

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

January 24, 1983

Robert Ross
70 Comsequogue Road
East Setauket, NY 11733

Dear Mr. Ross:

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
Eric A. Sackstein
Estrin & Sackstein
640 Main Street
Port Jefferson, NY 11777
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of :
Robert Ross :

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 3/1/78 - 2/29/80.

State of New York
County of Albany

Kathy Pfaffenbach, 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 24th day of January, 1983, she served the within notice of Decision by certified mail upon Eric A. Sackstein the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Eric A. Sackstein
Estrin & Sackstein
640 Main Street
Port Jefferson, NY 11777

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
24th day of January, 1983.

Carole A. Hegland
AUTHORIZED TO ADMINISTER
OATHS PURSUANT TO TAX LAW
SECTION 174

Kathy Pfaffenbach

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition
of
Robert Ross

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: AFFIDAVIT OF MAILING

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Kathy Pfaffenbach, 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 24th day of January, 1983, she served the within notice of Decision by certified mail upon Robert Ross, the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Robert Ross
70 Comseguogue Road
East Setauket, NY 11733

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
24th day of January, 1983.

James P. Hagerlund

AUTHORIZED TO ADMINISTER
OATHS PURSUANT TO TAX LAW
SECTION 174

Kathy Pfaffenbach

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition	:	
of	:	
ROBERT ROSS	:	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 March 1, 1978	:	
through February 29, 1980.	:	

Petitioner, Robert Ross, 70 Comseguogue Road, East Setauket, New York 11733, 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 March 1, 1978 through February 29, 1980 (File No. 39544).

A formal hearing was held before Doris E. Steinhardt, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on November 22, 1982 at 1:30 P.M. Petitioner appeared by Estrin & Sackstein, Esqs. (Eric A. Sackstein, Esq., of counsel). The Audit Division appeared by Paul B. Coburn, Esq. (Patricia Brumbaugh, Esq., of counsel).

ISSUES

I. Whether petitioner is a person required to collect tax as defined in subdivision (1) of section 1131 of the Tax Law, subject to personal liability under subdivision (a) of section 1133 for taxes owed by PDR Leasing Corp.

II. Whether petitioner is a bulk transferee, subject to personal liability pursuant to subdivision (a) of section 1141 for taxes owed by PDR Leasing Corp.

FINDINGS OF FACT

1. On September 30, 1982, the Audit Division issued to petitioner, Robert Ross, a Notice of Determination and Demand for Payment of Sales and Use Taxes

Due, assessing sales and use taxes under Articles 28 and 29 of the Tax Law for the period March 1, 1978 through February 29, 1980 in the amount of \$35,266.11, plus penalty of \$8,816.54 and interest of \$12,040.55, for a total due of \$56,123.20. According to the notice of determination, the Audit Division considered petitioner "personally liable as a responsible individual of PDR Leasing Co., Inc. (sic) under Sections 1131(1) and 1133 of the Tax Law...". At the formal hearing, the Audit Division also asserted that petitioner is liable for taxes due from PDR Leasing Corp. ("PDR") pursuant to the bulk sale provisions of section 1141(c).

2. Patricia D. Ross, petitioner's wife, was the incorporator, sole shareholder and president of PDR, a New York corporation with its principal place of business at 70 Consequogue Road, East Setauket. That building also housed the offices of several businesses operated by petitioner and other entities operated by other parties. PDR was engaged in leasing equipment to contractors and to the Town of Brookhaven, and because Mrs. Ross is of Native American origin, the corporation was eligible for certain governmental funding and for bidding on certain subcontracts.

3. PDR borrowed funds from USI Capital and Leasing ("USI"), a division of USI Credit Corp., to purchase the 27 pickup trucks, dump trucks, flatbed trucks and other pieces of equipment used in its leasing business. Mrs. Ross and Mr. Ross each executed an agreement with USI, personally guaranteeing performance of PDR's purchase money security agreement.

