

STATE OF NEW YORK
STATE TAX COMMISSION

In the Matter of the Petition
of

John Van Drill

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 3/1/73-12/31/73. :

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 20th day of February, 1981, he served the within notice of Decision by mail upon John Van Drill, the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

John Van Drill
2 Cromwell Dr.
Morristown, NJ

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 February, 1981.

Carrie P. Hagelund

J. Vredenburg

STATE OF NEW YORK
STATE TAX COMMISSION

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of

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for Redetermination of a Deficiency or a Revision :
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Sales & Use Tax :
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for the Period 3/1/73-12/31/73. :

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 20th day of February, 1981, he served the within notice of Decision by mail upon Joseph G. Aronson the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Mr. Joseph G. Aronson
Zuckerman & Aronson
60 Park Place
Newark, NJ 07102

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 February, 1981.

Cornie A. Hagelund

J. Vredenburg

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

February 20, 1981

John Van Drill
2 Cromwell Dr.
Morristown, NJ

Dear Mr. Van Drill:

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
Joseph G. Aronson
Zuckerman & Aronson
60 Park Place
Newark, NJ 07102
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition	:	
of	:	
JOHN VAN DRILL	:	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, 1973 through	:	
December 31, 1973.	:	

Petitioner John Van Drill, 2 Cromwell Drive, Morristown, New Jersey, 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, 1973 through December 31, 1973 (File No. 11453).

A formal hearing was held before William Dean, Hearing Officer, at the offices of the State Tax Commission, 2 World Trade Center, New York, New York, on March 23, 1977 at 9:15 A.M. Petitioner appeared by Zuckerman & Aronson, Esqs., (Joseph G. Aronson, Esq., of counsel). The Audit Division appeared by Peter Crotty, Esq., (Aliza Schwadron, Esq., of counsel).

ISSUE

Whether petitioner John Van Drill was an officer or employee so closely involved with the financial and managerial control and operation of Brides Penthouse Ltd., as to be found a person responsible for collection and paying over of sales and use taxes on behalf of Brides Penthouse Ltd. pursuant to sections 1131, 1133, 1137 and 1138 of the Tax Law.

FINDINGS OF FACT

1. On September 20, 1975, the Audit Division issued two notices and demands for payment of sales and use tax due to petitioner John Van Drill for

the periods ended May 31, 1973 and November 30, 1973, and for the period ended August 31, 1973 and the period December 1 through December 31, 1973.

2. The amounts shown as due from the above notices were as follows:

Notice number 90,738,036:

<u>Period ended</u>	<u>Tax</u>	<u>Interest</u>	<u>Total</u>
5/31/73	\$ 4,845.82	\$ 848.02	\$ 5,693.84
11/30/73	1,554.77	242.93	1,797.70
Total	<u>\$ 6,400.59</u>	<u>\$ 1,090.95</u>	<u>\$ 7,491.54</u>
Total Tax and Interest Due			<u>\$ 7,491.54</u>

Notice number 90,738,037:

<u>Period Ended</u>	<u>Tax</u>	<u>Interest</u>	<u>Total</u>
8/31/73	\$ 5,000.00	\$ 781.25	\$ 5,781.25
12/1/73 to 12/31/73	800.00	113.34	913.34
Total	<u>\$ 5,800.00</u>	<u>\$ 894.59</u>	<u>\$ 6,694.59</u>
Total Tax and Interest Due			<u>\$ 6,694.59</u>

3. The basis upon which the above notices were issued was that while the proper returns were filed for the periods at issue, there was no remittance included for the tax computed as due and owing. The petitioner herein, John Van Drill, was issued the above notices on the grounds that he was an officer or person responsible to collect and remit sales and use taxes on behalf of Brides Penthouse Ltd., the taxpaying entity against which the taxes due were originally assessed.

4. Petitioner John Van Drill is president of, and is employed full time by Le Boeuf Corporation (herein "Le Boeuf"). Le Boeuf is a company engaged in the manufacture and sale of wedding gowns and accessories, and also to some extent in the business of dry cleaning. Its method of operation is primarily through the use of "home shops".

5. The "home shop" concept is one where an individual, wishing to supplement the family income, agrees to sell Le Boeuf merchandise from the home on a commission basis. Petitioner's role is to visit the home and provide advice and training to the person who will be operating the "home shop." He aids in setup, inventory selection and purchasing, and financing by Le Boeuf of the original inventory. Receipts from sales are deposited in a Le Boeuf account, and the "home shop" operator is paid a commission on these sales. Petitioner generally provides such assistance until the "home shop" operator is able to operate alone.

6. Le Boeuf has "home shops" in a number of states throughout the United States, and petitioner spends the majority of his time travelling in order to set up new "home shops" and continue to provide advice for existing "home shops".

7. Brides Penthouse Ltd. (herein "Brides") was opened by Eugene Sherman in 1964 after a store he previously operated had gone bankrupt. Sherman had extensive experience in the area of wedding apparel and felt he could successfully operate a store selling such clothing and accessories. Brides was organized as a corporation with petitioner Van Drill's mother-in-law owning 51 percent of the stock, and Sherman owning none of the stock. This setup was ostensibly to shield Brides' assets from potential tax and/or union problems related to the bankruptcy previously mentioned above.

8. Petitioner Van Drill was neither an officer nor a stockholder in Brides, and he did not advise Sherman as to the manner in which Brides should be run. Brides was primarily involved with the retail sale of wedding gowns and accessories, but was not set up as a "home shop" operated by Le Boeuf.

