

STATE OF NEW YORK

STATE TAX COMMISSION

---

In the Matter of the Petition :  
of :  
Top Tile Building & Supply Corp. :  
and Norman L. Stone & Richard Stone, : AFFIDAVIT OF MAILING  
Indiv. & as Officers :

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:  
12/1/67 - 2/28/74.

---

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 23rd day of October, 1981, he served the within notice of Decision by certified mail upon Top Tile Building & Supply Corp. and Norman L. Stone & Richard Stone, Indiv. & as Officers the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Top Tile Building & Supply Corp.  
and Norman L. Stone & Richard Stone, Indiv. & as Officers  
P.O. Box 307  
Harrison, NY 10528

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  
23rd day of October, 1981.

*Cornelia A. Heyland*

*J. Vredenburg*

STATE OF NEW YORK  
STATE TAX COMMISSION

---

In the Matter of the Petition :  
of :  
Top Tile Building & Supply Corp. :  
and Norman L. Stone & Richard Stone, :  
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 12/1/67 - 2/28/74. :

---

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 23rd day of October, 1981, he served the within notice of Decision by certified mail upon Marshall L. Goldstein the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Marshall L. Goldstein  
149 Grand St.  
White Plains, NY 10601

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  
23rd day of October, 1981.

*Connie A. Haglund*

*J. Vredenburg*

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

October 23, 1981

Top Tile Building & Supply Corp.  
and Norman L. Stone & Richard Stone, Indiv. & as Officers  
P.O. Box 307  
Harrison, NY 10528

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  
Marshall L. Goldstein  
149 Grand St.  
White Plains, NY 10601  
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

---

In the Matter of the Petition :  
of :  
Top Carpets Corp. :  
and Norman L. Stone & Richard Stone, :  
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: :  
12/1/67 - 5/31/73. :

---

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 23rd day of October, 1981, he served the within notice of Decision by certified mail upon Top Carpets Corp. and Norman L. Stone & Richard Stone, Indiv. & as Officers the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Top Carpets Corp.  
and Norman L. Stone & Richard Stone, Indiv. & as Officers  
P.O. Box 307  
Harrison, NY 10528

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  
23rd day of October, 1981.

*Amie A. Hugeland*

*J. Vredenburg*

STATE OF NEW YORK  
STATE TAX COMMISSION

---

In the Matter of the Petition :  
of :  
Top Carpets Corp. :  
and Norman L. Stone & Richard Stone, :  
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 12/1/67 - 5/31/73.

---

State of New York  
County of Albany

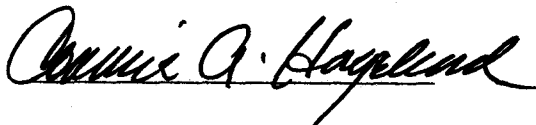
Jay Vredenburg, being duly sworn, deposes and says that he is an employee of the Department of Taxation and Finance, over 18 years of age, and that on the 23rd day of October, 1981, he served the within notice of Decision by certified mail upon Lorentz W. Hanson the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

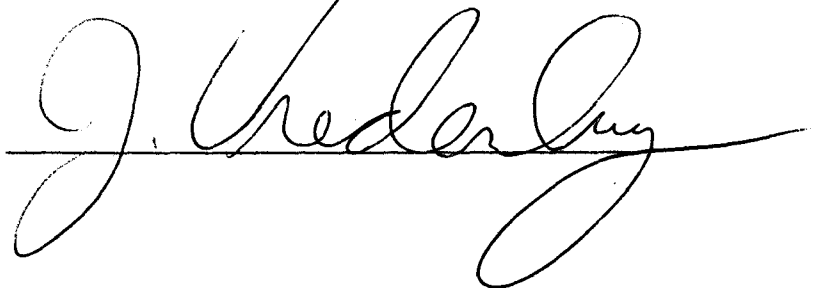
Lorentz W. Hanson  
175 Main St.  
White Plains, NY

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  
23rd day of October, 1981.





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

October 23, 1981

Top Carpets Corp.  
and Norman L. Stone & Richard Stone, Indiv. & as Officers  
P.O. Box 307  
Harrison, NY 10528

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  
Lorentz W. Hanson  
175 Main St.  
White Plains, NY  
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

---

In the Matter of the Petition  
of  
TOP TILE BUILDING SUPPLY CORP.  
and NORMAN L. STONE and RICHARD STONE,  
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 December 1, 1967 through  
February 28, 1974.

