

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

December 14, 1982

Elliott Schiller
d/b/a Electronic Alarm Co.
1 Auburn Court
Monsey, NY 10952

Dear Mr. Schiller:

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
Simon L. Blauman
Blauman & McCabe, P.C.
120 N. Main St.
New City, NY 10956
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition	:	
of	:	
ELLIOTT SCHILLER	:	DECISION
D/B/A ELECTRONIC ALARM CO.	:	
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 December 1, 1969	:	
through August 31, 1976.	:	

Petitioner, Elliott Schiller, d/b/a Electronic Alarm Co., 1 Auburn Court, Monsey, New York, 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 December 1, 1969 through August 31, 1976 (File No. 17175).

A formal hearing was held before Milton Koerner, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York on October 8, 1980 at 1:30 P.M. and was continued to conclusion before Robert A. Couze, Hearing Officer at the same location on November 6, 1980 at 10:30 A.M.; on January 12, 1981 at 10:20 A.M.; on January 13, 1981 at 10:30 A.M.; on January 16, 1981 at 10:30 A.M. and on January 19, 1981 at 10:30 A.M. Petitioner appeared by Blauman and McCabe, Esqs. (Simon Blauman, Esq., of counsel). The Audit Division appeared by Ralph J. Vecchio, Esq. (Aliza Schwadron, Esq., of counsel on October 8, 1980 and Samuel J. Freund, Esq., of counsel at all other times).

ISSUE

Whether the Audit Division's estimate of petitioner's sales tax liability was proper.

FINDINGS OF FACT

1. On June 15, 1976 and on December 13, 1976, the Audit Division issued notices of determination and demand for payment of sales and use taxes due, against petitioner, Elliott Schiller, in the respective sums of \$19,654.90 for the period December 1, 1969 through November 30, 1973 and \$25,162.43 for the period December 1, 1973 through August 31, 1976. Both are subject to penalty and interest due.

2. Petitioner was the owner and operator of Electronic Alarm Co. He was in the business of installing burglar alarm systems in residences and in a few instances small business establishments.

3. Until the fall of 1972 petitioner operated his business from his residence, an apartment located at 1130 Pelham Parkway, Bronx, New York. His telephone number was (212) 792-3397, and he was listed in both the yellow pages and the white pages.

4. In the fall of 1972, petitioner took up residence in a home that he purchased in Monsey, New York.

5. When petitioner relocated his residence from the Bronx to Monsey, he also relocated his business into a warehouse type building located on Boston Post Road, Bronx, New York for four or five months. The telephone number was also (212) 792-3397. Subsequent to operating out of the Bronx, Electronic Alarm operated out of petitioner's Monsey home.

6. Electronic Alarm Co. was a one man operation. However, on rare occasions, petitioner would hire a man to help him out, and at times he would subcontract some of his work out.

7. Petitioner's sales were on credit, with monthly payments after small downpayments.

8. In addition to the foregoing business establishments, the petitioner also maintained a van type vehicle for the operation of Electronic Alarm Co.

9. Petitioner admits that he was in business from May 1970 through 1973. However, he contends that in 1973 he ceased to operate Electronic Alarm Co., and that he was not in business during the years 1974 through 1976 nor for the period of time, in issue herein, prior to May 1970.

10. Petitioner further testified that he only operated Electronic Alarm Co. for about four months from the Boston Post Road location, and that he ceased to receive any payments on accounts receivable approximately one year later.

11. Petitioner did not keep any business books and records, i.e., accounts payable, accounts receivable or cash books nor any other cumulative summaries.

12. Petitioner concedes that for the period of time he admits doing business as Electronic Alarm Co., he received cash money for work and services performed and supplies sold, and that he maintained no record of such activity. Petitioner contended that his cash sales for the period May 1970 through 1973 only averaged \$100.00 per week or \$5,000.00 per year.

13. Petitioner also testified that he estimated Electronic Alarm Co. had a business loss of between \$8,000.00 and \$10,000.00 as a result of bad debts during the period May 1970 through 1973.

