

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition  
of  
Tile Town, Inc.

AFFIDAVIT OF MAILING

for Redetermination of a Deficiency or Revision  
of a Determination or Refund of Sales & Use Taxes  
under Article 28 & 29 of the Tax Law  
for the Period 9/1/75-8/31/78.

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 26th day of July, 1984, he served the within notice of Decision by certified mail upon Tile Town, Inc., the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Tile Town, Inc.  
3195 Erie Blvd. East  
DeWitt, NY 13214

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  
26th day of July, 1984.

David Parchuck

James J. Harnett  
Authorized to administer oaths  
pursuant to Tax Law section 174

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :  
of :  
Tile Town, Inc. :

AFFIDAVIT OF MAILING

for Redetermination of a Deficiency or Revision :  
of a Determination or Refund of Sales & Use Taxes :  
under Article 28 & 29 of the Tax Law for the :  
Period 9/1/75-8/31/78. :

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 26th day of July, 1984, he served the within notice of Decision by certified mail upon Sheldon G. Kall, the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Sheldon G. Kall  
3522 James St.  
Syracuse, NY 13206

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  
26th day of July, 1984.

David Parchuck

Constance H. Hays  
Authorized to administer oaths  
pursuant to Tax Law section 174

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

July 26, 1984

Tile Town, Inc.  
3195 Erie Blvd. East  
DeWitt, NY 13214

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  
Sheldon G. Kall  
3522 James St.  
Syracuse, NY 13206  
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

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In the Matter of the Petition :  
of :  
TILE TOWN, 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 September 1, 1975 :  
through August 31, 1978.

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Petitioner, Tile Town, Inc., 3195 Erie Boulevard East, Dewitt, New York 13214, 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 September 1, 1975 through August 31, 1978 (File No. 27748).

A formal 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 1:15 P.M. Petitioner appeared by Sheldon G. Kall, Esq. The Audit Division appeared by John P. Dugan, Esq. (Anne Murphy, Esq., of counsel).

ISSUES

I. Whether the Audit Division properly disallowed certain nontaxable sales reported by petitioner.

II. Whether the Audit Division's use of test periods as a basis for estimating additional taxes due was proper.

III. Whether petitioner is liable for tax on materials used in performing capital improvement work.

FINDINGS OF FACT

1. Petitioner, Tile Town, Inc., was engaged in the sale and installation of floor covering.

2. On June 20, 1979, as the result of an audit, the Audit Division issued a Notice of Determination and Demand for Payment of Sales and Use Taxes Due against petitioner covering the period September 1, 1975 through August 31, 1978 for taxes due of \$75,085.08, plus interest of \$15,339.71, for a total of \$90,424.79.

3. Petitioner executed a consent extending the period of limitation for assessment of sales and use taxes for the period September 1, 1975 through February 29, 1976 to June 20, 1979.

4. On audit, the Audit Division examined sales invoices and cash register tapes for the period September 1, 1976 through November 30, 1976. These documents were reconciled with daily totals in the sales journal. This review disclosed that store sales per the sales journal agreed with the gross sales reported on sales tax returns. The taxable sales on the returns represented cash sales only. The difference between gross sales and taxable sales was charge sales which included both sales of floor covering and installations. Petitioner did not report any sales or use taxes on charge sales.

The Audit Division reviewed exemption certificates on file and found that for the above period petitioner had unsubstantiated exempt cash sales of \$1,741.00 or three percent (3%) of taxable sales reported for that period. This percentage was applied to total taxable sales reported for the audit period to determine additional taxable sales of \$20,659.00 and tax due thereon of \$1,446.13. Unsubstantiated charge sales amounted to \$6,452.00 or five percent (5%) of store sales. This percentage was applied to total store sales

from the sales journal for the audit period which resulted in unreported taxable sales of \$73,904.00 and taxes due of \$5,173.28.

The Audit Division also examined petitioner's corporation tax return for the fiscal year March 1, 1976 through February 28, 1977 and found that store sales per the tax return were \$38,339.00 greater than such sales per the sales journal. Petitioner's accountant could not account for the discrepancy and, therefore, store sales per the sales journal were increased 7.6 percent for the audit period to arrive at unreported store sales of \$112,113.00 with additional taxes due thereon of \$7,847.91.

Approximately 43 percent of petitioner's business involved the installation of floor covering. Such installations constituted capital improvements to real property. Petitioner did not collect any sales tax on these transactions nor did it pay use taxes on the materials used in performing the capital improvements.

The materials used in installations were recorded in the sales journal at the retail selling price under the heading "material installed" and amounted to \$1,055,744.00 for the audit period. This amount did not include materials used in the installations recorded under charge store sales. In order to determine the amount of such materials, the Audit Division analyzed the installation sales invoices for the period September 1, 1976 through November 30, 1976 and determined that 70.7 percent of the total sales price was for material. In addition, it was determined that 19.76 percent of store sales involved charge installation sales. Using these percentages, the Audit Division computed installed materials totalling \$206,103.00. This amount was combined with the above materials to arrive at total materials used in capital improvements of \$1,261,847.00. Petitioner had exemption certificates on file covering certain installations which reduced the taxable materials to \$1,236,604.00.

Petitioner's corporation tax return for the fiscal year ended February 28, 1977 showed material sales of \$1,068,394.00. The cost for such material was \$737,447.00, leaving a gross profit of \$330,947.00. A markup of 44.88% was computed based on these figures and was used to convert the sales price of the taxable materials installed to a cost of \$853,538.00 (\$1,236,604.00 divided by 144.88%). The use taxes due thereon were \$59,747.66.

