

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of
Better Lawn Care Co., Inc. :

AFFIDAVIT OF MAILING

for Redetermination of a Deficiency or Revision :
of a Determination or Refund of Sales & Use Tax
under Article(s) 28 & 29 of the Tax Law :
for the Period 12/1/78 - 8/31/81.

State of New York :

ss.:

County of Albany :

Doris E. Steinhardt, 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 18th day of February, 1986, he/she served the within notice of Decision by certified mail upon Better Lawn Care Co., Inc. the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Better Lawn Care Co., Inc.
c/o Robert Bertaglia, Jr.
400 W. Main St.
Babylon, NY 11702

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
18th day of February, 1986.

Doris E. Steinhardt

Jan C. [Signature]

Authorized to administer oaths
pursuant to Tax Law section 174

STATE OF NEW YORK

STATE TAX COMMISSION

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of
Better Lawn Care Co., Inc. :

AFFIDAVIT OF MAILING

for Redetermination of a Deficiency or Revision :
of a Determination or Refund of Sales & Use Tax
under Article(s) 28 & 29 of the Tax Law :
for the Period 12/1/78 - 8/31/81.

State of New York :
ss.:
County of Albany :

Doris E. Steinhardt, 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 18th day of February, 1986, he served the within notice of Decision by certified mail upon Daniel Turchin, the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Daniel Turchin
170 Broadway
New York, NY 10038

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
18th day of February, 1986.

Doris E. Steinhardt

Jean Coughlin
Authorized to administer oaths
pursuant to Tax Law section 174

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

February 18, 1986

Better Lawn Care Co., Inc.
c/o Robert Bertaglia, Jr.
400 W. Main St.
Babylon, NY 11702

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: Taxing Bureau's Representative

Petitioner's Representative:
Daniel Turchin
170 Broadway
New York, NY 10038

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition	:	
of	:	
BETTER LAWN CARE CO., 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 December 1, 1978	:	
through August 31, 1981.	:	

Petitioner, Better Lawn Care Co., Inc., c/o Robert Bertuglia, Jr., 400 West Main Street, Babylon, New York 11702, 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, 1978 through August 31, 1981 (File No. 42029).

A hearing was held before Arthur Johnson, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on June 4, 1985 at 1:15 P.M., with additional information to be submitted by September 1, 1985. Petitioner appeared by Daniel Turchin, Esq. The Audit Division appeared by John P. Dugan, Esq. (William Fox, Esq., of counsel).

ISSUES

Whether the Audit Division properly increased petitioner's sales subject to tax without allowing credit for any exempt sales.

FINDINGS OF FACT

1. On March 1, 1982, the Audit Division issued a Notice of Determination and Demand for Payment of Sales and Use Taxes Due against petitioner, Better Lawn Care Co., Inc., in the amount of \$4,866.91, plus penalty of \$923.34 and

interest of \$901.53, for a total due of \$6,691.78 for the period December 1, 1978 through August 31, 1981.

2. On or about November 25, 1981, petitioner notified the Audit Division of a bulk sale of its assets to take place on December 7, 1981. The business involved landscaping and lawn care and the selling price was reported to be \$23,000.00, including \$10,230.00 in furniture, fixtures, equipment and supplies.

3. On or about January 18, 1982, petitioner completed and filed a Bulk Sale Questionnaire indicating that \$741.68 in sales tax was to be collected from the purchaser on the sale of the furniture and equipment. The questionnaire also reported that petitioner's gross sales for the fiscal year ended November 30, 1979 were \$80,903.00 and for the fiscal year ended November 30, 1980 gross sales were \$85,398.00. An auditor reviewed petitioner's sales tax returns for the aforesaid fiscal years and found that petitioner reported gross sales of \$62,015.00 and \$54,263.00, respectively, for those two years. This represented unreported gross sales of \$18,888.00 for the year ended November 30, 1979 and \$31,135.00 for the year ended November 30, 1980. The difference between the combined totals for both years reflected a percentage increase over reported gross sales of 43 percent. The auditor increased reported gross sales by 43 percent to arrive at audited taxable sales. This amount was reduced by taxable sales reported to arrive at additional taxable sales. Three of the quarters were estimated because no returns were filed.

4. Petitioner maintained that it was not in business after November, 1980 and that it was not liable for tax for any periods thereafter. However, the bulk sale did not occur until December 7, 1981 and petitioner filed letters purporting to be sales tax returns indicating that sales took place at least

until August 31, 1981. Petitioner offered no proof that it was not in business after November, 1980.

5. Petitioner also argues that it had \$55,390.00 in exempt sales during the audit period. In support of this allegation, petitioner submitted four exempt organization certificates from customers with which it did business. Petitioner submitted ledger statements for two of the customers; however, neither statement indicated the year in which the transactions took place, making it impossible to determine whether the sales took place within the audit period. For a third customer, petitioner submitted evidence of sales, all of which occurred prior to the audit period and which would have no bearing on its liability for the period in issue. For the fourth customer, petitioner submitted no evidence of sales, only the exemption certificate. Petitioner asserted that it had \$18,000.00 in sales to a fifth exempt organization; however no documentation in any form was offered with respect to sales to that organization.

