

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

May 27, 1983

Higgins & McLaughlin, Inc. (Purchaser)
c/o Allen, Litt, Hulnick & Giordano
15 Neperan Rd.
Tarrytown, NY 10591

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) 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
Donald Hulnick
Allen, Litt, Hulnick & Giordano
15 Neperan Rd.
Tarrytown, NY 10591
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of :
Higgins & McLaughlin, Inc. (Purchaser) :
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 3/1/72-5/31/74 & 3/1/75-2/28/76. :

AFFIDAVIT OF MAILING

State of New York
County of Albany

David Parchuck, 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 27th day of May, 1983, he served the within notice of Decision by certified mail upon Higgins & McLaughlin, Inc. (Purchaser), the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Higgins & McLaughlin, Inc. (Purchaser)
c/o Allen, Litt, Hulnick & Giordano
15 Neperan Rd.
Tarrytown, NY 10591

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
27th day of May, 1983.

David Parchuck

James A. Hepler

AUTHORIZED TO ADMINISTER
OATHS PURSUANT TO TAX LAW
SECTION 174

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of :
Higgins & McLaughlin, Inc. (Purchaser) :
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 3/1/72-5/31/74 & 3/1/75-2/28/76. :

AFFIDAVIT OF MAILING

State of New York
County of Albany

David Parchuck, 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 27th day of May, 1983, he served the within notice of Decision by certified mail upon Donald Hulnick the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Donald Hulnick
Allen, Litt, Hulnick & Giordano
15 Neperan Rd.
Tarrytown, NY 10591

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
27th day of May, 1983.

David Parchuck

James A. Spleen

AUTHORIZED TO ADMINISTER
OATHS PURSUANT TO TAX LAW
SECTION 174

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition
of
HIGGINS & McLAUGHLIN, INC. (PURCHASER)
for Revision of a Determination or for Refund
of Sales and Use Taxes under Articles 28 and 29 :
of the Tax Law for the Periods March 1, 1972 :
through May 31, 1974 and March 1, 1975 through :
February 28, 1976.

DECISION

Petitioner, Higgins & McLaughlin, Inc., c/o Allen, Litt, Hulnick & Giordano, 15 Neperan Road, Tarrytown, New York 10591, 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 periods March 1, 1972 through May 31, 1974 and March 1, 1975 through February 28, 1976 (File No. 17743).

A small claims hearing was held before Judy M. Clark, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on September 22, 1982 at 1:15 P.M. Petitioner appeared by Allen, Litt, Hulnick & Giordano (Donald Hulnick, Esq., of counsel). The Audit Division appeared by Paul B. Coburn, Esq. (Anne W. Murphy, Esq., of counsel).

ISSUE

Whether petitioner is liable under the provisions of section 1141(c) of the Tax Law for taxes asserted due against the seller, which included taxes due from a previous owner.

FINDINGS OF FACT

1. On March 23, 1976, petitioner, Higgins & McLaughlin, Inc., purchased the business assets of Gary E. Slattery who, under the name of Florida Hotel Corp., operated a bar at 68 Maple Avenue, Florida, New York. The purchase

price of the business assets was \$52,500.00, of which \$6,000.00 was for furniture and fixtures. Petitioner notified the State Tax Commission of said purchase subsequent to the date of sale.

2. On April 5, 1976, the Audit Division issued a Notice of Claim to Purchaser advising it of a possible existing claim for sales tax against the seller and acknowledging receipt of bulk sales tax received on the furniture and fixtures in the amount of \$240.00.

3. On September 23, 1976, the Audit Division issued a Notice and Demand for Payment of Sales and Use Taxes Due against Higgins & McLaughlin, Inc. (Purchaser) representing its liability under the provisions of section 1141(c) of the Tax Law. The Notice asserted additional tax due of \$4,508.49 covering the period March 1, 1972 through May 31, 1974 and additional tax due of \$2,070.68 covering the period March 1, 1975 through February 28, 1976, for a total tax due of \$6,579.17 plus penalty and interest.

4. The tax asserted due for the period March 1, 1972 through May 31, 1974 represented a liability of the seller, Gary E. Slattery, under the provisions of section 1141(c) of the Tax Law for his purchase of the Florida Hotel. It was the Audit Division's position that said tax liability in turn became the liability of petitioner under Tax Law §1141(c).

5. Petitioner argued that it purchased the business assets of Gary E. Slattery without any knowledge of a prior ownership of the business and should therefore not be held liable for the taxes of a predecessor individual. Petitioner further argued that Gary E. Slattery did not purchase a business

from the previous owner, but merely purchased real property and was therefore not liable under the provisions of section 1141(c) of the Tax Law.¹

6. Petitioner requested the abatement of penalty and interest.

CONCLUSIONS OF LAW

A. That section 1141(c) of the Tax Law provides, in summary, that whenever a person required to collect tax shall make a sale of his business assets otherwise than in the ordinary course of business, the purchaser shall at least ten days before taking possession notify the Tax Commission by registered mail of the proposed sale. Whenever the purchaser shall fail to give notice as required or whenever the Tax Commission shall inform the purchaser that a possible claim for tax exists, any sums of money shall be subject to a first priority right and lien for any such taxes due from the seller, limited to an amount not in excess of the purchase price or fair market value of the business assets sold, whichever is higher.

B. That petitioner was notified of a possible existing claim for sales tax as provided by section 1141(c) of the Tax Law and later notified of the amount of taxes claimed due. Accordingly, petitioner is liable under said section for any taxes due from the seller until such taxes are paid or otherwise cancelled.

C. That section 1145(a)(3) of the Tax Law states in part that "Unpaid penalties and interest may be determined, assessed, collected and enforced in the same manner as the tax imposed by this article." Without support that the taxes due were not paid by the seller(s) due to reasonable cause, petitioner was properly assessed for penalties and interest applicable to the seller(s) in accordance with Tax Law §§ 1141(c) and 1145(a)(3). (Matter of Anna Manzella (Purchaser), State Tax Commission, November 20, 1981.)

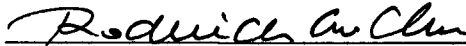
¹ A hearing in the Matter of Gary E. Slattery was simultaneously held, a decision on which appears separately.

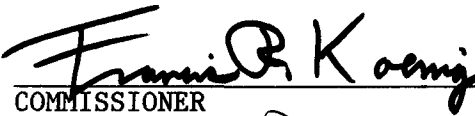
D. That the petition of Higgins & McLaughlin, Inc. (Purchaser) is denied, and the Notice and Demand for Payment of Sales and Use Taxes Due issued September 23, 1976 is sustained.

DATED: Albany, New York

MAY 27 1983

STATE TAX COMMISSION


PRESIDENT


COMMISSIONER


COMMISSIONER

P 481 207 843

RECEIPT FOR CERTIFIED MAIL

NO INSURANCE COVERAGE PROVIDED—
NOT FOR INTERNATIONAL MAIL

(See Reverse)

Sent to <u>Higgins & McLaughlin, Inc.</u> <u>c/o Allen, Litt, Hulnick & Giordano</u>	
Street and No. <u>15 Neperan Rd.</u>	
P.O., State and ZIP Code <u>Tarrytown, NY 10591</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 481 207 844

RECEIPT FOR CERTIFIED MAIL

NO INSURANCE COVERAGE PROVIDED—
NOT FOR INTERNATIONAL MAIL

(See Reverse)

Sent to <u>Donald Hulnick</u> <u>Allen, Litt, Hulnick & Giordano</u>	
Street and No. <u>15 Neperan Rd.</u>	
P.O., State and ZIP Code <u>Tarrytown, NY 10591</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