

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of :
Valley Instant Homes, Inc. :
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 9/1/77-1/1/81. :
:

AFFIDAVIT OF MAILING

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 Valley Instant Homes, Inc., the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Valley Instant Homes, Inc.
RD #1, Route 199
Athens, PA 18810

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

Sean Corry
Authorized to administer oaths
pursuant to Tax Law section 174

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of :
Valley Instant Homes, Inc. :
for Redetermination of a Deficiency or Revision :
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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 Steven L. Barcus, the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Steven L. Barcus
Etkind & Golos
213 Madison Ave.
Elmira, NY 14901

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

Jan 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

Valley Instant Homes, Inc.
RD #1, Route 199
Athens, PA 18810

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: Petitioner's Representative
Steven L. Barcus
Etkind & Golos
213 Madison Ave.
Elmira, NY 14901
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of :
John R. Snell :
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 9/1/77-11/30/80. :
:

State of New York :

ss.:

County of Albany :

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John R. Snell
RD #5, Box 252-A
Towanda, PA 18848

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.

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18th day of February, 1986.

Doris E. Steinhardt

Jan Coughlin
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STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
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18th day of February, 1986.

Doris E. Steinhardt

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

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

February 18, 1986

John R. Snell
RD #5, Box 252-A
Towanda, PA 18848

Dear Mr. Snell:

Please take notice of the Decision of the State Tax Commission enclosed herewith.

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Albany, New York 12227
Phone # (518) 457-2070

Very truly yours,

STATE TAX COMMISSION

cc: Petitioner's Representative
Steven L. Barcus
Etkind & Golos
213 Madison Ave.
Elmira, NY 14901
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition	:	
of	:	
Michael J. Debach	:	
for Redetermination of a Deficiency or Revision	:	AFFIDAVIT OF MAILING
of a Determination or Refund of Sales & Use Tax	:	
under Article 28 & 29 of the Tax Law for the	:	
Period 9/1/77-11/30/80.	:	

State of New York :

ss.:

County of Albany :

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Michael J. Debach
RD #2
Troy, PA 16947

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.

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18th day of February, 1986.

Doris E. Steinhardt

Juan Corp
Authorized to administer oaths
pursuant to Tax Law section 174

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of :
Michael J. Debach :
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for Redetermination of a Deficiency or Revision :
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Sworn to before me this
18th day of February, 1986.

Doris E. Steinhardt

Jean C. [Signature]
Authorized to administer oaths
pursuant to Tax Law section 174

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

February 18, 1986

Michael J. Debach
RD #2
Troy, PA 16947

Dear Mr. Debach:

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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Albany, New York 12227
Phone # (518) 457-2070

Very truly yours,

STATE TAX COMMISSION

cc: Petitioner's Representative
Steven L. Barcus
Etkind & Golos
213 Madison Ave.
Elmira, NY 14901
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition

of

VALLEY INSTANT HOMES, INC.

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, 1977
through January 17, 1981.

In the Matter of the Petition

of

JOHN R. SNELL

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 September 1, 1977
through November 30, 1980.

In the Matter of the Petition

of

MICHAEL J. DEBACH

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, 1977
through November 30, 1980.

Petitioner Valley Instant Homes, Inc., RD #1, Route 199, Athens, Pennsylvania 18810, 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, 1977 through January 17, 1981 (File No. 35813).

Petitioner John R. Snell, RD #5, Box 252-A, Towanda, Pennsylvania 18848, 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, 1977 through November 30, 1980 (File No. 46724).

Petitioner Michael J. Debach, RD #2, Troy, Pennsylvania 16947, 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, 1977 through November 30, 1980 (File No. 46725).

A consolidated hearing was held before James J. Morris, Jr., Hearing Officer, at the offices of the State Tax Commission, State Office Building, 164 Hawley Street, Binghamton, New York, on May 24, 1985 at 9:00 A.M. Petitioners appeared by Etkind & Golas (Steven R. Barcus, of counsel). The Audit Division appeared by John P. Dugan, Esq. (Deborah J. Dwyer, Esq., of counsel).

ISSUES

I. Whether the Audit Division properly determined additional tax due from petitioner Valley Instant Homes, Inc. for the period September 1, 1977 through January 17, 1981.

II. Whether petitioners John Snell and Michael Debach are liable as purchasers in bulk of the business assets of Valley Instant Homes, Inc. pursuant to the provisions of section 1141(c) of the Tax Law for the unpaid taxes claimed owing from Valley Instant Homes, Inc. and, if so, to what extent.

