

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

June 11, 1982

Roma Furniture of Staten Island Co., Inc  
and Thomas Iuculano & Nancy Annese, Ind. & as Officers  
15 Bank St.  
Staten Island, NY 10301

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) 1139 & 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  
Joseph A. Mauriello  
358 S. Orange Ave.  
S. Orange, NJ  
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

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|---|---|----------|
| In the Matter of the Petition                 | : |          |
| of  | : |          |
| ROMA FURNITURE OF STATEN ISLAND CO., INC. and | : |          |
| THOMAS IUCULANO and NANCY ANNESE,             | : | DECISION |
| 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 June 1, 1969 | : |          |
| through November 30, 1972.                    | : |          |

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Petitioner, Roma Furniture of Staten Island Co., Inc., 15 Bank Street, Staten Island, New York and Thomas Iuculano and Nancy Annese, filed a petition for revision of a determination or for refund of sales or use taxes under Articles 28 and 29 of the Tax Law for the period June 1, 1969 through November 30, 1972 (File Nos. 10298, 10299 and 10300).

A formal hearing was commenced before Julius E. Braun, Hearing Officer at the offices of the State Tax Commission, Two World Trade Center, New York, New York on December 8, 1976. The hearing was continued at such offices before Solomon Sies, Hearing Officer on April 20, 1977, and concluded at such offices before Frank A. Romano, Hearing Officer on March 25, 1980. Petitioner appeared, at the respective hearings by Pustornio, Puglisi & Co. (Morton Sacks, CPA); DiFalco, Field & Lorenzo, Esqs. (Robert Field, Esq.) and Joseph A. Mauriello, C.P.A. The Audit Division appeared by Peter Crotty, Esq. (William Fox, Esq., of counsel).

### ISSUES

- I. Whether the proper tax rate was collected from customers when the sales tax rate was increased between the time of an order for furniture and the time of delivery.
- II. Whether the use of test periods and projections was a correct procedure.
- III. Whether the correct tax was paid on purchases of fixed assets and warehouse equipment.
- IV. Whether the officers are personally liable for underpayment of taxes.
- V. Whether penalty and interest in excess of the statutory minimum should be abated.

### FINDINGS OF FACT

1. The petitioner operates a retail furniture store, and 95% of the merchandise sold is on special order.
2. An audit of the vendor was conducted for the sales tax quarters June 1, 1969 through November 30, 1972. As a result of the audit, additional tax in the amount of \$5,400.96, plus penalty and interest in the amount of \$1,653.02 for a total of \$7,053.98 was assessed by Notice of Determination and Demand 90,750,752 dated August 9, 1973 against the corporation and its officers, Thomas Iuculano and Nancy Annese. Consents extending the period of limitation for assessment of tax until June 20, 1973 and December 19, 1973 were signed on July 24, 1972 and June 15, 1973, respectively.
3. The examiner noted that a general ledger, sales register, sales invoices, sales contracts, cash disbursements, purchase orders and inventory register were maintained.
4. An examination of the general ledger for the entire period revealed that sales per returns filed were understated by \$5,213.92, which sales petitioner

deemed non-taxable. A test for June 1 through November 30, 1971 showed that of \$56,488.00 claimed as non-taxable sales, \$3,194.00 were actually taxable. The percentage disallowed of 5.7 percent was applied across the audit period to find additional taxable sales of \$16,596.60, and tax due of \$1,115.87.

5. A margin of error test for overcollection and undercollection was made for June 1971. It revealed no errors.

6. The examiner tested lay away sales for June, 1971 and November, 1971 to find the percentage of sales in which the correct tax rate was not collected; and applied the test results to the various sales tax quarters. Tax due was stated to be \$2,581.03.

7. Fixed asset and warehouse equipment purchases were examined for the audit period and tax was unpaid on the amount of \$4,979.00. No testimony was given on this facet of the audit.

8. Expense purchases were examined for the entire year 1971, and a total of \$6,697.97 was found on which tax was not paid. The examiner computed the percentage of unpaid expense purchases to sales in 1971 to be .85 percent. This .85 percent error ratio was applied to sales per general ledger for each quarter, to arrive at estimated purchases of \$21,556.78.

9. At a conference, the petitioner submitted additional documentation with respect to fixed asset additions and expense purchases which was accepted by the Audit Division. It specifically reduced tax on fixed asset purchases to zero because capital improvement certificates or professional services to vendor was shown; and reduced the expense purchase tax by 42.99 percent because of payments of tax to petitioner's vendors and non-taxable services. The Audit Division recommended reducing the tax due on this portion of the assessment from \$1,740.06 to \$801.24.

10. The record is silent as to whether the petitioner was asked to agree to test periods, or consented to the use thereof.

11. When merchandise is ordered from the petitioner, a written agreement is entered into, which requests a 25% deposit. Usually the deposit received is 20% to 30%. Upon receipt of the deposit, the furniture is ordered from the manufacturers. The date of delivery to a customer depends upon the time of the manufacturer's cutting and delivery, which could be 6 to 8 months after the order. The sales tax, based on the rate at the time of the order, was stated on the receipt given to the customer.

