

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :

of :

Patricia W. Heath :

d/b/a The Griddle Inn :

AFFIDAVIT OF MAILING

for Redetermination of a Deficiency or Revision
of a Determination or Refund of Sales & Use Tax
under Article 28 & 29 of the Tax Law for the
Periods 3/1/77-5/31/77 & 11/1/77-8/31/81. :

State of New York }

ss.:

County of Albany }

David Parchuck, being duly sworn, deposes and says that he is an employee of the State Tax Commission, that he is over 18 years of age, and that on the 5th day of October, 1984, he served the within notice of Decision by certified mail upon Patricia W. Heath d/b/a The Griddle Inn, the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Patricia W. Heath
d/b/a The Griddle Inn
130 Main St.
Stamford, NY 12167

and by depositing same enclosed in a postpaid properly addressed wrapper in a post office 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
5th day of October, 1984.

David Parchuck

[Signature]
Authorized to administer oaths
pursuant to Tax Law section 174

STATE TAX COMMISSION

In the Matter of the Petition
of
Patricia W. Heath
d/b/a The Griddle Inn

AFFIDAVIT OF MAILING

State of New York }
County of Albany } ss.:

David Parchuck, being duly sworn, deposes and says that he is an employee of the State Tax Commission, that he is over 18 years of age, and that on the 5th day of October, 1984, he served the within notice of Decision by certified mail upon Carl Becker, the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Carl Becker
Govern, McDowell & Becker
72 Main St.
Stamford, NY 12167

and by depositing same enclosed in a postpaid properly addressed wrapper in a post office 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
5th day of October, 1984.

David Parbuck

James A. Haglund
Authorized to administer oaths
pursuant to Tax Law section 174

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

October 5, 1984

Patricia W. Heath
d/b/a The Griddle Inn
130 Main St.
Stamford, NY 12167

Dear Ms. Heath:

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, a proceeding in court to review an adverse decision by the State Tax Commission may be instituted only 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
Carl Becker
Govern, McDowell & Becker
72 Main St.
Stamford, NY 12167
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition	:	
of	:	
PATRICIA W. HEATH	:	DECISION
d/b/a The Griddle Inn	:	
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, 1977	:	
through May 31, 1977 and November 1, 1977	:	
through August 31, 1981.	:	

Petitioner, Patricia W. Heath, d/b/a The Griddle Inn, 130 Main Street, Stamford, New York 12167, 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, 1977 through May 31, 1977 and November 1, 1977 through August 31, 1981 (File No. 36973).

A small claims hearing was held before Richard L. Wickham, Hearing Officer, at the offices of the State Tax Commission, Bldg. #9, State Campus, Albany, New York, on June 7, 1983 and continued to conclusion on September 7, 1983, with all briefs to be submitted by January 19, 1984. Petitioner appeared by Govern, McDowell & Becker (Carl Becker, Esq., of counsel). The Audit Division appeared by John P. Dugan, Esq. (James Della Porta, Esq., of counsel).

ISSUES

I. Whether the Audit Division compromised its claim against petitioner, Patricia W. Heath.

II. Whether the Audit Division is estopped from collecting the sales and use taxes due assessed against petitioner.

III. Whether the Audit Division's claim for sales tax monies is superior to the claims of other creditors.

IV. Whether petitioner is liable under section 1141(c) of the Tax Law for sales taxes determined due from Clayton Sparkes.

V. Whether the Audit Division correctly determined the sales taxes due from Clayton Sparkes, d/b/a The Griddle Inn.

FINDINGS OF FACT

1. On August 18, 1981 the Audit Division received from petitioner, Patricia W. Heath, a Notice of Sale, Transfer or Assignment in Bulk dated August 14, 1981. The notice set forth petitioner's anticipated purchase of The Griddle Inn from Clayton Sparkes for \$36,000.00, of which \$10,000.00 was apportioned to the furniture and fixtures and \$26,000.00 to the real estate. Petitioner listed the scheduled date of acquisition as August 24, 25 or 26, 1981.