FINDINGS OF FACT

1. On April 9, 1981, the Audit Division issued a Notice of Determination and Demand for Payment of Sales and Use Taxes Due to petitioner Valley Instant Homes, Inc. for the period September 1, 1977 through January 17, 1981 asserting additional tax due of \$38,312.32 plus penalty and interest accrued to the date of the notice.

2. On August 3, 1983, the Audit Division issued a Notice of Determination and Demand for Payment of Sales and Use Taxes Due to petitioner John Snell for the period September 1, 1977 through November 30, 1980 asserting additional tax in the amount of \$38,312.32 plus penalty and interest accrued to the date of the notice.

3. On August 3, 1983, the Audit Division issued a Notice of Determination and Demand for Payment of Sales and Use Taxes Due to petitioner Michael Debach for the period September 1, 1977 through November 30, 1980 asserting additional tax in the amount of \$38,312.32 plus penalty and interest accrued to the date of the notice.

4. Petitioner Valley Instant Homes, Inc. ("Valley Instant") was engaged in the business of selling mobile homes and modular homes from its place of business located in Athens, Pennsylvania, which is near the New York State border. Most of Valley Instant's sales were in the State of Pennsylvania; however, it did make sales of mobile and modular homes which were delivered either by common carrier or by its own vehicles and installed in New York.

5. Petitioner Valley Instant registered as a vendor for New York State sales and use tax purposes on or about January 2, 1980.

6. The Audit Division performed an audit upon the books and records of Valley Instant. No books or records relating to periods prior to January 2, 1980 were made available upon the audit. Books and records for the period January, 1980 through January, 1981 were, however, made available for audit.

For the period in which records were made available (January, 1980 - January, 1981), it was determined that petitioner had underreported sales tax in the amount of \$40.25 and had failed to pay use tax (after credits for tax previously paid to Pennsylvania) in the amount of \$2,535.07. Said taxes were

found due and owing for the quarterly periods ended May 31, 1980 and November 30, 1981. Thus, although the audit with respect to petitioner Valley Instant purports to cover the period September 1, 1977 through January 17, 1981, no taxes are claimed due for the quarter ended February 28, 1981, since no taxes were found due and owing for such period. Likewise, no taxes were asserted as due and owing from petitioners for the quarterly periods ended February 28, 1980 and August 31, 1980. With respect to the quarterly periods ended November 30, 1977 through November 30, 1979 for which records were not made available, the Audit Division used the taxable sales determined with respect to the period January, 1980 through January, 1981 in the amount of \$276,071.00 and the amount of purchases subject to use tax determined for such period in the amount of \$39,596.00 (which amount takes into account credit for taxes required to be paid to Pennsylvania in respect thereof) and divided by five (comprising the quarterly periods ended February 28, 1980, May 31, 1980, August 31, 1980, November 30, 1980 and February 28, 1981) to arrive at average quarterly purchases subject to use tax in the amount of \$7,919.00 and averages quarterly taxable sales of \$55,214.00. Applying the state and local sales tax rates (in the same proportion as determined for the period January, 1980 through January, 1981) results in the \$3,975.25 in tax claimed owing for each of such quarters.

7. On or about the 21st day of October, 1980, petitioners John Snell and Michael Debach entered into an agreement to purchase the corporate stock ownership of petitioner Valley Instant. The base purchase price was \$20,000.00; however, the agreement provided for payments of certain additional sums to the seller of the stock. The purchasers also agreed to assume certain other liabilities.

8. Petitioners John Snell and Michael Debach decided to liquidate petitioner Valley Instant. On or about the 25th of December, 1980, they filed a certificate of election to dissolve with the Pennsylvania Department of State, Corporation Bureau. On or about the 20th of January, 1981, they filed an out-of-existence affidavit stating that Valley Instant had ceased to transact business in or about January, 1981 and that all its assets were distributed on or about said date; and requesting the company be marked "Out of Existence" on the records of the Department of Revenue. Petitioners filed a "final" Federal return for Valley Instant reflecting that the corporation ceased doing business on or about January 18, 1981.

9. In a bill of sale dated January 15, 1981, Valley Instant transferred to petitioners John Snell and Michael Debach all of the machinery, equipment, inventory, tangible personal assets of the corporation, accounts receivable, and all tangible assets of whatever kind whatsoever. The bill of sale provided that "[t]his bill of sale is given to confirm the distribution by reason of the election to dissolve of (sic) the corporation, distributing its assets to its shareholders."

