STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition of Claude Gardner and Clinton Mathison d/b/a C & C Super Service	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 9/1/77 - 11/30/80.	

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 19th day of June, 1986, he/she served the within notice of Decision by certified mail upon Claude Gardner and Clinton Mathison, d/b/a C & C Super Service the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Claude Gardner and Clinton Mathison
d/b/a C & C Super Service
c/o Claude Gardner
1335 W. Washington
Orlando, FL 32805

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
19th day of June, 1986.

Janet M. Snay

Daniel J. Ranalli

Authorized to administer oaths
pursuant to Tax Law section 174

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition of Claude Gardner and Clinton Mathison d/b/a C & C Super Service	:	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 9/1/77 - 11/30/80.	:	

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 19th day of June, 1986, he served the within notice of Decision by certified mail upon Attilia Kalmus, the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Attilia Kalmus
Bernard Fromartz
26 Court St.
Brooklyn, NY 11242

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
19th day of June, 1986.

Janet M. Snay

Authorized to administer oaths
pursuant to Tax Law section 174

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

June 19, 1986

Claude Gardner and Clinton Mathison
d/b/a C & C Super Service
c/o Claude Gardner
1335 W. Washington
Orlando, FL 32805

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:
Attilia Kalmus
Bernard Fromartz
26 Court St.
Brooklyn, NY 11242

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of Petition of CLAUDE GARDNER AND CLINTON MATHISON D/B/A C & C SUPER SERVICE for Revision of a Determination or for Refund of Sales and Use Taxes under Articles 28 & 29 of the Tax Law for the Period September 1, 1977 through November 30, 1980.	DECISION

Petitioners, Claude Gardner and Clinton Mathison, d/b/a C & C Super Service, c/o Claude Gardner, 1335 West Washington Street, Orlando, FL 32805 filed a petition for revision of a determination or for refund of sales and use taxes under Articles 28 & 29 of the Tax Law for the period September 1, 1977 through November 30, 1980 (File No. 58134).

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 November 19, 1985 at 9:15 A.M. with all briefs to be submitted by January 20, 1986. Petitioner appeared by Bernard Fromartz, Esq. (Attilia Kalmus, Esq. of Counsel). The Audit Division appeared by John P. Dugan, Esq. (William Fox, Esq., of Counsel).

ISSUES

I. Whether the Audit Division properly issued a Notice of Determination and Demand for Payment of Sales and Use Taxes Due to petitioners in accordance with the provisions of sections 1138(a) 1147(a)(1) and of the Tax Law and if so,

II. Whether petitioners timely applied for a hearing.

FINDINGS OF FACT

1. On September 18, 1981, the Audit Division issued a Notice of Determination and Demand for Payment of Sales and Use Taxes Due against Claude Gardner and Clinton Mathison, d/b/a C & C Super Service (hereinafter "C & C") covering the period September 1, 1977 through November 30, 1980 for taxes due of $20,720.00, plus penalty and interest of $9,475.17, for a total of $30,195.27. Said notice was issued following an audit of C & C's books and records.

2. Clinton Mathison, a partner in C & C, executed a consent dated September 26, 1980 extending the period of limitation for assessment of sales and use taxes for the period September 1, 1977 through August 31, 1980 to December 20, 1981.

3. The notice was addressed to 259 Empire Blvd., Brooklyn, NY 11225 which was the correct address for the business. The mailing record of the Department of Taxation and Finance dated September 18, 1981 for notices of determination listed the notice referred to above. The mailing record had the signatures of the person who witnessed the sealing and stamping of the envelopes in which the notices were enclosed and also the person who deposited the notices in a branch of the United States Post Office. The signatures were witnessed by two different employees of the mail and supply section. Petitioner Claude Gardner denied receipt of the notice.

4. C & C argued that the Department's mailing record does not meet the statutory mailing requirements provided in section 1147 (a)(1) of the Tax Law. C & C further argued that a Postal Service form entitled "Acceptance of Registered, Insured, C.O.D. and Certified Mail" which was submitted at the hearing in conjunction with the mailing record was incomplete and did not have a U.S. post office seal.