4. PDR maintained one checking account at the Centereach branch of the Bank of Smithtown, on which account Mrs. Ross was the sole authorized signatory.¹

¹ The account, established on January 16, 1978, was in the name of PDR Leasing Co., the name under which Mrs. Ross had filed a business certificate on January 5, 1978. Mrs. Ross testified that this was the only checking account of PDR. (PDR's certificate of incorporation was filed with the Department of State on January 17, 1978.)

Mrs. Ross had a facsimile stamp of her signature which she, Mr. Ross and PDR office personnel used to sign corporate checks.

5.(a) Upon leasing equipment to the Town of Brookhaven, all officers and shareholders of PDR were required to file with the Superintendent of Highways a corporate affidavit of ownership, stating (among other things) that no town official was or would become a stockholder or officer of the corporation during the rental period; the only person who filed such affidavit on behalf of PDR was Mrs. Ross.

(b) PDR entered into a trust agreement with Local 282, affiliated with the International Brotherhood of Teamsters, for the establishment of a welfare benefit trust fund and a pension payment trust fund, which agreement was signed by Mrs. Ross as president of PDR.

(c) All communications and transactions with PDR's insurance carrier were handled by Mrs. Ross.

6. Petitioner held no position with PDR although he supervised at least one employee, a mechanic.

7. In February or March, 1980, PDR began to experience financial difficulties and defaulted in its payments to USI. USI threatened to foreclose on the equipment and informed petitioner that it would seek payment from him, on his personal guarantee, of the excess of PDR's obligation over the proceeds received from auction and other sales. Petitioner subsequently paid some installments on PDR's note.

8. With USI's permission, PDR sold one Mack truck, one Mack trailer, two Houghs and two Brockways to outside parties.

9.(a) On March 18 and 19, 1980, petitioner filed with the Audit Division fourteen Forms ST-170.3, Statement of Transaction-Casual Sale of Motor Vehicle

and fourteen Forms ST-170.9, Affidavit-Gift of Motor Vehicle, reflecting gifts to him on March 10, 1980 by Patricia Ross of the following motor vehicles: one 1975 Ford pickup (F10GEV24490), two 1978 Chevrolet pickups (CKL248F315170 and CKL248F309816), one 1979 Hyster flatbed (22004), one 1976 Chevrolet dump (CCL3361102030), one 1972 International power shovel (H65C2953), one 1979 Michigan road-building machine (473A274CB), one 1973 Caterpillar wheel loader (80U313), one 1978 Caterpillar wheel loader (62K9094), one 1975 Caterpillar wheel loader (80U2726), one 1975 International power shovel (2294), one 1977 International power shovel (510CHA050328), one 1979 two-door sedan (9481S605290) and one 1971 Caterpillar wheel loader (41K2056). Each of the forms states that: PDR was the previous owner of the vehicle, Patricia Ross was the donor and no consideration was paid for the transfer. Mrs. Ross could not recollect why the vehicles were so transferred to her husband.

(b) On March 18 and 19, 1980, petitioner filed with the Department of Motor Vehicles eleven Forms MV-82TD, Application for Registration or Title, five of which constituted applications for title (one 1975 Ford pickup (F10GEV24490), two 1978 Chevrolet pickups (CKL248F315170 and CKL248F309816), one 1979 Hyster flatbed (22004) and one 1976 Chevrolet dump (CCL3361102030)) and six of which constituted applications for registration only (one 1979 Michigan road-building machine (473A274CB), one 1978 Caterpillar wheel loader (62K9094), one 1975 Caterpillar wheel loader (80U2726), one 1975 International power shovel (2294), one 1977 International power shovel (510CHA050328) and one 1971 Caterpillar wheel loader (41K2056)). The certificates of title and certificates of registration indicated transfer by Mrs. Ross, as president of PDR, to Robert Ross on March 10, 1980. (Petitioner had earlier filed, on August 29, 1979, an application for registration of a 1969 Mack dump (DM685SX2230)

transferred to him by his wife, as president of PDR, with the date of disposition left blank; and an application for title to a 1973 Mack dump (DM811SX2910), also transferred to him by his wife as president of PDR, on August 4, 1979.)

