

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of :
Nino A. & Joan M. Donatelli :
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 9/1/75 - 11/30/78. :
:

AFFIDAVIT OF MAILING

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 7th day of November, 1985, he served the within notice of Decision by certified mail upon Nino A. & Joan M. Donatelli, the petitioners in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Nino A. & Joan M. Donatelli
432 Center St.
Lewiston, NY 14092

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
7th day of November, 1985.

David Parchuck

Barrie A. Hagelund
Authorized to administer oaths
pursuant to Tax Law section 174

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of :
Nino A. & Joan M. Donatelli :
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 9/1/75 - 11/30/78. :
:

AFFIDAVIT OF MAILING

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 7th day of November, 1985, he served the within notice of Decision by certified mail upon Michael V. Maloney, the representative of the petitioners in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Michael V. Maloney
256 3rd Street
Niagara Falls, NY 14303

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
7th day of November, 1985.

David Parchuck

Annice A. Hegdorn
Authorized to administer oaths
pursuant to Tax Law section 174

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

November 7, 1985

Nino A. & Joan M. Donatelli
432 Center St.
Lewiston, NY 14092

Dear Mr. & Mrs. Donatelli:

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
Michael V. Maloney
256 3rd Street
Niagara Falls, NY 14303
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition	:	
of	:	
NINO A. AND JOAN M. DONATELLI	:	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 November 30, 1978.	:	

Petitioners, Nino A. and Joan M. Donatelli, 432 Center Street, Lewiston, New York 14092, 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 November 30, 1978 (File No. 31380).

A formal hearing was held before James J. Morris, Jr., Hearing Officer, at the offices of the State Tax Commission, 65 Court Street, Buffalo, New York, on February 6, 1985 at 1:15 P.M., with all briefs to be filed by March 22, 1985. Petitioners appeared by Michael V. Maloney. The Audit Division appeared by John P. Dugan, Esq. (Deborah Dwyer, Esq., of counsel).

ISSUES

I. Whether petitioners were timely assessed sales and use tax liability as purchasers in a bulk sale.

II. Whether sales tax was properly assessed upon the tangible personal property transferred in the bulk sale.

III. Whether the Audit Division may amend its Answer to conform to the proof.

IV. Whether the Audit Division properly determined the extent of petitioners' liability as bulk sale purchasers.

FINDINGS OF FACT

1. On December 15, 1978, the Audit Division issued to petitioners, Nino A. and Joan M. Donatelli, a Notice and Demand for Payment of Sales and Use Taxes Due Number S781206722C covering the periods ended November 30, 1975 through September 15, 1978 for taxes due of \$14,106.69 plus penalty and interest. Said notice stated, "This notice is in addition to Notice #S781206723C."

On December 15, 1978, the Audit Division also issued to petitioners Nino A. and Joan M. Donatelli a Notice and Demand for Payment of Sales and Use Taxes Due Number S781206723C covering the periods ended August 31, 1976 through February 28, 1978 for taxes due of \$7,569.45 plus penalty and interest. Said notice stated, "This notice is in addition to Notice #S781206722C."

Each of said notices and demands for payment of taxes due stated:

"The following taxes are determined to be due from Milton and Elizabeth Bradshaw d/b/a Schneider's Restaurant and represents your liability, as purchaser, in accordance with Section 1141(c) of the Sales Tax Law."

2. A "Notice of Sale in Bulk" was sent to the Department of Taxation and Finance by certified mail, metered and postmarked the sixteenth of September, 1978. Said notice stated, in part:

"PLEASE TAKE NOTICE, pursuant to Article 6 of the Uniform Commercial Code, you are hereby notified that a transfer in bulk is about to be made between ELIZABETH BRADSHAW AND MILTON BRADSHAW, whose business address is 432 Center Street, Lewiston NY as Transferor, and NINO A. DONATELLI AND JOAN MARIE DONATELLI, whose business address will be 432 Center Street, Lewiston NY as Transferee.

The following business names and addresses have been used by the Transferor in addition to that set forth above, within the past three years so far as the same are known to the Transferee:

SCHNEIDERS RESTAURANT, 432 Center Street, Lewiston NY"

Said "Notice of Sale in Bulk" did not disclose the date of the proposed sale nor an address of the buyer other than that of the business being sold.

3. The Audit Division claims that a notice of possible claim for sales taxes due from the seller was sent to petitioners addressed to the business address provided in the Notice of Sale in Bulk on or about October 3, 1978. The business was closed during said month and petitioners did not receive said notice.