2. The Audit Division mailed to petitioner a Notice of Claim to Purchaser on August 19, 1981, advising her of a possible claim for sales and use taxes due from the seller, Clayton Sparkes. This notice stated that no distribution of funds or property to the extent of the amount of the State's claim was to be made before the seller's liability had been determined, payment of such liability had been made, and the purchaser was authorized to release the funds or property.

Said notice was addressed to the petitioner at the address stated in her notification of the impending purchase. Normal mailing procedures were followed by the Audit Division, that is, a mailing record was made of all notices of claims to purchasers mailed that day, a count was taken, and the sealing and stamping of the envelope were witnessed by two parties. The notices were then

deposited in a branch of the United States Post Office in Albany, New York, such deposit witnessed by two different parties.

3. A Notice to the Seller and a Bulk Sale Questionnaire were subsequently mailed to Clayton Sparkes on September 4, 1981. The questionnaire requested information relative to Mr. Sparkes' operation of The Griddle Inn. Among the requests made by the notice were that Mr. Sparkes file a final sales and use tax return and the delinquent returns for the quarterly periods ended May 31, 1981, February 28, 1981, November 30, 1980 and August 31, 1977 and that he send a remittance to cover the taxes shown due on the returns, the taxes due on open assessments and the taxes due on the bulk sale of the furniture and fixtures to petitioner.

4. On October 28, 1981 as a result of noncompliance with these requests on the part of the seller, Mr. Sparkes, two notices of determination and demand for payment of sales and use taxes due were issued against petitioner, Mrs. Heath, as purchaser of The Griddle Inn pursuant to the provisions of section 1141(c) of the Tax Law. These notices covered the sales and use taxes due from Clayton Sparkes, d/b/a The Griddle Inn, for the periods March 1, 1977 through May 31, 1977 and December 1, 1977 through August 31, 1981 in the amount of \$18,033.54 and assessed a penalty and interest charge of \$7,720.15.

5. Petitioner, Patricia Heath, acquired The Griddle Inn under a Contract of Sale dated July 7, 1981. The price of the business and premises at West Main Street, Stamford, New York was set at \$36,000.00. In accordance with the terms of the agreement, all liens and encumbrances on the property including sales tax liens were payable out of the \$36,000.00 sale price.

6. Petitioner's representative, aware of sales tax liens on the property, drafted a letter dated July 14, 1981 requesting a release of the sales tax

liens. The letter, sent to a Tax Compliance Agent in the Binghamton Tax Office who was acquainted with Mrs. Heath's proposed purchase, explained that liens on file by the New York State Tax Commission, the New York State Industrial Commission, the Internal Revenue Service, the County of Delaware, the Village of Stamford and the National Bank of Stamford totaled \$38,565.72. As the liens exceeded the purchase price, petitioner proposed to pay to the County of Delaware, the Village of Stamford, the Internal Revenue Service and the National Bank of Stamford the exact amount of their liens plus penalty and interest to the date of payment. The Tax Commission and Industrial Commission were to be paid the balance remaining (\$13,034.00) on a pro rata basis.

7. The warrants filed by the Tax Commission in the Delaware County Clerk's office on August 2, 1978, April 3, 1980 and April 30, 1980 totaled \$14,772.76. The amount represented estimated taxes due plus penalty and interest for nine quarterly periods where Clayton Sparkes failed to file returns, and penalty and interest for two quarterly periods where returns were late filed. The quarterly periods assessed and covered by the warrants filed are as follow:

<u>Quarterly Tax Period Ended</u>	<u>Tax</u>	<u>Penalty and Interest</u>
May 31, 1977	\$	\$ 82.05
August 31, 1977	1,822.40	1,020.54
November 30, 1977		93.96
February 28, 1978	1,219.65	186.51
May 31, 1978	1,219.65	232.96
August 31, 1978	1,119.65	213.55
November 30, 1978	1,219.65	439.07
February 28, 1979	1,219.65	365.90
May 31, 1979	1,219.65	292.72
August 31, 1979	1,219.65	219.54
November 30, 1979	1,219.65	146.36

8. The Tax Compliance Bureau responded on August 4, 1981 and August 12, 1981 to the letter sent by petitioner's representative. Each response contained

a Release of Lien of Tax Warrant. The August 4 response indicated the release was issued conditionally upon payment of \$12,100.00. The August 12 response provided "The release will not be filed until New York State receives its payment of \$12,100.00."

