

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of :
Embassy Distributors, Inc. (Seller) :
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 6/1/75-5/31/78. :

AFFIDAVIT OF MAILING

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 9th day of November, 1982, he served the within notice of Decision by certified mail upon Embassy Distributors, Inc. (Seller), the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

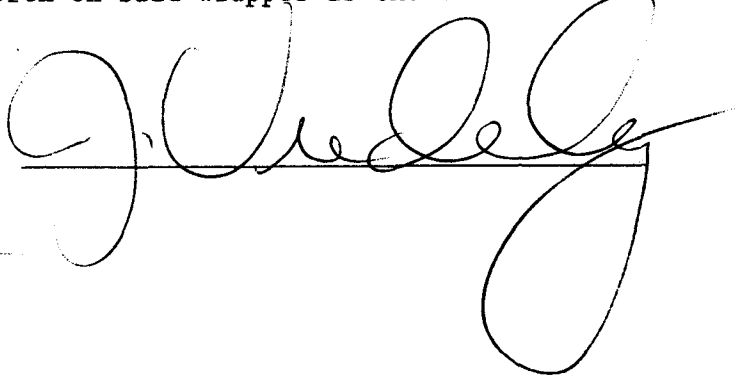
Embassy Distributors, Inc. (Seller)
c/o Modell's
2000 Hempstead Tpke.
East Meadow, NY 11554

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
9th day of November, 1982.


ANNE A. HAGLUND
ADMINISTRATOR
OATHS PURSUANT TO TAX LAW
SECTION 174



STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of :
Embassy Distributors, Inc. (Seller) :
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 6/1/75-5/31/78. :

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 9th day of November, 1982, he served the within notice of Decision by certified mail upon Frank Settembrini the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

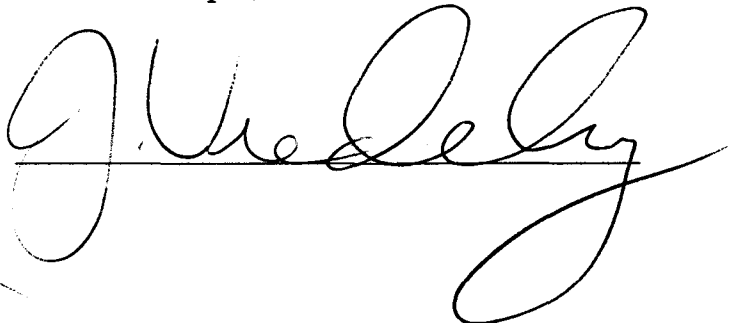
Frank Settembrini
Settembrini & Gentile
1610 Sheepshead Bay Rd.
Brooklyn, NY 11235

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
9th day of November, 1982.





COMMISSIONER OF TAXATION AND FINANCE
OATHS PURSUANT TO TAX LAW
SECTION 174

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition	:	
of	:	
Allan Cohen	:	
for Redetermination of a Deficiency or a Revision	:	AFFIDAVIT OF MAILING
of a Determination or a Refund of Sales & Use Tax	:	
under Article 28 & 29 of the Tax Law for the	:	
Period 6/1/75 - 5/31/78.	:	

State of New York
County of Albany

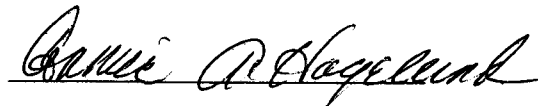
Jay Vredenburg, being duly sworn, deposes and says that he is an employee of the Department of Taxation and Finance, over 18 years of age, and that on the 9th day of November, 1982, he served the within notice of Decision by certified mail upon Allan Cohen, the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

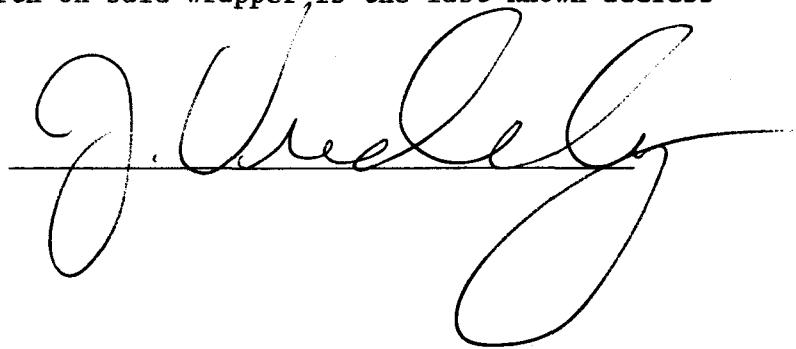
Allan Cohen
2801 N.E. 183rd St.
N. Miami Beach, FL

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
9th day of November, 1982.