---

DECISION

In the Matter of the Petition  
of  
TOP CARPET CORP.  
and NORMAN L. STONE and RICHARD STONE,  
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 December 1, 1967 through May 31,  
1973.

---

Petitioners, Top Tile Building Supply Corp., Top Carpet Corp. and Norman L. Stone and Richard Stone, Individually and as Officers, 237 Mamaroneck Avenue, White Plains, New York 10605, filed petitions for revision of a determination or for refund of sales and use taxes under Articles 28 and 29 of the Tax Law. Top Tile Building Supply Corp. filed a petition for the period December 1, 1967 through February 28, 1974 (File No. 14362). Top Carpet Corp. filed a petition for the period December 1, 1967 through May 31, 1973 (File No. 14361).

A formal hearing was held before William J. Dean, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on October 31, 1979 at 1:15 P.M. and was continued on January 31, 1980,

and on February 1, 1980. Petitioners appeared by Lorentz W. Hanson, Esq. The Audit Division appeared by Ralph J. Vecchio, Esq. (Patricia L. Brumbaugh, Esq., of counsel).

### ISSUES

I. Whether the assessments against petitioners are barred by the period of limitations provided for in section 1147(b) of the Tax Law.

II. Whether the field audit properly determined the sales tax due.

III. Whether Norman L. Stone and Richard Stone are personally liable for any taxes due pursuant to section 1131 of the Tax Law.

### FINDINGS OF FACT

1. On November 8, 1973, the Audit Division, on the basis of an estimate, issued a Notice of Determination and Demand for Payment of Sales and Use Taxes Due against petitioner, Top Tile Building Supply Corp. ("Top Tile"), for taxes due of \$82,985.77, plus penalty and interest of \$30,596.35, for a total of \$113,582.12. On April 2, 1976, the Audit Division issued an additional Notice of Determination and Demand for Payment of Sales and Use Taxes Due against Top Tile for taxes due of \$24,520.02, plus penalty and interest of \$19,717.47, for a total of \$44,237.49. The notice dated April 2, 1976 was in addition to, and did not supersede, the notice dated November 8, 1973.

2. At the hearing it was stipulated that, with regard to Top Tile, the amount of tax at issue was \$64,697.37.

3. On November 20, 1973, the Audit Division, on the basis of an estimate, issued a Notice of Determination and Demand for Payment of Sales and Use Taxes Due against petitioner, Top Carpet Corp. ("Top Carpet"), for taxes due of \$13,262.09, plus penalty and interest of \$4,373.11, for a total of \$17,635.20. On April 2, 1976, the Audit Division issued an additional Notice of Determination



and Demand for Payment of Sales and Use Taxes Due against Top Carpet for taxes due of \$3,011.72, plus penalty and interest of \$1,825.04, for a total of \$4,836.76. The notice dated April 2, 1976 was in addition to, and did not supersede, the notice dated November 20, 1973.

4. At the hearing it was stipulated that, with regard to Top Carpet, the amount of tax at issue was \$7,775.43.

5. The audit of Top Tile and Top Carpet was originally assigned to the New York City District Office in 1970 where the offices of both petitioner corporations were located. The corporate offices were moved to White Plains and the corporations changed the location where their records were stored several times during 1971 through 1973. As a result, the audit was reassigned but never completed.

On October 26, 1973, the audit was assigned to Frances Schaeffer, an auditor in the White Plains District Office. She made an initial appointment with the vendors' accountant which was subsequently cancelled. At that time, the auditor mailed to Norman L. Stone, President of Top Tile, consents extending the period of limitations for both Top Tile and Top Carpet. The consents, dated October 29, 1973, were executed by Norman L. Stone and received by the White Plains District Office on November 5, 1973. Both consents extended the periods of limitation until December 20, 1974. Each corporation had previously submitted consents extending the periods of limitation in January 1971, October 1971, and November 1972.

Mrs. Schaeffer was of the opinion that the repeated transfer of the records indicated that the vendors were avoiding an audit. She discussed the matter with her supervisor and at his direction prepared estimated assessments against both corporations increasing reported sales by 20 percent.

6. In February, 1974, the audit was assigned to auditor Donald Bryant of the Albany District Office. Mr. Bryant began his examination on October 28, 1974, and submitted his reports on November 5, 1975. The audit procedures used were as follows:

(a) The first phase of the audit of Top Tile involved the selection of two (2) one-week test periods, February 1-6, 1969 and September 1-7, 1971. A one-week test period, September 1-7, 1971, was selected for Top Carpet. The sales records of each corporation were examined and it was determined that both Top Tile and Top Carpet owed additional sales tax for the test period in the amounts of \$129.57 and \$36.10 respectively. The result of the test period audits were used to calculate error ratios in the petitioner's reporting of sales tax. These error ratios were then projected over the full periods covered by the audits.