12. The petitioner attempted to collect the appropriate sales tax rate from its customers. It requested additional tax from its customers, where appropriate, and in most cases was refused. Where a customer paid additional tax, it was remitted.

13. Mr. Iuculano testified that he was the President of the Corporation, that he signed checks and tax returns for all purposes, and that his sister, Nancy Annese, although an officer, was inactive and had no authority to sign checks.

14. Mr. Iuculano testified that he relied on the advice of his attorney or accountant with respect to the collection of tax on sales where the rate changed prior to delivery.

#### CONCLUSIONS OF LAW

A. That subdivision (a) of section 1132 of the Tax Law provides in relevant part that "(e)very person required to collect the tax shall collect the tax from the customer when collecting the price, amusement charge or rent to which it applies". The evidence presented supports the conclusion that the petitioner timely collected and remitted tax collected from its customers, but

in certain cases collected taxes at a rate in effect at the time an order for merchandise was received, rather than the rate in effect at the time the furniture was delivered.

B. That subdivisions (a) and (g) of section 1106 of the Tax Law when read together provide that where delivery of tangible personal property is made after June 1, 1971, that property shall not be subject to the additional tax rate of 1% if the agreement for the sale of the property was made in writing before February 1, 1971, the property was segregated from other property in the possession of the vendor and identified as appropriated to the sale before February 1, 1971, and not less than 10% of the price was paid before June 1, 1971. The evidence indicates that written agreements were entered into before February 1, 1971 and more than 10% of the sale price was paid prior to June 1, 1971. However, the merchandise was not in existence at the time of the agreement; therefore it could not have been segregated, and the third requirement for exception from the tax increase could not be met.

C. That since the records were available to determine for each quarterly reporting period which sales deemed non-taxable by the petitioners were actually taxable, the test for June 1 through November 30, 1971 should not have been projected across the audit period. The actual additional taxable sales should have been determined. The additional taxable sales found with respect to June 1 through November 30, 1971, are taxable; the portion of the assessment with respect to the balance of the audit period for additional taxable sales is cancelled.

D. That as records were available, the actual deficiency in tax collection due to increased tax rates should have been determined, rather than a projection

based on a test. This part of the assessment is cancelled except for the deficiency actually found for June, 1971 and November, 1971.

E. That as the petitioner satisfied the Audit Division that no tax was due as to fixed asset and warehouse equipment purchases, this portion of the assessment is cancelled.

F. That as records were available, the actual amount of tax due on expense purchases where tax had not been paid should have been determined rather than on estimate based on a test. This part of the assessment is cancelled except for the tax on \$3,818.21 which was actually found owing for 1971 as modified by Finding of Fact "9".

G. That based on the evidence presented in Finding of Fact "13", it is determined that Thomas Iuculano is a person required to collect tax under section 1131(1); Nancy Annese is not such a person as she was not under a duty to act for the corporation in complying with the Sales and Use Tax Law.

H. That penalties and interest in excess of the statutory minimum are waived, because the petitioners acted in good faith with respect to the collection and payment of tax.

I. That the petition of Roma Furniture of Staten Island Co., Inc. and Thomas Iuculano is granted in accordance with Conclusions of Law "C", "D", "E", "F" and "H". The Audit Division is hereby directed to accordingly modify the Notice of Determination and Demand issued August 9, 1973. In all other respects the petition is denied.

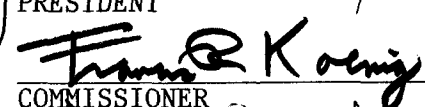
J. That the petition of Nancy Annese is granted in accordance with Conclusion of Law "G" and the Notice of Determination and Demand issued against her on August 9, 1973 is cancelled.

DATED: Albany, New York

JUN 11 1982

STATE TAX COMMISSION

  
PRESIDENT

  
COMMISSIONER

  
COMMISSIONER



P 230 840 286

RECEIPT FOR CERTIFIED MAIL

NO INSURANCE COVERAGE PROVIDED—  
NOT FOR INTERNATIONAL MAIL

(See Reverse)

*James J. Luntz of Staten*  
*Island Co. Inc. & Thomas*  
*Quiciliano & Nancy Annese*  
STREET AND NO.  
*15 Bank St*  
P.O., STATE AND ZIP CODE  
*Staten Island, NY 10301*

|                             |                        |   |    |
|-----------------------------|------------------------|---|----|
| CONSULT POSTMASTER FOR FEES | OPTIONAL SERVICES      | SPECIAL DELIVERY  | ¢  |
|                             |                        | RESTRICTED DELIVERY   | ¢  |
|                             | RETURN RECEIPT SERVICE | SHOW TO WHOM AND DATE DELIVERED                                     | ¢  |
|                             |                        | SHOW TO WHOM, DATE, AND ADDRESS OF DELIVERY                         | ¢  |
|                             |                        | SHOW TO WHOM AND DATE DELIVERED WITH RESTRICTED DELIVERY            | ¢  |
|                             |                        | SHOW TO WHOM, DATE AND ADDRESS OF DELIVERY WITH RESTRICTED DELIVERY | ¢  |
|                             | TOTAL POSTAGE AND FEES |   | \$ |
| POSTMARK OR DATE            |                        |   |    |