The Audit Division presented no evidence or testimony in support of its claim that said notice was in fact mailed.

4. Petitioners purchased the business on or about September 29, 1978 for a total sales price in excess of \$100,000.00. Included in such total sales price was a mortgage from petitioners to the sellers of some \$32,000.00 to \$33,000.00, of which approximately \$30,000.00 is still owing, petitioners having ceased payments to the sellers after receiving the notices and demands for payment of sales and use taxes due from the Audit Division (Finding of Fact "1") for sales taxes due from petitioners on account of the seller's past liabilities.

5. Pursuant to conferences, additional submissions and/or part payments, the Audit Division had, prior to the hearing, reduced the amount of claimed outstanding liability due by petitioners as bulk sale purchasers. The Audit Division claims that \$4,381.86 tax, together with applicable interest and penalty, is still owing with respect to Notice and Demand Number S781206723C and that \$3,083.08 tax, together with applicable interest and penalty, is still owing with respect to Notice and Demand Number S781206722C.

6. The Notice and Demand for Payment of Sales and Use Tax Number S781206722C is the result of an audit of the records of the "bulk sale" sellers' business, Schneider's Restaurant. Said records were incomplete and the taxes originally

claimed due were determined by applying office experience markups to liquor, beer, wine and food.

Also included was \$700.00 in tax liability premised upon a transfer of \$10,000.00 in tangible personal property upon the sale in bulk of the business assets of Schneider's Restaurant.

7. The consideration paid for the tangible personal property transferred from Schneider's Restaurant to petitioners was \$5,000.00.

8. The Notice and Demand for Payment of Sale and Use Tax Number S781206723C is based upon sales and use tax returns filed by Schneider's Restaurant for which full payment was not received.

9. Paragraph 3 of the Audit Division's Answer to petitioners' perfected petition stated that the Audit Division "Affirmatively states that the amount assessed against petitioner has been reduced from \$5,269.25 to \$3,083.08", and the wherefore clause therein stated that:

"WHEREFORE, the AUDIT DIVISION OF THE DEPARTMENT OF TAXATION AND FINANCE respectfully requests that the Perfected Petition herein be in all respects denied and that the Notice of Determination and Demand issued December 15, 1978 and reduced to \$3,083.08 be sustained, with interest and applicable penalties thereon."

10. Petitioners, in their Power of Attorney, Petition and Perfected Petition, were aware of the two "Notice and Demands" issued against them and the total amount (\$21,676.14) of tax initially asserted against them.

11. The Audit Division asserted at the hearing that the Answer of the Audit Division was in error with respect to the amounts of tax still claimed owing.

12. The Answer of the Audit Division referred only to Notice Number S781206723C which liability had been concededly (by the Audit Division) reduced to \$3,083.08.

13. That the Answer of the Audit Division failed to include the tax assessed and still claimed due with respect to Notice Number S781206722C in the amount of \$4,381.86.

14. The Audit Division, at the hearing, made a motion to amend and conform its Answer and the "wherefore clause" therein to the proof.

15. That "Notices of Assessment Review" were sent to petitioners on April 24, 1980 informing them that adjustments had been made to Assessment Notice Number S781206722C resulting in adjusted tax due of \$10,485.55 and to Assessment Notice Number S781206723C resulting in adjusted tax due of \$4,381.86.

CONCLUSIONS OF LAW

A. That section 1141(c) of the Tax Law establishes certain notice requirements that must be met by purchasers of business assets and by the Department. That section also provides relief for the purchaser when the Department fails to give proper notice. The failure of the Audit Division to produce evidence of the mailing of a notice of possible claim or a questionnaire does not in and of itself relieve petitioners from any tax liability.

That during the relevant period, section 1141(c) of the Tax Law provided, in part:

"Within ninety days of receipt of the notice of the sale, transfer, or assignment from the purchaser, transferee, or assignee, the tax commission shall give notice to the purchaser, transferee or assignee and to the seller, transferrer or assignor of the total amount of any tax or taxes which the state claims to be due from the seller, transferrer, or assignor to the state, and whenever the tax commission shall fail to give such notice to the purchaser, transferee or assignee and the seller, transferrer or assignor within ninety days from receipt of notice of the sale, transfer, or assignment, such failure will release the purchaser, transferee or assignee from any further obligation to withhold any sums of money, property or choses in action, or other consideration, which the purchaser, transferee or assignee is required to transfer over to the seller, transferrer or assignor,...".