9. A witness knowledgeable about the computer system of the Department of Taxation and Finance testified she had reviewed a transcript of the sales tax master file printed on November 23, 1981. This transcript indicated that Clayton Sparkes had filed sales and use tax returns without remittances for the quarterly period ended February 28, 1978 through the quarterly period ended February 29, 1980 and that this information was available to the Tax Compliance Bureau in August 1981 at the time of its issuance of the release of tax warrant lien. The tax due based on the returns, as shown in the November 23, 1981 transcript, follows:

<u>Quarterly Tax Period Ended</u>	<u>Tax Due Per Return¹</u>
February 28, 1978	\$832.01
May 31, 1978	825.13
August 31, 1978	859.40
November 30, 1978	921.96
February 28, 1979	892.54
May 31, 1979	921.59
August 31, 1979	956.27
November 30, 1979	903.82
February 29, 1980	803.68

10. The witness further testified that she had visually inspected the information on file within the computer system and based on her inspection, conducted on the date of the September 7, 1983 hearing, "no remittance - tax due" returns were filed for the periods ended May 31, 1980 and August 31, 1980. Additionally, no returns were filed for the quarterly period ended November 30,

¹ Tax due is exclusive of penalty and interest charges.

1980 through the quarterly period ended August 31, 1981 and the computer had generated estimated assessments for said periods. The information available to the Tax Compliance Bureau in August 1981 included all the activity up to the period ended February 28, 1981. A summary of the further activity as described by the witness is shown below:

<u>Quarterly Tax Period Ended</u>	<u>Tax Due Per Return¹</u>	<u>Estimated Tax Due¹</u>
May 31, 1980	\$875.97	\$
August 31, 1980	866.53	
November 30, 1980		1,254.75
February 28, 1981		1,254.75
May 31, 1981		1,254.75
August 31, 1981		1,254.75

11. On September 23, 1981, petitioner drew a check payable to the State Tax Commission in the amount of \$12,100.00.

12. An allocation of petitioner's \$12,100.00 payment was made by the computer system for taxes, penalty and interest due for the quarterly periods ended February 28, 1978 through February 29, 1980 as shown below:

<u>Quarterly Tax Period Ended</u>	<u>Allocation</u>
February 28, 1978	\$1,395.15
May 31, 1978	1,359.63
August 31, 1978	1,227.42
November 30, 1978	1,462.61
February 28, 1979	1,389.54
May 31, 1979	1,406.89
August 31, 1979	1,430.91
November 30, 1979	1,472.00 ²
February 29, 1980	955.85 ²

13. On or about November 24, 1981, an auditor assigned to the Bulk Sales Unit of the Audit Division undertook a review of the computer system master

¹ Tax due is exclusive of penalty and interest charges.

² Penalty and interest remaining due at the time of the allocation amounted to \$180.67.

file. This review revealed: that the assessment against Clayton Sparkes of penalty and interest for the period ended August 31, 1977 was still open; that the amount of tax, penalty and interest on the assessment for the periods ended May 31, 1980 and August 31, 1980 were flagged "uncollectible"; and that the assessments for the periods ended November 30, 1980 and February 28, 1981 were flagged "closed". The auditor had no explanation for the uncollectible and closed notations on the master file.

14. Petitioner argued that pursuant to Findings of Fact "5" through "13" a compromise was made of the taxes assessed against Clayton Sparkes and that, therefore, the Audit Division is estopped from collecting any sales taxes from her for the periods that Clayton Sparkes operated The Griddle Inn.

