

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of :
John E. McIntosh, Jr. :
Officer of 2075 Sheridan Drive, Inc. : 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 :
11/30/78 - 11/30/80. :

State of New York :

ss.:

County of Albany :

David Parchuck/Connie Hagelund, 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 28th day of January, 1986, he/she served the within notice of Decision by certified mail upon John E. McIntosh, Jr., Officer of 2075 Sheridan Drive, Inc., the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

John E. McIntosh, Jr.
Officer of 2075 Sheridan Drive, Inc.
11 Euclid Avenue
Lockport, NY 14094

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
28th day of January, 1986.

David Parchuck

Connie O. Hagelund
Authorized to administer oaths
pursuant to Tax Law section 174

STATE OF NEW YORK

STATE TAX COMMISSION

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Officer of 2075 Sheridan Drive, Inc.	:	AFFIDAVIT OF MAILING
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for Redetermination of a Deficiency or Revision	:	
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under Article 28 & 29 of the Tax Law for the	:	
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State of New York :

ss.:

County of Albany :

David Parchuck/Connie Hagelund, 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 28th day of January, 1986, he served the within notice of Decision by certified mail upon Ralph J. Gregg, the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Ralph J. Gregg
Albrecht, Maguire, Heffern & Gregg
2100 Main Place Tower
Buffalo, NY 14202

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
28th day of January, 1986.

David Parchuck

Connie Hagelund

Authorized to administer oaths
pursuant to Tax Law section 174

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

January 28, 1986

John E. McIntosh, Jr.
Officer of 2075 Sheridan Drive, Inc.
11 Euclid Avenue
Lockport, NY 14094

Dear Mr. McIntosh:

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
Ralph J. Gregg
Albrecht, Maguire, Heffern & Gregg
2100 Main Place Tower
Buffalo, NY 14202
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition
of
JOHN E. McINTOSH, JR.
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 Ended November 30,
1978 and the Periods Ended November 30, 1979
through November 30, 1980.

DECISION

Petitioner, John E. McIntosh, Jr., 11 Euclid Avenue, Lockport, NY 14094, 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 ended November 30, 1978 and the periods ended November 30, 1979 through November 30, 1980 (File No. 43270).

A formal hearing was held before James J. Morris, Jr., Hearing Officer, at the offices of the State Tax Commission, State Office Building, 65 Court Street, Buffalo, New York, on April 3, 1985 at 9:15 A.M., with all briefs to be submitted by June 17, 1985. Petitioner appeared by Ralph J. Gregg, Esq. The Audit Division appeared by John P. Dugan, Esq. (Deborah J. Dwyer, Esq., of Counsel).

ISSUE

Whether the State Tax Commission has jurisdiction to conduct an administrative hearing regarding petitioner, John E. McIntosh, Jr., with respect to his personal liability for penalty and interest on sales taxes due from 2075 Sheridan Drive, Inc., and, if so, whether petitioner was a person responsible for the payment of such taxes.

FINDINGS OF FACT

1. On June 7, 1982, the Audit Division issued to petitioner, John E. McIntosh, Jr., as officer of 2075 Sheridan Drive, Inc., a Notice and Demand for Payment of Sales and Use Taxes Due for the period ended November 30, 1978 and the periods ended November 30, 1979 through November 30, 1980, with respect to penalty in the amount of \$1,281.10 and interest in the amount of \$2,349.76 accrued to the date of issuance of the notice.

2. The notice of determination provided on its face the following explanation as the basis for issuance, together with a detailed breakdown of the amounts for each of the quarterly periods at issue:

"[y]ou are personally liable as a responsible officer of 2075 Sheridan Drive Inc. under Sections 1131(1) and 1133 of the Tax Law."

