

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :  
of  
Abitt Wine & Liquor Corp. :

AFFIDAVIT OF MAILING

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, 1978 :  
through August 31, 1981. :

State of New York :

ss.:

County of Albany :

David Parchuck/Janet M. Snay, being duly sworn, deposes and says that he/she is an employee of the State Tax Commission, that he/she is over 18 years of age, and that on the 15th day of September, 1986, he/she served the within notice of Decision by certified mail upon Abitt Wine & Liquor Corp. the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Abitt Wine & Liquor Corp.  
85 Avenue D  
New York, NY 10009

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  
15th day of September, 1986.

David Parchuck  
Authorized to administer oaths  
pursuant to Tax Law section 174

Janet M. Snay

STATE OF NEW YORK

STATE TAX COMMISSION

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David Parchuck/Janet M. Snay, being duly sworn, deposes and says that he/she is an employee of the State Tax Commission, that he/she is over 18 years of age, and that on the 15th day of September, 1986, he served the within notice of Decision by certified mail upon Charles B. Linn, the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Charles B. Linn  
Fein, Silberbush, Katz & Linn  
187 Main St., P.O. Box 457  
Tuckahoe, NY 10707

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.

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Janet M. Snay

STATE OF NEW YORK

STATE TAX COMMISSION

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In the Matter of the Petition :  
of :  
James McDonald : AFFIDAVIT OF MAILING  
Officer of Abitt Wine & Liquor Corp. :  
:  
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, 1978 :  
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James McDonald  
Officer of Abitt Wine & Liquor Corp.  
85 Avenue D  
New York, NY 10009

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Authorized to administer oaths  
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Janet M. Snay

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

September 15, 1986

Abitt Wine & Liquor Corp.  
85 Avenue D  
New York, NY 10009

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  
Audit Evaluation Bureau  
Assessment Review Unit  
Building #9, State Campus  
Albany, New York 12227  
Phone # (518) 457-2086

Very truly yours,

STATE TAX COMMISSION

cc: Taxing Bureau's Representative

Petitioner's Representative:  
Charles B. Linn  
Fein, Silberbush, Katz & Linn  
187 Main St., P.O. Box 457  
Tuckahoe, NY 10707

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

September 15, 1986

James McDonald  
Officer of Abitt Wine & Liquor Corp.  
85 Avenue D  
New York, NY 10009

Dear Mr. McDonald:

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.

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STATE OF NEW YORK

STATE TAX COMMISSION

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In the Matter of the Petition  
of  
ABITT WINE & LIQUOR CORP.  
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, 1978  
through August 31, 1981.

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DECISION

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In the Matter of the Petition  
of  
JAMES McDONALD  
OFFICER OF ABITT WINE & LIQUOR CORP.  
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, 1978  
through August 31, 1981.

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Petitioner, Abitt Wine & Liquor Corp., 85 Avenue D, New York, New York 10009, 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, 1978 through August 31, 1981 (File No. 39522).

Petitioner, James McDonald, 85 Avenue D, New York, New York 10009, 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, 1978 through August 31, 1981 (File No. 43995).

A hearing was commenced before James Hoefer, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on June 4, 1985 at 9:15 A.M. and continued to conclusion before the same Hearing Officer, at the same location, on February 6, 1986 at 2:45 P.M., with

all briefs to be submitted by April 30, 1986. Petitioners at all times appeared by Fein, Silberbush, Katz & Linn (Charles B. Linn, Esq., of counsel). The Audit Division at all times appeared by John P. Dugan, Esq. (Angelo A. Scopellito, Esq., of counsel).

#### ISSUES

I. Whether the Audit Division properly assessed against petitioners a penalty of 50 percent based upon fraud.

II. Whether petitioners, if not found subject to the fraud penalty, are liable for the penalty imposed pursuant to Tax Law section 1145(a)(1).

III. Whether reasonable cause existed for petitioners' failure to pay the proper sales tax due, thereby warranting cancellation of interest charges in excess of minimum interest.