AUTHORIZED TO ADMINISTER
OATHS PURSUANT TO TAX LAW
SECTION 174

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of :
Allan Cohen :
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 6/1/75 - 5/31/78. :

State of New York
County of Albany

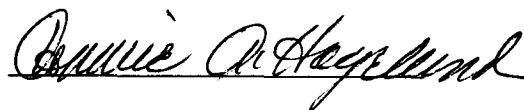
Jay Vredenburg, being duly sworn, deposes and says that he is an employee of the Department of Taxation and Finance, over 18 years of age, and that on the 9th day of November, 1982, he served the within notice of Decision by certified mail upon Frank Settembrini the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

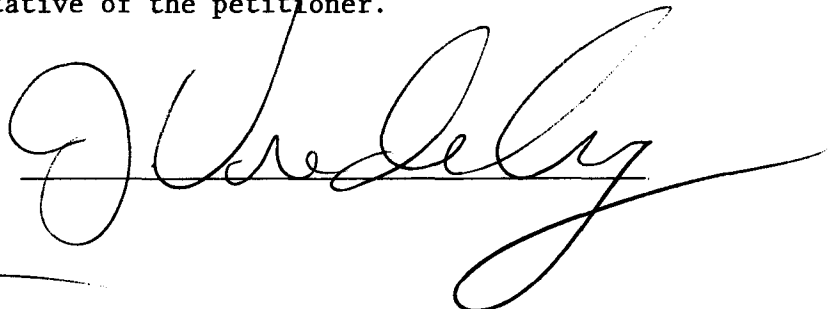
Frank Settembrini
Settembrini & Gentile
1610 Sheepshead Bay Rd.
Brooklyn, NY 11235

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
9th day of November, 1982.





NOTARY PUBLIC
CRANE PURSUANT TO TAX LAW
SECTION 174

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition	:	
of	:	
Joseph Capone	:	
for Redetermination of a Deficiency or a Revision	:	AFFIDAVIT OF MAILING
of a Determination or a Refund of Sales & Use Tax	:	
under Article 28 & 29 of the Tax Law for the	:	
Period 6/1/75 - 5/31/78.	:	

State of New York
County of Albany

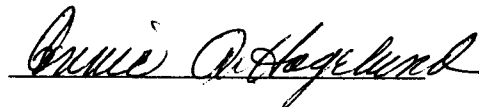
Jay Vredenburg, being duly sworn, deposes and says that he is an employee of the Department of Taxation and Finance, over 18 years of age, and that on the 9th day of November, 1982, he served the within notice of Decision by certified mail upon Joseph Capone, the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Joseph Capone
128 Lazier Ave.
Emerson, NJ

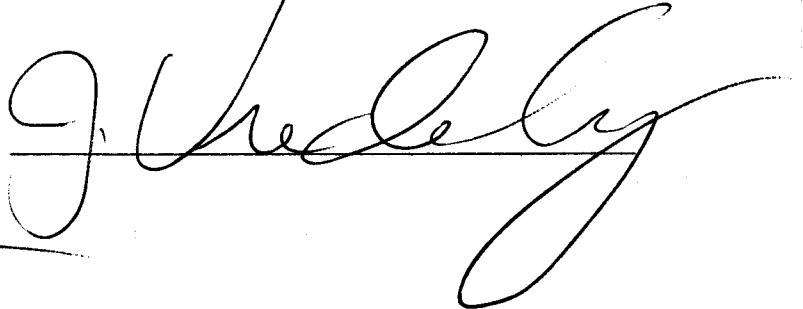
and by depositing same enclosed in a postpaid properly addressed wrapper in a (post office or official depository) under the exclusive care and custody of the United States Postal Service within the State of New York.

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
9th day of November, 1982.