5. The Audit Division did not present a signed postal receipt. There was no evidence in the Audit Division's file that the notice was returned undelivered.

6. The Audit Division and the Tax Appeals Bureau have no record of a protest or a petition being filed with respect to the notice issued September 18, 1981 within ninety days after the notice was issued. Accordingly, C & C was denied a hearing on the merits of the audit. At the request of Bernard Fromartz, the representative for C & C, the Tax Appeals Bureau granted a hearing on the jurisdictional issue of timeliness. C & C argued that Martin Fliegel, an accountant who represented them during the audit, disagreed with the audit results as early as June 1981. C & C offered several pieces of correspondence which either predated the notice or were not dated within ninety days of the issuance of the notice. Moreover, the only correspondence submitted that makes reference to the notice was a letter dated November 23, 1983.

CONCLUSIONS OF LAW

A. That section 1138(a)(1) of the Tax Law provides, in pertinent part, that a notice of determination of tax due shall be given to the person liable for the collection or payment of the tax and such determination shall finally and irrevocably fix the tax unless the person against whom it is assessed, within ninety days after giving of notice of such determination shall apply to the tax commission for a hearing, or unless the Tax Commission of its own motion shall redetermine the same.

B. That section 1147(a)(1) of the Tax Law provides that any notice required under the provisions of Article 28 & 29 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 or application made. A notice of determination shall be mailed promptly by registered or certified

mail and that any period of time which is determined according to the provisions of Article 28 by the giving of notice shall commence to run from the date of mailing of such notice. The mailing of such notice shall be presumptive evidence of the receipt by the person to whom it is addressed.

Subsection (2) provides that if any return, claim, statement, application, or other document required to be filed within a prescribed period under Article 28 is delivered after such period, the date of the United States postmark stamped on the envelope shall be deemed to be the date of delivery.

C. That the Audit Division gave petitioners notice of the additional taxes determined due in accordance with section 1138(a) of the Tax Law. Moreover, the Audit Division established that it followed the mailing requirements of section 1147 (a)(1) of the Tax Law. Since mailing was shown, it is presumed that the notice was received by C & C (Matter of T.J. Gulf, Inc., State Tax Comm., May 29 1985). The presumption of receipt is rebuttable (Matter of Ruggerite ,Inc. v State Tax Commission, 64 NY 2d 688). However, petitioners failed to overcome the presumption.

D. That petitioners did not file a protest to the notice or make application for a hearing with respect thereto within ninety days after the Audit Division gave notice of the taxes due. Accordingly, the liability was finally and irrevocably fixed.

E. That the petition of Claude Gardner and Clinton Mathison, d/b/a C & C Super Service is denied and the Notice of Determination and Demand for Payment of Sales and Use Taxes issued September 18, 1981 is sustained.

DATED: Albany, New York

STATE TAX COMMISSION

JUN 19 1986

PRESIDENT

COMMISSIONER

COMMISSIONER

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RECEIPT FOR CERTIFIED MAIL

NO INSURANCE COVERAGE PROVIDED
NOT FOR INTERNATIONAL MAIL
(See Reverse)

Sent to Claude Gardner + Clinton Mathison	
Street and No. C+C Super Service c/o Claude Gardner	
P.O., State and ZIP Code 335 Washington Orlando, FL 32805	
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, June 1985 ★ U.S.G.P.O. 1985-480-794

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RECEIPT FOR CERTIFIED MAIL

NO INSURANCE COVERAGE PROVIDED
NOT FOR INTERNATIONAL MAIL
(See Reverse)

Sent to Attila Kalmus	
Street and No. Bernard Fromartz 26 Court St.	
P.O., State and ZIP Code Brooklyn, N.Y. 11242	
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, June 1985 ★ U.S.G.P.O. 1985-480-794