#### FINDINGS OF FACT

1. On March 20, 1982 and January 20, 1983, the Audit Division, as the result of a field examination, issued notices of determination and demands for payment of sales and use taxes due to Abitt Wine and Liquor Corp. (hereinafter "Abitt"). The notice dated March 20, 1982, which encompassed the period September 1, 1978 through August 31, 1979, assessed sales tax due of \$25,507.60, plus a 50 percent fraud penalty of \$12,753.80 and interest of \$9,114.78, for a total amount due of \$47,376.18. The notice dated January 20, 1983, which included the period September 1, 1979 through August 31, 1981, assessed sales tax due of \$91,793.76, plus a 50 percent fraud penalty of \$45,896.62 and interest of \$25,563.25, for a total amount due of \$163,253.63. Notices, also dated March 20, 1982 and January 20, 1983, were issued against James McDonald individually as an officer of Abitt. The notices issued to James McDonald assessed amounts identical to those assessed against Abitt.



2. On November 13, 1981, Abitt executed a consent extending the period of limitation for assessment for the period September 1, 1978 through November 30, 1978 to March 20, 1982. Abitt executed a second consent, dated November 13, 1982, extending the period of limitation for assessment for the period September 1, 1979 through November 30, 1979 to March 20, 1983.

3. At the hearing held herein, petitioners conceded that the sales tax as assessed in the notices issued to Abitt was due and owing. It was also conceded that Mr. McDonald was personally liable as an officer of Abitt for payment of the sales taxes determined to be due from said corporation. In this proceeding petitioners seek to have the 50 percent fraud penalty cancelled and to have statutory interest reduced to minimum interest. The Audit Division argued that the 50 percent fraud penalty should be sustained and, in the alternative, argued that if petitioners' failure to report the proper sales tax due was not based upon fraud, that the imposition of a penalty pursuant to Tax Law section 1145(a)(1) was warranted.

4. During the period at issue Abitt was engaged in the retail sale of wine and liquor. James McDonald was president of Abitt and its sole officer and stockholder. Sometime in 1982 the Audit Division commenced a field examination of petitioner's books and records. Said books and records consisted of a cash receipts journal and a cash disbursements journal. Petitioner did not maintain sales invoices, cash register tapes or any other verifiable record of taxable sales.

5. During the course of its examination the Audit Division compared gross receipts per the cash receipts journal (\$296,582.00) to gross receipts reported on the sales tax returns and found no discrepancies. Purchases per Abitt's cash disbursements journal totalled \$221,978.00 and, when compared to reported

gross sales, petitioner showed an overall markup percentage of 133.609 percent (\$296,582.00 divided by \$221,978.00).

6. Since Abitt's books and records were inadequate, the Audit Division resorted to a purchase mark-up analysis to verify the accuracy of reported gross sales. In order to verify purchases shown per Abitt's cash disbursement journal, the Audit Division requested information from Abitt's suppliers concerning purchases made by Abitt during the period in question. Information received from said suppliers revealed that Abitt had made cash purchases of wine and liquor totalling \$1,303,274.00. Audited purchases of \$1,303,274.00 were marked up 135.263 percent, producing an audited gross sales figure of \$1,762,849.00. Reported sales were subtracted from audited sales, resulting in additional taxable sales of \$1,466,267.00 and additional sales tax due of \$117,301.36.

7. The Audit Division asserted the 50 percent fraud penalty against petitioners based solely upon the fact that purchases per Abitt's books and records were understated by \$1,081,296.00 and that sales per Abitt's books and records were understated by \$1,466,267.00. Other than the large understatements of sales and purchases, there was no other evidence presented to prove fraud.

8. During the period at issue James McDonald was over 70 years old and in poor health. Mr. McDonald did not appear at either of the hearings held herein to offer his testimony. The only evidence presented by petitioner was his letter dated July 22, 1985 and an affidavit from a liquor salesman who serviced Abitt. In both these documents it was asserted that Mr. McDonald was an absentee owner and that the large discrepancy between audited sales and reported sales and between audited purchases and reported purchases was due to after hour sales being made by Abitt's employees.