AUTHORIZED TO ADMINISTER
OATHS PURSUANT TO TAX LAW
SECTION 174



STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of :
Joseph Capone :

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 6/1/75 - 5/31/78. :

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 9th day of November, 1982, he served the within notice of Decision by certified mail upon Frank Settembrini the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Frank Settembrini
Settembrini & Gentile
1610 Sheepshead Bay Rd.
Brooklyn, NY 11235

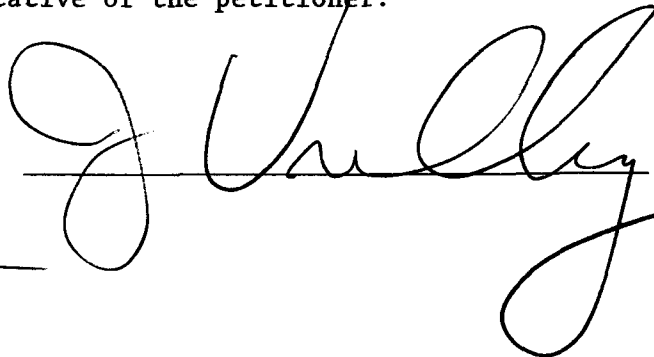
and by depositing same enclosed in a postpaid properly addressed wrapper in a (post office or official depository) under the exclusive care and custody of the United States Postal Service within the State of New York.

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
9th day of November, 1982.



AUTHORIZED TO ADMINISTER
OATHS PURSUANT TO TAX LAW
SECTION 174



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

November 9, 1982

Embassy Distributors, Inc. (Seller)
c/o Modell's
2000 Hempstead Tpke.
East Meadow, NY 11554

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

Very truly yours,

STATE TAX COMMISSION

cc: Petitioner's Representative
Frank Settembrini
Settembrini & Gentile
1610 Sheepshead Bay Rd.
Brooklyn, NY 11235
Taxing Bureau's Representative

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

November 9, 1982

Allan Cohen
2801 N.E. 183rd St.
N. Miami Beach, FL

Dear Mr. Cohen:

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

Very truly yours,

STATE TAX COMMISSION

cc: Petitioner's Representative
Frank Settembrini
Settembrini & Gentile
1610 Sheepshead Bay Rd.
Brooklyn, NY 11235
Taxing Bureau's Representative

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

November 9, 1982

Joseph Capone
128 Lazier Ave.
Emerson, NJ

Dear Mr. Capone:

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

Very truly yours,

STATE TAX COMMISSION

cc: Petitioner's Representative
Frank Settembrini
Settembrini & Gentile
1610 Sheepshead Bay Rd.
Brooklyn, NY 11235
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of :
EMBASSY DISTRIBUTORS, INC. (SELLER) :
for Revision of a Determination or for Refund :
of Sales and Use Taxes under Articles 28 & 29 :
of the Tax Law for the Period June 1, 1975 :
through May 31, 1978.

In the Matter of the Petition :
of :
JOSEPH CAPONE : DECISION
for Revision of a Determination or for Refund :
of Sales and Use Taxes under Articles 28 & 29 :
of the Tax Law for the Period June 1, 1975 :
through May 31, 1978.

In the Matter of the Petition :
of :
ALLAN COHEN :
for Revision of a Determination or for Refund :
of Sales and Use Taxes under Articles 28 & 29 :
of the Tax Law for the Period June 1, 1975 :
through May 31, 1978.

Petitioners, Embassy Distributors, Inc. (Seller), c/o Modell's, 2000
Hempstead Turnpike, East Meadow, New York 11554; Joseph Capone, 128 Lazier
Avenue, Emerson, New Jersey; and Allan Cohen, 2801 N.E. 183 Street, North
Miami Beach, Florida, filed petitions for revision of a determination or for
refund of sales and use taxes under Articles 28 & 29 of the Tax Law for the
period June 1, 1975 through May 31, 1978 (File Nos. 23092, 23093 and 23094).

A combined 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 August 5, 1981 at 9:15 A.M. Petitioners appeared by Frank Settembrini and Emile F. Gentile, P.A.'s. The Audit Division appeared by Ralph J. Vecchio, Esq. (William Fox, Esq., of counsel).

ISSUES

- I. Whether the Audit Division properly assessed tax due on additional gross sales found on audit.
- II. Whether the Audit Division properly estimated corporate petitioner's overcollections of sales tax.
- III. Whether corporate petitioner overreported sales tax on its sales and use tax returns.

FINDINGS OF FACT

1. Petitioner Embassy Distributors, Inc. ("Embassy") operated a retail variety store located in Baldwin Place, Westchester County, New York. The business was sold on May 1, 1978.

2. On July 24, 1978, the Audit Division issued a Notice of Determination and Demand for Payment of Sales and Use Taxes Due against Embassy Distributors, Inc. (Seller) covering the period June 1, 1975 through May 31, 1978. The Notice was issued as a result of a field audit and asserted tax due of \$8,660.94 plus penalties and interest of \$3,198.61 for a total due of \$11,859.55.

