

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :

of

Henry Stempien :

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 12/1/74 - 9/10/77. :

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 18th day of July, 1984, he served the within notice of Decision by certified mail upon Henry Stempien, the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Henry Stempien
315 Richmond Ave.
Syracuse, NY 13204

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
18th day of July, 1984.

David Parchuck

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

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

July 18, 1984

Henry Stempien
315 Richmond Ave.
Syracuse, NY 13204

Dear Mr. Stempien:

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: Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition	:	
of	:	
HENRY STEMPIEN	:	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 December 1, 1974	:	
through September 10, 1977.	:	

Petitioner, Henry Stempien, 315 Richmond Avenue, Syracuse, New York 13204, 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 December 1, 1974 through September 10, 1977 (File No. 32565).

A small claims hearing was held before Arthur Johnson, Hearing Officer, at the offices of the State Tax Commission, 333 East Washington Street, Syracuse, New York, on October 19, 1983 at 9:15 A.M. Petitioner appeared pro se. The Audit Division appeared by John P. Dugan, Esq. (Anne Murphy, Esq., of counsel).

ISSUES

I. Whether petitioner, the purchaser in a bulk sales transaction, is liable for sales taxes determined due from the seller in accordance with section 1141(c) of the Tax Law.

II. Whether the Audit Division properly estimated the sales tax liability of the seller.

FINDINGS OF FACT

1. On September 2, 1977, the Audit Division received a Notification of Sale, Transfer or Assignment in Bulk from petitioner, Henry Stempien, regarding

his purchase of a restaurant business owned by Thomas Heaney, Sr. Said notification indicated September 10, 1977 as the scheduled date of sale and listed the total sales price as \$21,000.00. The sales price of the furniture and fixtures was \$4,000.00 on which the bulk sales tax of \$280.00 has been paid. There was no escrow fund.

2. On September 6, 1977, the Audit Division notified petitioner of a possible claim for New York State and local sales and use taxes from the seller. The notification stated that no distribution of funds or property to the extent of the amount of the state's claim may be made before the following conditions have been met:

- a) The State Tax Commission has determined the seller's liability, if any.
- b) Payment of such liability has been made to the state.
- c) This office has authorized you to release the funds or property.

3. On February 14, 1978, the Audit Division issued a Notice and Demand for Payment of Sales and Use Taxes Due against petitioner for taxes due of \$4,289.88, plus penalty and interest of \$1,691.34, for a total of \$5,981.22. Petitioner was held liable for the taxes determined due from the seller pursuant to section 1141(c) of the Tax Law.

4. The taxes determined due from the seller, Thomas Heaney, Sr., resulted from his failure to provide certain information requested by the Audit Division regarding the business operations. In the absence of such information, the Audit Division estimated taxable sales of \$10,000.00 for each reporting period under review. The estimated sales was based on sales reported by similar establishments.

5. Mr. Heaney attended a post-assessment conference, at which time he indicated that all books and records for the business were destroyed in a

flood. The Audit Division advised Mr. Heaney, by letter dated July 10, 1978, that without further evidence, no revisions to the assessment were possible.

Mr. Heaney failed to appear at a Tax Appeals Bureau pre-hearing conference scheduled for July 24, 1981 and a default order was issued by the State Tax Commission.

6. Petitioner argued that the Audit Division did not timely notify him of Mr. Heaney's tax liability. Moreover, petitioner argued that the Audit Division erroneously based its assessment on sales tax returns he filed after taking over the business.

7. Petitioner acted in good faith at all times.

CONCLUSIONS OF LAW

A. That the Tax Commission, upon receipt of the notice of bulk sale from petitioner, notified petitioner not to distribute funds or property until it determined if the seller is liable for sales taxes and the extent of such liability; that the Tax Commission notified petitioner of the amount of taxes due from the seller within 180 days (90 days effective January 1, 1978) of receipt of petitioner's notice of sale as required by section 1141(c) of the Tax Law.

That petitioner transferred funds prior to being notified of the amount of state's claim for taxes due from the seller and, therefore, is personally liable for the payment of such taxes in accordance with the provisions of section 1141(c) of the Tax Law.

B. That the seller, Thomas J. Heaney, Sr., failed to provide the Audit Division with books and records or other information it requested in order to make a determination as to the accuracy of the sales tax returns filed for periods prior to the bulk sale; therefore, the Audit Division determined

Mr. Heaney's taxable sales from such information as was available and external indices as authorized in section 1138(a) of the Tax Law.

C. That the penalty is cancelled and interest shall be reduced to the minimum amount prescribed by law.

D. That the petition of Henry Stempien is granted to the extent indicated in Conclusion of Law "C"; that the Audit Division is hereby directed to modify the Notice and Demand for Payment of Sales and Use Taxes Due issued February 14, 1978; and that, except as so granted, the petition is in all other respects denied.

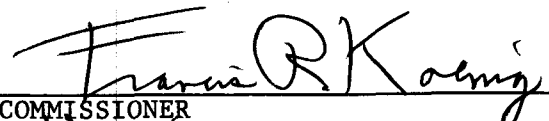
DATED: Albany, New York

STATE TAX COMMISSION

JUL 18 1984



PRESIDENT



COMMISSIONER

COMMISSIONER

P 440 977 316

RECEIPT FOR CERTIFIED MAIL

NO INSURANCE COVERAGE PROVIDED—
NOT FOR INTERNATIONAL MAIL

(See Reverse)

Sent to <i>Henry Stephen</i>	
Street and No. <i>315 Richmond Ave.</i>	
P.O., State and ZIP Code <i>Spokane, WA 99204</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