 1977 and apply the payment referred to in Finding of Fact "8" to such modified notice; and that, except as so granted, the petition is in all other respects denied.

DATED: Albany, New York

OCT 30 1981

STATE TAX COMMISSION


PRESIDENT


COMMISSIONER


COMMISSIONER