10. Petitioner subsequently organized PDRK Trucking, Inc. ("PDRK") to engage in the business of truck leasing. On or about September 30, 1980, PDRK received the following nine pieces of equipment either from PDR or petitioner: one Caterpillar wheel loader (62K9094), one 1979 Hyster trailer (22004), one 1972 Hough pay loader (2953), one 1971 Caterpillar wheel loader (41K2056), one 1973 Caterpillar wheel loader (80U313), one 1975 Caterpillar wheel loader (80U2726), two 1969 Mack dump trucks (DM685SX2230 and DM811SX1958) and one 1973 Mack dump truck (DM811SX2910). A Uniform Commercial Code financing statement (Form UCC-1) filed by PDR indicates that it was the secured party with respect to said equipment and also that it assigned the security interest to USI. On September 30, 1980, PDR assigned to USI, without recourse, all its rights and interest in the purchase money security agreement between PDR and PDRK.

11. For purposes of clarification, the transfers set forth in the above three Findings of Fact can be summarized as follows: (a) six vehicles were sold by PDR to outside parties (Finding of Fact "8"); (b) one dump truck and the registration of another dump truck were transferred by PDR to petitioner in August, 1979 (Finding of Fact "9(b)") and subsequently transferred by petitioner to PDRK (Finding of Fact "10"); (c) fourteen vehicles were gifted to petitioner by his wife in March, 1980 (Finding of Fact "9(a)"), five of which vehicles he later transferred to PDRK (Finding of Fact "10"); (d) two vehicles were transferred by PDR to PDRK in September, 1980 (Finding of Fact "10"). As a result of the transactions between Mrs. Ross and petitioner, and between petitioner

and PDRK, petitioner owned nine vehicles and PDRK owned eight vehicles plus the registration of one vehicle.

12. Petitioner characterizes his acquisition of assets from PDR as a repossession, and maintains that the repossession of assets of a corporation by a co-obligor, as receiver for a finance company having a security interest in such assets, does not constitute a sale, transfer or assignment in bulk.

13. On September 30, 1980, PDRK borrowed funds from USI and authorized USI to disburse \$108,942.93 of the loan proceeds to USI.

14. A sales tax examiner assigned to the Audit Division's Suffolk District Office conducted a field audit and determined that sales and use taxes were due from PDR. During the course of the audit, the examiner discussed his analyses of PDR's expense purchases, fixed asset purchases and nontaxable sales with petitioner. Assessments were issued to PDR and to Patricia Ross, individually and as an officer of PDR. Just prior to the issuance of the assessments, a conference was held in the offices at 70 Comsequogue Road on August 4, 1981, attended by the examiner, his supervisor, petitioner and PDR's accountant. Patricia Ross was on the premises but not present in the office where the conference was held. When the examiner or his supervisor raised questions which PDR's accountant could not answer, the accountant referred to petitioner.

15. In September, 1982, collection of the assessments against PDR and against Patricia Ross was assigned to a tax compliance agent in the Suffolk County District Office. The agent was informed by two detectives from the Suffolk County District Attorney's office that they had evidence indicating petitioner was an officer of PDR and he was planning to transfer some of his vehicles to a newly organized corporation. The agent attempted to verify this information. He was unable to obtain documentary substantiation that petitioner

was an officer of PDR, but he did substantiate that petitioner had transferred vehicles to Fig-A-Do-Fig-A-Dont Corp.

CONCLUSIONS OF LAW

A. That section 1133, subdivision (a) of the Tax Law places personal liability for the taxes imposed, collected or required to be collected under Article 28 upon "every person required to collect any tax" imposed by said article. Section 1131, subdivision (1) furnishes the following definition for the term "persons required to collect tax":

"'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; every recipient of amusement charges; and every operator of a hotel. 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." (Emphasis added.)

By the very terms of the statute, petitioner is not a person required to collect tax on behalf of PDR Leasing Corp.