15. On the closing of the purchase of the premises and business known as The Griddle Inn, petitioner paid out a total of \$37,349.42 which the Closing Statement reflected as being for the following expenses:

1981-82 School Tax	\$ 201.58
Postage/Notice to Creditors	15.30
SERVICO Search of Sec. of State Records	20.04
Filing Satisfaction of Mortgage	4.25
Revenue Stamps	28.60
Record Sales Tax Release	10.25
Stamford Bank Mortgage	5,182.65
IRS Lien	10,210.67
NYS Dept. of Labor Lien	872.99
NYS Sales Tax Lien	12,100.00
Village of Stamford Taxes, Water and Sewer Rents	5,284.02
Delaware County Returned Land and School Taxes	3,419.07

16. Petitioner's payment to the National Bank of Stamford represented an agreed balance due on a \$13,000.00 mortgage obtained by Clayton Sparkes in September 1974 and filed in the Delaware County Clerk's office on October 1, 1974. Payment to the Internal Revenue Service was in satisfaction of a \$15,165.70 federal tax lien recorded in the Delaware County Clerk's office June 24, 1980.

Payment to the New York State Department of Labor was in satisfaction of a \$808.74 unemployment insurance warrant recorded in the Delaware County Clerk's office October 31, 1980. Payment to the New York State Tax Commission was for the release of liens on the real property of Clayton Sparkes created by the filing of warrants for \$176.01, \$4,191.97 and \$10,404.78 in the Delaware County Clerk's office on August 2, 1978, April 3, 1980 and April 30, 1980, respectively. Payment to the Village of Stamford represented the balance due, including penalties and interest, on water bills, sewer rents, 1980-1981 village taxes and 1981-1982 village taxes in the respective amounts of \$673.82, \$566.00, \$1,990.69 and \$2,053.51, and payment to the Delaware County Clerk represented unpaid town and county taxes, including penalties and interest, for 1980 and 1981 in the respective amounts of \$1,670.19 and \$1,748.88.

17. Petitioner argued that the purchase price paid Clayton Sparkes for The Griddle Inn must be distributed first to secured creditors and then on a first in time, first in right basis.

18. The sales tax liability of Clayton Sparkes, d/b/a The Griddle Inn, which the Audit Division asserted in the notices of October 28, 1981 was determined from a bulk sales audit. This audit involved a search of the computer system file for open assessments, an examination of the returns which Clayton Sparkes filed and a review of a field audit which had been previously conducted. The assessed tax consisted of the tax due for the returns with no remittance which Clayton Sparkes filed for the quarters ended February 28, 1978 through August 31, 1980, an additional tax due of 30 percent on the aforesaid quarterly returns pursuant to the results of the field audit, and an estimated tax due of \$1,250.00 per quarter for the quarters ended November 30, 1980 through August 31, 1980 where no returns were filed.

19. At the hearing, the Audit Division conceded that the tax due reflected in the notices to petitioner should be \$8,622.06. The reasons for the Division's reduction were the application of petitioner's \$12,000.00 payment to the assessments considered open against Clayton Sparkes, an adjustment in the additional tax due to 17 percent from 30 percent, and a revision in the estimated tax due to \$1,180.00 a quarter.

20. The field audit occurred in 1978. The Audit Division performed a markup audit due to the fact that the sales records of Clayton Sparkes were insufficient for the purpose of verifying the taxable sales he reported. The Division computed markups of 196.7 percent on food; 78 percent on doughnuts, cupcakes and English muffins; 45 percent on candies and tobacco; and 33.629 percent on cigarettes. The examiner applied the markups to the respective purchases and arrived at audited taxable sales from which reported taxable sales were deducted. The unreported taxable sales resulted in additional tax due of \$2,581.64. Clayton Sparkes signed a Consent to Fixing of Tax Not Previously Determined and Assessed and paid the tax determined due.

21. The Audit Division in the computation of markup on food failed to consider condiments such as salt, pepper, sugar, ketchup, mustard, relish and lettuce. Petitioner testified that in her operation of The Griddle Inn, 10 to 20 percent of the food expense represented the purchase of condiments. Petitioner argued that the food markup included only a few of the items sold at The Griddle Inn and that no consideration was given to the total food sales and the percentage thereof which the item marked-up represented. Petitioner testified that 50 percent of all her sales were of hamburgers and cheeseburgers and that the operation of The Griddle Inn under her ownership was essentially the same as under her predecessor. The audit mark-up on hamburg sandwiches was

114.3 percent as compared to the overall food markup of 196.7 percent. No documentation was offered in evidence in support of the condiment purchases or hamburger/cheeseburger sales.

