

STATE OF NEW YORK

STATE TAX COMMISSION

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In the Matter of the Petition :  
of :  
Cornwall Variety Store, 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 6/1/72-5/31/75.

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State of New York :

ss.:

County of Albany :

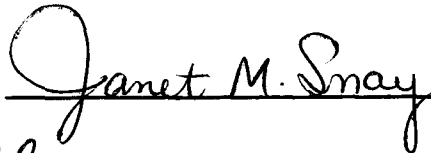
David Parchuck/Janet M. Snay, being duly sworn, deposes and says that he/she is an employee of the State Tax Commission, that he/she is over 18 years of age, and that on the 12th day of June, 1986, he/she served the within notice of Decision by certified mail upon Cornwall Variety Store, Inc. the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

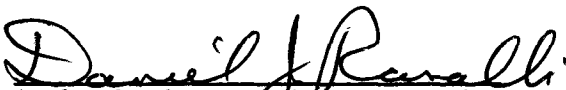
Cornwall Variety Store, Inc.  
282 Main St.  
Cornwall, NY 12518

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  
12th day of June, 1986.

  
\_\_\_\_\_

  
Authorized to administer oaths  
pursuant to Tax Law section 174

STATE OF NEW YORK

STATE TAX COMMISSION

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In the Matter of the Petition :  
of :  
Cornwall Variety Store, Inc. :

AFFIDAVIT OF MAILING

for Redetermination of a Deficiency or Revision :  
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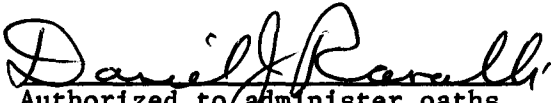
David Parchuck/Janet M. Snay, being duly sworn, deposes and says that he/she is an employee of the State Tax Commission, that he/she is over 18 years of age, and that on the 12th day of June, 1986, he served the within notice of Decision by certified mail upon Gerald Cohen, the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

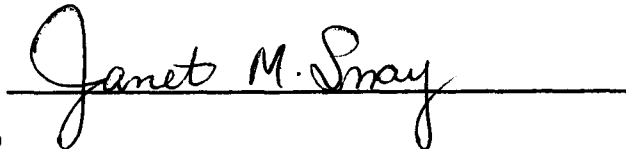
Gerald Cohen  
Coopers & Lybrand  
20 Toni Court  
Plainview, NY 11803

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  
12th day of June, 1986.

  
\_\_\_\_\_  
Authorized to administer oaths  
pursuant to Tax Law section 174

  
\_\_\_\_\_

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

June 12, 1986

Cornwall Variety Store, Inc.  
282 Main St.  
Cornwall, NY 12518

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:  
Gerald Cohen  
Coopers & Lybrand  
20 Toni Court  
Plainview, NY 11803

STATE OF NEW YORK

STATE TAX COMMISSION

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In the Matter of the Petition :  
of :  
CORNWALL VARIETY STORE, 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 June 1, 1972 :  
through May 31, 1975.

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Petitioner Cornwall Variety Store, Inc., 282 Main Street, Cornwall, New York, 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 June 1, 1972 through May 31, 1975 (File No. 48584).

A hearing was held before Brian L. Friedman, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on January 15, 1986 at 1:30 P.M. Petitioner appeared by Coopers & Lybrand (Gerald Cohen, Esq., of counsel). The Audit Division appeared by John P. Dugan, Esq. (Angelo A. Scoppellito, Esq., of counsel).

ISSUE

I. Whether petitioner, purchaser in a bulk sale transaction, is liable for sales taxes determined to be due from the seller in accordance with section 1141(c) of the Tax Law.

FINDINGS OF FACT

1. On June 15, 1983, the Department of Taxation and Finance ("the Department") received from petitioner, a purchaser in a bulk sale, a Notification of Sale, Transfer or Assignment in Bulk.

2. On June 16, 1983, the Department mailed to Stephen Duggan, Esq., identified by petitioner as the escrow agent for the sale, a notice of a possible claim for New York State and local sales and use taxes and instructed

the escrow agent not to distribute funds or property until one of the following conditions were met:

- "1. The State Tax Commission has determined the seller's liability if any.
2. Payment of such liability has been made to the State.
3. This office has authorized you to release the funds or property."

3. On the same date as above, the Department mailed to petitioner a Notice of Claim to Purchaser reiterating the instructions given to the escrow agent.

4. On September 19, 1983, the Department issued against petitioner a Notice of Determination and Demand for Payment of Sales and Use Taxes Due for the period ended August 31, 1976, asserting a tax due of \$7,864.14 plus penalty of \$1,966.04 and interest of \$6,849.82 for a total amount due of \$16,680.00. The notice stated, in pertinent part:

The following taxes are determined to be due from Peter Pan Supermarkets, Inc. and represents your liability as purchaser, in accordance with Section 1141(c) of the Sales Tax Law.

