

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :

of

Edward M. Burns :

d/b/a Studio B :

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 :  
3/1/68-8/31/71. :

State of New York  
County of Albany

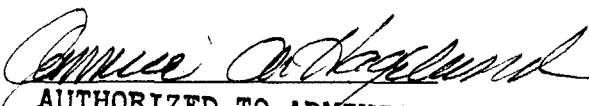
Jay Vredenburg, being duly sworn, deposes and says that he is an employee of the Department of Taxation and Finance, over 18 years of age, and that on the 14th day of December, 1982, he served the within notice of Decision by certified mail upon Edward M. Burns, d/b/a Studio B, the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

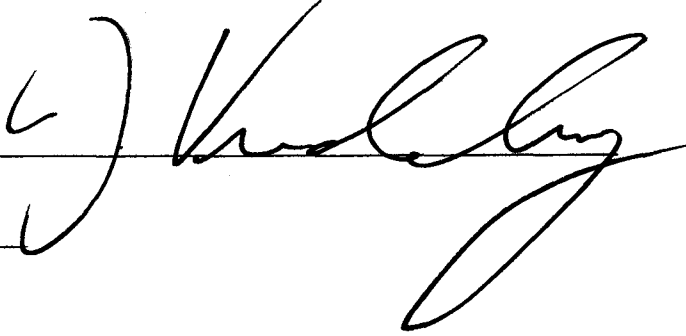
Edward M. Burns  
d/b/a Studio B  
205 Weed Ave.  
Staten Island, NY 10306

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  
14th day of December, 1982.

  
AUTHORIZED TO ADMINISTER  
OATHS PURSUANT TO TAX LAW  
SECTION 174



STATE OF NEW YORK

STATE TAX COMMISSION

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In the Matter of the Petition	:	
of	:	
Edward M. Burns	:	
d/b/a Studio B	:	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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Period 3/1/68-8/31/71.	:	

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State of New York  
County of Albany

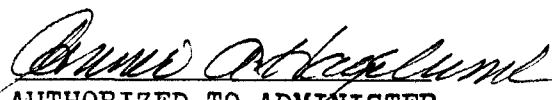
Jay Vredenburg, being duly sworn, deposes and says that he is an employee of the Department of Taxation and Finance, over 18 years of age, and that on the 14th day of December, 1982, he served the within notice of Decision by certified mail upon Alexander Weiss the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

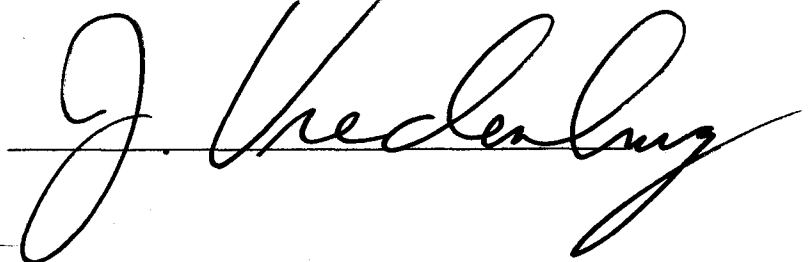
Alexander Weiss  
26 Bay St.  
Staten Island, NY 10301

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  
14th day of December, 1982.

  
AUTHORIZED TO ADMINISTER  
OATHS PURSUANT TO TAX LAW  
SECTION 174



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

December 14, 1982

Edward M. Burns  
d/b/a Studio B  
205 Weed Ave.  
Staten Island, NY 10306

Dear Mr. Burns:

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 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  
Law Bureau - Litigation Unit  
Albany, New York 12227  
Phone # (518) 457-2070

Very truly yours,

STATE TAX COMMISSION

cc: Petitioner's Representative  
Alexander Weiss  
26 Bay St.  
Staten Island, NY 10301  
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

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In the Matter of the Petition	:	
of	:	
EDWARD M. BURNS	:	DECISION
D/B/A STUDIO B	:	
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, 1968	:	
through August 31, 1971.	:	

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Petitioner, Edward M. Burns d/b/a Studio B, 205 Weed Avenue, Staten Island, New York 10306, 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, 1968 through August 31, 1971 (File No. 29821).

A small claims hearing was held before Judy M. Clark, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on January 14, 1982 at 10:45 A.M. Petitioner appeared by Alexander Weiss, Esq. The Audit Division appeared by Paul B. Coburn, Esq. (William Fox, Esq., of counsel).

ISSUES

I. Whether petitioner is personally liable as a bulk sale purchaser for sales tax due where no notice of sale was sent to the State Tax Commission.

II. Whether the Audit Division was guilty of laches in having failed to take action against the bulk sale seller rather than the purchaser.

