

## STATE TAX COMMISSION

# AFFIDAVIT OF MAILING

Bernie R. Chapman  
Authorized to administer oaths  
pursuant to Tax Law section 174

## STATE TAX COMMISSION

Ernest P. Hagedorn  
Authorized to administer oaths  
pursuant to Tax Law section 174

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

November 9, 1984

Two Doubtful Women, Inc.  
1285 Hertel Ave.  
Buffalo, NY 14216

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  
John I. Salomon  
15 Court St.  
Buffalo, NY 14202  
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

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|  |   |          |
|--|---|----------|
| In the Matter of the Petition                  | : |          |
|  | : |          |
| of   | : |          |
|  | : |          |
| TWO DOUBTFUL WOMEN, 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, 1981 | : |          |
| through May 31, 1981.                          | : |          |

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Petitioner, Two Doubtful Women, Inc., 1285 Hertel Avenue, Buffalo, New York 14216, 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, 1981 through May 31, 1981 (File No. 42481).

A small claims hearing was held before Arthur Johnson, Hearing Officer, at the offices of the State Tax Commission, 65 Court Street, Buffalo, New York, on April 26, 1984 at 10:45 A.M. Petitioner appeared by Thomas A. Palmer, Esq. and John Salomon, CPA. The Audit Division appeared by John P. Dugan, Esq. (James Della Porta, Esq., of counsel).

#### ISSUE

Whether after advising petitioner by letter that no additional taxes were due for the period at issue, the Audit Division was precluded from issuing a Notice of Determination and Demand for Payment of Sales and Use Taxes Due for the same period.

#### FINDINGS OF FACT

1. Petitioner, Two Doubtful Women, Inc., operated a bar and restaurant located at 1285 Hertel Avenue, Buffalo, New York.
2. During January and February, 1982, the Audit Division conducted an audit of petitioner's books and records for the period March 1, 1979

through November 30, 1981. By letter dated May 24, 1982, the Audit Division advised petitioner that the audit was complete and that no additional sales or use taxes were due.

3. The audit report and schedules were sent by the district office to the Audit Division in Albany. These documents were received by the Audit Evaluation Bureau, which found that taxable sales recorded by petitioner in the sales journal for the period March 1, 1981 through May 31, 1981 exceeded taxable sales reported on the sales tax return filed for the period by \$50,393.00. The Bureau requested that the auditor determine the reason for the discrepancy. After consulting with petitioner's accountant, it was determined that petitioner inadvertently omitted the sales for May, 1981 from the return.

4. On December 22, 1982, the Audit Division issued a Notice of Determination and Demand for Payment of Sales and Use Taxes Due against petitioner covering the period March 1, 1981 through May 31, 1981 for taxes due of \$3,527.50 plus interest of \$701.62, for a total of \$4,229.12. Said notice indicated that the taxes were determined to be due based on an audit of the books and records.

5. Petitioner argued that the audit of its books and records had been completed as of May 24, 1982 when the Audit Division issued the aforementioned letter (Finding of Fact "2") and that the subsequent review of the audit by the Audit Evaluation Bureau constituted a second audit covering the same period.

Petitioner took the position that the Audit Division was prohibited from conducting the second audit and relied on section 7605(b) of the Internal Revenue Code which provides, "No taxpayer shall be subjected to unnecessary examination or investigations, and only one inspection of a taxpayer's books of account shall be made for each taxable year unless the taxpayer requests otherwise or unless the Secretary, after investigation, notifies the taxpayer in writing that an additional inspection is necessary."

6. Petitioner was not prejudiced in any way by the representation made in the letter of May 24, 1982 nor did it rely on such letter to its detriment.

CONCLUSIONS OF LAW

A. That there is no provision under Articles 28 and 29 of the Tax Law, except for the time limitations set forth in section 1147(b), which prohibits the Audit Division from issuing a notice of additional taxes due. The notice herein did not result from a second audit of a previously audited period but rather, was issued because of an error discovered on review of the original audit. The Tax Commission has authority to correct clerical mistakes (Turner Construction Co.v. State Tax Commission, 57 A.D.2d 201).

B. That concept of estoppel cannot be invoked against the state under the circumstances herein (Di Giacomo v. City of New York, 58 A.D.2d 347).

C. That the petition of Two Doubtful Women, Inc. is denied and the Notice of Determination and Demand for Payment of Sales and Use Taxes Due issued December 22, 1982 is sustained.

DATED: Albany, New York

STATE TAX COMMISSION

NOV 09 1984

Rodriguez  
PRESIDENT

Francis R. Koenig  
COMMISSIONER

Mark J. Friedman  
COMMISSIONER

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|---|----|
| Sent to<br><b>Two Doubtful Women, Inc.</b>                    |    |
| Street and No.<br><b>1285 Hertel Ave.</b>                     |    |
| P.O., State and ZIP Code<br><b>Buffalo, NY 14216</b>          |    |
| Postage   | \$ |
| Certified Fee   |    |
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