5. The taxes determined to be due from Peter Pan Supermarkets, Inc. ("Peter Pan") resulted from an audit of its records which revealed additional taxable sales for the period June 1, 1972 through May 31, 1975. A Notice of Determination and Demand was issued against Peter Pan on February 3, 1976.

6. At a tax conference with petitioner, a review of the Audit Division's field audit report on Peter Pan revealed that purchases had been overstated due to a mathematical error. Furthermore, the Audit Division agreed to reduce the markup on cigarettes, to cancel the asserted penalty and to reduce interest on the tax assessment to the statutory minimum. These adjustments reduced the tax assessment to \$7,153.94 plus minimum interest.

7. Petitioner has paid the tax due in full; however, it has refused to pay the asserted interest based on its belief that the amount is exorbitant and that the accrual of interest over a nine year period is due to the Department's own negligence in failing to collect the tax due from the seller. Furthermore, petitioner now asks for a refund of taxes paid asserting that it never received timely notification of the sales tax due from Peter Pan.

8. Petitioner's assertion that it did not receive timely notification of taxes due is predicated upon the fact that the Department issued a Notice to the Seller to Peter Pan on July 6, 1983 which stated, in pertinent part: "Remit payment for the following open assessments:". A space was provided for the listing of assessments; however, the Department crossed out the words "the following" and asserted the word "all"; no assessments were listed.

9. By letters dated March 2, 1976 and April 27, 1976, Peter Pan protested the tax assessments issued against it. The Tax Compliance Bureau sent Peter Pan two postcards, each stating: "This acknowledges receipt of your letter of recent date which has been referred to the proper Bureau and will be answered as soon as possible. The first postcard is postmarked December 4, 1978; the second is postmarked December 12, 1980. On December 10, 1980, a stop collection was placed on the assessment against Peter Pan.

10. Petitioner asserts that the Department's failure either to provide Peter Pan with a hearing or to proceed with collection efforts against Peter Pan prevents it from asserting taxes due against petitioner.

#### CONCLUSIONS OF LAW

A. That Tax Law, Section 1141, subdivision (c) requires the State Tax Commission, upon timely receipt of a notice from the purchaser in a bulk sale, to give notice to the purchaser, within ninety days of the receipt of such

notice, of the total amount of any taxes which the state claims to be due from the seller. Upon receipt of proper notification of the State's claim, the purchaser may make payment of such claims from any sums of money, property or choses in action withheld from the seller under this provision of the law. The State Tax Commission complied fully with this statute by issuing a notice of determination and demand to petitioner on September 13, 1983.

B. That the Tax Commission also complied fully with its own regulations (see, 20 NYCRR 537.6) by sending to petitioner and its escrow agent notices of possible claim for New York State and local sales and use taxes with unequivocal instructions not to release any consideration to the seller until the seller's liability was finally determined and satisfied.

C. That the State may not be estopped "from collecting taxes lawfully imposed and remaining unpaid in the absence of statutory authority" (McMahon v. State Tax Commission, 45 A.D.2d 625, 627). Furthermore, there is no statutory duty or responsibility imposed on the State to first obtain tax due from the seller in a bulk sale transaction (Matter of Edward M. Burns d/b/a Studio B, State Tax Commission, December 14, 1982).

D. That petitioner has made full payment in the amount of \$7,153.94 for all taxes due and all penalties have been cancelled by the Audit Division. However, petitioner remains liable for minimum statutory interest on the amount of the tax paid.


E. That the petition of Cornwall Variety Store, Inc. is granted to the extent indicated in Conclusion of Law "D"; that the Notice of Determination and

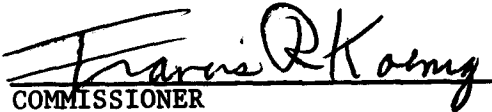
Demand for Payment of Sales and Use Taxes Due issued on September 13, 1983 shall be reduced accordingly; and that, except as so granted, the petition is denied.

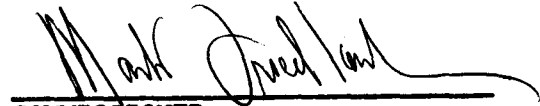
DATED: Albany, New York

STATE TAX COMMISSION

JUN 12 1986

  
PRESIDENT

  
COMMISSIONER

  
COMMISSIONER



P 319 372 708

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>Gerald Cohen</b>	
Street and No. <b>Coopers + Lybrand</b>	
<b>20 Town Court</b>	
P.O., State and ZIP Code <b>Plainville, N.Y. 11803</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 319 372 707

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>Cornwall Variety Store Inc.</b>	
Street and No. <b>282 Main St.</b>	
P.O., State and ZIP Code <b>Cornwall, N.Y. 12518</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	