B. That section 1147(a)(1) of the Tax Law provides:

"Any notice authorized or required under the provisions of this article may be given by mailing the same to the person for whom it is intended in a postpaid envelope addressed to such person at the address given in the last return filed by him pursuant to the provisions of this article or in any application made by him or, if no return has been filed or application made, then to such address as may be obtainable."

C. That since the Notice and Demand for Payment of Sales and Use Taxes Due, dated December 15, 1978, was mailed within ninety days of the receipt of the notification of the bulk sale, which was no earlier than the sixteenth day of September, 1978, the assessment issued by the Audit Division was timely [Tax Law §§1141(c); 1147(a)(1)].

D. That the amount of tax claimed due on Notice Number S781206723C should be reduced by \$350.00 to reflect the tax on the transfer of \$5,000.00 of tangible personal property rather than the \$700.00 in tax claimed due with respect to that portion of the bulk sale transaction.

E. That section 1141(c) limits the liability of the purchaser in a bulk sale to "an amount not in excess of the purchase price or fair market value of the business assets sold, transferred or assigned." Said section is not limited to "tangible personal property sold" but to the purchase price or fair market value of the "business assets" sold, transferred or assigned and provides the State with a first priority right and lien in such amount [see Klausner Supply Co., Inc. v. Chemical Bank (Supreme Court New York County, Gammerman, J., April 20, 1984) TSB-H-84(122)S].

F. That the Commission's Rules of Practice and Procedure provide, in part, as follows:

"(c) Amended pleadings. Either party may amend a pleading once without leave of the Commission, if the amended pleading is served on the adversary within 30 days after service of the original pleading. After such time, a pleading may be amended only by consent of the Commission or its designee. All such requests for leave to amend must be made prior to the hearing, and must be accompanied by the

proposed amendments or amended pleadings. Where a pleading is amended, the party which must respond to such pleading shall have the full time allowed pursuant to this section. The one exception to the requirement that a pleading be amended prior to a hearing is where a party, at the hearing, requests leave to amend a pleading to conform to the proof. In such an instance, the hearing officer shall determine whether such amendment would work to the prejudice of the adverse party, affect a person not present at the hearing or unduly delay the proceeding.

If none of these problems would result, and good cause exists, leave may be granted to so amend the pleading. No such amended pleading can revive a point of controversy which is barred by the time limitations of the Tax Law, unless the original pleading gave notice of the point of controversy to be proved under the amended pleading."
[20 NYCRR 601.6(c)].

G. That it was proper to allow the Audit Division (Law Bureau) to amend its Answer to include both Notice and Demands issued to petitioners, each of which petitioners timely protested and filed a petition and perfected petition.

H. That penalty and interest in excess of the statutory minimum is cancelled.

I. That except as noted in Conclusion of Law "H" (and taking into account Conclusion of Law "D"), Notice Number S781206723C in the reduced amount of \$2,733.08 (\$3,083.08 less \$350.00) exclusive of interest and Notice Number S781206722C in the amount of \$4,381.86 exclusive of interest are sustained.


J. That the petition of Nino A. and Joan M. Donatelli is granted to the extent of Conclusions of Law "D", "H" and "I" and is in all other respects denied.


DATED: Albany, New York

NOV 07 1985

STATE TAX COMMISSION


PRESIDENT


COMMISSIONER


COMMISSIONER

P 153 387 642

RECEIPT FOR CERTIFIED MAIL

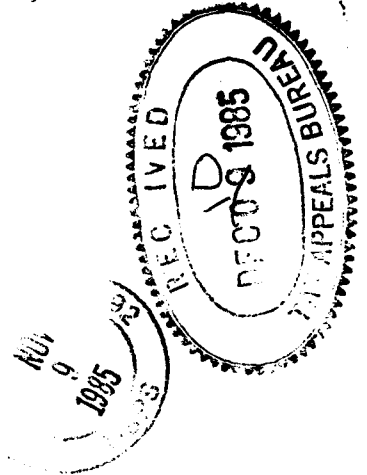
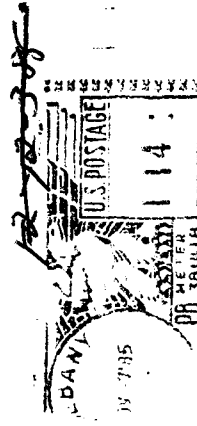
NO INSURANCE COVERAGE PROVIDED
NOT FOR INTERNATIONAL MAIL