CONCLUSIONS OF LAW

A. That section 1132(c) of the Tax Law provides in part, that sales will be deemed taxable at retail unless the vendor takes from the purchaser a proper exemption certificate. Although this presumption may be overcome by sufficient evidence (see Matter of Ruemil Contract Interiors, Inc., State Tax Commission, September 9, 1983), merely stating that tax exempt sales occurred and that a certain amount of sales should be allocated as exempt is not sufficient evidence to overcome the presumption of taxability. In the absence of any evidence to the contrary, all sales must be deemed to be subject to tax.

B. That a "...vendor is obligated to maintain records of his sales for audit purposes (Tax Law, §1135), and the State, when conducting an audit, must

determine the amount of tax due 'from such information as may be available,' but 'if necessary, the tax may be estimated on the basis of external indices' (Tax Law, §1138, subd. [a])." Korba v. New York State Tax Commission, 84 A.D.2d 655. Exactness in determining the amount of sales tax liability is not required where it is the petitioner's own failure to maintain proper records which necessitates the use of external indices. Markowitz v. State Tax Commission, 54 A.D.2d 1023, aff'd 44 N.Y.2d 684.

C. That petitioner has failed to overcome its burden of proving that either it was out of business during 1981 or that it had exempt sales amounting to \$55,000.00. As discussed in Findings of Fact "4" and "5", petitioner offered very little proof to support either allegation and it was impossible to determine if the evidence it did submit was applicable to the period in issue.

D. That the petition of Better Lawn Care Co., Inc. is denied and the Notice of Determination and Demand for Payment of Sales and Use Taxes Due issued March 1, 1982 is sustained.

DATED: Albany, New York

STATE TAX COMMISSION

FEB 18 1986

Rodwin A. Auer
PRESIDENT

Francis R. Koenig
COMMISSIONER

[Signature]
COMMISSIONER

P 684 313 279

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>Harriet Turchin</i>
Street and No.	<i>170 Broadway</i>
P.O., State and ZIP Code	<i>New York NY 10038</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 684 313 278

RECEIPT FOR CERTIFIED MAIL

NO INSURANCE COVERAGE PROVIDED
NOT FOR INTERNATIONAL MAIL

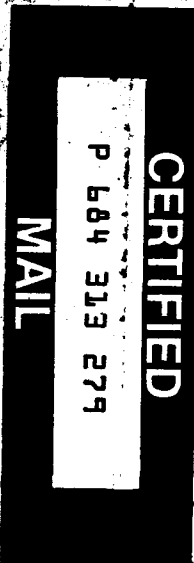
(See Reverse)

★ U.S.G.P.O. 1983-403-517

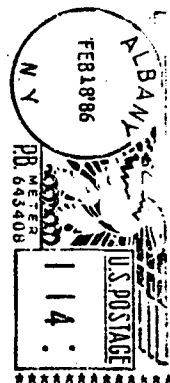
Sent to	<i>Dr. Harriet Turchin</i>
Street and No.	<i>40 West 170th St</i>
P.O., State and ZIP Code	<i>Manhattan NY 10032</i>
Postage	\$
Certified Fee	
Special Delivery Fee	
Restricted Delivery Fee	
Return Receipt Showing to whom and Date Delivered	
Return receipt showing to whom, Date, and Address of Delivery	
TOTAL Postage and Fees	\$
Postmark or Date	

Form 3800, Feb. 1982

TA-26 (7/85)
STATE OF NEW YORK
State Tax Commission
TAX APPEALS BUREAU
W. A. Hartman Campus
ALBANY, N.Y. 12227



Harriet Turchin
170 Broadway
New York, NY 10038



TA-26 (7/85)
STATE OF NEW YORK
State Tax Commission
TAX APPEALS BUREAU
W. A. Harriman Campus
ALBANY, N.Y. 12227

CERTIFIED

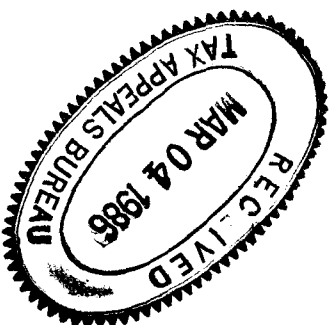
P 684 313 279

MAIL



UNKNOWN
NEW YORK, N.Y.

Daniel Turchin
170 Broadway
New York, NY 10038



TA-36 (9/76)

State of New York - Department of Taxation and Finance
Tax Appeals Bureau

S.T.

REQUEST FOR BETTER ADDRESS

Requested by Tax Appeals Bureau Room 107 - Bldg. #9 State Campus Albany, New York 12227	Unit Tax Appeals Bureau Room 107 - Bldg. #9 State Campus Albany, New York 12227	Date of Request 3/6/86
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Please find most recent address of taxpayer described below; return to person named above.

Social Security Number	Date of Petition Dec - 2/18/86
Name Daniel Turshin	
Address 170 Broadway New York, N.Y. 10038	

Results of search by Files

<input type="checkbox"/> New address:	no found 84-85-82 pb 3/6/86 M Turshin or Bertoglia
<input type="checkbox"/> Same as above, no better address	
<input type="checkbox"/> Other:	Unknown

Searched by	Section	Date of Search

PERMANENT RECORDFOR INSERTION IN TAXPAYER'S FOLDER

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

February 18, 1986

Better Lawn Care Co., Inc.
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STATE OF NEW YORK

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BETTER LAWN CARE CO., INC.	:	DECISION
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DATED: Albany, New York

STATE TAX COMMISSION

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Jack
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