

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of :
Orrin Creations, Inc. :

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 - 5/31/77.

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 11th day of December, 1981, he served the within notice of Decision by certified mail upon Orrin Creations, Inc., the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Orrin Creations, Inc.
c/o Orin Schiller, Pres.
61-14 170th Street
Freshmeadow, NY 11365

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
11th day of December, 1981.

Gunnar A. Hagelund

J. Vredenburg

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

December 11, 1981

Orrin Creations, Inc.
c/o Orin Schiller, Pres.
61-14 170th Street
Freshmeadow, NY 11365

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

Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition	:	
of	:	
ORRIN CREATIONS, 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 March 1, 1974	:	
through May 31, 1977.	:	

Petitioner, Orrin Creations, Inc., c/o Orrin Schiller, 61-14 170th Street, Fresh Meadows, New York 11365, 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 March 1, 1974 through May 31, 1977 (File No. 20753).

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 29, 1981 at 9:15 A.M. Petitioner appeared by Orrin Schiller, President. The Audit Division appeared by Ralph J. Vecchio, Esq. (Samuel Freund, Esq., of counsel).

ISSUES

I. Whether the Audit Division properly determined that certain sales recorded in petitioner's books and records as cash sales were subject to tax, and if so,

II. Whether petitioner's president, Orrin J. Schiller's personal liability for payment of such taxes was discharged in bankruptcy.

FINDINGS OF FACT

1. Petitioner, Orrin Creations, Inc., was engaged in the manufacture and sale of leather and suede apparel.

2. On August 16, 1977, the Audit Division issued a Notice of Determination and Demand for Payment of Sales and Use Taxes Due against petitioner and Orrin J. Schiller and Arlene Schiller individually and as officers for the period March 1, 1974 through May 31, 1977 for taxes due of \$68,930.55 plus penalty and interest of \$27,872.50, for a total of \$96,803.05.

3. Petitioner executed a consent extending the period of limitation for assessment of sales and use taxes for the period March 1, 1974 through February 28, 1977, to December 20, 1977.

4. Petitioner did not provide the Audit Division with sufficient books and records to conduct an audit. Consequently, the Audit Division asserted tax on gross sales totaling \$871,702.00 recorded in petitioner's cash receipts journal for the period at issue. Subsequent to the issuance of the assessment petitioner furnished additional records from which the Audit Division verified certain nontaxable sales and adjusted the sales held subject to tax to \$68,099.00 and taxes due to \$4,234.75. These sales were sales recorded in petitioner's records as "cash sales" (excluding sales tax collected). The basis for the Audit Division's determination that cash sales were taxable was that petitioner's reported taxable sales on its return filed for the period ending May 31, 1974 (one of three returns filed showing taxable sales) were substantially the same as cash sales in petitioner's books and records for said period.

5. Petitioner argued that only a small part of its business operations consisted of retail sales and that such sales included nontaxable cleaning and alteration services. Petitioner adduced no evidence to show that cash sales were nontaxable.

6. Notwithstanding the foregoing argument, petitioner argued that the United States Bankruptcy Court for the Eastern District of New York discharged the personal liability of Orrin Schiller for the sales taxes at issue.

7. Petitioner's books and records were insufficient for the Audit Division to determine whether petitioner's cash sales or any part thereof were for resale or were sales of services not subject to tax.

8. Petitioner failed to establish that reasonable cause exists for the abatement of penalty and interest in excess of the statutory rate.

CONCLUSIONS OF LAW

A. That section 1132(c) of the Tax Law provides, in part, that it shall be presumed that all receipts for property or services... are subject to tax until the contrary is established, and the burden of proving that any receipt... is not taxable shall be upon the person required to collect tax. Petitioner failed to sustain the burden of proof required by said section of the Tax Law with respect to cash sales and therefore, is liable for the taxes imposed thereon pursuant to section 1133(a) of the Tax Law.

B. That section 1132(a) of the Tax Law provides, in part, that tax "shall be paid to the person required to collect it as trustee for and on account of the state."

That section 17(a) of the Bankruptcy Act, as amended, 80 Stat 270, provides in pertinent part:

"A discharge in bankruptcy shall release a bankrupt from all his provable debts,... except such as

(1) are taxes which became legally due and owing by the bankrupt to the United States or to any State... within three years preceding bankruptcy: Provided, however, that a discharge in bankruptcy shall not release a bankrupt from any taxes... (e) which the bankrupt has collected or withheld from others as required by the laws of the United

States or any State... but has not paid over..." 11 USC §35(a) (1976 ed) [11USCS §35(a)].

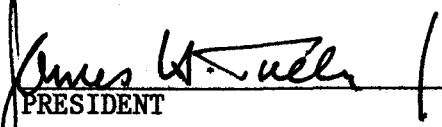
That sales taxes fall within the provisions of section 17(a)(1)(e) of the Bankruptcy Act and therefore, are nondischargable in bankruptcy (United States v. Sotelo, 436 US 268).

C. That the petition of Orrin Creations, Inc. is granted to the extent that the additional taxes due are reduced to \$4,234.75; that the Audit Division is hereby directed to modify the Notice of Determination and Demand for Payment of Sales and Use Taxes Due issued August 16, 1977; and that, except as so granted, the petition is in all other respects denied.

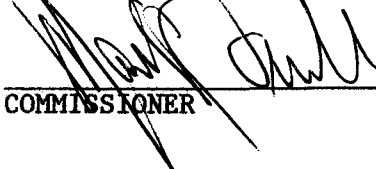
DATED: Albany, New York

DEC 11 1981

STATE TAX COMMISSION


PRESIDENT


COMMISSIONER


COMMISSIONER