

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of :
Stuart Newman :
as Officer of G & E Hardware & Appliance Corp. : 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 Ending 8/31/78, 2/29/80, 8/31/80 & 2/28/81 :
:

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 1st day of June, 1984, he served the within notice of Decision by certified mail upon Stuart Newman, as Officer of G & E Hardware & Appliance Corp., the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Stuart Newman
as Officer of G & E Hardware & Appliance Corp.
3041 Bond Dr.
Merrick, NY 11566

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
1st day of June, 1984.

David Parchuck

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

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of :
Stuart Newman :
as Officer of G & E Hardware & Appliance Corp. : AFFIDAVIT OF MAILING
:
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of a Determination or Refund of Sales & Use Tax :
under Article 28 & 29 of the Tax Law for the :
Periods Ending 8/31/78, 2/29/80, 8/31/80 & :
2/28/81. :
_____ :

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 1st day of June, 1984, he served the within notice of Decision by certified mail upon Alan E. Golomb, the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Alan E. Golomb
150 Old Country Rd.
Mineola, NY 11501

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
1st day of June, 1984.

David Parchuck

James A. H. [Signature]
Authorized to administer oaths
pursuant to Tax Law section 174

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

June 1, 1984

Stuart Newman
as Officer of G & E Hardware & Appliance Corp.
3041 Bond Dr.
Merrick, NY 11566

Dear Mr. Newman:

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
Alan E. Golomb
150 Old Country Rd.
Mineola, NY 11501
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition	:	
of	:	
STUART NEWMAN	:	DECISION
as Officer of G & E HARDWARE & APPLIANCE CORP.	:	
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 Ended August 31,	:	
1978, February 29, 1980, August 31, 1980, and	:	
February 28, 1981.	:	

Petitioner, Stuart Newman, as officer of G & E Hardware & Appliance Corp., 3041 Bond Drive, Merrick, New York 11566, filed a petition for revision of a determination or for refund of sales and use taxes under Articles 28 & 29 of the Tax Law for the periods ended August 31, 1978, February 29, 1980, August 31, 1980, and February 28, 1981 (File No. 36557).

A small claims hearing was held before Judy M. Clark, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on September 14, 1983 at 2:45 p.m., with all briefs submitted by October 17, 1983. Petitioner appeared by Alan E. Golomb, Esq. The Audit Division appeared by John P. Dugan, Esq. (Angelo Scopellito, Esq., of counsel).

ISSUES

I. Whether Stuart Newman, as an officer of G & E Hardware & Appliance Corp., was responsible for sales tax under the provisions of sections 1131(1) and 1133(a) of the Tax Law, and if so,

II. Whether Stuart Newman is personally liable for penalties and interest under such provisions.

FINDINGS OF FACT

1. On November 20, 1981, the Audit Division issued a Notice and Demand for Payment of Sales and Use Taxes Due against Stuart Newman as a responsible officer of G & E Hardware & Appliance Corp. under the provisions of sections 1131(1) and 1133(a) of the Tax Law. The notice asserted sales tax due but not remitted by the corporation totalling \$11,991.06 plus penalty and interest of \$6,924.79 for a total due of \$18,915.85. The periods covered by the Notice were the sales tax filing quarters ended August 31, 1978, February 29, 1980, August 31, 1980 and February 28, 1981.

2. At a pre-hearing conference held, the Audit Division deleted the period ended August 31, 1978 from the Notice issued due to the expiration of that period under the statute of limitations. This reduced petitioner's tax liability assessed by \$920.62.

At the same conference, petitioner issued a personal check in payment of the reduced tax due in the amount of \$11,070.44. The payment was made under protest and to curtail the accrual of any further penalty and interest.

3. Petitioner was president of G & E Hardware & Appliance Corp. during the periods remaining in issue. Prior to October, 1979 petitioner was the corporation's treasurer. Mr. Michael Onorato acquired an equal interest in the corporation and took over the position of treasurer as of October, 1979.

4. Petitioner's duties as president of the corporation during the periods remaining at issue herein involved the day-to-day operation of the business, i.e. the buying and selling of merchandise, receiving shipments and making deliveries, and general cleaning of the store. Mr. Newman devoted ten hours a day to these duties. Petitioner signed corporate checks for merchandise received and signed a corporate check in payment of sales tax for the filing

period ended February 28, 1981 at issue herein. The check was returned by the bank due to "uncollected funds". Mr. Newman also signed the sales and use tax return filed for this period.