14. The auditor's records reflect that petitioner vacillated in complying with the Audit Division's attempts to conduct field audits of Electronic Alarm Co. Petitioner denied that such was the case. Notwithstanding, he only submitted for audit checkbook stubs numbered 101 through 442, dated July 11, 1970 through September 15, 1974, respectively. The cancelled checks were never produced for audit.

15. Petitioner asserted that the aforementioned checkbook stubs accurately reflected the income and the expenses of Electronic Alarm Co. during the period of time May 1970 through 1973, exclusive of the average \$100.00 per week that was received for cash sales.

16. Petitioner submitted 85 invoices dated from June 1, 1970 through August 28, 1972 for the purchase of supplies.

17. In 1979 petitioner had a bookkeeper named "Sarah" (last name unknown) who prepared a ledger assertedly reflecting Electronic Alarm Co.'s business receipts and business expenses for the period June 23, 1970 through November 27, 1974. Besides not remembering "Sarah's" last name, petitioner testified at the hearing that he had not seen her since 1978 and that he did not know whether he could locate her.

18. The aforementioned ledger contained disbursements of a personal nature, i.e., automobile payments, costs for plane tickets, etc. in addition to those items pertaining to Electronic Alarm Co.

19. On March 3, 1971, petitioner was issued a New York City Pistol License on the basis that he carried large sums of money on his person. Petitioner stated on the application for this license that he commenced doing business as Electronic Alarm Co. on March 1, 1970. Petitioner also continued to state on subsequent renewal applications for the years 1972 through 1975/1976 that he was doing business as Electronic Alarm Co., and that during these years he carried on his person between \$1,000.00 and \$2,000.00 per week.

20. Petitioner also conducted a business under the name Anytime Locksmith, Inc. from the same address on Boston Post Road, Bronx that he conducted Electronic Alarm Co. Petitioner testified that he only operated Anytime Locksmith, Inc. for the same asserted three or four months that he operated Electronic Alarm

Co. from the Boston Post Road location. However, notwithstanding this assertion, petitioner did in fact maintain an active checking account under the name Anytime Locksmith, Inc. with Manufacturers Hanover Trust Company (Branch #056 Account #0-50955) for the period August 14, 1972 through September 25, 1973 when he made his last substantial deposit into such account.

21. The Certificate of Incorporation of Anytime Locksmith, Inc. stated its purpose was "to lease, own, operate, acquire, engage, conduct and carry on in the business of operating a locksmith, burglar alarm and hardware business. To buy all things necessary [or incidental thereto]."

22. Anytime Locksmith, Inc. is not in issue herein, but evidence pertaining thereto was permitted because it related to petitioner's credibility.

23. Petitioner maintained that the reason he did not have any books or records for Electronic Alarm Co. for the years 1974 through 1976 was that he was not operating said business during said years.

24. Petitioner testified that during 1974, 1975 and 1976 he occasionally did burglar alarm installation jobs, as a subcontractor, for other alarm companies under the name Elliott Schiller. At times he had two jobs a week, and at other times he had three or four jobs a week. Some weeks he had none.

25. Petitioner testified that on October 11, 1973 he entered into a contract with Universal Security Instruments, Baltimore, Maryland. He was employed as a sales representative for nine or ten months with a weekly salary of \$185.00 drawn against commissions.

26. In 1974 petitioner earned \$2,076.96 as a sales representative from Empire Machines and Systems, Garden City Park, New York.

27. In 1975 petitioner was employed as a sales representative by Creative Concepts Unlimited which, according to the petitioner, is located in either

Stamford or Norwalk, Connecticut. He worked for them for two years at a salary of \$9,000.00 or \$10,000.00 per year.

28. The Audit Division found it necessary to subpoena from several banks records of petitioner's savings accounts and checking accounts, since on the advice of his accountant, the petitioner failed to cooperate with the audit herein.