<u>PERIOD ENDING</u>	<u>TAX DUE</u>	<u>PENALTY DUE</u>	<u>INTEREST DUE</u>
11/30/78	-0-	\$1,056.16	\$1,302.80
11/30/79	-0-	23.44	459.16
2/29/80	-0-	-0-	159.67
5/31/80	-0-	-0-	62.26
8/31/80	-0-	201.50	337.43
11/30/80	-0-	-0-	28.44

3. The above Notice and Demand issued to petitioner stems from assessments issued against 2075 Sheridan Drive Inc., as a result of that entity's filing of sales and use tax returns for the periods at issue, which returns had either no remittance of the tax shown as due thereon or were filed and paid later than the due date therefor without payment of interest and penalty. All sales taxes as shown due on such returns were paid subsequent to the filing of said returns. The only outstanding liability at issue herein is interest and penalty.

4. Petitioner is listed as the president of 2075 Sheridan Drive, Inc. upon its "Certificate of Registration" as a sales and use tax vendor.

5. Petitioner offered no testimony or other evidence in support of the assertions raised in his petition, but rather rests his entire case upon the following arguments: (a) that under the particular factual circumstances, the State Tax Commission lacks jurisdiction to determine petitioner's liability for the taxes at issue via its administrative hearing procedure; and (b) that the Commission does not have the authority to hold petitioner personally liable for penalty and interest owing from the corporation due to the corporation's failure to timely file and pay sales taxes. A determination by this body that no administrative remedy lies in this situation would remove a potential obstacle to judicial action by petitioner.

6. Petitioner submitted proposed "findings of fact" with respect to this proceeding which have been substantially incorporated in Findings of Fact 1-3 herein.

CONCLUSIONS OF LAW

A. That where as here, correct returns were submitted by the corporate entity, this Commission is not empowered to determine a petitioner's liability as "a person required to collect tax" for the corporation's unpaid sales taxes in an administrative hearing. [Matter of Parsons v. State Tax Commission, 34 N.Y.2d 190 (1974); Matter of William R. Hall v. State Tax Commission, 108 A.D.2d 488 (Third Dept., 1985)].

B. That for the periods herein, section 1145(a)(3) of the Tax Law in pertinent part provided that:

"Unpaid penalties and interest may be determined, assessed, collected and enforced in the same manner as the tax imposed by this article."

Since penalties and interest are to be determined in the same manner as tax, and since this Commission lacks the authority to determine the petitioner's liability as a person required to collect tax for the sales taxes claimed due herein in an

administrative hearing, it follows that it likewise lacks the authority determine a petitioner's liability as a person required to collect tax for interest and penalties in respect of such taxes in its administrative hearings.

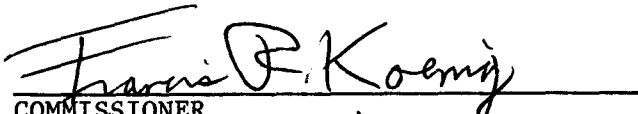
C. That since this Commission does not have the authority to determine petitioner's liability at an administrative hearing, his petition is dismissed.

DATED: Albany, NY

STATE TAX COMMISSION

JAN 28 1986


PRESIDENT


COMMISSIONER


COMMISSIONER

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RECEIPT FOR CERTIFIED MAIL

NO INSURANCE COVERAGE PROVIDED
NOT FOR INTERNATIONAL MAIL

(See Reverse)

Sent to John E. McIntosh, JR
OFF. OF 2075 SHERIDAN DRIVE
INC.
 Street and No. 11 Euclid Ave
 P.O., State and ZIP Code LOCKPORT, N.Y. 14094

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

★ U.S.G.P.O. 1983-403-517

P 684 313 246

RECEIPT FOR CERTIFIED MAIL

NO INSURANCE COVERAGE PROVIDED
NOT FOR INTERNATIONAL MAIL

(See Reverse)

Sent to Ralph J. Gregg
Albrecht, Maguire, Heffern
+ Gregg
 Street and No. 2100 MAIN PLACE TOWER
 P.O., State and ZIP Code BUFFALO, N.Y. 14202

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

★ U.S.G.P.O. 1983-403-517