

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of :
Benjamin E. & Florence Myers :
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 11/30/76 - 2/28/80. :
:

AFFIDAVIT OF MAILING

State of New York
County of Albany

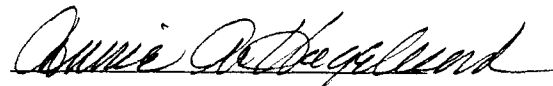
Jay Vredenburg, being duly sworn, deposes and says that he is an employee of the Department of Taxation and Finance, over 18 years of age, and that on the 3rd day of December, 1982, he served the within notice of Decision by certified mail upon Benjamin E. & Florence Myers, the petitioners in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

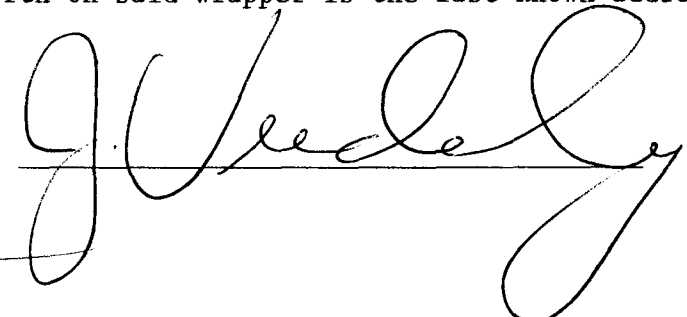
Benjamin E. & Florence Myers
21 Main St.
Massena, NY 13662

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
3rd 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 3, 1982

Benjamin E. & Florence Myers
21 Main St.
Massena, NY 13662

Dear Mr. & Mrs. Myers:

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
Lawrence X. Dalton
P.O. Box 284, 16 Main St.
Massena, NY 13662
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of :
BENJAMIN E. MYERS AND FLORENCE MYERS : 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 September 1, 1976 :
through February 28, 1980.

Petitioners, Benjamin E. Myers and Florence Myers, 21 Main Street, Massena, New York 13662, 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 September 1, 1976 through February 28, 1980 (File No. 32881).

A small claims hearing was held before Arthur Johnson, Hearing Officer, at the offices of the State Tax Commission, 207 Genesee Street, Utica, New York, on March 24, 1982 at 10:45 A.M. Petitioners appeared by Lawrence X. Dalton, Esq. The Audit Division appeared by Ralph J. Vecchio, Esq. (Alexander Weiss, Esq., of counsel).

ISSUES

I. Whether an agreement between petitioners and Main and Philips, Inc. constituted a bulk sale.

II. Whether petitioners are liable for sales taxes due from Main and Philips, Inc.

FINDINGS OF FACT

1. Petitioner Benjamin Myers along with Dominic Violi, Ross Violi, Jr. and George T. Foley were stockholders of Main and Philips, Inc. Main and Philips, Inc. d/b/a Toby's operated a restaurant and bar in Massena, New York.

2. On or about February 1976, petitioner Benjamin Myers and F. Armand Bourdon purchased the outstanding stock of Main and Philips, Inc. from the other stockholders. On or about October 1976, petitioner Benjamin Myers sold his stock to F. Armand Bourdon and Robert C. La Plante.

3. On February 25, 1976, petitioners executed an unlimited guarantee with the Farmers National Bank of Malone in consideration of financial accommodations given to Main and Philips, Inc. When Benjamin Myers sold his stock in October 1976, he was not released from his obligations thereunder.

4. Main and Philips, Inc., under the ownership of Bourdon and La Plante, operated the business on premises leased from petitioner Benjamin Myers. Said corporation defaulted in rent payments amounting to approximately \$10,000.00, and in the latter part of 1979, Benjamin Myers brought action to evict.

At such time, the Farmers National Bank of Malone threatened to foreclose its mortgage, sell the assets of the corporation and seek any deficiency from petitioners under the unlimited guarantee they executed.

5. In an effort to mitigate their losses, petitioners with the consent of the bank, entered into an agreement with Main and Philips, Inc. dated November 30, 1979. The agreement provided that Main and Philips, Inc. sell to petitioners all the tables, chairs, bar, kitchen equipment, food, liquor, beer and any contents being stored on the premises subject to all and any outstanding chattel mortgages and/or retail installment contracts. Petitioners agreed to assume the balance due on an outstanding promissory note held by the Farmers National Bank of Malone in the sum of \$33,255.48 in payment for said goods. The agreement further provided that Main and Philips, Inc. shall continue to be liable for any other outstanding debts against it.

Petitioners operated a new business on the premises known as "The Gallery Lounge".

6. On February 11, 1980, the Audit Division notified petitioners, as purchasers in a bulk sale transaction, of a possible claim for New York State and local sales and use taxes from the seller, Main and Philips, Inc.

7. On May 6, 1980, the Audit Division issued a Notice of Determination and Demand for Payment of Sales and Use Taxes Due against petitioners Benjamin E. Myers and Florence Myers covering the period September 1, 1976 through February 28, 1980 for taxes due of \$30,691.29, plus penalty and interest of \$13,074.00, for a total of \$43,765.29. Petitioners were held liable for taxes determined due from Main and Philips, Inc. in accordance with section 1141(c) of the Tax Law. The notice also includes the bulk sale tax on the value of tangible personal property transferred.

On November 14, 1980, the amount of the state's tax claim was revised to \$25,580.85, plus penalty and interest.

8. Petitioners argued that the transaction with Main and Philips, Inc. was not a bulk sale in that no consideration passed between the parties because they were already liable for the same note pursuant to the unlimited guarantee.

9. Reasonable cause existed for petitioners failure to pay over the taxes at issue.

CONCLUSIONS OF LAW

A. That the agreement between petitioners and Main and Philips, Inc. described in Finding of Fact "5" constituted a bulk sale within the meaning and intent of section 1141(c) of the Tax Law.

B. That petitioners failed in all respects to comply with the provisions of section 1141(c) of the Tax Law and for such failure, are personally liable

for the payment of the taxes determined to be due from Main and Philips, Inc.
as provided in said section of the Tax Law.

C. That the penalty is cancelled and interest is reduced to the minimum
statutory rate.

D. That the petition of Benjamin E. Myers and Florence Myers is granted
to the extent indicated in Conclusion of Law "C", and that, except as granted,
the petition is in all other respects denied.

DATED: Albany, New York

DEC 03 1982

STATE TAX COMMISSION

ACTING PRESIDENT

COMMISSIONER

COMMISSIONER