The Audit Division also issued Notices of Determination and Demand for Payment of Sales and Use Taxes Due against Joseph Capone, president, and Allan Cohen, secretary/treasurer of Embassy Distributors, Inc., for their liability under section 1131(1) and 1133 of the Tax Law for the aforesaid taxes.

3. Embassy had the following records available for audit: general ledgers, cash books, bank deposits, purchase invoices, cash disbursements and Federal tax returns. Petitioners did not retain any cash register tapes.

4. On audit, the Audit Division found that gross receipts recorded in the cash receipts journal exceeded gross sales reported on sales and use tax returns filed for the audit period by \$92,815.02. The Audit Division rejected Embassy's claim that the difference was attributable to the New York State cigarette tax, which is not subject to sales tax, since Embassy did not have cash register receipts to verify its non-taxable sales. Therefore, the Audit Division held said sum subject to additional sales tax of \$4,640.74. The Audit Division then estimated that Embassy overcharged sales tax at the rate of 5 percent of sales tax reported. It applied the estimated margin of error to the sales tax reported in the audit period and held additional sales tax due on overcollections of \$3,705.10.

The Audit Division also determined tax due of \$315.10 on purchases of fixed assets. The tax due on these purchases is not at issue. A total sales and use tax deficiency of \$8,660.94 was thereby determined.

5. Cash registers used by Embassy produced only a cumulative total of all entries rung on the register which included any sales tax collected. In order to determine daily sales, the beginning register reading was subtracted from the ending reading. Upon verification of daily bank deposits, sales including sales tax collected were posted to the cash receipts journal. At the end of each month, gross sales were divided by 105 percent (sales & tax rate) and posted to the appropriate accounts.

In preparing sales and use tax returns, Embassy's accountant extracted the New York State cigarette tax on cigarettes purchased during the period and

reported the difference as both gross sales and taxable sales on the New York State sales and use tax returns. Embassy maintained signs at the cigarette counter indicating the components of the selling prices on cigarettes. Embassy did not collect sales tax on the New York State cigarette tax portion of cigarette sales.

6. Embassy retained numerous cash register receipts for those sales that were charged to major credit cards. Those receipts revealed that sales tax overcollection errors were made of .0043 percent of the sales tax charged. This analysis resulted in additional tax due of \$318.64 for the audit period.

7. In addition to the state cigarette tax, Embassy made additional non-taxable sales of magazines, non-prescription drugs and food products which were not deleted from gross sales to determine taxable sales. Petitioners submitted purchases of such items which disclosed exempt sales made in the audit period of approximately \$39,950.00. Embassy did not charge sales tax on such sales.

8. Petitioners Joseph Capone and Allan Cohen did not dispute their liability as responsible officers.

CONCLUSIONS OF LAW

A. That section 1135 of the Tax Law provides that every person required to collect tax shall keep records of every sale and of all amounts paid, charged or due thereon and of the tax payable thereon, in such form as the Tax Commission may require. Such records shall include a true copy of each sales slip, invoice, receipt, statement or memorandum upon which subdivision (a) of section 1132 of the Tax Law requires that the tax be stated separately. That corporate petitioner's records were insufficient for the verification of its sales tax due; therefore, the Audit Division may use available information in

determining said petitioner's sales tax due pursuant to section 1138(a) of the Tax Law.

B. That the difference in gross receipts found by the Audit Division on audit was attributable to the non-taxable portion of cigarette sales; therefore, the additional tax determined by the Audit Division of \$4,640.74 is hereby cancelled.

C. That the overcollections of sales tax determined by the Audit Division are reduced to \$318.64 pursuant to Finding of Fact "6".

D. That petitioner Embassy Distributors, Inc. has shown that exempt purchases for resale were made and that the sales thereof were erroneously reported as taxable sales. Such purchases when sold amounted to \$39,950.00 in exempt sales. That said petitioner erroneously reported sales tax on such sales by neglecting to deduct them from gross sales in arriving at taxable sales reported. Embassy Distributors, Inc. is therefore entitled to a credit of tax erroneously reported, that credit being limited to the amount of the total additional tax due on overcollections per Conclusion of Law "C" above and the uncontested tax due on fixed assets (Finding of Fact "4").

E. That the petitions of Embassy Distributors, Inc. (Seller) and Joseph Capone and Allan Cohen as officers are granted and the notices of determination and demand for payment of sales and use taxes due issued July 24, 1978 are cancelled.

DATED: Albany, New York

NOV 09 1982

STATE TAX COMMISSION

ACTING

PRESIDENT

COMMISSIONER

COMMISSIONER