

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

December 31, 1984

Pine Brook Service Center, Inc.  
and John LoPilato  
115-50 Black Oak Lane  
Smoke Rise, NJ

Gentlemen:

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  
Samuel D. Bornstein  
Stern, Steiger, Croland & Bornstein, P.C.  
1 Mac Center Dr.  
Paramus, NJ 07652  
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :  
of :  
Pine Brook Service Center, Inc. :  
and John LoPilato :

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 :  
3/1/79-11/30/81. :

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 31st day of December, 1984, he served the within notice of Decision by certified mail upon Pine Brook Service Center, Inc. and John LoPilato, the petitioners in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Pine Brook Service Center, Inc.  
and John LoPilato  
115-50 Black Oak Lane  
Smoke Rise, NJ

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  
31st day of December, 1984.

David Parchuck

Nicola J. Williams  
Authorized to administer oaths  
pursuant to Tax Law section 174

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :  
of :  
Pine Brook Service Center, Inc. :  
and John LoPilato :

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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 3/1/79-11/30/81. :

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 31st day of December, 1984, he served the within notice of Decision by certified mail upon Samuel D. Bornstein, the representative of the petitioners in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Samuel D. Bornstein  
Stern, Steiger, Croland & Bornstein, P.C.  
1 Mac Center Dr.  
Paramus, NJ 07652

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  
31st day of December, 1984.

David Parchuck

Nicholas J. Williams  
Authorized to administer oaths  
pursuant to Tax Law section 174

STATE OF NEW YORK

STATE TAX COMMISSION

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In the Matter of the Petition	:	
	:	
of	:	
	:	
PINEBROOK SERVICE CENTER, INC.	:	DECISION
AND JOHN LOPILATO	:	
	:	
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 November 30, 1981.	:	

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Petitioner, Pinebrook Service Center, Inc., 420 North Beverwick Road, Parsippany, New Jersey, and petitioner, John LoPilato, 115-50 Black Oak Lane, Smoke Rise, New Jersey,<sup>1</sup> 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 November 30, 1981 (File Nos. 38898 and 38924).

A formal hearing was held before Arthur Bray, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York on May 10, 1984 with all briefs to be submitted on or before May 18, 1984. Petitioner appeared by Stern, Steiger, Croland & Bornstein (Samuel D. Bornstein, Esq., of counsel). The Audit Division appeared by John P. Dugan, Esq. (Kevin A. Cahill, Esq., of counsel).

#### ISSUES

I. Whether the Audit Division properly determined Pinebrook Service Center, Inc.'s sales and use tax liability during the periods in issue through the use of an observation test.

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<sup>1</sup> Mr. LoPilato's representative stated at the hearing that Mr. LoPilato currently resides in Avellino, Italy. However, he was unable to provide a complete address.

II. Whether penalties and interest in excess of the statutory minimum imposed pursuant to section 1145(a) of the Tax Law should be waived.

III. Whether petitioner John LoPilato is personally liable for the sales tax due from Pinebrook Service Center, Inc.

FINDINGS OF FACT

1. Petitioner Pinebrook Service Center, Inc. ("Pinebrook") is a corporation organized under the laws of the State of New Jersey. It owned and operated a Shell gasoline station ("the gasoline station") in West Nyack, New York, as well as other gasoline stations located in the State of New Jersey. Petitioner John LoPilato is the president and sole shareholder of Pinebrook.

2. On February 17, 1982 Leonardo Finelli, Inc. filed a Notification of Sale, Transfer or Assignment in Bulk. The Notification stated that Leonardo Finelli, Inc. had purchased the gasoline station located in West Nyack, New York on December 1, 1981 for a total selling price of \$48,308.44. The selling price represented \$8,308.44 for real estate and \$40,000.00 for goodwill. No amount was listed for furniture and fixtures.

3. On April 20, 1982 the Audit Division, on the basis of a field audit, issued a Notice of Determination and Demand for Payment of Sales and Use Taxes Due to Pinebrook for the period March 1, 1979 through November 30, 1981. The Notice assessed a tax due of \$145,301.42 plus penalty of \$27,514.32 and interest of \$26,938.03 for a total of \$199,753.77. On the same date, the Audit Division issued a Notice of Determination and Demand for Payment of Sales and Use Taxes Due to John LoPilato as an officer of Pinebrook for the same periods and amounts of tax, penalty and interest.

4. Pinebrook filed New York State and Local Sales and Use Tax Returns during the periods in issue. On these returns, Pinebrook reported only a small

portion of its gross sales and services as subject to sales tax. The reason why only a small portion of Pinebrook's sales was listed as taxable was because Pinebrook was unaware that, unlike New Jersey, the New York sales tax on gasoline sales was not collected at the wholesale level during the periods in issue. In addition, Pinebrook relied upon the advice of its accountant to properly prepare the sales tax returns.

5. At the commencement of the audit, Mr. LoPilato and Pinebrook's accountant were requested to provide the Audit Division with the gasoline station's books and records. Neither party, however, submitted the requested books and records. Thereafter, the Audit Division attempted to ascertain the amount of the gasoline station's purchases of gasoline from Pinebrook's supplier. However, since the Audit Division was unable to provide the supplier with Pinebrook's customer identification number, Pinebrook's supplier was unable to advise the Audit Division of the amount of the gasoline station's purchases of gasoline during the audit period.

