

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of :
Ray's Chris Craft Sales & Service, Inc. :
for Revision of a Determination or for Refund of :
Sales & Use Taxes under Articles 28 & 29 of the :
Tax Law for the Period December 1, 1975 through :
August 31, 1980. :

AFFIDAVIT OF MAILING

In the Matter of the Petition :
of :
Adeline Starace :
for Revision of a Determination or for Refund of :
Sales & Use Taxes under Articles 28 & 29 of the :
Tax Law for the Period December 1, 1975 through :
August 31, 1980. :

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 9th day of March, 1984, he served the within notice of Decision by certified mail upon Ray's Chris Craft Sales & Service, Inc. and Adeline Starace, the petitioners in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Ray's Chris Craft Sales & Service, Inc.
Adeline Starace
503 City Island Ave.
Bronx, NY 10464

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.

Page 2
Affidavit of Mailing

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
9th day of March, 1984.

David Paroluck

James C. [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 :
Ray's Chris Craft Sales & Service, Inc. :
for Revision of a Determination or for Refund of :
Sales & Use Taxes under Articles 28 & 29 of the :
Tax Law for the Period December 1, 1975 through :
August 31, 1980. :

AFFIDAVIT OF MAILING

In the Matter of the Petition :
of :
Adeline Starace :
for Revision of a Determination or for Refund of :
Sales & Use Taxes under Articles 28 & 29 of the :
Tax Law for the Period December 1, 1975 through :
August 31, 1980. :

State of New York }
County of Albany } ss.:

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 9th day of March, 1984, he served the within notice of Decision by certified mail upon Larry Nelson, the representative of the petitioners in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Larry Nelson
Box 592
Forest Hills, NY 11375

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.

Page 2
Affidavit of Mailing

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
9th day of March, 1984.

David Parshuck

James A. Haddad
Authorized to administer oaths
pursuant to Tax Law section 174

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

March 9, 1984

Ray's Chris Craft Sales & Service, Inc.
Adeline Starace
503 City Island Ave.
Bronx, NY 10464

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
Larry Nelson
Box 592
Forest Hills, NY 11375
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of :
RAY'S CHRIS CRAFT SALES & SERVICE, INC. :
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 December 1, :
1975 through August 31, 1980.

DECISION

In the Matter of the Petition :
of :
ADELINE STARACE :
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 December 1, :
1975 through August 31, 1980.

Petitioners Ray's Chris Craft Sales & Service, Inc., 503 City Island Avenue, Bronx, New York 10464 and Adeline Starace, 417 King Avenue, Bronx, New York 10464 filed petitions 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 December 1, 1975 through August 31, 1980 (File Nos. 35145 and 35197).

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 12, 1983 at 2:00 P.M. Petitioners appeared by Larry Nelson, C.P.A. The Audit Division appeared by John P. Dugan, Esq. (Michael Gitter, Esq., of counsel).

ISSUES

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

II. Whether petitioner Adeline Starace was a person required to collect sales tax within the meaning and intent of sections 1131(1) and 1133(a) of the Tax Law.

FINDINGS OF FACT

1. On May 11, 1981, 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 Ray's Chris Craft Sales & Service, Inc. ("Ray's") in the amount of \$115,895.00 plus penalty of \$28,973.75 and interest of \$44,081.73 for a total due of \$188,950.48 for the period December 1, 1975 through May 31, 1979. On the same date the Audit Division issued a second notice against Ray's in the amount of \$45,387.00 plus penalty of \$7,532.76 and interest of \$5,576.57 for a total due of \$58,496.33 for the period June 1, 1979 through August 31, 1980. On the same date the Audit Division issued notices in the same amounts and for the same periods against petitioner Adeline Starace as an officer of Ray's.

2. Ray's, by its president, Frank Starace, had executed consents extending the period of limitation for assessment of sales and use taxes for the period December 1, 1975 through August 31, 1980 to September 20, 1981. Petitioner Adeline Starace signed no such consents.

3. Ray's was a corporation engaged in the business of boat sales, dockage, storage and repairs. Frank Starace was the president and his sister, petitioner Adeline Starace, was the secretary. Frank Starace testified that he was the only person authorized to sign checks for Ray's and that Adeline Starace was a mere figurehead who did nothing for the corporation. All of the invoices of

Ray's in evidence bore the signature of Frank Starace and there are no documents in the record bearing the signature of Adeline Starace and nothing in the record, other than her title, indicates that she had any responsibilities with respect to the corporation.

4. At some time prior to the audit, Mr. Starace had become involved with "loan sharks" to whom he owed an undisclosed amount of money. Mr. Starace offered to testify against the loan sharks in a prosecution being undertaken by the Bronx District Attorney's office. Mr. Starace was placed under the protection of the District Attorney and two detectives were assigned as bodyguards. Mr. Starace testified that in return for his testimony the District Attorney agreed to nullify Ray's sales tax liability. It appears that no one in the Department of Taxation and Finance was aware of such an agreement and, if there was such an agreement, there is no evidence that the Department was a party to it. In September, 1979 the District Attorney subpoenaed most of Ray's books and records. An assistant district attorney also asked the auditor to advise him as to the audit results.

5. On audit, the auditor had to go to the District Attorney's office to transcribe and photocopy Ray's records. The auditor found the books and records to be in an incomplete and disordered state. The auditor compared sales as reported on sales tax returns to sales as reported on Federal tax returns. Sales per sales tax returns were \$383,181.00 and sales per Federal tax returns were \$2,039,366.00, a difference of \$1,656,185.00. The auditor also found that Ray's had been incorrectly registered under the name of Frank Starace rather than under its corporate name.

