

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

September 16, 1983

Oakley M. Gentry, III  
141 Gillette Ave.  
Sayville, NY 11782

Dear Mr. Gentry:

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  
John J. Barnosky  
Farrel, Faitz, Caemmerer & Cleary, P.C.  
379 Hillside Ave.  
Williston Park, NY 11596  
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

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In the Matter of the Petition :  
of :  
Oakley M. Gentry, III :  
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 12/1/73-10/31/75. :  
\_\_\_\_\_ :

AFFIDAVIT OF MAILING

State of New York  
County of Albany

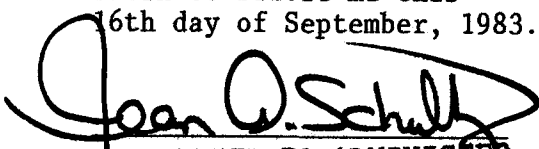
Connie Hagelund, being duly sworn, deposes and says that she is an employee of the Department of Taxation and Finance, over 18 years of age, and that on the 16th day of September, 1983, she served the within notice of Decision by certified mail upon Oakley M. Gentry, III, the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Oakley M. Gentry, III  
141 Gillette Ave.  
Sayville, NY 11782

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  
16th day of September, 1983.

  
AUTHORIZED TO ADMINISTER  
OATHS PURSUANT TO TAX LAW  
SECTION 174





STATE OF NEW YORK

STATE TAX COMMISSION

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In the Matter of the Petition	:	
	:	
of	:	
	:	
OAKLEY M. GENTRY, III	:	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, 1973	:	
through October 31, 1975.	:	

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Petitioner, Oakley M. Gentry, III, 141 Gillette Avenue, Sayville, New York 11782, 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, 1973 through October 31, 1975 (File No. 29676).

A formal hearing was held before Julius E. Braun, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on September 25, 1981 at 9:15 A.M. Petitioner appeared by Anthony J. Puccio, Esq. The Audit Division appeared by Ralph J. Vecchio, Esq. (Thomas Sacca, Esq., of counsel).

ISSUES

I. Whether the execution by an officer of a corporation of a "Consent Extending Period of Limitation for Assessment of Sales and Use Taxes under Articles 28 and 29 of the Tax Law" extends the period of limitation for assessment of a former officer.

II. Whether the Audit Division properly determined, pursuant to audit, the amount of sales tax liability of the corporation for the period in issue.

III. Whether petitioner was liable as a person required to collect tax under sections 1131(1) and 1133(a) of the Tax Law for sales tax owed by Starfish Marine Boat and Motor Sales, Inc.

FINDINGS OF FACT

1. On February 15, 1977 and February 21, 1978, Victor G. Kane, the president of Starfish Marine Boat and Motor Sales, Inc. ("Starfish"), executed consents on behalf of said corporation extending the periods of limitation for the assessment of sales and use taxes under Articles 28 and 29 of the Tax Law for the period December 1, 1973 through August 31, 1976 to any time on or before March 20, 1978 and September 20, 1978, respectively.

2. On September 8, 1978, the Audit Division issued a Notice of Determination and Demand for Payment of Sales and Use Taxes Due for the period December 1, 1973 through October 31, 1975 against Oakley M. Gentry, III on the basis that he is personally liable as an officer of Starfish under sections 1131(1) and 1133 of the Tax Law for taxes determined to be due in accordance with section 1138(a) of the Tax Law in the amount of \$43,692.01, plus penalty of \$10,922.97 and interest of \$18,724.93, for a total due of \$73,339.91. On November 14, 1978, petitioner was advised that the amount of tax due was revised to \$40,622.32, plus penalty and interest to December 4, 1978 of \$28,853.50, for a total due of \$69,475.82.

3. On December 3, 1980, petitioner filed a perfected petition wherein he states that the taxes, penalties and interest were improperly assessed because the assessments were based on a test period which was inconclusive and that a substantive portion of the sales made during the period were exempt. In addition, for an affirmative defense, petitioner alleges the following:

a. Petitioner was formerly an officer of Starfish until October 31, 1975 when petitioner sold all his interest in said corporation;

b. Upon information and belief, all sales and use tax returns filed by the taxpayer corporation for tax periods December 1, 1973 to February 28, 1974, March 1, 1974 to May 31, 1974, June 1, 1974 to August 31, 1974, September 1, 1974 to November 30, 1974, December 1, 1974 to February 28, 1975, March 1, 1975 to May 31, 1975 and June 1, 1975 to August 31, 1975 were filed on the last day of each of said periods;

c. Upon information and belief, the State Tax Commission mailed a Notice of Determination and Demand for Payment of Sales and Use Taxes Due dated September 8, 1978 to petitioner on or about said date;

d. More than three (3) years had expired from the dates of filing of the above returns to the date of mailing of the aforesaid Notice;

e. Petitioner, either as individual or on behalf of taxpayer corporation, has not consented in writing, within said three year period, to an extension of the time for the assessment of additional taxes, pursuant to §1147(c) of the Tax Law;

f. Any such written consent to extend the time for assessment of additional taxes made by Starfish Marine Boat and Motor Sales, Inc. subsequent to petitioner's affiliation with said taxpayer, is not binding upon petitioner who neither knew of nor approved any such action by taxpayer corporation;

g. In any event, an extension made by a taxpayer pursuant to the provisions of §1147(c) of the Tax Law does not, as a matter of law, extend the period of liability of persons personally liable for the tax under Tax Law §1133.