10. In December of 1980, petitioners John Snell and Michael Debach formed a corporation, Debach & Snell Associates, Inc., of which they individually were the sole shareholders and to which they, on or about the 18th of January, 1981, transferred the assets of Valley Instant which had been transferred to them in dissolution of Valley Instant on or about that date.

11. On or about the 13th of January, 1981, the Department received a Notification of Sale, Transfer or Assignment in Bulk (Form ST-274) dated and mailed by registered mail on the 8th of January, 1981, which provided that (a) the "transferee" was "Debach & Snell Associates, Inc., d/b/a Valley Instant

Homes"; (b) the "transferer (sic)" was "Valley Instant Homes, Inc."; (c) the "scheduled date of transfer" was "1/18/81"; and (d) that the "terms and conditions of sale" were "John R. Snell and Michael Debach, having recently purchased the stock of Valley Instant Homes, Inc., are now dissolving Valley Instant Homes, Inc. and transferring assets to Debach and Snell Associates, Inc., in a tax free exchange under I.R.S. 333."

12. During the period October 21, 1980 through January 18, 1981, petitioners contend that they made no sales of mobile or modular homes in New York State, although they admit there may have been deliveries of such property in New York during said period, as found by the auditor, with the negotiations of such sales having occurred in prior periods.

13. Petitioners John Snell and Michael Debach consider Debach & Snell Associates, Inc. to be a "successor corporation" to Valley Instant Homes, Inc. and the Federal corporate income tax returns apparently also reflect such status.

CONCLUSIONS OF LAW

A. That the Audit Division properly determined petitioner Valley Instant's liability for the period January, 1980 through January, 1981, during which it was registered as a vendor, from its books and records.

B. That petitioner Valley Instant offered no books or records with respect to the period September, 1977 through December, 1979, nor was any testimony or other evidence offered to show that this petitioner's business activities in said period differed from its business activities in the period commencing January, 1980. The Audit Division properly determined petitioner Valley Instant's liability for the period September, 1977 through December,

1979 based upon such information as was available, to wit, petitioner's records for the period January 1980 through January 1981 (Tax Law §1138).

C. That petitioner Valley Instant has failed to sustain its burden of proof to show that the Audit Division's determination was erroneous.

D. That section 1141(c) of the Tax Law establishes certain notice requirements that must be met by purchasers, transferees and assignees of business assets and by the Department. That section also provides relief for the purchaser, transferee or assignee when the Department fails to give proper notice.

That during the relevant period, section 1141(c) of the Tax Law provided, in part:

"Whenever a person required to collect tax shall make a sale, transfer, or assignment in bulk of any part or the whole of his business assets otherwise than in the ordinary course of business, the purchaser, transferee or assignee shall at least ten days before taking possession of the subject of said sale, transfer or assignment, or paying therefor, notify the tax commission by registered mail of the proposed sale and of the price, terms and conditions thereof..."

* * *

"Within ninety days of receipt of the notice of the sale, transfer, or assignment from the purchaser, transferee, or assignee, the tax commission shall give notice to the purchaser, transferee or assignee and to the seller, transferrer or assignor of the total amount of any tax or taxes which the state claims to be due from the seller, transferrer, or assignor to the state, and whenever the tax commission shall fail to give such notice to the purchaser, transferee or assignee and the seller, transferrer or assignor within ninety days from receipt of notice of the sale, transfer, or assignment, such failure will release the purchaser, transferee or assignee from any further obligation to withhold any sums of money, property or choses in action, or other consideration, which the purchaser, transferee or assignee is required to transfer over to the seller, transferrer or assignor,..."

E. That the purchase of the corporate stock of Valley Instant by petitioners, John Snell and Michael Debach, on or about October 21, 1980 was not a sale,

transfer or assignment in bulk of the business assets of petitioner Valley Instant within the meaning and intent of section 1141(c) of the Tax Law.

F. That petitioners John Snell and Michael Debach gave the Audit Division proper notice under section 1141(c) on or about January 8, 1981 of the transfer in bulk of the business assets of Valley Instant to themselves upon the dissolution of said corporation on or about January 18, 1981. The Audit Division did not assert individual liability against petitioners John Snell and Michael Debach until August 3, 1983, which is more than 90 days from the receipt of the notice and the date of the transfer. Accordingly, to the extent that the transfer of assets upon the liquidation of the corporation was a bulk sale transaction between Valley Instant and petitioners John Snell and Michael Debach, the transferees in such transaction are, pursuant to the provision of section 1141(c) of the Tax Law, released from liability under said section (see also Regulation 537.3[c][2]).

