

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

October 21, 1983

Keith Pierpont
Officer of Treemanian, Inc.
200 West 54th Street
New York, NY 10019

Dear Mr. Pierpont:

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
Nathaniel Carmen
155 W. 20th St.
New York, NY 10011
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of :
Keith Pierpont :
Officer of Treemanía, Inc. :
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 :
12/1/76 - 11/30/79. :

State of New York
County of Albany

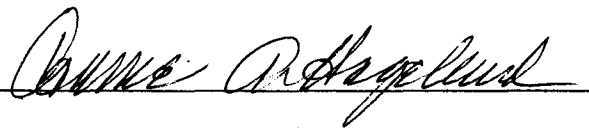
Connie Hagelund, being duly sworn, deposes and says that she is an employee of the State Tax Commission, over 18 years of age, and that on the 21st day of October, 1983, she served the within notice of Decision by certified mail upon Keith Pierpont, Officer of Treemanía, Inc., the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

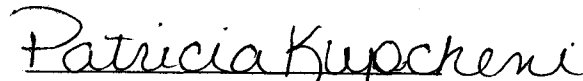
Keith Pierpont
Officer of Treemanía, Inc.
200 West 54th Street
New York, NY 10019

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
21st day of October, 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	:	
Keith Pierpont	:	
Officer of Treemanian, Inc.	:	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 12/1/76 - 11/30/79.	:	

State of New York
County of Albany

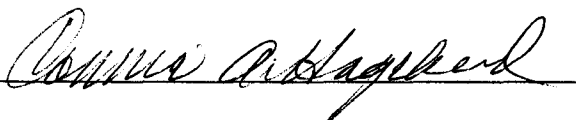
Connie Hagelund, being duly sworn, deposes and says that she is an employee of the State Tax Commission, over 18 years of age, and that on the 21st day of October, 1983, she served the within notice of Decision by certified mail upon Nathaniel Carmen the representative of the petitioners in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

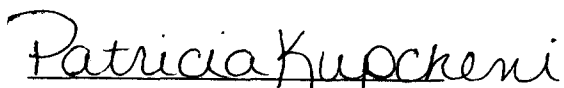
Nathaniel Carmen
155 W. 20th St.
New York, NY 10011

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
21st day of October, 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	:	
	:	
KEITH PIERPONT	:	DECISION
OFFICER OF TREEMANIA, INC.	:	
	:	
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, 1976	:	
through November 30, 1979.	:	

Petitioner, Keith Pierpont, officer of Treemanía, Inc., 200 West 54th Street, New York, New York 10019, 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, 1976 through November 30, 1979 (File No. 31472).

A formal hearing was held before Robert Couze, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on February 9, 1983 at 1:30 P.M. Petitioner appeared by Nathaniel Carmen, Esq. The Audit Division appeared by Paul B. Coburn, Esq. (Angelo A. Scopellito, Esq., of counsel).

ISSUES

I. Whether the Audit Division must attempt to collect sales and use taxes due equally from all persons required to collect tax before it collects the entire amount due from petitioner.

II. Whether the Audit Division used proper audit procedures in determining petitioner's sales tax liability.

FINDINGS OF FACT

1. On July 7, 1980, as the result of a field audit, the Audit Division issued a Notice of Determination and Demand for Payment of Sales and Use Taxes

Due against petitioner, Keith Pierpont, as officer of Treemanian, Inc. ("Treemanian") in the amount of \$41,368.40, plus penalty of \$8,024.71 and interest of \$7,926.51, for a total due of \$57,319.62 for the period December 1, 1976 through November 30, 1979. A similar Notice for the same amounts and period was issued against Treemanian on the same date.

2. On February 28, 1980, Treemanian, by petitioner, Keith Pierpont, president, had executed a consent extending the period of limitation for assessment of sales and use taxes due for the period December 1, 1976 through November 30, 1979 to March 20, 1981.

3. Treemanian was in the business of selling plants and flowers on a wholesale and retail basis. Petitioner held various offices with Treemanian during the period in issue including those of president, secretary, treasurer and secretary-treasurer. At one time during the audit period, petitioner owned one-third of the stock in Treemanian. Later, after another stockholder left the company, petitioner owned one-half of the stock with one Michael Bisceglie owning the other one-half. Petitioner did not dispute the fact that he was a person required to collect tax within the meaning and intent of sections 1131(1) and 1133(a) of the Tax Law.