(See Reverse)

★ U.S.G.P.O. 1984-446-014

PS Form 3800, Feb. 1982

Sent to	<i>Michael V. Melaney</i>	
Street and No.	<i>236 3rd St</i>	
P.O. State and ZIP Code	<i>Niagara Falls NY 14143</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		



CERTIFIED

P 153 387 641

MAIL

Nino A. & Joan M. Donatelli
432 Center St.
Leviston, NY 14092

gone - no fund

P 153 387 641

RECEIPT FOR CERTIFIED MAIL

NO INSURANCE COVERAGE PROVIDED
NOT FOR INTERNATIONAL MAIL

(See Reverse)

★ U.S.G.P.O. 1984-446-014

PS Form 3800, Feb. 1982

Sent to	<i>Nino & Joan Donatelli</i>	
Street and No.	<i>432 Center St</i>	
P.O. State and ZIP Code	<i>Leviston NY 14092</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		

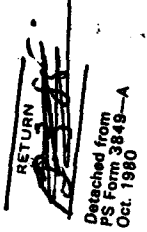
TA 28 (9-79)

STATE OF NEW YORK
State Tax Commission
TAX APPEALS BUREAU
STATE CAMPUS
ALBANY, N. Y. 12227

CLAIM CHECK NO.

560716

<input type="checkbox"/> HOLD	DATE	11/9/85
RETURNED TO	1ST NOTICE	11/19/85
2ND NOTICE		
<p>Under penalty of perjury, I declare that the information furnished herein is true and correct to the best of my knowledge and belief.</p>		



Detached from PS Form 3849-A Oct. 1980

ALBANY, N. Y. 12227

Undelivered _____
 Addressed to _____
 Registered _____
 No such card _____
 No such address _____
 No such person in this envelope _____

RETURNED

TO
O. S. 1000

100-443883

~~SECRET~~

... ..

... ..

100-7528-1

2005 10 10 10:00

CERTIFIED

THU 28E 518

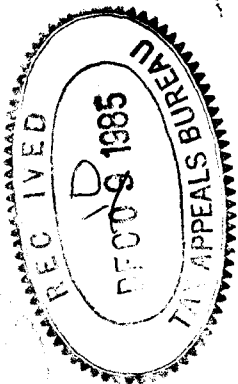
MAIL

Nino A. & Joan M. Donatelli

~~432 Center St.~~

~~Lewis, NY 14092~~

gone - no fund





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

November 7, 1985

Nino A. & Joan M. Donatelli
432 Center St.
Lewiston, NY 14092

Dear Mr. & Mrs. Donatelli:

Please take notice of the Decision of the State Tax Commission enclosed herewith.

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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
Michael V. Maloney
256 3rd Street
Niagara Falls, NY 14303
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition
of
NINO A. AND JOAN M. DONATELLI
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 November 30, 1978.

DECISION

Petitioners, Nino A. and Joan M. Donatelli, 432 Center Street, Lewiston, New York 14092, 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 November 30, 1978 (File No. 31380).

A formal hearing was held before James J. Morris, Jr., Hearing Officer, at the offices of the State Tax Commission, 65 Court Street, Buffalo, New York, on February 6, 1985 at 1:15 P.M., with all briefs to be filed by March 22, 1985. Petitioners appeared by Michael V. Maloney. The Audit Division appeared by John P. Dugan, Esq. (Deborah Dwyer, Esq., of counsel).

ISSUES

I. Whether petitioners were timely assessed sales and use tax liability as purchasers in a bulk sale.

II. Whether sales tax was properly assessed upon the tangible personal property transferred in the bulk sale.

III. Whether the Audit Division may amend its Answer to conform to the proof.

IV. Whether the Audit Division properly determined the extent of petitioners' liability as bulk sale purchasers.

FINDINGS OF FACT

1. On December 15, 1978, the Audit Division issued to petitioners, Nino A. and Joan M. Donatelli, a Notice and Demand for Payment of Sales and Use Taxes Due Number S781206722C covering the periods ended November 30, 1975 through September 15, 1978 for taxes due of \$14,106.69 plus penalty and interest. Said notice stated, "This notice is in addition to Notice #S781206723C."