PS Form 3800, Apr. 1976

P 230 840 287

RECEIPT FOR CERTIFIED MAIL

NO INSURANCE COVERAGE PROVIDED—  
NOT FOR INTERNATIONAL MAIL

(See Reverse)

*Joseph A. Mauriello*  
STREET AND NO.  
*358 S. Orange Ave*  
P.O., STATE AND ZIP CODE  
*S. Orange, NJ 07079*

|                             |                        |   |   |
|-----------------------------|------------------------|---|---|
| CONSULT POSTMASTER FOR FEES | OPTIONAL SERVICES      | CERTIFIED FEE   | ¢ |
|                             |                        | SPECIAL DELIVERY  | ¢ |
|                             | RESTRICTED DELIVERY    | ¢   |   |
|                             | RETURN RECEIPT SERVICE | SHOW TO WHOM AND DATE DELIVERED                                     | ¢ |
|                             |                        | SHOW TO WHOM, DATE, AND ADDRESS OF DELIVERY                         | ¢ |
|                             |                        | SHOW TO WHOM AND DATE DELIVERED WITH RESTRICTED DELIVERY            | ¢ |
|                             |                        | SHOW TO WHOM, DATE AND ADDRESS OF DELIVERY WITH RESTRICTED DELIVERY | ¢ |
| TOTAL POSTAGE AND FEES      |                        | \$  |   |
| POSTMARK OR DATE            |                        |   |   |

PS Form 3800, Apr. 1976

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :  
of :  
Roma Furniture of Staten Island Co., Inc. :  
and Thomas Iuculano & Nancy Annese, :  
Ind. & 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 6/1/69 - 11/3/72. :  
:

State of New York  
County of Albany

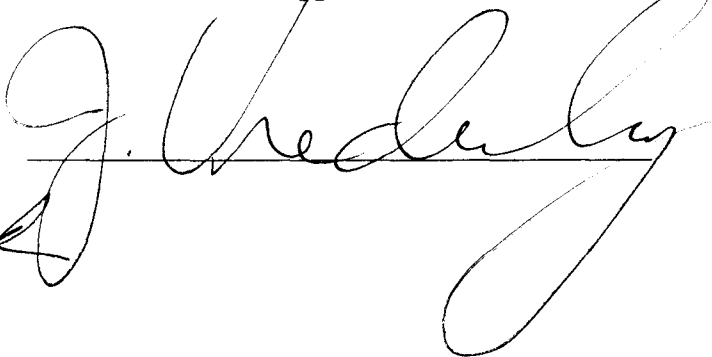

Jay Vredenburg, being duly sworn, deposes and says that he is an employee of the Department of Taxation and Finance, over 18 years of age, and that on the 11th day of June, 1982, he served the within notice of Decision by certified mail upon Roma Furniture of Staten Island Co., Inc, and Thomas Iuculano & Nancy Annese, Ind. & as Officers the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Roma Furniture of Staten Island Co., Inc  
and Thomas Iuculano & Nancy Annese, Ind. & as Officers  
15 Bank 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 petitioner herein and that the address set forth on said wrapper is the last known address of the petitioner.

Sworn to before me this  
11th day of June, 1982.

STATE OF NEW YORK

STATE TAX COMMISSION

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In the Matter of the Petition :  
of :  
Roma Furniture of Staten Island Co., Inc :  
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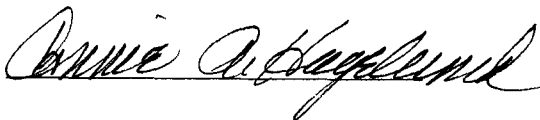
Jay Vredenburg, being duly sworn, deposes and says that he is an employee of the Department of Taxation and Finance, over 18 years of age, and that on the 11th day of June, 1982, he served the within notice of Decision by certified mail upon Joseph A. Mauriello the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

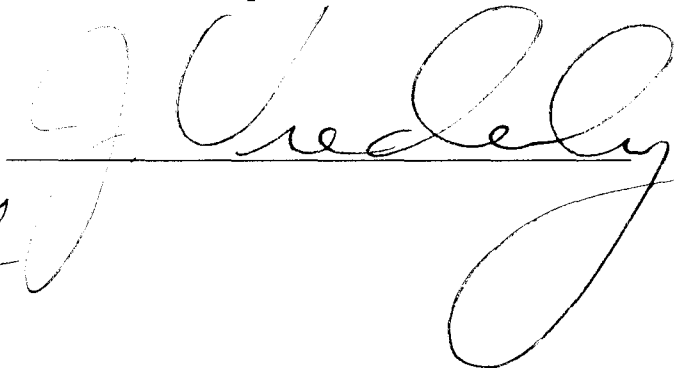
Joseph A. Mauriello  
358 S. Orange Ave.  
S. Orange, NJ

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 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  
11th day of June, 1982.

  
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