G. That in accordance with Conclusions of Law "E" and "F", the petitions of Michael Debach and John Snell are granted and the notices of deficiency dated August 3, 1983 addressed to each of said petitioners are cancelled.


H. That the petition of Valley Instant Homes, Inc. is in all respects denied, and the Notice of Deficiency dated April 9, 1981 addressed to said petitioner is in all respects sustained, together with such applicable penalty and interest as by law allowed.


DATED: Albany, New York

STATE TAX COMMISSION

FEB 18 1986


PRESIDENT


COMMISSIONER


COMMISSIONER

TA-26 (7/85)

STATE OF NEW YORK

State Tax Commiss^r

TAX APPEALS BUREAU

W. A. Harriman Cal

ALBANY, N.Y. 122

CERTIFIED

P 684 313 451

MAIL

7

RETURNED TO
SENDER
UNDELIVERABLE
REMAIN IN THIS ENVELOPE

Valley Instant Homes, Inc.
RD #1, Route 199
Athens, PA 18810

RECEIVED
MAR 04 1986
TAX APPEALS BUREAU

OL
BUSINESS

[Handwritten scribbles]



REQUEST FOR BETTER ADDRESS

Requested by Tax Appeals Bureau Room 107 - Bldg. #9 State Campus Albany, New York 12227	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 Valley Instant Homes, Inc.	
Address RD #1, Route 199 Athens, GA 30610	

Results of search by Files

<input type="checkbox"/> New address:	
<input type="checkbox"/> Same as above, no better address	
<input type="checkbox"/> Other:	Out of Business

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

Valley Instant Homes, Inc.
RD #1, Route 199
Athens, PA 18810

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Steven L. Barcus
Etkind & Golos
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Elmira, NY 14901
Taxing Bureau's Representative

STATE OF NEW YORK

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for Revision of a Determination or for Refund
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through January 17, 1981.

In the Matter of the Petition
of
JOHN R. SNELL
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, 1977
through November 30, 1980.

DECISION

In the Matter of the Petition
of
MICHAEL J. DEBACH
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, 1977
through November 30, 1980.

Petitioner Valley Instant Homes, Inc., RD #1, Route 199, Athens, Pennsylvania 18810, 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, 1977 through January 17, 1981 (File No. 35813).

Petitioner John R. Snell, RD #5, Box 252-A, Towanda, Pennsylvania 18848, 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, 1977 through November 30, 1980 (File No. 46724).

Petitioner Michael J. Debach, RD #2, Troy, Pennsylvania 16947, 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, 1977 through November 30, 1980 (File No. 46725).

A consolidated hearing was held before James J. Morris, Jr., Hearing Officer, at the offices of the State Tax Commission, State Office Building, 164 Hawley Street, Binghamton, New York, on May 24, 1985 at 9:00 A.M. Petitioners appeared by Etkind & Golas (Steven R. Barcus, of counsel). The Audit Division appeared by John P. Dugan, Esq. (Deborah J. Dwyer, Esq., of counsel).

ISSUES

I. Whether the Audit Division properly determined additional tax due from petitioner Valley Instant Homes, Inc. for the period September 1, 1977 through January 17, 1981.

II. Whether petitioners John Snell and Michael Debach are liable as purchasers in bulk of the business assets of Valley Instant Homes, Inc. pursuant to the provisions of section 1141(c) of the Tax Law for the unpaid taxes claimed owing from Valley Instant Homes, Inc. and, if so, to what extent.

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1. On April 9, 1981, the Audit Division issued a Notice of Determination and Demand for Payment of Sales and Use Taxes Due to petitioner Valley Instant Homes, Inc. for the period September 1, 1977 through January 17, 1981 asserting additional tax due of \$38,312.32 plus penalty and interest accrued to the date of the notice.

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3. On August 3, 1983, the Audit Division issued a Notice of Determination and Demand for Payment of Sales and Use Taxes Due to petitioner Michael Debach for the period September 1, 1977 through November 30, 1980 asserting additional tax in the amount of \$38,312.32 plus penalty and interest accrued to the date of the notice.