On December 15, 1978, the Audit Division also issued to petitioners Nino A. and Joan M. Donatelli a Notice and Demand for Payment of Sales and Use Taxes Due Number S781206723C covering the periods ended August 31, 1976 through February 28, 1978 for taxes due of \$7,569.45 plus penalty and interest. Said notice stated, "This notice is in addition to Notice #S781206722C."

Each of said notices and demands for payment of taxes due stated:

"The following taxes are determined to be due from Milton and Elizabeth Bradshaw d/b/a Schneider's Restaurant and represents your liability, as purchaser, in accordance with Section 1141(c) of the Sales Tax Law."

2. A "Notice of Sale in Bulk" was sent to the Department of Taxation and Finance by certified mail, metered and postmarked the sixteenth of September, 1978. Said notice stated, in part:

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The following business names and addresses have been used by the Transferor in addition to that set forth above, within the past three years so far as the same are known to the Transferee:

SCHNEIDERS RESTAURANT, 432 Center Street, Lewiston NY"

Said "Notice of Sale in Bulk" did not disclose the date of the proposed sale nor an address of the buyer other than that of the business being sold.

3. The Audit Division claims that a notice of possible claim for sales taxes due from the seller was sent to petitioners addressed to the business address provided in the Notice of Sale in Bulk on or about October 3, 1978. The business was closed during said month and petitioners did not receive said notice.

The Audit Division presented no evidence or testimony in support of its claim that said notice was in fact mailed.

4. Petitioners purchased the business on or about September 29, 1978 for a total sales price in excess of \$100,000.00. Included in such total sales price was a mortgage from petitioners to the sellers of some \$32,000.00 to \$33,000.00, of which approximately \$30,000.00 is still owing, petitioners having ceased payments to the sellers after receiving the notices and demands for payment of sales and use taxes due from the Audit Division (Finding of Fact "1") for sales taxes due from petitioners on account of the seller's past liabilities.

5. Pursuant to conferences, additional submissions and/or part payments, the Audit Division had, prior to the hearing, reduced the amount of claimed outstanding liability due by petitioners as bulk sale purchasers. The Audit Division claims that \$4,381.86 tax, together with applicable interest and penalty, is still owing with respect to Notice and Demand Number S781206723C and that \$3,083.08 tax, together with applicable interest and penalty, is still owing with respect to Notice and Demand Number S781206722C.

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Also included was \$700.00 in tax liability premised upon a transfer of \$10,000.00 in tangible personal property upon the sale in bulk of the business assets of Schneider's Restaurant.

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"WHEREFORE, the AUDIT DIVISION OF THE DEPARTMENT OF TAXATION AND FINANCE respectfully requests that the Perfected Petition herein be in all respects denied and that the Notice of Determination and Demand issued December 15, 1978 and reduced to \$3,083.08 be sustained, with interest and applicable penalties thereon."

10. Petitioners, in their Power of Attorney, Petition and Perfected Petition, were aware of the two "Notice and Demands" issued against them and the total amount (\$21,676.14) of tax initially asserted against them.

11. The Audit Division asserted at the hearing that the Answer of the Audit Division was in error with respect to the amounts of tax still claimed owing.

12. The Answer of the Audit Division referred only to Notice Number S781206723C which liability had been concededly (by the Audit Division) reduced to \$3,083.08.

13. That the Answer of the Audit Division failed to include the tax assessed and still claimed due with respect to Notice Number S781206722C in the amount of \$4,381.86.

14. The Audit Division, at the hearing, made a motion to amend and conform its Answer and the "wherefore clause" therein to the proof.

15. That "Notices of Assessment Review" were sent to petitioners on April 24, 1980 informing them that adjustments had been made to Assessment Notice Number S781206722C resulting in adjusted tax due of \$10,485.55 and to Assessment Notice Number S781206723C resulting in adjusted tax due of \$4,381.86.

CONCLUSIONS OF LAW

A. That section 1141(c) of the Tax Law establishes certain notice requirements that must be met by purchasers of business assets and by the Department. That section also provides relief for the purchaser when the Department fails to give proper notice. The failure of the Audit Division to produce evidence of the mailing of a notice of possible claim or a questionnaire does not in and of itself relieve petitioners from any tax liability.