(b) In addition to using these test periods to calculate uncollected taxes, the auditor examined petitioners' daily sales sheets to determine unreported taxes. From these sheets the sales tax actually collected during the entire audit period was compared to the sales tax reported. It was determined that Top Tile had failed to report \$31,951.45 in sales tax it had collected and Top Carpet had failed to report \$2,625.69 in sales tax it had collected.

7. While the audits were being conducted, petitioners made their records available to Mr. Bryant. These included original sales invoices, original purchase invoices, purchase journals, ledgers, and daily cash sheets. Because the audit covered an extended period and involved records of numerous stores, the documents made available to the auditor were voluminous.

8. Top Carpet was formed for the benefit of former employees of Top Tile. No shares of Top Carpet stock were given to Norman L. Stone or to Richard

Stone. Top Tile provided bookkeeping and sales tax preparation assistance to Top Carpet. Neither Norman L. Stone nor Richard Stone were officers of Top Carpet.

9. Norman L. Stone was president of Top Tile and Richard Stone was treasurer of Top Tile. Both had major responsibility for the management and affairs of Top Tile.

#### CONCLUSIONS OF LAW

A. That the consent extending the period of limitations executed by Norman Stone on behalf of Top Tile in November of 1973 was valid since he was an officer of that corporation and as such was authorized to sign such a consent. Therefore, no portion of the assessment included in the Notice of Determination issued to Top Tile was barred by the period of limitations provided by section 1147(b) of the Tax Law. However, the consent extending the period of limitation executed by Norman Stone on behalf of Top Carpet was invalid since he was neither an officer nor was he a person authorized by that corporation to sign such a consent.

B. That the Audit Division was justified in issuing estimated assessments against Top Tile and Top Carpet in November, 1973, since petitioners had repeatedly delayed in making their books and records available.

C. That section 1147(b) of the Tax Law provides that "no assessment of additional tax shall be made after the expiration of more than three years from the date of the filing of a return". Since the Notice of Determination was issued against Top Carpet on November 20, 1973 and since no valid consents extending the period of limitations were executed, that portion of the assessment against Top Carpet relating to taxable quarters prior to September 1, 1970, must be cancelled.

D. That "Although there is statutory authority for the use of a 'test period' to determine the amount of tax due when a filed return is incorrect or insufficient (Tax Law, §1138, subd. [a]), resort to this method of computing tax liability must be founded upon an insufficiency of record keeping which makes it virtually impossible to verify taxable sales receipts and conduct a complete audit...However, if records are available from which the exact amount of tax can be determined, the estimate procedures adopted by the respondent become arbitrary and capricious and lack of rational basis." Chartair, Inc. v. State Tax Commission, 411 N.Y.S.2d 41; therefore, the Audit Division was not justified in using the "test period" audit procedures described in Finding of Fact "6(a)" since petitioners had, by the time of the actual audits, made their books and records available to the auditor and these records were sufficient for determining the exact amount of tax due. Since these records were made available, only those portions of the assessments against Top Tile and Top Carpet which were based directly upon petitioners' records can be sustained. Those portions include the actual sales tax found to be due during the one and two week test periods of Top Carpet and Top Tile, and also the amounts of unreported sales tax as were discovered by the audit procedures described in Finding of Fact "6(b)".

E. That Norman L. Stone and Richard Stone were persons required to collect tax for Top Tile with respect to section 1131 of the Tax Law. Norman L. Stone served as President of Top Tile and Richard Stone as Treasurer. Both had major responsibility for the management and affairs of Top Tile.

F. That Norman L. Stone and Richard Stone were not persons required to collect tax for Top Carpet with respect to section 1131 of the Tax Law. Neither Norman L. Stone nor Richard Stone served as an officer of Top Carpet.

G. That the petitions of Top Tile Building Supply Corp., Top Carpet Corp. and Norman L. Stone and Richard Stone, individually and as officers, are granted to the extent indicated in Conclusions of Law "C", "D" and "F"; that the Audit Division is directed to modify the notices of determination issued on November 8, 1973, November 20, 1973 and April 2, 1976; and that, except as so granted, the petitions are in all other respects denied.

DATED: Albany, New York

OCT 23 1981

STATE TAX COMMISSION

  
PRESIDENT

  
COMMISSIONER

  
COMMISSIONER