

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

June 29, 1983

Donald K. Abbey
4887 Minsham Lane
Manlius, NY 13104

Dear Mr. Abbey:

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 Law 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
Building #9 State Campus
Albany, New York 12227
Phone # (518) 457-2070

Very truly yours,

STATE TAX COMMISSION

cc: Petitioner's Representative
J. Alexander Davidson
Scott, Sardano & Pomeranz
351 S. Warren St.
Syracuse, NY 13202
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of :
DONALD K. ABBEY : 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 December 1, 1975 :
through August 31, 1980. :

Petitioner, Donald K. Abbey, 4887 Minsham Lane, Manlius, New York 13104, 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, 1975 through August 31, 1980 (File No. 35639).

A formal hearing was held before Arthur Johnson, Hearing Officer, at the offices of the State Tax Commission, 333 East Washington St., Syracuse, New York, on October 28, 1982, at 2:45 P.M., with all briefs to be submitted by December 15, 1982. Petitioner appeared by John Alexander Davidson, Esq. The Audit Division appeared by Paul B. Coburn, Esq. (Anne Murphy, Esq., of counsel).

ISSUES

I. Whether petitioner, Donald K. Abbey, was a person required to collect tax on behalf of A & R Truckin' Accessories, Inc. and thus personally liable for sales taxes unpaid by said corporation.

II. Whether the Audit Division correctly estimated the amount of sales taxes due from A & R Truckin' Accessories, Inc. for the period March 1, 1980 through May 31, 1980.

FINDINGS OF FACT

1. Petitioner, Donald K. Abbey, together with John Reidy formed A & R Truckin' Accessories, Inc. on February 19, 1976. Petitioner was named president

and John Reidy became vice-president. A few months later, Thomas Reidy joined the corporation as secretary-treasurer. The outstanding stock was divided equally among the officers.

2. On January 12, 1981, the Audit Division issued a Notice and Demand for Payment of Sales and Use Taxes Due against petitioner covering the period December 1, 1975 through May 31, 1978 for taxes due of \$350.33, plus interest of \$169.39, for a total of \$519.72

A second Notice and Demand was issued on the same date for the periods June 1, 1978 through February 29, 1980 and June 1, 1980 through August 31, 1980 in the amount of \$24,032.26, plus penalty and interest of \$9,089.54, for a total of \$33,121.80.

Said notices were issued as a result of an audit and because of the corporation's failure to pay over sales taxes due on returns filed for certain periods.

The Audit Division also issued a Notice of Determination and Demand for Payment of Sales and Use Taxes Due on January 12, 1981 for the period March 1, 1980 through May 31, 1980 for taxes due of \$6,163.85, plus penalty and interest of \$1,171.12, for a total of \$7,334.97. The corporation failed to file a return for said period and as a result the taxes due were estimated in accordance with section 1138(a) of the Tax Law.

The amount of taxes assessed is not in dispute, except the estimate for the quarter ended May 31, 1980.

3. Petitioner, John Reidy and Thomas Reidy equally shared the responsibility for the day to day management and financial affairs of the corporation. Each was an authorized signatory on the business bank account. Two signatures were

required to issue a check. Petitioner's specific duties were related to outside sales (wholesale sales to dealerships).

Petitioner signed corporation franchise tax reports for 1976 and 1977. Thomas Reidy signed the report for 1978 and John Reidy signed the report for 1979.

4. Petitioner devoted 100 percent of his time to the business and was paid a salary.

5. Petitioner was aware that sales tax returns were filed without remitting the taxes due shown thereon.

6. From February 8, 1979 to June 5, 1979, petitioner was traveling throughout the United States rather than working in the Syracuse store. Consequently, he was not actively involved in the operations of the business during this period. He did however, remain the president of the corporation.

7. Effective June 30, 1980, petitioner resigned from the office of president and terminated all activities with A & R Truckin' Accessories, Inc.

8. The sales taxes reported by A & R Truckin' Accessories, Inc. never approached \$6,163.85 in any one period. The average sales tax reported over the entire period at issue was \$3,487.00.

9. Petitioner argued that for the period indicated in Finding of Fact "6", he had no control over the use of corporate funds and therefore should not be held responsible for unpaid sales taxes for that period. Moreover, petitioner argued that he was not responsible after he resigned.

CONCLUSIONS OF LAW

A. That section 1131(1) of the Tax Law provides:

"Persons required to collect tax' or 'person required to collect any tax imposed by this article' shall include: every vendor of tangible personal property or services;... Said terms shall also include any officer or employee of a corporation or of a dissolved corporation who as such

officer or employee is under a duty to act for such corporation in complying with any requirement of this article and any member of a partnership."

