

STATE OF NEW YORK

STATE TAX COMMISSION

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In the Matter of the Petition :  
of :  
L. M. Rabinowitz & Co., Inc. : 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 3/1/76 - 2/28/79. :

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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 14th day of March, 1984, he served the within notice of Decision by certified mail upon L. M. Rabinowitz & Co., Inc., the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

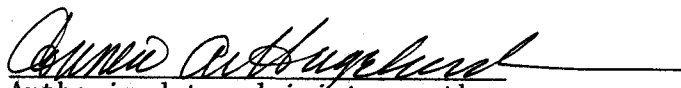
L. M. Rabinowitz & Co., Inc.  
30 Irving Pl.  
New York, NY 10003

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  
14th day of March, 1984.



  
Authorized to administer oaths  
pursuant to Tax Law section 174

STATE OF NEW YORK

STATE TAX COMMISSION

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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 14th day of March, 1984, he served the within notice of Decision by certified mail upon Joel L. Pascaner, the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:


Joel L. Pascaner  
Peat, Marwick, Mitchell & Co.  
345 Park Ave.  
New York, NY 10154

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  
14th day of March, 1984.



  
Authorized to administer oaths  
pursuant to Tax Law section 174



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

March 14, 1984

L. M. Rabinowitz & Co., Inc.  
30 Irving Pl.  
New York, NY 10003

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  
Joel L. Pascaner  
Peat, Marwick, Mitchell & Co.  
345 Park Ave.  
New York, NY 10154  
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

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In the Matter of the Petition	:	
	:	
of	:	
	:	
L. M. RABINOWITZ & CO., INC.	:	DECISION
	:	
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, 1976	:	
through February 28, 1979.	:	

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Petitioner, L. M. Rabinowitz & Co., Inc., 30 Irving Place, New York, New York 10003, 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, 1976 through February 28, 1979 (File No. 30363).

A formal hearing was held before Daniel J. Ranalli, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on July 15, 1983 at 9:00 A.M. Petitioner appeared by Peat, Marwick, Mitchell & Co. (Joel Pascaner, C.P.A.). The Audit Division appeared by John P. Dugan, Esq. (Michael Gitter, Esq., of counsel).

ISSUE

Whether tax due on a purchase of assets occurring on February 27, 1976 was properly included on a Notice of Determination and Demand for Payment of Sales and Use Taxes Due for the period March 1, 1976 through February 28, 1979.

FINDINGS OF FACT

1. On March 27, 1980, 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, L. M. Rabinowitz & Co., Inc., in the amount of \$14,231.28

plus interest of \$4,445.20 for a total due of \$18,676.48 for the period March 1, 1976 through February 28, 1979.

2. On May 24, 1979, petitioner, by its treasurer, executed a consent extending the period of limitation for assessment of sales and use taxes for the period March 1, 1976 through February 28, 1979 to December 20, 1980.

3. Petitioner is a Delaware corporation which was incorporated on February 27, 1976. On the same date, petitioner purchased the assets of the L. M. Rabinowitz & Co., Division of petitioner's parent, Athlone Industries, Inc. ("Athlone"). The assets were valued at \$536,957.00 for sales tax reporting purposes and \$21,999.08 in tax on the sale was paid to the seller, Athlone. By the terms of the agreement, Athlone was to remit the tax to the Department of Taxation and Finance. However, when the assets were entered on petitioner's books on March 1, 1976, the valuation of the assets was listed as \$851,596.00. No sales tax return was filed by petitioner with respect to the sale. However, petitioner filed timely sales and use tax returns for the audit period.

4. On audit, the auditor determined that, based on the difference between the two valuations, an additional tax of \$12,921.36 was due on the sale of the assets.<sup>1</sup>

5. Petitioner did not contest the amount of the additional tax due on the sale. However, it maintained that, since the sale occurred on February 27, 1976, it fell within the sales tax reporting period ended February 29, 1976. The Notice of Determination and Demand for Payment of Sales and Use Taxes Due issued March 27, 1980 was for the period beginning March 1, 1976 and thus did not include the sale of the assets. Petitioner argued, therefore, that the

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<sup>1</sup> The remaining \$1,309.92 of the assessment was for fixed assets acquired in later years and is not in issue.