22. Petitioner argued that no attempt had been made by the Audit Division to secure the books and records of Clayton Sparkes. No evidence was submitted to show the existence of books and records and if such existed, the accuracy thereof. Petitioner further argued that she was denied a full, fair and adequate hearing when she was refused the opportunity to question the auditor as to the standard audit procedures of the Tax Department.

CONCLUSIONS OF LAW

A. That the rules generally applicable to accords and satisfactions do not apply to a compromise or settlement of taxes. (See 9 Mertens Law of Fed. Income Tax section 52.07.) An offer in compromise must conform to the provisions of section 171 of the Tax Law and petitioner has failed to establish that she or her predecessor, Clayton Sparkes, are entitled to such relief.

B. That the doctrine of estoppel may not be invoked to prevent the State from collecting taxes lawfully imposed and remaining unpaid in the absence of statutory authority (McMahon v. State Tax Commission, 45 A.D.2d 624, Ms. for lev. to App. denied 36 N.Y.2d 646).

C. That section 1141(c) of the Tax Law provides, in part:

"[W]henver the tax commission shall inform the purchaser, transferee or assignee that a possible claim for...tax or taxes exists, any sums of money, property or choses in action, or other consideration, which the purchaser, transferee or assignee is required to transfer over to the seller, transferrer or assignor shall be subject to a first priority right and lien for any such taxes there- tofore or thereafter determined to be due from the seller, transferrer or assignor to the state..." (emphasis added).

In accordance with Finding of Fact "2", the Audit Division timely notified petitioner of a possible claim for sales and use taxes due from the seller. Therefore, the taxes set forth in the notices of determination and demand for payment of sales and use taxes due issued October 28, 1981 were first in priority over the secured claims of other creditors.

D. That the term "sale" is defined in section 1101(b)(5) of the Tax Law as:

"Any transfer of title or possession or both,...conditional or otherwise, in any manner or by any means whatsoever for a consideration, or any agreement therefor..."

Pursuant to the contract petitioner executed with Clayton Sparkes, there was a sale as said term is defined in section 1101(b)(5) of the Tax Law and a bulk sale within the meaning and intent of section 1141(c) of the Tax Law.

E. That petitioner received a fair and adequate hearing. Questions in reference to standard audit procedures of the Tax Department amount to a discovery procedure which is not applicable at a hearing in accordance with 20 NYCRR 601.8(c)(3) and 601.10(a).

F. That the Audit Division properly determined the additional taxes due from Clayton Sparkes, d/b/a The Griddle Inn, in accordance with section 1138(a) of the Tax Law. The Audit Division, however, erred on audit in not making an allowance for condiments which represented 5 percent of the food purchases.

G. That the petition of Patricia Heath, d/b/a The Griddle Inn, is granted to the extent indicated in Conclusion of Law "F". The Audit Division is hereby directed to modify the notices of determination and demand for payment of sales and use taxes issued October 28, 1981 in accordance with said conclusion and

also to reflect the concessions of the Audit Division set forth in Finding of Fact "19".

DATED: Albany, New York

OCT 05 1984

STATE TAX COMMISSION


PRESIDENT


COMMISSIONER


COMMISSIONER

P 693 168 849

RECEIPT FOR CERTIFIED MAIL

NO INSURANCE COVERAGE PROVIDED
NOT FOR INTERNATIONAL MAIL

(See Reverse)

★ U.S.G.P.O. 1983-403-517 PS Form 3800, Feb. 1982	Sent to <u>Carl Becker</u>	
	Street and No. <u>609 N. McDowell & Becker</u>	
	P.O., State and ZIP Code <u>130 Main St.</u>	
	Postage	<u>\$ 12.16</u>
	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		

P 693 168 848

RECEIPT FOR CERTIFIED MAIL

NO INSURANCE COVERAGE PROVIDED
NOT FOR INTERNATIONAL MAIL

(See Reverse)

★ U.S.G.P.O. 1983-403-517 PS Form 3800, Feb. 1982	Sent to <u>Patricia W. Heath</u>	
	Street and No. <u>1101 The Griddle Inn</u>	
	P.O., State and ZIP Code <u>130 Main St.</u>	
	Postage	<u>\$ 12.16</u>
	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		