4. Petitioner Valley Instant Homes, Inc. ("Valley Instant") was engaged in the business of selling mobile homes and modular homes from its place of business located in Athens, Pennsylvania, which is near the New York State border. Most of Valley Instant's sales were in the State of Pennsylvania; however, it did make sales of mobile and modular homes which were delivered either by common carrier or by its own vehicles and installed in New York.

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6. The Audit Division performed an audit upon the books and records of Valley Instant. No books or records relating to periods prior to January 2, 1980 were made available upon the audit. Books and records for the period January, 1980 through January, 1981 were, however, made available for audit.

For the period in which records were made available (January, 1980 - January, 1981), it was determined that petitioner had underreported sales tax in the amount of \$40.25 and had failed to pay use tax (after credits for tax previously paid to Pennsylvania) in the amount of \$2,535.07. Said taxes were

found due and owing for the quarterly periods ended May 31, 1980 and November 30, 1981. Thus, although the audit with respect to petitioner Valley Instant purports to cover the period September 1, 1977 through January 17, 1981, no taxes are claimed due for the quarter ended February 28, 1981, since no taxes were found due and owing for such period. Likewise, no taxes were asserted as due and owing from petitioners for the quarterly periods ended February 28, 1980 and August 31, 1980. With respect to the quarterly periods ended November 30, 1977 through November 30, 1979 for which records were not made available, the Audit Division used the taxable sales determined with respect to the period January, 1980 through January, 1981 in the amount of \$276,071.00 and the amount of purchases subject to use tax determined for such period in the amount of \$39,596.00 (which amount takes into account credit for taxes required to be paid to Pennsylvania in respect thereof) and divided by five (comprising the quarterly periods ended February 28, 1980, May 31, 1980, August 31, 1980, November 30, 1980 and February 28, 1981) to arrive at average quarterly purchases subject to use tax in the amount of \$7,919.00 and averages quarterly taxable sales of \$55,214.00. Applying the state and local sales tax rates (in the same proportion as determined for the period January, 1980 through January, 1981) results in the \$3,975.25 in tax claimed owing for each of such quarters.

7. On or about the 21st day of October, 1980, petitioners John Snell and Michael Debach entered into an agreement to purchase the corporate stock ownership of petitioner Valley Instant. The base purchase price was \$20,000.00; however, the agreement provided for payments of certain additional sums to the seller of the stock. The purchasers also agreed to assume certain other liabilities.

8. Petitioners John Snell and Michael Debach decided to liquidate petitioner Valley Instant. On or about the 25th of December, 1980, they filed a certificate of election to dissolve with the Pennsylvania Department of State, Corporation Bureau. On or about the 20th of January, 1981, they filed an out-of-existence affidavit stating that Valley Instant had ceased to transact business in or about January, 1981 and that all its assets were distributed on or about said date; and requesting the company be marked "Out of Existence" on the records of the Department of Revenue. Petitioners filed a "final" Federal return for Valley Instant reflecting that the corporation ceased doing business on or about January 18, 1981.

9. In a bill of sale dated January 15, 1981, Valley Instant transferred to petitioners John Snell and Michael Debach all of the machinery, equipment, inventory, tangible personal assets of the corporation, accounts receivable, and all tangible assets of whatever kind whatsoever. The bill of sale provided that "[t]his bill of sale is given to confirm the distribution by reason of the election to dissolve of (sic) the corporation, distributing its assets to its shareholders."

10. In December of 1980, petitioners John Snell and Michael Debach formed a corporation, Debach & Snell Associates, Inc., of which they individually were the sole shareholders and to which they, on or about the 18th of January, 1981, transferred the assets of Valley Instant which had been transferred to them in dissolution of Valley Instant on or about that date.

11. On or about the 13th of January, 1981, the Department received a Notification of Sale, Transfer or Assignment in Bulk (Form ST-274) dated and mailed by registered mail on the 8th of January, 1981, which provided that (a) the "transferee" was "Debach & Snell Associates, Inc., d/b/a Valley Instant

Homes"; (b) the "transferer (sic)" was "Valley Instant Homes, Inc."; (c) the "scheduled date of transfer" was "1/18/81"; and (d) that the "terms and conditions of sale" were "John R. Snell and Michael Debach, having recently purchased the stock of Valley Instant Homes, Inc., are now dissolving Valley Instant Homes, Inc. and transferring assets to Debach and Snell Associates, Inc., in a tax free exchange under I.R.S. 333."