\$12,921.36 tax due on the sale should be removed from the March 27, 1980 notice.

CONCLUSIONS OF LAW

A. That section 1101(b)(5) of the Tax Law provides, in pertinent part, that a sale consists of "any transfer of title or possession or both...in any manner or by any means whatsoever for a consideration..." (see also Uniform Commercial Code, §2-106[1]). Generally, title passes to the buyer at the time and place at which the seller completes his performance with reference to the physical delivery of the goods (Uniform Commercial Code, §2-401[2]). In the instant case, the sale of the assets by Athlone to petitioner took place on February 27, 1976, not on March 1, 1976 when the assets were entered on petitioner's books.

B. That inasmuch as the sale took place on February 27, 1976, it would properly be included in the sales tax reporting period ended February 29, 1976 and not the period ended May 31, 1976. The additional tax due on said sale was, therefore, improperly included on the notice of determination issued March 27, 1980 which only covered the period March 1, 1976 through February 28, 1979, and said notice must be modified by removing the tax due on the sale.

C. That, under section 1147(b) of the Tax Law, where no return has been filed as provided by law, the tax may be assessed at any time. Section 1136 provides that:

"...Every person required to register...as required by section eleven hundred thirty-four...shall only file a return quarterly with the tax commission."

However, prior to October 1, 1979, section 1134 provided that:

"...within three days after...commencement or opening [of a business] every person required to collect any tax imposed by this article... shall file with the tax commission a certificate of registration..."


D. That inasmuch as the sale of the assets took place on February 27, 1976, petitioner was not required to be registered and file returns under sections 1134 and 1136 until March 1, 1976 and, therefore, that part of section 1147(b) relating to the unlimited assessment period for non-filing of returns is inapplicable. The three-year period of limitation for assessment, as provided in section 1147(b), applies in this instance and such period expired in 1979.

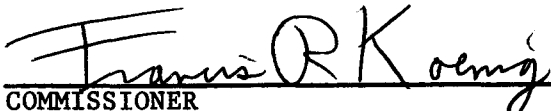
E. That the petition of L. M. Rabinowitz & Co., Inc. is granted and that the Audit Division is directed to modify the Notice of Determination and Demand for Payment of Sales and Use Taxes Due issued March 27, 1980 accordingly.

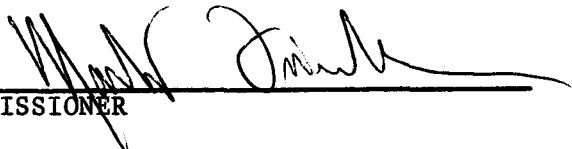
DATED: Albany, New York

STATE TAX COMMISSION

MAR 14 1984

  
PRESIDENT

  
COMMISSIONER

  
COMMISSIONER



P 470 315 301  
**RECEIPT FOR CERTIFIED MAIL**

NO INSURANCE COVERAGE PROVIDED—  
 NOT FOR INTERNATIONAL MAIL

(See Reverse)

Sent to <i>L.M. Rabinowitz &amp; Co.</i>	
Street and No. <i>30 Irving Pl.</i>	
P.O., State and ZIP Code <i>NY, NY 10003</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	
<b>TOTAL Postage and Fees</b>	<b>\$</b>
Postmark or Date	

PS Form 3800, Feb. 1982

P 470 315 302  
**RECEIPT FOR CERTIFIED MAIL**

NO INSURANCE COVERAGE PROVIDED—  
 NOT FOR INTERNATIONAL MAIL

(See Reverse)

Sent to <i>Joel L. Pascare</i>	
Street and No. <i>345 Park Ave.</i>	
P.O., State and ZIP Code <i>NY, NY 10154</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	
<b>TOTAL Postage and Fees</b>	<b>\$</b>
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PS Form 3800, Feb. 1982