4. On audit, the auditor found that Treemanian had no useable books and records. Petitioner alleged that all of the business books and records had been destroyed by a flood in its basement. Additionally, the auditor found a discrepancy of \$687,481.00 between gross sales as reported on Federal corporation tax returns and gross sales as reported on sales tax returns for the years 1977 and 1978. Said discrepancy resulted in an error factor of 255.44 percent which the auditor applied to gross sales as reported for the entire audit period to arrive at total gross sales for the period.

5. Petitioner estimated that 75 percent of Treemania's sales were wholesale and 25 percent retail. However, he had no original resale certificates and no invoices. Petitioner did maintain a list of retailers with their respective resale numbers. The auditor, however, could not accurately determine sales for resale to any retailers on petitioner's list without invoices indicating sales to a particular individual. To arrive at a ratio of taxable sales to gross sales, the auditor conducted an observation test on March 13, 17, and 20, 1980 at Treemania's place of business. Based on said test and a review of charge sales, the auditor arrived at a taxable ratio of 40.782 percent. The auditor applied the aforesaid percentage to total gross sales to arrive at taxable sales for the period in issue.

6. Petitioner argued that the taxable sales figure arrived at by the auditor was based on conjecture and was inaccurate. With no useable records, however, petitioner was unable to offer any proof that the figure arrived at in the audit was erroneous. Petitioner also maintained that, since there were other officers of Treemania who were equally liable for sales tax due, the Audit Division must attempt to collect the tax equally from all persons liable before collecting the entire amount due from him.

CONCLUSIONS OF LAW

A. That section 1133(a) of the Tax Law provides, in part, that every person required to collect the taxes imposed under the Sales Tax Law is also personally liable for the tax imposed, collected or required to be collected under such law. Section 1131(1) of the Tax Law defines "persons required to collect tax" as used in section 1133(a) to include any officer or employee of a corporation, or a dissolved corporation, who as such officer or employee is

under a duty to act for the corporation in complying with any requirement of the Sales Tax Law.

B. That a person required to collect tax who is equally liable with others for the payment of unpaid tax, cannot avoid collection against himself on the ground that the State should first collect it from the other parties (cf. Kelly v. Lethert, 362 F.2d 629, 635 (8th Cir. 1966); Matter of Martin J. Kamp, State Tax Commission, May 20, 1983). Therefore, petitioner may not use as a defense the fact that there may be other persons who are equally liable.

C. That section 1135 of the Tax Law requires every person required to collect tax to maintain records of sales and to make these records available for audit. "When records are not provided or are incomplete and insufficient, it is [the Tax Commission's] duty to select a method reasonably calculated to reflect the taxes due. The burden then rests upon the taxpayer to demonstrate... that the method of audit or the amount of the tax assessed was erroneous." (Surface Line Operators Fraternal Organization, Inc. v. Tully, 85 A.D.2d 858.)

D. That inasmuch as petitioner had no books and records with which to conduct an audit and Treemanian's tax returns indicated a discrepancy between Federal gross sales and gross sales as reported on sales tax returns, the Audit Division was justified in utilizing an observation test to determine a taxable sales ratio and in using other external indices to arrive at additional tax due. Moreover, petitioner was unable to produce any evidence indicating that the tax determined was erroneous.

E. That the petition of Keith Pierpont, as officer of Treemanina, Inc., is denied and the Notice of Determination and Demand for Payment of Sales and Use Taxes Due issued July 7, 1980 is sustained.

DATED: Albany, New York

STATE TAX COMMISSION

OCT 21 1983

Rodwin A. Clark
PRESIDENT

Francis R. Koenig
COMMISSIONER

Mark J. [Signature]
COMMISSIONER

P 481 208 411

RECEIPT FOR CERTIFIED MAIL

NO INSURANCE COVERAGE PROVIDED—
NOT FOR INTERNATIONAL MAIL

(See Reverse)

Sent to KEITH PIERPONT	
Street and No. 200 W. 54th ST.	
P.O., State and ZIP Code NEW YORK, NY 10019	
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 481 208 412

RECEIPT FOR CERTIFIED MAIL

NO INSURANCE COVERAGE PROVIDED—
NOT FOR INTERNATIONAL MAIL

(See Reverse)

Sent to NATHANIEL CARMEN	
Street and No. 155 W. 20th ST.	
P.O., State and ZIP Code NEW YORK, NY 10011	
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