A review of expense purchases for the fiscal year March 1, 1976 through February 28, 1977 revealed that petitioner failed to pay a sales or use tax on purchases such as carpet samples, tables and chairs etc. These purchases totaled \$5,061.00. The taxable purchases were divided by total purchases for the sample year to determine an error factor of .69 percent. The error factor was applied to total purchases for the audit period resulting in a use tax liability of \$870.10.

5. Following a pre-hearing conference petitioner's liability was revised as follows:

<u>Category</u>	<u>Tax Assessed</u>	<u>Revised Tax Due</u>
cash store sales	\$ 1,446.13	\$ 1,210.58
charge store sales	5,173.28	4,667.74
difference in gross sales	7,847.91	7,135.44
materials used in installations	59,747.66	52,627.05
expense purchases	870.10	816.76
TOTAL	<u>\$75,085.08</u>	<u>\$66,457.57</u>

6. Petitioner argued that although exemption certificates were not available for certain nontaxable sales disallowed by the Audit Division, the sales were to tax exempt organizations or to businesses with the same operation.

With respect to expense purchases, petitioner argued that the samples were purchased for resale and moreover, that one particular purchase from Agency Tile for \$1,066.92 was billed in error and never paid.

Petitioner adduced no further exemption certificates or other evidence to support the foregoing arguments.

7. Petitioner maintained complete and adequate books and records from which the Audit Division could have determined petitioner's actual tax liability on disallowed exempt sales, unreported gross sales, materials used in capital improvement work and expense purchases.

#### CONCLUSIONS OF LAW

A. That section 1132(c) of the Tax Law provides in part, that it shall be presumed that all receipts for property or services are subject to tax until the contrary is established, and the burden of proving that any receipt is not taxable shall be upon the person required to collect tax. Unless a vendor shall have taken from the purchaser a certificate in such form as the tax commission may prescribe to the effect that the property was purchased for resale or some use by reason of which the sale is exempt from tax under section 1115. Where such a certificate has been furnished to the vendor, the burden of proving that the receipt is not taxable shall be solely upon the customer.

Petitioner failed to sustain the burden of proof required by section 1132(c) of the Tax Law on those sales for which no exemption certificates were on file and the excess gross sales reported on corporate tax returns. Accordingly, petitioner is liable for the tax it failed to collect from the customers pursuant to section 1133(a) of the Tax Law.

B. Petitioner is liable for the taxes due on expense purchases in accordance with section 1133(b) of the Tax Law.

C. That although there is statutory authority for use of a test period to determine the amount of tax due, resort to such method of computing tax liability must be founded upon an insufficiency of recordkeeping which makes it virtually

impossible to verify such liability and conduct a complete audit (Matter of Chartair, Inc. v. State Tax Commission, 65 A.D.2d 44, 411 N.Y.S.2d 41).

That in view of the fact that petitioner maintained complete books and records which were available for audit, the Audit Division's use of test periods as the basis for estimating petitioner's tax liability for the three year audit period was improper. Therefore, the additional taxes due determined on the basis of test periods are limited to the actual amounts found due for the periods examined:

(a) unsubstantiated exempt cash sales	\$ 1,558.61
(b) unsubstantiated exempt charge sales	5,702.27
(c) gross sales comparison	36,339.00
(d) materials used in installations included under charge sales	17,639.00
(e) expense purchases	5,061.00
Total	<u>\$66,299.88</u>
Tax Due	\$ 4,640.99

D. That the tangible personal property sold to petitioner for use in performing capital improvements constituted a retail sale in accordance with section 1101(b)(4) of the Tax Law. Petitioner is liable for the tax on such tangible personal property pursuant to section 1110 of the Tax Law.

E. That the petition of Tile Town, Inc. is granted to the extent that the additional sales and use taxes due are reduced to \$48,508.99 as follows:

actual materials installed per journal	\$1,055,744.00
taxable materials (86 percent per pre-hearing conference)	907,940.00
conversion to cost (44.88 markup)	626,684.00
tax due on installed materials	43,868.00
Conclusion of Law "C"	4,640.99
Total revised liability	<u>\$ 48,508.99</u>

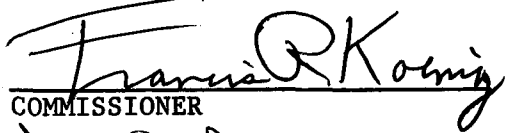
That the Audit Division is hereby directed to modify the Notice of Determination and Demand for Payment of Sales and Use Taxes Due issued June 20, 1979; and that, except as so granted, the petition is in all other respects denied.

DATED: Albany, New York

JUL 26 1984

STATE TAX COMMISSION

  
PRESIDENT

  
COMMISSIONER

  
COMMISSIONER

P 440 976 992

RECEIPT FOR CERTIFIED MAIL

NO INSURANCE COVERAGE PROVIDED—  
NOT FOR INTERNATIONAL MAIL

(See Reverse)

Sent to <i>Tile Town, Inc.</i>	
Street and No. <i>3195 Erie Blvd. East</i>	
P.O., State and ZIP Code <i>DeWitt, NY 13214</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 440 976 993

RECEIPT FOR CERTIFIED MAIL

NO INSURANCE COVERAGE PROVIDED—  
NOT FOR INTERNATIONAL MAIL

(See Reverse)

Sent to <i>Sheldon G. Kael</i>	
Street and No. <i>3522 James St.</i>	
P.O., State and ZIP Code <i>Syracuse, NY 13206</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