6. From various books and invoices examined at the District Attorney's office, the auditor determined total sales for a test period of December 1,

1975 through November 30, 1978 to be \$2,226,566.00. The auditor reduced this figure by boat sales per sales invoices amounting to \$852,032.00 leaving \$1,374,534.00 in non-boat sales. The non-boat sales figure was reduced by 3 percent to allow for sales to other boat dealers leaving \$1,333,298.00 subject to tax of \$106,663.84. Of the \$852,032.00 in boat sales the auditor determined that \$370,591.25 in sales were taxable. In arriving at taxable sales, the auditor allowed a credit for trade-ins. Where delivery was made outside of New York State or where no place of delivery was listed but the purchaser resided outside New York State, the auditor deemed such boat sales to be non-taxable. The tax due on boat sales was determined to be \$23,321.06 for a total due for the period tested of \$129,984.90. Tax previously paid by petitioners for the test period was \$30,694.48 resulting in additional sales tax due of \$99,290.42 for the test period. Based on a ratio of tax due to tax paid during the test period the auditor determined an error factor of 223.48 percent which percentage he applied to tax paid for the entire audit period resulting in additional tax due of \$161,282.00.¹

7. Petitioners argued that the amount of taxable sales as determined by the auditor was excessive and that credit should have been given for commission sales wherein Frank Starace would sell boats for third parties for a ten percent commission. Mr. Starace used Ray's invoices for such sales but title to the boats never passed to Ray's and checks were made out by purchasers directly to the sellers. A review, by Mr. Starace, of numerous boat sale

¹ In determining the error factor, the auditor divided the additional tax due for the test period of \$99,290.42 by tax paid for the test period of \$30,694.48 and arrived at a percentage of 223.48 percent. This computation was erroneous. The correct percentage should have been 323.48 percent which would have resulted in additional tax due of \$211,139.92.

invoices submitted into evidence, indicated, by Mr. Starace's credible testimony, that, by taking commission sales into account, the taxable sales figure approximated the \$2,039,366 in sales as reported on Ray's Federal returns.

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 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 the incomplete and disordered condition of Ray's books and records along with the one million dollar discrepancy in sales as reported left the auditor no alternative but to utilize a test period to determine taxable sales. Therefore, the auditor was justified in resorting to an estimate of the taxable sales ratio to arrive at petitioners' sales tax liability. [See Korba v. New York State Tax Commission 84 A.D. 2d 655; Tax Law §1138(a)].

C. That the Audit Division should have allowed a credit for Mr. Starace's commission sales. However, as the result of the computation error discussed in Finding of Fact "6", the error factor of 223.48 percent utilized by the Audit Division is lower than the error factor which would result from using the sales figures reported by Ray's on its Federal returns. Therefore, since utilization of petitioners' own figures would result in an increased assessment and since the period of limitation for assessment of additional tax has expired, the amount of the assessment must be sustained.

D. That section 1133(a) of the Tax Law provides, in part, that every person required to collect the taxes imposed under the Sales Tax Law is also personally liable for the tax imposed, collected, or required to be collected under such law. Section 1131(1) of the Tax Law defines "persons required to collect tax" as used in section 1133(a) to include any officer or employee of a corporation, or a dissolved corporation, who as such officer or employee is under a duty to act for the corporation in complying with any requirement of the Sales Tax Law.

E. That 20 NYCRR 526.11(b)(2) describes an officer or employee who is under a duty to act as a person who is authorized to sign a corporation's tax returns or is responsible for maintaining the corporate books, or is responsible for the corporation's management. Other "[i]ndicia of this duty...include factors...such as the officer's day-to-day responsibilities and involvement with the financial affairs and management of the corporation" and "the officer's duties and functions..." (Vogel v. New York State Department of Taxation and Finance, 98 Misc. 2d 222, 225).

F. That inasmuch as Adeline Starace had no authority to sign checks, did not participate in the day-to-day operations of Ray's and appears to have been given the office of Secretary only because she was Frank Starace's sister, she was not a person required to collect tax within the meaning and intent of sections 1131(1) and 1133(a) of the Tax Law.

G. That the petition of Ray's Chris Craft Sales & Service is denied and the notices of determination and demands for payment of sales and use taxes due issued to it on May 11, 1981 are sustained; the petition of Adeline Starace is

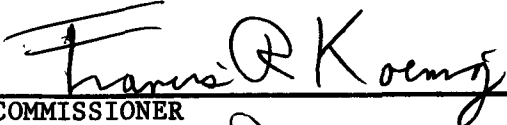
granted and the notices of determination and demands for payment of sales and use taxes due issued against her on May 11, 1981 are cancelled.

DATED: Albany, New York

STATE TAX COMMISSION

MAR 09 1984


PRESIDENT


COMMISSIONER


COMMISSIONER

P 470 315 274

RECEIPT FOR CERTIFIED MAIL

NO INSURANCE COVERAGE PROVIDED—
NOT FOR INTERNATIONAL MAIL

(See Reverse)

Sent to <i>Service, Inc.</i>	
Street and No. <i>503 City Island Ave.</i>	
P.O., State and ZIP Code <i>Bronx, NY 10464</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 470 315 275

RECEIPT FOR CERTIFIED MAIL

NO INSURANCE COVERAGE PROVIDED—
NOT FOR INTERNATIONAL MAIL

(See Reverse)

Sent to <i>Larry Nelson</i>	
Street and No. <i>Box 592</i>	
P.O., State and ZIP Code <i>West Hills, NY 11375</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