

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :

of :

Thomas C. Molloy :

d/b/a Molloy Rubbish :

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 :
6/1/70-5/31/77. :

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 25th day of May, 1984, he served the within notice of Decision by certified mail upon Thomas C. Molloy d/b/a Molloy Rubbish, the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Thomas C. Molloy
d/b/a Molloy Rubbish
13 Bradford St.
Auburn, NY 13021

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
25th day of May, 1984.

David Parchuck

Authorized to administer oaths
pursuant to Tax Law section 174

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition	:	
of	:	
Thomas C. Molloy	:	
d/b/a Molloy Rubbish	:	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 6/1/70-5/31/77.	:	

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 25th day of May, 1984, he served the within notice of Decision by certified mail upon Joseph Siracusa, the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Joseph Siracusa
Limpert, Kenny & Siracusa
Suite 208-10 Loew Bldg., 108 W. Jefferson St.
Syracuse, NY 132022570

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
25th day of May, 1984.



Authorized to administer oaths
pursuant to Tax Law section 174

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

May 25, 1984

Thomas C. Molloy
d/b/a Molloy Rubbish
13 Bradford St.
Auburn, NY 13021

Dear Mr. Molloy:

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
Joseph Siracusa
Limpert, Kenny & Siracusa
Suite 208-10 Loew Bldg., 108 W. Jefferson St.
Syracuse, NY 132022570
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition	:	
	:	
of	:	
	:	
THOMAS C. MOLLOY	:	DECISION
d/b/a MOLLOY RUBBISH	:	
	:	
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 June 1, 1970	:	
through May 31, 1977.	:	

Petitioner, Thomas C. Molloy d/b/a Molloy Rubbish, 13 Bradford Street, Auburn, New York 13021, 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 June 1, 1970 through May 31, 1977 (File No. 36559).

A formal hearing was held before Daniel J. Ranalli, Hearing Officer, at the offices of the State Tax Commission, State Office Building, 333 East Washington Street, Syracuse, New York, on July 25, 1983 at 1:00 P.M., with all briefs to be submitted by October 31, 1983. Petitioner appeared by Joseph Siracusa, Esq. The Audit Division appeared by John P. Dugan, Esq. (Anne W. Murphy, Esq., of counsel).

ISSUES

I. Whether the Audit Division used proper audit procedures in determining petitioner's additional sales tax due.

II. Whether petitioner was unduly prejudiced by a delay of four years between his request for a hearing and any action being taken by the State Tax Commission on his request.

FINDINGS OF FACT

1. On December 7, 1977, 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, Thomas C. Molloy d/b/a Molloy Rubbish, in the amount of \$7,678.04, plus penalty and interest of \$5,000.23, for a total due of \$12,678.27 for the period June 1, 1970 through May 31, 1977.

2. Petitioner was engaged in the operation of a rubbish removal business in Auburn, New York. Although engaged in such business since June, 1970, petitioner did not register as a vendor for sales tax purposes until October, 1975. As a result, petitioner filed no sales tax returns for the period June 1, 1970 through August 31, 1975.

3. On audit, the auditor found that the only records available for audit were Federal income tax returns for 1973 through 1976, current customer route lists, sales tax exemption certificates, and a notebook listing gross sales, taxable sales and sales tax collected for the period September 1, 1975 through May 31, 1977. There were no original source documents such as sales invoices, charge sales slips, purchase invoices, cancelled checks or bank statements. Petitioner advised the auditor that he transacted all his business in cash.

4. The auditor compared sales as reported on petitioner's income tax returns with sales recorded in his sales notebook and found significant discrepancies (\$5,000.00 more in sales was recorded than was reported on the tax return for 1976). Because of such discrepancies and because there were no original source documents to verify the accuracy of the notebook or the income tax returns, the auditor decided to rely on a current customer route list to determine taxable sales. The route list was a weekly listing of customer names or addresses with the respective charges listed opposite each listing. Certain

listings were marked "exempt". The auditor verified the exempt listings against the exemption certificates provided by petitioner and reduced petitioner's total weekly sales by exempt sales so verified. The route list total sales, modified for exempt sales, amounted to \$5,404.00 in taxable sales per quarter for 1976 and 1977.

5. For years prior to 1976, the auditor noted that the Federal income tax returns indicated an increase in sales each year from 1973 up to 1976. The percentage increases for each year were applied to the audited taxable sales for 1976 to reflect the lower amounts of taxable sales for prior years. For years prior to 1973 when no income tax returns were available, the auditor used the taxable sales determined for 1973.

6. Prior to the hearing, petitioner brought a motion before the State Tax Commission requesting an order dismissing the notice of determination issued December 7, 1977 by reason of the fact that four years had elapsed since petitioner had originally requested a hearing, thus prejudicing petitioner's efforts to effectively contest the assessment. The Commission denied petitioner's motion by an order dated May 20, 1983 and ordered that a hearing be held within 60 days. At the hearing, petitioner renewed his arguments with respect to his case being prejudiced citing the fact that on September 23, 1979, a fire completely destroyed petitioner's garage which contained all of his business records. These records, it was alleged, would have been significant in supporting petitioner's case.

CONCLUSIONS OF LAW

A. That section 1135 of the Tax Law requires every person required to collect tax, to maintain records of his 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).

B. That in view of the limited records available for audit, the use of the route list was a reasonable means of determining taxable sales. The auditor incorporated an allowance for exempt sales for every year audited even though petitioner did not have exemption certificates for every year and, moreover, the auditor allowed for the increase in petitioner's business for prior years even though not substantiated by original source documents. Under the circumstances, the audit procedures used resulted in a fair and reasonable determination of additional sales tax due.

C. That this Commission, by its order dated May 20, 1983, has previously decided the issue of whether there was an unreasonable delay in petitioner receiving a hearing and we stated at that time, "[w]hile there existed a lapse of approximately four years between the filing of the petition and the instant motion, there is no indication of deliberate delay by the Department of Taxation and Finance or a request for a hearing preference by the petitioner". Although it is unfortunate that petitioner's records were lost in a fire in the interim, it should be noted that if there were records which could have significantly affected the audit, such records should have been made available to the auditor at the time of the audit as required by section 1135 of the Tax Law.

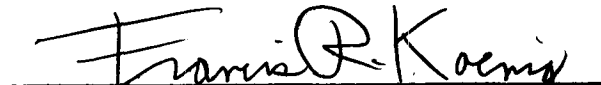
D. That the petition of Thomas C. Molloy d/b/a Molloy Rubbish is denied and the Notice of Determination and Demand for Payment of Sales and Use Taxes Due issued December 7, 1977 is sustained.

DATED: Albany, New York

STATE TAX COMMISSION

MAY 25 1984


PRESIDENT


COMMISSIONER


COMMISSIONER

P 440 976 971

RECEIPT FOR CERTIFIED MAIL

NO INSURANCE COVERAGE PROVIDED—
NOT FOR INTERNATIONAL MAIL

(See Reverse)

Sent to	
Joseph Siracusa	
Street and No. 108 W. Jefferson St.	
Suite 208-10 New Bldg.	
P.O., State and ZIP Code	
Syracuse, NY 13225-28	
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 440 976 970

RECEIPT FOR CERTIFIED MAIL

NO INSURANCE COVERAGE PROVIDED—
NOT FOR INTERNATIONAL MAIL

(See Reverse)

Sent to	
Thomas C. Holley	
Street and No. 13 Cladyard St.	
P.O., State and ZIP Code	
Auburn, NY 13022-1	
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