4. The Audit Division in its answer acknowledges that petitioner was president of Starfish from December 1, 1972 to October 31, 1975. Sales tax returns for this period were timely filed and payments were made thereto.

5. Sales tax returns were filed by petitioner on behalf of Starfish more than three years prior to the Notice of Determination and Demand for Payment of Sales and Use Taxes Due dated September 8, 1978 for all quarters assessed, except for the period June 1, 1975 through October 31, 1975.

6. Due to insufficient records submitted by Victor Kane, petitioner's successor as president of Starfish, the Audit Division utilized a test period, the month of June 1976, since it was the most complete of the three months of sales invoices made available (June 1976, July 1976, August 1976). The Audit Division determined that though Starfish claimed that the nontaxable sales for such months were \$151,648.61, only 15.41 percent of such sales, or \$23,364.33, were verifiable as exempt. Therefore, 84.59 percent of the sales claimed by Starfish to be exempt could not be verified. The Audit Division then applied the 84.59 percent factor to the reported nontaxable sales in the periods at issue.

7. The percentage of nontaxable sales to gross sales reported by Victor Kane while he was president of Starfish were substantially higher than the percentage of nontaxable sales to gross sales during petitioner's tenure as president. While Victor Kane was president, such percentage was 56 percent while the average for petitioner was 23 percent.

8. That the verified exempt sales for the test month of June 1976, \$23,364.33, constitutes 10.95 percent of gross sales for that month. That by using this factor, the Audit Division should have allowed petitioner exempt

sales of \$61,686.65 for the period ended August 31, 1975 and \$22,108.90 for the period ended November 30, 1975.

9. Petitioner does not deny that under Tax Law sections 1131(1) and 1133(a), he is a person who is personally liable for sales tax imposed against Starfish for the period that he was president.

#### CONCLUSIONS OF LAW

A. That section 1147(b) of the Tax Law limits the time within which the State or the Tax Commission may "levy, appraise, assess, determine or enforce collection of" sales and use taxes. This section provides in pertinent part:

"However, except in the case of a willfully false or fraudulent return with intent to evade the tax, no assessment of additional tax shall be made after the expiration of more than three years from the date of the filing of a return..."

B. That subdivision (c) of §1147 of the Tax Law provides as follows:

"(c) Where, before the expiration of the period prescribed herein for the assessment of an additional tax, a taxpayer has consented in writing that such period be extended the amount of such additional tax due may be determined at any time within such extended period. The period so extended may be further extended by consents in writing made before the expiration of the extended period..."

C. That no assessment may be made with respect to Oakley M. Gentry for the periods in issue for which sales tax returns were filed more than three years prior to the Notice of Determination and Demand for Payment of Sales and Use Taxes Due dated September 8, 1978 since the consents to extend the period of limitation for assessment were executed by "taxpayer" Starfish Marine Boat and Motor Sales, Inc. and no consents were signed by "taxpayer" petitioner. The consents executed by Starfish Marine Boat and Motor Sales, Inc. cannot bind a former officer who was not in any way affiliated with the corporation at the time the waiver of the statute of limitations was executed.



D. That it was unreasonable for the Audit Division to apply the 84.59 percent factor, the percentage of claimed nontaxable sales not verifiable in June, 1976 when Victor Kane was president of Starfish, to nontaxable sales reported by petitioner, since Victor Kane reported nontaxable sales in amounts more than double those reported by petitioner.

E. That, however, pursuant to Tax Law section 1138, due to the lack of adequate records it was proper for the Audit Division to utilize a test period, and that it is reasonable to determine additional tax owing by applying the 10.95 percent factor as set forth in Finding of Fact "8", supra.

F. That petitioner is personally liable under Tax Law section 1133(a) for sales tax imposed against Starfish for the period he was president and which was timely assessed against petitioner.

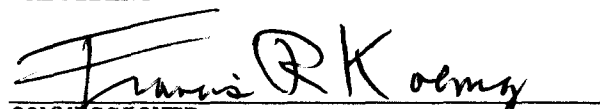
G. That the petition of Oakley M. Gentry, III is granted to the extent indicated in Conclusions of Law "C" and "E"; that the Audit Division is hereby directed to modify the Notice of Determination and Demand for Payment of Sales and Use Taxes Due dated September 8, 1978 and that, except as so granted, the petition is in all other respects denied.


DATED: Albany, New York

STATE TAX COMMISSION

SEP 16 1983

  
PRESIDENT

  
COMMISSIONER

  
COMMISSIONER

P 481 208 384

RECEIPT FOR CERTIFIED MAIL

NO INSURANCE COVERAGE PROVIDED—  
NOT FOR INTERNATIONAL MAIL

(See Reverse)

Sent to <b>Gakley M. Gentry III</b>	
Street and No. <b>141 Gillette Ave</b>	
P.O., State and ZIP Code <b>Sayville N.Y 11782</b>	
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 481 208 385

RECEIPT FOR CERTIFIED MAIL

NO INSURANCE COVERAGE PROVIDED—  
NOT FOR INTERNATIONAL MAIL

(See Reverse)

Sent to <b>John J BAKWOSKI</b>	
Street and No. <b>FARRELL, PAITE, CHAMBERLAIN + CLEARY PC</b>	
P.O., State and ZIP Code <b>379 HILLSIDE AVE WATKINSON PARK NY 11596</b>	
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