CONCLUSIONS OF LAW

A. That section 1145(a)(2) of the Tax Law was added by section 2 of chapter 287 of the laws of 1975. During the period in issue, this paragraph provided:

"If the failure to file a return or to pay over any tax to the tax commission within the time required by this article is due to fraud, there shall be added to the tax a penalty of fifty percent of the amount of the tax due (in lieu of the penalty provided for in paragraph (1)), plus interest..."

Section 1145(a)(2) of the Tax Law was enacted by the Legislature with the intention of having a penalty provision in the Sales and Use Tax Law which was similar to that which already existed in the Tax Law with respect to deficiencies of, inter alia, personal income tax (N.Y. Legis. Ann., 1975, p. 350). Thus, the burden placed upon the Audit Division to establish fraud at a hearing involving a deficiency of sales and use tax is the same as the burden placed upon the Audit Division in a hearing involving a deficiency of personal income tax. A finding of fraud at such a hearing "... requires clear, definite and unmistakable evidence of every element of fraud, including willful, knowledgeable and intentional wrongful acts or omissions constituting false representations, resulting in deliberate nonpayment or underpayment of taxes due and owing." (Matter of Walter Shutt and Gertrude Shutt, State Tax Commission, June 4, 1982).

B. That based on the evidence presented, the Audit Division has not sustained its burden of proving that the imposition of a fraud penalty is warranted. However, there nonetheless emerges a pattern of conduct by Abitt and James McDonald sufficient to warrant the imposition of a penalty pursuant to Tax Law section 1145(a)(1) for the period September 1, 1978 through August 31, 1981. Furthermore, the evidence presented by petitioners is insufficient

to show that reasonable cause existed for failure to pay the proper sales tax due. Accordingly, the assertion of Tax Law section 1145(a)(1) penalty and the imposition of statutory interest charges are both sustained.

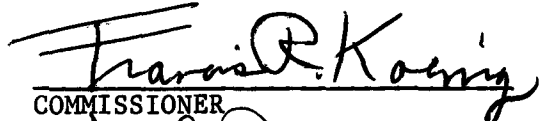
C. That the petitions of Abitt Wine and Liquor Corp. and James McDonald are granted to the extent indicated in Conclusion of Law "B", supra; and that, except as so granted, the petitions are in all other respects denied.

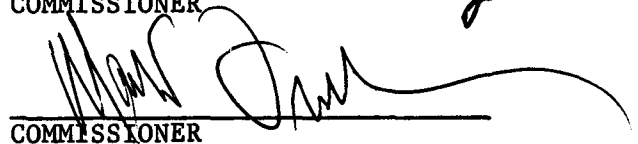
DATED: Albany, New York

STATE TAX COMMISSION

SEP 15 1986

  
PRESIDENT

  
COMMISSIONER

  
COMMISSIONER

P 319 372 941

## RECEIPT FOR CERTIFIED MAIL

NO INSURANCE COVERAGE PROVIDED  
NOT FOR INTERNATIONAL MAIL

(See Reverse)

★ U.S.G.P.O. 1985-480-794

PS Form 3800, June 1985

Sent to <b>Charles B. Linn</b>	
Street and No. <b>Fein, Silberbush, Katz &amp; Linn</b>	
<b>187 Main St., P.O. Box 457</b>	
P.O., State and ZIP Code <b>Tuckahoe, N.Y. 10707</b>	
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	

P 319 372 940

## RECEIPT FOR CERTIFIED MAIL

NO INSURANCE COVERAGE PROVIDED  
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(See Reverse)

★ U.S.G.P.O. 1985-480-794

PS Form 3800, June 1985

Sent to <b>Abitt Wine + Liquor Corp</b>	
Street and No. <b>85 Avenue D</b>	
P.O., State and ZIP Code <b>N.Y., N.Y. 10009</b>	
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	

P 319 372 942

## RECEIPT FOR CERTIFIED MAIL

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(See Reverse)

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Postage	\$
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