

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of :
Thomas Siuta : 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 12/1/79-8/31/80. :

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 6th day of February, 1985, he served the within notice of Decision by certified mail upon Thomas Siuta, the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

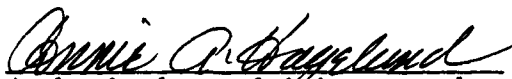
Thomas Siuta
3362 Lockport Rd.
Sanborn, NY 14132

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
6th day of February, 1985.




Annie R. Haglund
Authorized to administer oaths
pursuant to Tax Law section 174

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition
of

Thomas Siuta

:

:

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 12/1/79-8/31/80. :

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 6th day of February, 1985, he served the within notice of Decision by certified mail upon Victor J. Orzechowski, the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

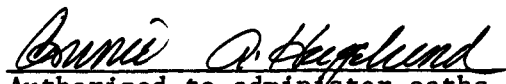
Victor J. Orzechowski
321 Portage Road
Niagara Falls, NY 14303

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
6th day of February, 1985.




Authorized to administer oaths
pursuant to Tax Law section 174

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

February 6, 1985

Thomas Siuta
3362 Lockport Rd.
Sanborn, NY 14132

Dear Mr. Siuta:

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
Victor J. Orzechowski
321 Portage Road
Niagara Falls, NY 14303
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of :
THOMAS S. SIUTA : 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, 1979 :
through August 31, 1980.

Petitioner Thomas S. Siuta, 3362 Lockport Road, Sanborn, New York 14132, 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, 1979 through August 31, 1980 (File No. 42320).

A small claims hearing was held before Richard L. Wickham, Hearing Officer, at the offices of the State Tax Commission, 65 Court Street, Buffalo, New York, on September 20, 1984 at 10:45 A.M. Petitioner appeared by Victor J. Orzechowski, Esq. The Audit Division appeared by John P. Dugan, Esq. (Deborah Dwyer, Esq., of counsel).

ISSUES

I. Whether petitioner Thomas S. Siuta is personally liable for the taxes reported but not paid by Astro Guard International Sales, Inc.

II. Whether the penalty and that portion of interest exceeding the minimum statutory rate assessed against petitioner should be cancelled.

FINDINGS OF FACT

1. On November 16, 1982, the Audit Division issued a Notice and Demand for Payment of Sales and Use Taxes Due against petitioner, Thomas S. Siuta, as

the responsible officer of Astro Guard International Sales, Inc., ("the corporation"). Said Notice scheduled a tax, penalty and interest due as follows:

<u>Period Ending</u>	<u>Tax Due</u>	<u>Penalty Due</u>	<u>Interest Due</u>
Feb. 29, 1980	\$1,145.17	\$457.77	\$228.15
May 31, 1980	901.39	353.50	159.13
Aug. 31, 1980	599.78	230.68	92.28

2. Petitioner, Thomas S. Siuta, the corporation's sole shareholder, conceded, at the hearing, that he was a person required to collect tax on behalf of the corporation pursuant to sections 1131(1) and 1133 of the Tax Law. Mr. Siuta disputes the amount of tax, penalty and interest assessed.

3. During the period under review, petitioner delegated to a manager the corporate management functions. The manager neglected to either maintain or retain sales and purchase records and failed to file the required New York State and local sales and use tax returns for the quarterly periods that ended February 29, 1980, May 31, 1980 and August 31, 1980.

4. Petitioner, upon discovery that the corporation was delinquent in filing its sales and use tax returns, late filed the returns in December 1980. For the periods ended February 29, 1980 and August 31, 1980, petitioner reported tax due of \$1,145.17 and \$599.78 respectively, or approximately double the average of the tax reported on previously filed returns for similar quarters.* Petitioner estimated a tax due of \$901.39 for the period ended May 31, 1980 even though no tax was previously reported for this quarterly period.

* Astro Guard International Sales, Inc. reported a tax due on the returns for the periods ended February 28, 1978 and February 28, 1979 of \$541.82 and \$683.90, respectively. A tax due of \$313.39 and \$388.00 was reported for the periods ended August 31, 1978 and August 31, 1979, respectively.