III. Whether the method used by the Audit Division in arriving at petitioner's tax liability was proper.

FINDINGS OF FACT

1. On February 8, 1980, the Audit Division issued a Notice of Determination and Demand for Payment of Sales and Use Taxes Due against the petitioner, Edward M. Burns d/b/a Studio B, in the amount of \$15,000.00 for the period March 1, 1968 through August 31, 1971.

2. Prior to August, 1977, Peter, Anthony and Jenny Lisi d/b/a Papa Lisi's Restaurant (hereafter referred to as Papa Lisi's) owned and operated the business in question as a bar and restaurant. In August, 1977, petitioner purchased the business assets for \$15,000.00. Petitioner started operating the business in March, 1978.

3. At the time of the purchase transaction, petitioner failed to notify the State Tax Commission of the bulk sale as required by section 1141(c) of the Tax Law. When attempting to commence an audit of Papa Lisi's, an auditor from the Audit Division discovered that a bulk sale had occurred but had not been reported. The auditor immediately notified the State Tax Commission. The auditor also found that petitioner was not registered as a vendor for sales tax purposes and facilitated registration of the petitioner at the time of contact.

4. Petitioner had no books or records concerning Papa Lisi's operation available for the auditor. As a result, the auditor determined Papa Lisi's tax liability for the period March 1, 1968 through August 31, 1971 by first examining State Liquor Authority records which required that gross sales for Papa Lisi's be supplied for a period just prior to issuing a liquor license to petitioner. Then, these figures were utilized and expanded to cover the entire audit period of March 1, 1968 through August 31, 1971 with consideration

for inflation. As Papa Lisi's liability exceeded the purchase price of the assets (\$15,000.00), the Notice of Determination and Demand issued to the purchaser (petitioner) was issued in the amount of \$15,000.00.

5. At the hearing, petitioner offered no evidence indicating whether any sales tax had ever been paid either by petitioner or by the seller, Papa Lisi's. Petitioner alleged that the "corporation"<sup>1</sup> which owned Papa Lisi's was still operating another restaurant in Staten Island. However, he made no attempt to subpoena any of the principals for the hearing in order to ascertain whether any sales tax had been paid for the period in issue. Petitioner also alleged that \$1,000.00 to \$3,000.00 had been placed in an escrow account for sales tax purposes at the time of the purchase. No evidence, however, was offered indicating the present status of such an account other than petitioner's testimony that the attorney holding the account had died.

6. Petitioner contends that he is only secondarily liable for the tax during the period at issue and that the seller is primarily liable. He further contends that the Audit Division is guilty of laches in not attempting to obtain the sales tax due from the seller.

7. There was no documentary evidence or testimony presented by the petitioner to show that the tax liability computed to be due from Papa Lisi's by the auditor was erroneous.

#### CONCLUSIONS OF LAW

A. That section 1141(c) of the Tax Law provides, in part, that a bulk sale purchaser must notify the Tax Commission of the sale ten days prior to

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<sup>1</sup> There is no documentation in the file that the seller, Peter, Anthony and Jenny Lisi d/b/a Papa Lisi's, operated the business referred to herein as a corporation.

taking possession or paying therefor. If the purchaser fails to so notify the Tax Commission, he will be personally liable for any sales taxes determined to be\*due from the seller to the extent of the amount of the purchase price or fair market value of the assets purchased, whichever is higher. Petitioner, as a result of his failure to notify the Tax Commission of the sale, is therefore personally liable for sales tax due from the seller to the extent of the purchase price of the assets (\$15,000.00).



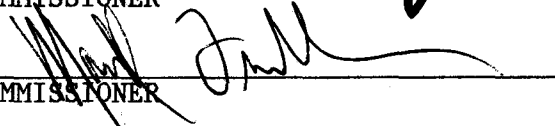
B. That the State may not be estopped "from collecting taxes lawfully imposed and remaining unpaid in the absence of statutory authority" (McMahan v. State Tax Commission, 45 A.D.2d 625, 627). There is no statutory duty or responsibility imposed on the State to first obtain tax due from the seller in a bulk sale transaction. Therefore, petitioner's charge that the Audit Division is guilty of laches is without merit.

C. That section 1138(a) of the Tax Law allows tax to be estimated on the basis of external indices where necessary. In the absence of proper records, the Audit Division may choose a method "reasonably calculated to reflect the taxes due" (Wood v. State Tax Commission, 67 A.D.2d 1042, 1043). Since no books or records were available to the auditor, the use of State Liquor Authority records to estimate sales for the audit period was a proper audit method.

D. That the petition of Edward M. Burns d/b/a Studio B is denied and the Notice of Determination and Demand for Payment of Sales and Use Taxes Due issued February 8, 1980 is sustained.

DATED: Albany, New York

DEC 14 1982

STATE TAX COMMISSION  
  
ACTING PRESIDENT  
  
COMMISSIONER  
  
COMMISSIONER