

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :

of :

Lawrence J. Kuhn, Jr. :

d/b/a Kuhn's Mobil Service :

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 Period :
3/1/79 - 2/28/82. :

State of New York }

ss.:

County of Albany }

David Parnuck, 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 Lawrence J. Kuhn, Jr. d/b/a Kuhn's Mobil Service, the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Lawrence J. Kuhn, Jr.
d/b/a Kuhn's Mobil Service
1814 Chambers Road
Horseneads, NY 14843

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 Parnuck

James J. Hascall
Authorized to administer oaths
pursuant to Tax Law section 114

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

October 5, 1984

Lawrence J. Kuhn, Jr.
d/b/a Kuhn's Mobil Service
1814 Chambers Road
Horseheads, NY 14845

Dear Mr. Kuhn:

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: Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition	:	
of	:	
LAWRENCE J. KUHN, JR.	:	DECISION
d/b/a KUHN'S MOBIL SERVICE	:	
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, 1979	:	
through February 28, 1982.	:	

Petitioner, Lawrence J. Kuhn, Jr. d/b/a Kuhn's Mobil Service, 1814 Chambers Road, Horseheads, New York 14845, 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, 1979 through February 28, 1982 (File No. 39320).

A small claims hearing was held before Arthur Bray, Hearing Officer, at the offices of the State Tax Commission, State Office Building Annex, Hawley Street, Binghamton, New York on June 21, 1984 at 9:00 A.M. Petitioner appeared pro se. The Audit Division appeared by John P. Dugan (Anna Colello, Esq., of counsel).

ISSUE

Whether the lack of complete instructions on the proper method of collecting sales tax coupled with petitioner's good faith attempt to collect sales tax is a basis for cancelling the assessment of sales and use taxes due.

FINDINGS OF FACT

1. On September 20, 1982, on the basis of a field audit, the Audit Division issued a Notice of Determination and Demand for Payment of Sales and Use Taxes Due to petitioner, Kuhn's Mobil Service, assessing a deficiency of sales and use taxes for the periods ending May 31, 1979 through February 28, 1982 in the

amount of \$11,520.42 plus simple interest of \$2,454.80 for a total amount due of \$13,975.22.

2. The assessment of sales and use taxes was premised upon an audit of petitioner's records during the audit period and was based upon three items. First, petitioner did not collect New York State sales and use taxes upon the Federal tax on gasoline. Second, petitioner remitted tax on the basis of the expected selling price rather than the actual selling price. Lastly, petitioner was assessed \$224.00 in use tax arising from the purchase of a truck engine. The last amount has been agreed to.

3. At the hearing, petitioner acknowledged the accuracy of the amount assessed. However, he argued that he should not be held responsible for the sales and use taxes assessed.

4. Petitioner, Lawrence J. Kuhn, Jr., owns and operates Kuhn's Mobil Service.

5. Mr. Kuhn has been operating a gasoline station for approximately fifteen years. During this period of time, he was never advised by the Audit Division that he was erroneously collecting sales tax. Mr. Kuhn did receive a schedule explaining the proper amount of sales tax which should be collected. However, Mr. Kuhn found this form to be confusing and never received directions as to how to use the schedule. Therefore, Mr. Kuhn contacted the oil company which supplied him with gasoline for instructions as to how to collect sales tax. The oil company inadvertently misinformed Mr. Kuhn as to the correct manner of collecting sales tax.

6. The sales tax returns were prepared by Mr. Kuhn with the assistance of his bookkeeper. Mr. Kuhn acted in good faith in preparing the returns and attempted to pay the tax due.

7. At the hearing, petitioner argued, among other things, that since he never collected the sales tax due he can not and should not be required to pay it over and that the Department of Taxation and Finance was negligent in not advising him how to collect sales tax.

CONCLUSIONS OF LAW

A. That, in general, section 1133(a) of the Tax Law imposes upon any person required to collect the tax imposed by Article 28 of the Tax Law, personal liability for the tax imposed, collected, or required to be collected. Section 1131(1) of the Tax Law defines persons required to collect tax to include, among others, corporate officers and employees who are under a duty to act for such corporation in complying with the requirements of Article 28. Since petitioner owned and operated Kuhn's Mobil Service, he is personally liable for the taxes required to be collected by Article 28 of the Tax Law.

B. That it is unfortunate that Mr. Kuhn was unaware that sales tax should have been collected on the Federal tax on gasoline [20 NYCRR 526.5(b)(1)(iii)] and that sales tax should have been collected on the actual receipts [Tax Law §§1101(b)(3); 1105(a)]. However, petitioner has not presented any basis to cancel or modify the assessment dated September 20, 1982.

C. That the petition of Lawrence J. Kuhn, Jr. d/b/a Kuhn's Mobil Service is denied.

DATED: Albany, New York

OCT 05 1984

STATE TAX COMMISSION

Roderick W. Clun.
PRESIDENT

Francis R. Koony
COMMISSIONER

Mark J. [Signature]
COMMISSIONER

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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	Lawrence J. Kuhn, Jr.
Street and No.	1161A Kuhn's Mobil Service
P.O., State and ZIP Code	1614 Chambers Rd.
Postage	Horsesheds, NY 14845
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	