29. The records of petitioner's wife's savings account were also subpoenaed since the petitioner deposited therein some of the income from Electronic Alarm Co.'s sales.

30. Because of the insufficiency of petitioner's business information and the inability to reconstruct an accurate set of books for petitioner, the Audit Division elected to determine his sales taxes due by the application of external indicies.

31. The auditor, herein, stated in his Field Audit Report dated April 8, 1976, that the procedure he used to determine petitioner's liability for the period December 1, 1969 to November 30, 1973 was as follows:

"To arrive at this 'funds requirement' examiner took into account apartment rental expenses for the period December 1, 1969 to September 15, 1972 and mortgage and real estate taxes per bank records and Mr. Schiller's copies of personal federal income tax returns. For the balance of audit period, an estimate was made for utilities and insurance expense regarding apartment and house. To this was added federal income tax due with returns for the years 1970, 1971 and 1972 per taxpayer's copies. An estimate of income taxes paid to New York State and New York City was also included in this analysis. Auto expenses including insurance, gas, oil and maintenance were estimated. Vendor purchased six (6) automobiles or trucks during the audit period at a total cost estimated by the examiner at \$29,400 based on Mr. Schiller's statements. As no source of funds was substantiated, the total cost was added to the analysis. Mr. Schiller did not submit transcripts of all savings accounts indicated by federal returns therefore examiner approximated deposits for 1970 and 1971 by the increase in interest income reported. Examiner assumed deposits were made mid-year and earned 5% per year. As interest income for 1972 and 1973 was unclear, examiner assumed deposits for those years were the same amount as determined for 1970 and 1971. These savings account deposits, together with actual

deposits into business checking account (checks deposited only as noted above) were added to 'funds required' analysis.

On September 15, 1972 Mr. Schiller purchased a new home. The mortgagee furnished examiner with a copy of mortgage application which disclosed purchase price and mortgage amount. The difference was the downpayment which was added to analysis. An estimate was made of closing costs, legal fees and improvements as observed by examiner and included in the cash requirement analysis. Also indicated on mortgage application was other various liquid assets owned by Mr. Schiller. Examiner took the position that these assets were acquired during the audit period and added them to the analysis.

To the above was added \$15,000 per year or \$60,000 for the audit period for necessary living expenses such as food, clothing and entertainment, etc. This annual figure seems reasonable in view of Mr. Schiller's apparent standard of living as reflected by his tastes in automobiles purchased and living accommodations.

The cash requirement for the audit period amounts to \$311,736.89 in funds necessary for Mr. Schiller to operate business and his personal living expenses. This amount is determined to be sales for the period December 1, 1969 to November 30, 1973. This amount was allocated to the various quarters in the audit period based on actual business checking account deposits. As noted above, a return was filed for period ended February 28, 1971 and therefore 'outlawed'. The sales allocated to this period amount to \$17,724.28 of the \$311,736.89 sales determined for the period December 1, 1969 to November 30, 1973. The balance of \$294,012.58 in unreported sales are being taxed at New York City rates prevalent for the given period and results in tax due of \$19,654.90.

Examiner realizes many of the amounts included in the above analysis are estimates but he feels they are reasonable as they are based on partial information supplied by vendor plus factual data gathered by examiner from third parties. Moreover, this total cash requirement is supported by and reconcilable to Mr. Schiller's sworn statements on his New York City Postol (sic) Permit applications (copies enclosed) for the years 1970 to 1976. These applications were all investigated by the New York City Police Department and with the exception of the most recent application, approved by them. Mr. Schiller, under oath, stated he was the owner of Electronic Alarm Co. and carried approximately \$1,500.00 weekly in receipts derived from New York City sales of said firm. Using Mr. Schiller's own figure of \$1,500.00 per week for the 208 weeks in the period covered by this report results in gross sales of \$312,000.00 which approximates examiner's findings. Also, in his mortgage application (copy enclosed) Mr. Schiller states his net income from Electronic Alarm Co. as \$20,000.00 per year. This amounts to a net profit of \$80,000.00 for the audit period. On the determined sales of \$311,736.89 the net profit percentage on gross

sales is approximately 25% which is reasonable in a service oriented business which finances many of its own sales."