5. Petitioner's estimate of tax due was based on information provided by his accountant and his lawyer who advised petitioner to report at least twice what had been previously reported. While the sales and use tax returns which petitioner filed were not marked estimated returns, petitioner anticipated that amended returns would be filed at the time he became aware of the actual sales and use taxes due for the corporation. Due to the condition of the corporate records left by the manager and petitioner's inability to obtain records from the manager or other sources, petitioner has not been able to reconstruct the corporate sales and determine the actual tax due.

CONCLUSIONS OF LAW

A. That section 1138(a)(1) of the Tax Law provides, in part, that "(i)f a return required by this article is not filed, or if a return when filed is incorrect or insufficient, the amount of tax due shall be determined by the tax commission from such information as may be available."

B. That the tax due reported on the returns of Astro Guard International Sales, Inc. for the periods ended February 29, 1980, May 31, 1980 and August 31, 1980 was an estimate in excess of the actual tax due grounded on the credible testimony of the petitioner. Lacking the essential records needed to compute the actual tax, the tax due for the quarterly period ended February 29, 1980 shall be computed at 125 percent of the due as reported on the return for the period ended February 28, 1979 and the tax due for the period ended August 31, 1980 shall be computed at 125 percent of the tax due as reported for the period ended August 31, 1979. With respect to the sales tax quarterly period ended May 31, 1980, the tax due reported on the return for said period shall be reduced by 37.45 percent which is one-half the amount of tax due reported plus 25 percent.

C. That the tax commission may remit the penalty assessed and that portion of the interest in excess of the minimum interest where the taxpayer establishes that the failure to comply with the law was due to reasonable cause and was not due to willful neglect [20 NYCRR 536.1].

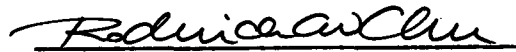
D. That while petitioner's action in filing the delinquent returns of Astro Guard International Sales, Inc. is admirable, it is essential to note that petitioner was an officer of the corporation and admittedly the responsible officer. In addition, petitioner filed the corporate returns without any remittance. This commission finds that no reasonable cause exists for the abatement of penalty and interest.

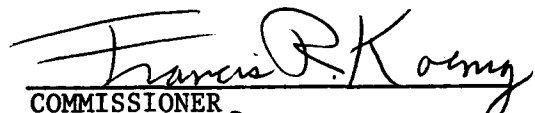
E. That the petition of Thomas S. Siuta is granted to the extent of Conclusion of Law "B" and the Audit Division is hereby directed to accordingly modify the Notice and Demand for Payment of Sales and Use Taxes Due issued November 16, 1982. Except as so granted, the petition is in all respects denied.

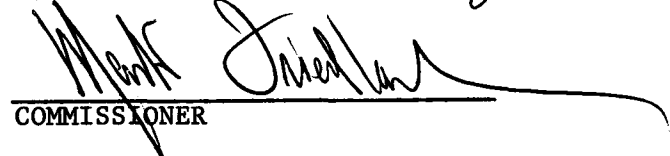
DATED: Albany, New York

STATE TAX COMMISSION

FEB 06 1985


PRESIDENT


COMMISSIONER


COMMISSIONER

P 693 169 547

RECEIPT FOR CERTIFIED MAIL

NO INSURANCE COVERAGE PROVIDED
NOT FOR INTERNATIONAL MAIL

(See Reverse)

★ U.S.G.P.O. 1983-403-517

Sent to <i>Thomas Siuta</i>	
Street and No. <i>3302 Suspect Rd</i>	
P.O. State and ZIP Code <i>Sanborn NY 14132</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 693 169 548

RECEIPT FOR CERTIFIED MAIL

NO INSURANCE COVERAGE PROVIDED
NOT FOR INTERNATIONAL MAIL

(See Reverse)

★ U.S.G.P.O. 1983-403-517

Sent to <i>Victor J. Orzechowski</i>	
Street and No. <i>321 Hartigan Rd</i>	
P.O. State and ZIP Code <i>Niagara Falls NY 14302</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