B. That the resolution of whether petitioner, Donald K. Abbey, is a person required to collect tax turns upon a factual determination (Vogel v. Dept. of Taxation and Finance, 413 N.Y.S.2d 862; Chevlowe v. Koerner, 407 N.Y.S.2d 427.)

That relevant factors in such a determination include, but are not limited to, the following: the day-to-day responsibilities in the corporation; involvement in and knowledge of the financial affairs of the corporation; the identity of who prepared and signed tax returns; authority to sign checks.

C. That petitioner, Donald K. Abbey, was a person required to collect tax within the meaning and intent of section 1131(1) of the Tax Law for the period December 1, 1975 through June 30, 1980 and therefore has personal liability for the sales taxes imposed on A & R Truckin' Accessories, Inc. in accordance with section 1133(a) of the Tax Law.

D. That petitioner bears no personal liability for sales taxes asserted for periods after June 30, 1980, the date of his resignation.

E. That the Audit Division's estimate of taxes due for the period March 1, 1980 through May 31, 1980 was excessive; that in accordance with Finding of Fact "8", such taxes due are reduced to \$3,487.00.

F. That the petition of Donald K. Abbey is granted to the extent indicated in Conclusions of Law "D" and "E"; that the Audit Division is hereby directed

STATE TAX COMMISSION

JUN 29 1983

Rodriguez
PRESIDENT

Francis R. Koenig
COMMISSIONER

Mark Friedman
COMMISSIONER

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition
of

Donald K. Abbey

:

:

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:
12/1/75-8/31/80.

State of New York
County of Albany

Connie Hagelund, being duly sworn, deposes and says that she is an employee of the Department of Taxation and Finance, over 18 years of age, and that on the 29th day of June, 1983, she served the within notice of Decision by certified mail upon Donald K. Abbey, the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Donald K. Abbey
4887 Minsham Lane
Manlius, NY 13104

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
29th day of June, 1983.





AUTHORIZED TO ADMINISTER
OATHS PURSUANT TO TAX LAW
SECTION 174

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition
of

Donald K. Abbey

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AFFIDAVIT OF MAILING

for Redetermination of a Deficiency or a Revision :
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State of New York
County of Albany

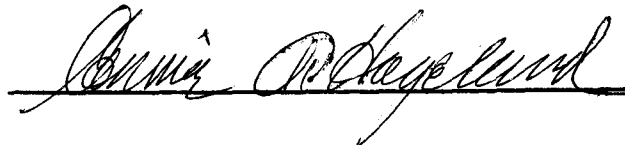
Connie Hagelund, being duly sworn, deposes and says that she is an employee of the Department of Taxation and Finance, over 18 years of age, and that on the 29th day of June, 1983, she served the within notice of Decision by certified mail upon J. Alexander Davidson the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

J. Alexander Davidson
Scott, Sardano & Pomeranz
351 S. Warren St.
Syracuse, NY 13202

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
29th day of June, 1983.



AUTHORIZED TO ADMINISTER
OATHS PURSUANT TO TAX LAW
SECTION 174

P 481 207 668

RECEIPT FOR CERTIFIED MAIL

INSURANCE COVERAGE PROVIDED—
NOT FOR INTERNATIONAL MAIL

(See Reverse)

Sent to <u>J. Alexander Davidson</u>	
Street and No. <u>Scott, Sardano + Pomeranz</u>	
P.O., State and ZIP Code <u>351 S. Warren St.</u>	
<u>Syracuse, NY 13202</u>	
Postage	\$
Certified Fee	
Special Delivery Fee	
Restricted Delivery Fee	
Return Receipt Showing to whom and Date Delivered	
Return Receipt Showing to whom, Date, and Address of Delivery	
TOTAL Postage and Fees	\$
Postmark or Date	

PS Form 3800, Feb. 1982

P 481 207 667

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(See Reverse)

Sent to <u>Donald K. Abbey</u>	
Street and No. <u>4887 Minsham Lane</u>	
P.O., State and ZIP Code <u>Manlius, NY 13104</u>	
Postage	\$
Certified Fee	
Special Delivery Fee	
Restricted Delivery Fee	
Return Receipt Showing to whom and Date Delivered	
Return Receipt Showing to whom, Date, and Address of Delivery	
TOTAL Postage and Fees	\$
Postmark or Date	

PS Form 3800, Feb. 1982