32. The procedure used to determine petitioner's liability for the period December 1, 1973 to August 31, 1976 was to use the audited taxable sales for the comparable period December 1, 1970 to August 31, 1973 as a base. These taxable sales were then increased by 25% to account for inflationary and industry price increases. This procedure results in taxable sales totaling \$326,007.82. Using the New York City rate to tax said sales results in an asserted tax due of \$25,162.43, plus penalty and interest.

CONCLUSIONS OF LAW

A. That section 1138 of the Tax Law provides in part as follows:

"§1138. Determination of Tax

(a) If a return required by this article is not filed, or if a return when filed is incorrect or insufficient, the amount of tax due shall be determined by the tax commission from such information as may be available. If necessary, the tax may be estimated on the basis of external indices."

B. That it was proper for the Audit Division to reconstruct the petitioner's sales since he failed to maintain adequate books and records, and that the tax liability ascertained by the Audit Division was fair and reasonable.

C. That the petition, herein, is denied and the notices of determination and demand for payment of sales and use taxes due issued June 15, 1976 and December 13, 1976 are sustained.

DATED: Albany, New York

DEC 14 1982

STATE TAX COMMISSION

ACTING PRESIDENT

COMMISSIONER

COMMISSIONER

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :

of

Elliott Schiller

d/b/a Electronic Alarm Co. :

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:
12/1/69 - 8/31/76.

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 Elliott Schiller, d/b/a Electronic Alarm Co. the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

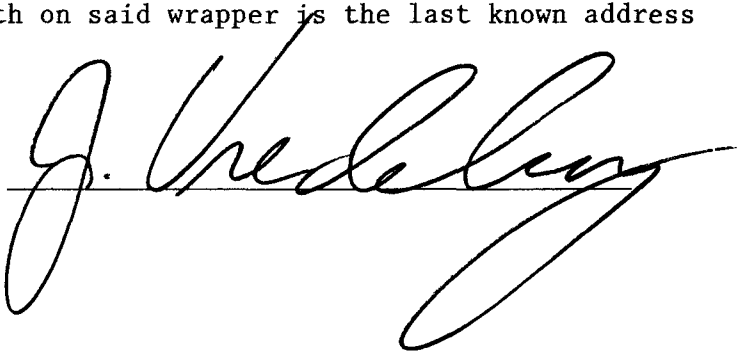
Elliott Schiller
d/b/a Electronic Alarm Co.
1 Auburn Court
Monsey, NY 10952

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

In the Matter of the Petition :
of :
Elliott Schiller :
d/b/a Electronic Alarm Co. :

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 12/1/69 - 8/31/76.

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 Simon L. Blauman the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Simon L. Blauman
Blauman & McCabe, P.C.
120 N. Main St.
New City, NY 10956

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



P 230 844 396
RECEIPT FOR CERTIFIED MAIL

NO INSURANCE COVERAGE PROVIDED—
 NOT FOR INTERNATIONAL MAIL

Blauzman (See Reverse) *Mr. Lake PC*

SENT TO		<i>Simax F. Blauzman</i>	
STREET AND NO.		<i>130 N. Main St.</i>	
P.O., STATE AND ZIP CODE		<i>New City, N.Y. 10956</i>	
POSTAGE		\$	
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

P 230 844 395
RECEIPT FOR CERTIFIED MAIL

NO INSURANCE COVERAGE PROVIDED—
 NOT FOR INTERNATIONAL MAIL

Electronic (See Reverse)

SENT TO		<i>E. Charr Schiller</i>	
STREET AND NO.		<i>1 Duhrum Court</i>	
P.O., STATE AND ZIP CODE		<i>Mansie, N.Y. 10957</i>	
POSTAGE		\$	
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