5. Petitioner argued that he was not under a duty to act for the corporation with respect to the collection and remittance of sales tax as defined by section 1131(1) of the Tax Law and, therefore, should not be held personally liable for such tax under the provisions of Tax Law section 1133(a). Petitioner contended that the corporate treasurer, Michael Onorato, and his wife, who was the bookkeeper, took care of all the finances of the business. Petitioner contended that he was unaware that the sales tax was not being remitted or that sufficient funds were not available for the payment of same. It was further argued that no profits from the business were diverted to personal funds rather than payment of sales tax. Petitioner offered no evidence to support these contentions.

In support of his arguments, petitioner cited Chevlowe v. Koerner, 95 Misc.2d 388 (1978) wherein the Court held that "the holding of corporate office does not, per se, impose liability upon the office holder." Similarly, petitioner argued that in Vogel v. New York State Dept. of Taxation, 98 Misc.2d 222 (1979), the Court held that where an officer did not maintain the corporation's financial books and records no liability existed for sales taxes.

Finally, petitioner argued that the same issue of personal liability arose before the Internal Revenue Service for penalty on withholding taxes not remitted, and that he was relieved of such liability for similar periods at issue herein.

6. Regarding penalty and interest, petitioner maintained that Tax Law section 1133 establishes personal liability for responsible corporate officers

only for the tax imposed and that there is no provision to hold an individual responsible for penalty and interest. Further, petitioner argued that should his personal sales tax liability be sustained, 20 NYCRR 536.1 provides for remission of penalty and interest in any case where the taxpayer was not guilty of willful neglect.

Petitioner contended that the corporation regularly paid all its taxes due and that only when Mr. Onorato took control of finances did the firm default.

CONCLUSIONS OF LAW

A. That section 1131(1) of the Tax Law defines "persons required to collect tax" as including 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 Article 28 of the Tax Law.

That section 1133(a) of the Tax Law provides that every person required to collect any tax imposed shall be personally liable for the tax imposed collected or required to be collected.

B. That petitioner, Stuart Newman, was a person required to collect tax within the meaning of section 1131(1) of the Tax Law and is therefore liable under the provisions of Tax Law section 1133(a) for such taxes. Petitioner was involved in the day-to-day operation of the business, had authority to sign corporate checks and, in fact, did so. Moreover, petitioner signed the sales and use tax return filed for the period ended February 28, 1981.

C. That petitioner's argument regarding personal liability for penalty and interest is without merit in that section 1145(a)(3) of the Tax Law provides

that unpaid penalties and interest may be determined, assessed, collected and enforced in the same manner as the tax imposed by Article 28 of the Tax Law.

D. That 20 NYCRR 536.1 provides for remission of penalties and interest only above the amount of interest prescribed by law. The taxpayer must establish reasonable cause and show that no willful neglect existed. The taxpayer's previous compliance record may be taken into account.


That although the sales tax filing period ended August 31, 1978 is no longer at issue herein, the inclusion of the period on the Notice shows that the sales tax payment record prior to October, 1979, the date petitioner relinquished his duties as treasurer, was similar to the periods remaining in issue. That the penalty and interest as determined is therefore sustained.

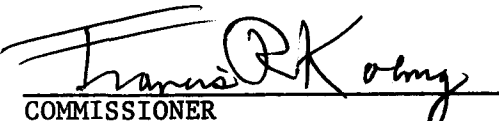
E. That the petition of Stuart Newman as officer of G & E Hardware & Appliance Corp. is denied, and the Notice and Demand for Payment of Sales and Use Taxes Due issued November 20, 1981 and reduced to \$11,070.44 is sustained with applicable penalty and interest thereon.


DATED: Albany, New York

STATE TAX COMMISSION

JUN 01 1984


PRESIDENT


COMMISSIONER


COMMISSIONER

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RECEIPT FOR CERTIFIED MAIL

NO INSURANCE COVERAGE PROVIDED—
NOT FOR INTERNATIONAL MAIL

(See Reverse)

Sent to <i>Stuart Newman</i>	
Street and No. <i>3041 Cold Dr.</i>	
P.O., State and ZIP Code <i>Perick, NY 11566</i>	
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 440 977 114

RECEIPT FOR CERTIFIED MAIL

NO INSURANCE COVERAGE PROVIDED—
NOT FOR INTERNATIONAL MAIL

(See Reverse)

Sent to <i>Alan E. Golomb</i>	
Street and No. <i>1500 Old Country Rd.</i>	
P.O., State and ZIP Code <i>Greene, NY 11501</i>	
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