9. In order to provide financing for the operation of Brides, an oral agreement was worked out between Sherman and Van Drill whereby Le Boeuf would provide a \$30,000 line of credit for the set up and operation of Brides. This was viewed by Le Boeuf as a factoring operation with Le Boeuf taking a percentage of Brides' sales. Originally, Le Boeuf took eight percent, but this figure was later reduced, at Bride's request, to five percent of sales.

10. In addition to the above mentioned line of credit, Le Boeuf also provided bookkeeping services for Brides. This service was performed according to a set procedure whereby Brides would send to Le Boeuf weekly sales receipts, invoices, payroll cards, etc., which had been checked and approved by Sherman. Le Boeuf's bookkeeper would then figure the payroll and payroll taxes, summarize the weekly sales and receipts, make a statement of payments to creditors, draw the appropriate checks, and send a report in summary to Eugene Sherman. By this weekly report and by sales tax returns prepared, Sherman would be made aware of taxes and other bills which were due or overdue, so as to decide when and in what amounts they would be paid.

11. The payment of Brides bills was through a Le Boeuf checking account maintained on behalf of Brides. Le Boeuf's bookkeeper had authority to sign checks on this account, as did petitioner Van Drill. Eugene Sherman did not have authority to sign checks. As noted previously, however, all bills sent weekly from Brides to Le Boeuf were checked by Sherman before being sent to Le Boeuf. Only those bills approved by Sherman for payment could be paid. If funds in the account were low or insufficient to cover Bride's outstanding bills, Sherman would indicate which bills were to be paid and in what amounts. Le Boeuf's bookkeeper did not have authority to pay bills, taxes, etc., without Sherman's approval.

12. In addition to the above account, Brides had a second account on which Sherman had authority to sign checks, but neither Van Drill nor Le Boeuf had such authority. This account was basically a petty cash account and deposits to it were made from the main Brides account with Le Boeuf.

13. Petitioner Van Drill generally did not review the books or concern himself with the operation of Brides, because he was busy travelling the majority of the time and because Brides was not a major source of income for Le Boeuf.

14. Eugene Sherman was in control of all facets of Bride's operation. He controlled hiring and firing, hours employees would work, hours the store would be open, vacations, inventory purchases, advertising, etc. All bills were sent to Brides (except bills for an accounting done on Brides' books at Le Boeuf's offices which were sent to Brides in care of Le Boeuf) where Sherman would determine who would be paid and how much they would be paid.

15. In addition to the aforementioned notices of deficiency issued against petitioner (see findings of fact 1, 2 and 3 supra), a warrant for the collection of the unpaid sales taxes was filed against Van Drill on January 21, 1976.

CONCLUSIONS OF LAW

A. That section 1131(1) of the Tax Law defines a "person" required to collect sales and use taxes as including "...any officer or employee of a corporation or of a dissolved corporation who as such officer or employee is under a duty to act for such corporation in complying with any requirement of this article...". In addition, section 1133(a) of the Tax Law provides that "...every person required to collect any tax imposed by this article shall be personally liable for the tax imposed, collected, or required to be collected under this article.".

B. That Regulations of the State Tax Commission, and examples cited therein, further provide: "Whether an officer or employee of a corporation is a person required to collect, truthfully account for, or pay over the sales or use tax is to be determined in every case on the particular facts involved. Generally, a person who is authorized to sign a corporation's tax returns or who is responsible for maintaining the corporate books, or who is responsible for the corporation's management, is under a duty to act." (20 NYCRR 526.11(b)(2)), (emphasis added).

C. That some of the particular facts which weigh in a determination of whether one, as an officer or employee of a corporation, is under a duty to collect sales and use taxes include his day-to-day involvement with the financial affairs and management of the corporation, his knowledge of such matters, his duties and functions outlined in the certificate of incorporation and the bylaws, and the preparation and filing of sales tax forms and returns. Vogel v. New York State Department of Taxation and Finance, et al, 98 Misc. 2d 222, 413 N.Y.S. 2d 862.

D. That petitioner John Van Drill was not an officer or employee of Brides, nor was he in control of or involved with the daily planning or operation of such business. Furthermore, the financing arrangement and bookkeeping service set up between Brides and Le Boeuf do not render petitioner an officer or employee of Brides.

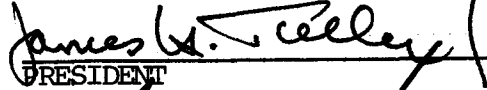
E. That petitioner is not a person responsible for collection and paying over of sales and use taxes on behalf of Brides Penthouse Ltd.

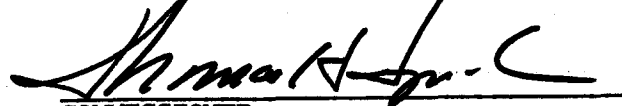
F. That the petition of John Van Drill is granted and the notices and demands issued September 20, 1975 are cancelled.

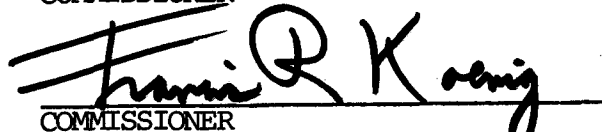
DATED: Albany, New York

FEB 20 1981

STATE TAX COMMISSION


PRESIDENT


COMMISSIONER


COMMISSIONER