6. Since the Audit Division was unable to obtain records upon which an audit of the gasoline station could be performed, it was concluded that an observation test was warranted.

7. On March 19, 1982 two auditors visited the premises of the gasoline station for one and one-half hours. They met with the purchaser of the gasoline station and observed that the station was busy and that there were two "islands" containing a total of six gasoline pumps. The observation test did not include recording the sales of gasoline or other items or counting the number of automobiles passing through the gasoline station.

8. On April 2, 1982 the auditors again visited the gasoline station and performed a similar observation test for approximately the same period of time.

9. On the basis of the foregoing observations and prior experience in conducting audits of gasoline stations, the Audit Division concluded that, with the exception of two quarters, the reported sales should be increased twenty-five percent. With respect to two quarterly periods, the Audit Division concluded that there was a significant reduction in reported gasoline sales without any apparent explanation. Therefore, the Audit Division increased the reported gasoline sales to a level commensurate with that of the other periods and then increased these amounts by twenty-five percent in accordance with the findings of the observation test.

10. Since the notification of the bulk sale did not list any furniture or fixtures as being sold, the Audit Division estimated that the value of these items was \$10,000.00 and assessed additional tax due of \$425.00. No evidence was presented as to whether this estimate by the Audit Division was incorrect.

11. The Audit Division concluded that petitioner John LoPilato was responsible for the sales and use tax due from Pinebrook since he filed the application to be a registered vendor of Pinebrook and listed his title as president of Pinebrook. In addition, Mr. LoPilato signed at least one New York State Sales and Use Tax Return during the period in issue and, on this return, he listed his title as president. No evidence was presented to refute the Audit Division's conclusion that Mr. LoPilato was responsible for the sales and use taxes due from Pinebrook.

#### CONCLUSIONS OF LAW

A. That section 1135 of the Tax Law requires every person required to collect tax to maintain records of its sales and to make such records available for inspection and examination. When records are not provided or are incomplete

or insufficient, the tax due may be determined on the basis of external indices (Tax Law §1138).

B. That although the Audit Division's observation did not include recording the sales of gasoline or other items or counting the number of automobiles passing through the gasoline station, it was based upon an observation of the gasoline station and Audit Division experience in conducting audits of other gasoline stations. Since petitioners have not presented any testimonial or documentary evidence to establish that the audit method resulted in an improper determination of sales and use taxes due, a modification of the sales and use taxes found due is unwarranted (see generally, Matter of Convissar v. State Tax Comm., 69 A.D.2d 929).

C. That since no evidence was presented to refute the supposition that tangible personal property was transferred in the course of the bulk sale or that the amount of tax assessed was in error, the portion of the assessment based upon the bulk sale as described in Finding of Fact "10" is sustained.

D. That upon all the facts and circumstances presented, petitioners' failure to comply with the Tax Law was not due to reasonable cause. It is noted that ignorance of the Tax Law is not considered reasonable cause (20 NYCRR 536.1(b)(6), effective December 27, 1979). Accordingly, the penalties and interest in excess of the statutory minimum, imposed pursuant to Tax Law §1145(a), are sustained.

E. 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.

F. That the determination of whether an individual is a person or officer under a duty to act for the corporation is based upon the facts presented (Vogel v. New York State Department of Taxation and Finance, 98 Misc.2d 222). The relevant factors include, but are not limited to: the individual's daily involvement in the corporation; the individual's participation and involvement in the financial affairs of the corporation; the individual's preparation and signing of the sales and use tax returns; the individual's authority to draft checks on the firm's bank account; and, in the case of a closely-held corporation, the individual's knowledge of the affairs of the firm and benefits from the firm's profits (Matter of Robert Gattie, State Tax Commission, September 5, 1980).

G. That in view of the facts that Mr. LoPilato was the president and sole stockholder of Pinebrook and the additional facts that he applied for the sales tax registration and signed at least one sales tax return, Mr. LoPilato was a person under a duty to act on Pinebrook's behalf with respect to the requirements of Article 28 of the Tax Law. Since Mr. LoPilato failed to act as required by Article 28 of the Tax Law, he was properly found to be personally liable for the sales tax due from Pinebrook [Tax Law §1133(a)].

H. That the petition of Pinebrook Service Center, Inc. and John LoPilato is denied.

DATED: Albany, New York

DEC 31 1984

STATE TAX COMMISSION

Rodriguez  
PRESIDENT

Francis R. Koenig  
COMMISSIONER

Mark J. Miller  
COMMISSIONER

P 470 316 364

RECEIPT FOR CERTIFIED MAIL

NO INSURANCE COVERAGE PROVIDED—  
NOT FOR INTERNATIONAL MAIL

(See Reverse)

Sent to <i>Samuel D. Bernstein</i>	
Street and No. <i>115-50 Black Out Hwy</i>	
P.O., State and ZIP Code <i>1 Mac Center Dr</i>	
Postage <i>Paramus NY 10965</i>	
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 470 316 363

RECEIPT FOR CERTIFIED MAIL

NO INSURANCE COVERAGE PROVIDED—  
NOT FOR INTERNATIONAL MAIL

(See Reverse)

Sent to <i>One Bank Service Center Inc</i>	
Street and No. <i>115-50 Black Out Hwy</i>	
P.O., State and ZIP Code <i>115-50 Black Out Hwy</i>	
Postage <i>Smack Line N.Y.</i>	
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