12. During the period October 21, 1980 through January 18, 1981, petitioners contend that they made no sales of mobile or modular homes in New York State, although they admit there may have been deliveries of such property in New York during said period, as found by the auditor, with the negotiations of such sales having occurred in prior periods.

13. Petitioners John Snell and Michael Debach consider Debach & Snell Associates, Inc. to be a "successor corporation" to Valley Instant Homes, Inc. and the Federal corporate income tax returns apparently also reflect such status.

CONCLUSIONS OF LAW

A. That the Audit Division properly determined petitioner Valley Instant's liability for the period January, 1980 through January, 1981, during which it was registered as a vendor, from its books and records.

B. That petitioner Valley Instant offered no books or records with respect to the period September, 1977 through December, 1979, nor was any testimony or other evidence offered to show that this petitioner's business activities in said period differed from its business activities in the period commencing January, 1980. The Audit Division properly determined petitioner Valley Instant's liability for the period September, 1977 through December,

1979 based upon such information as was available, to wit, petitioner's records for the period January 1980 through January 1981 (Tax Law §1138).

C. That petitioner Valley Instant has failed to sustain its burden of proof to show that the Audit Division's determination was erroneous.

D. That section 1141(c) of the Tax Law establishes certain notice requirements that must be met by purchasers, transferees and assignees of business assets and by the Department. That section also provides relief for the purchaser, transferee or assignee when the Department fails to give proper notice.

That during the relevant period, section 1141(c) of the Tax Law provided, in part:

"Whenever a person required to collect tax shall make a sale, transfer, or assignment in bulk of any part or the whole of his business assets otherwise than in the ordinary course of business, the purchaser, transferee or assignee shall at least ten days before taking possession of the subject of said sale, transfer or assignment, or paying therefor, notify the tax commission by registered mail of the proposed sale and of the price, terms and conditions thereof..."

* * *

"Within ninety days of receipt of the notice of the sale, transfer, or assignment from the purchaser, transferee, or assignee, the tax commission shall give notice to the purchaser, transferee or assignee and to the seller, transferrer or assignor of the total amount of any tax or taxes which the state claims to be due from the seller, transferrer, or assignor to the state, and whenever the tax commission shall fail to give such notice to the purchaser, transferee or assignee and the seller, transferrer or assignor within ninety days from receipt of notice of the sale, transfer, or assignment, such failure will release the purchaser, transferee or assignee from any further obligation to withhold any sums of money, property or choses in action, or other consideration, which the purchaser, transferee or assignee is required to transfer over to the seller, transferrer or assignor,..."

E. That the purchase of the corporate stock of Valley Instant by petitioners, John Snell and Michael Debach, on or about October 21, 1980 was not a sale,

transfer or assignment in bulk of the business assets of petitioner Valley Instant within the meaning and intent of section 1141(c) of the Tax Law.

F. That petitioners John Snell and Michael Debach gave the Audit Division proper notice under section 1141(c) on or about January 8, 1981 of the transfer in bulk of the business assets of Valley Instant to themselves upon the dissolution of said corporation on or about January 18, 1981. The Audit Division did not assert individual liability against petitioners John Snell and Michael Debach until August 3, 1983, which is more than 90 days from the receipt of the notice and the date of the transfer. Accordingly, to the extent that the transfer of assets upon the liquidation of the corporation was a bulk sale transaction between Valley Instant and petitioners John Snell and Michael Debach, the transferees in such transaction are, pursuant to the provision of section 1141(c) of the Tax Law, released from liability under said section (see also Regulation 537.3[c][2]).

G. That in accordance with Conclusions of Law "E" and "F", the petitions of Michael Debach and John Snell are granted and the notices of deficiency dated August 3, 1983 addressed to each of said petitioners are cancelled.

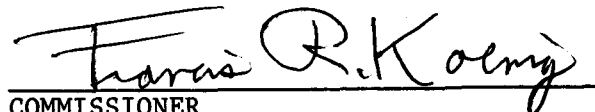
H. That the petition of Valley Instant Homes, Inc. is in all respects denied, and the Notice of Deficiency dated April 9, 1981 addressed to said petitioner is in all respects sustained, together with such applicable penalty and interest as by law allowed.


DATED: Albany, New York

STATE TAX COMMISSION

FEB 18 1986


PRESIDENT


COMMISSIONER


COMMISSIONER