B. That subdivision (c) of section 1141 provides that whenever a person required to collect tax makes a sale, transfer or assignment in bulk of any part or the whole of his business assets, other than in the ordinary course of business, the purchaser, transferee or assignee shall, at least ten days before taking possession of the asset(s) or paying therefor, notify the Tax Commission of the proposed sale. For failure to comply with the provisions of such subdivision, the purchaser, transferee or assignee shall be personally liable for payment to the state of any taxes theretofore or thereafter determined to be due to the state from the seller, transferor or assignor, limited to an amount not in excess of the purchase price or fair market value of the asset(s), whichever is higher.

C. That the transfer on March 10, 1980 by Patricia Ross, a person required to collect tax on behalf of PDR, of fourteen of the twenty-five vehicles used by PDR in its leasing business to petitioner, otherwise than in the ordinary course of PDR's business, constituted a bulk transfer within section 1141, subdivision (c); petitioner failed to comply with the requirements of said subdivision and consequently is personally liable for the taxes due from the transferor, in an amount not to exceed the aggregate fair market value of the vehicles.

Petitioner's argument that the transaction was a repossession is unconvincing. At the time of his receipt of the fourteen vehicles from PDR, he represented to the Audit Division, by his filing of statements and affidavits, that he received such equipment from his wife by gift. Furthermore, petitioner, as a guarantor of PDR's purchase money obligation to USI, was a "debtor" within the meaning of U.C.C. §9-105(1)(d). He thus would have been entitled to repossess the collateral (under U.C.C. §9-503) only in the event he made payments on the note, thereby becoming subrogated to the rights of USI. He has not demonstrated, however, that he made such payments before March 10, 1980 as would have entitled him to repossess the fourteen vehicles at that time. Nor has petitioner otherwise shown that he had any security interest in the vehicles on such date or that he had been appointed receiver of USI. Cf. Matter of Collectors Guild, Ltd., State Tax Comm., May 16, 1980.

D. That all penalties in excess of that amount of interest prescribed by statute are remitted.

E. That the petition of Robert Ross is granted to the extent indicated in Conclusion of Law "D"; that the Notice of Determination and Demand for Payment of Sales and Use Taxes Due issued on September 30, 1982 is to be modified

accordingly; and that except as so modified, the assessment is sustained, with petitioner's personal liability limited to the amount indicated in Conclusion of Law "C".


DATED: Albany, New York

JAN 24 1983

STATE TAX COMMISSION


ACTING PRESIDENT


COMMISSIONER


COMMISSIONER

P 278 401 720
RECEIPT FOR CERTIFIED MAIL

NO INSURANCE COVERAGE PROVIDED—
 NOT FOR INTERNATIONAL MAIL
 (See Reverse)

SENT TO		<i>Robert Ross</i>	
STREET AND NO.		<i>170 Consequogue Rd.</i>	
P.O., STATE AND ZIP CODE		<i>East Setauket NY</i>	
POSTAGE		\$ <i>1.73</i>	
CONSULT POSTMASTER FOR FEES	OPTIONAL SERVICES	CERTIFIED FEE	<i>1.73</i>
		SPECIAL DELIVERY	¢
	RETURN RECEIPT SERVICE	RESTRICTED DELIVERY	¢
		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 278 401 721
RECEIPT FOR CERTIFIED MAIL

NO INSURANCE COVERAGE PROVIDED—
 NOT FOR INTERNATIONAL MAIL
 (See Reverse)

SENT TO		<i>Eric A. Sackstein</i>	
STREET AND NO.		<i>East Setauket NY</i>	
P.O., STATE AND ZIP CODE		<i>640 Main St.</i>	
POSTAGE		\$ <i>1.73</i>	
CONSULT POSTMASTER FOR FEES	OPTIONAL SERVICES	CERTIFIED FEE	<i>1.73</i>
		SPECIAL DELIVERY	¢
	RETURN RECEIPT SERVICE	RESTRICTED DELIVERY	¢
		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