That during the relevant period, section 1141(c) of the Tax Law provided, in part:

"Within ninety days of receipt of the notice of the sale, transfer, or assignment from the purchaser, transferee, or assignee, the tax commission shall give notice to the purchaser, transferee or assignee and to the seller, transferrer or assignor of the total amount of any tax or taxes which the state claims to be due from the seller, transferrer, or assignor to the state, and whenever the tax commission shall fail to give such notice to the purchaser, transferee or assignee and the seller, transferrer or assignor within ninety days from receipt of notice of the sale, transfer, or assignment, such failure will release the purchaser, transferee or assignee from any further obligation to withhold any sums of money, property or choses in action, or other consideration, which the purchaser, transferee or assignee is required to transfer over to the seller, transferrer or assignor,...".

B. That section 1147(a)(1) of the Tax Law provides:

"Any notice authorized or required under the provisions of this article may be given by mailing the same to the person for whom it is intended in a postpaid envelope addressed to such person at the address given in the last return filed by him pursuant to the provisions of this article or in any application made by him or, if no return has been filed or application made, then to such address as may be obtainable."

C. That since the Notice and Demand for Payment of Sales and Use Taxes Due, dated December 15, 1978, was mailed within ninety days of the receipt of the notification of the bulk sale, which was no earlier than the sixteenth day of September, 1978, the assessment issued by the Audit Division was timely [Tax Law §§1141(c); 1147(a)(1)].

D. That the amount of tax claimed due on Notice Number S781206723C should be reduced by \$350.00 to reflect the tax on the transfer of \$5,000.00 of tangible personal property rather than the \$700.00 in tax claimed due with respect to that portion of the bulk sale transaction.

E. That section 1141(c) limits the liability of the purchaser in a bulk sale to "an amount not in excess of the purchase price or fair market value of the business assets sold, transferred or assigned." Said section is not limited to "tangible personal property sold" but to the purchase price or fair market value of the "business assets" sold, transferred or assigned and provides the State with a first priority right and lien in such amount [see Klausner Supply Co., Inc. v. Chemical Bank (Supreme Court New York County, Gammerman, J., April 20, 1984) TSB-H-84(122)S].

F. That the Commission's Rules of Practice and Procedure provide, in part, as follows:

"(c) Amended pleadings. Either party may amend a pleading once without leave of the Commission, if the amended pleading is served on the adversary within 30 days after service of the original pleading. After such time, a pleading may be amended only by consent of the Commission or its designee. All such requests for leave to amend must be made prior to the hearing, and must be accompanied by the

proposed amendments or amended pleadings. Where a pleading is amended, the party which must respond to such pleading shall have the full time allowed pursuant to this section. The one exception to the requirement that a pleading be amended prior to a hearing is where a party, at the hearing, requests leave to amend a pleading to conform to the proof. In such an instance, the hearing officer shall determine whether such amendment would work to the prejudice of the adverse party, affect a person not present at the hearing or unduly delay the proceeding.

If none of these problems would result, and good cause exists, leave may be granted to so amend the pleading. No such amended pleading can revive a point of controversy which is barred by the time limitations of the Tax Law, unless the original pleading gave notice of the point of controversy to be proved under the amended pleading."
[20 NYCRR 601.6(c)].

G. That it was proper to allow the Audit Division (Law Bureau) to amend its Answer to include both Notice and Demands issued to petitioners, each of which petitioners timely protested and filed a petition and perfected petition.

H. That penalty and interest in excess of the statutory minimum is cancelled.


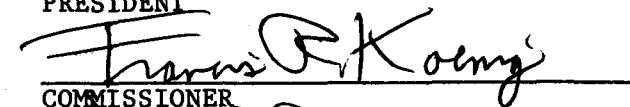
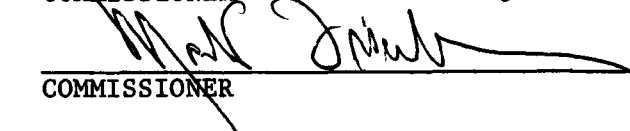
I. That except as noted in Conclusion of Law "H" (and taking into account Conclusion of Law "D"), Notice Number S781206723C in the reduced amount of \$2,733.08 (\$3,083.08 less \$350.00) exclusive of interest and Notice Number S781206722C in the amount of \$4,381.86 exclusive of interest are sustained.

J. That the petition of Nino A. and Joan M. Donatelli is granted to the extent of Conclusions of Law "D", "H" and "I" and is in all other respects denied.

DATED: Albany, New York

NOV 07 1985

STATE TAX COMMISSION


PRESIDENT

COMMISSIONER

COMMISSIONER