

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of :
West Indian Panamanian Ind., 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 6/1/76 - 8/31/79.

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 28th day of May, 1986, he/she served the within notice of decision by certified mail upon West Indian Panamanian Ind., Inc. the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

West Indian Panamanian Ind., Inc.
761 St. Johns Pl.
Brooklyn, NY 11216

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 May, 1986.

David Parchuck

Janet M. Snay
Authorized to administer oaths
pursuant to Tax Law section 174

STATE OF NEW YORK

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of :
West Indian Panamanian Ind., Inc. : AFFIDAVIT OF MAILING

for Redetermination of a Deficiency or Revision :
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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 28th day of May, 1986, he served the within notice of decision by certified mail upon A. Anthony Greene, the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

A. Anthony Greene
1265 Nostrand Ave.
Brooklyn, NY 11226

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 May, 1986.

David Parchuck

Janet M. Snay
Authorized to administer oaths
pursuant to Tax Law section 174

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

May 28, 1986

West Indian Panamanian Ind., Inc.
761 St. Johns Pl.
Brooklyn, NY 11216

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:
A. Anthony Greene
1265 Nostrand Ave.
Brooklyn, NY 11226

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition	:	
of	:	
WEST INDIAN PANAMANIAN IND., 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, 1976	:	
through August 31, 1979.	:	

Petitioner, West Indian Panamanian Ind., Inc., 761 St. Johns Place, Brooklyn, New York 11216, 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, 1976 through August 31, 1979 (File No. 41380).

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 21, 1985 at 1:15 P.M. Petitioner appeared by A. Anthony Greene, P.A. The Audit Division appeared by John P. Dugan, Esq. (Kevin A. Cahill, Esq., of counsel).

ISSUES

I. Whether petitioner was the transferee of the business assets of Roye Powell Bar & Grill, Inc.

II. Whether the Audit Division properly estimated the taxable sales of Roye Powell Bar & Grill, Inc.

FINDINGS OF FACT

1. Roye Powell Bar & Grill, Inc. ("Roye Powell") operated a bar located at 761 St. Johns Place, Brooklyn, New York.

2. The Audit Division scheduled an audit of Roye Powell's books and records for November 19, 1979. The appointment was confirmed by Mr. Ralph Roye. No one on Roye Powell's behalf appeared for the appointment. Mr. Roye was contacted by telephone and he indicated that the books and records would not be made available for audit. On December 20, 1979, the Audit Division issued a Notice of Determination and Demand for Payment of Sales and Use Taxes Due against Roye Powell for the period June 1, 1976 through August 31, 1979. Said notice estimated taxes due of \$45,077.36, plus applicable penalties and interest. The Audit Division estimated taxable sales of \$50,000.00 per quarter. Roye Powell was given credit for sales taxes paid during the audit period of \$6,922.61. Roye Powell had not filed sales tax returns for the periods ended May 31, 1977, August 31, 1978, November 30, 1978, February 28, 1979, May 31, 1979 and August 31, 1979. The estimated sales of \$50,000.00 were based on prior audit experience with similar businesses in the Brooklyn area. Roye Powell did not protest the assessment or otherwise apply to the Tax Commission for a hearing with respect thereto.

3. Ralph Roye and Calvin Powell were the shareholders of Roye Powell. Ralph Roye individually was the owner of the building in which Roye Powell operated its bar business. Messrs. Roye and Powell got into a personal dispute over the running of the business and, as a result of this dispute, Mr. Powell severed his relationship from the corporation on or about March 1, 1979. Thereafter, Mr. Roye formed a new corporate entity, West Indian Panamanian Ind., Inc. ("West Indian"). On March 20, 1979, West Indian applied for a liquor license. Said application indicated that West Indian leased the premises at 761 St. Johns Place, formerly occupied by Roye Powell, as of April 1, 1979. The application also stated that the net worth of West Indian was \$50,000.00.

4. On or about September 29, 1982, an agent from the Tax Compliance Bureau attempted to collect on the notice that had been issued against Roye Powell and found that West Indian occupied the premises. Consequently, the agent notified the Audit Division of a possible bulk sale of the business assets of Roye Powell.

5. On October 4, 1982, the Audit Division notified petitioner of a possible claim for New York State and local sales and use taxes due from Roye Powell.

6. On December 27, 1982, the Audit Division issued a Notice of Determination and Demand for Payment of Sales and Use Taxes Due against petitioner, West Indian, covering the period June 1, 1976 through August 31, 1979 for taxes due of \$49,719.92, plus penalty and interest of \$42,164.66, for a total of \$91,884.58. Said notice indicated that the taxes were determined to be due from Roye Powell and represented petitioner's liability, as purchaser, in accordance with section 1141(c) of the Tax Law. The Audit Division took the position that petitioner was the transferee of the business assets of Roye Powell, including fixtures, furniture and inventory.

7. At the hearing, counsel for the Audit Division conceded that the notice issued against petitioner should be amended to \$45,077.36 so as to conform with the notice issued to Roye Powell.

8. Petitioner argued that at the time it took over the premises from Roye Powell, there were no assets of any value and it was necessary to renovate the premises before it opened for business. Petitioner maintained that there was no transfer of the assets of Roye Powell or any connection with the former business.

9. Petitioner also took exception to the estimated sales of \$50,000.00 per quarter for Roye Powell. Its position was that a bar located in the neighborhood of Roye Powell could not generate annual sales of \$200,000.00.

10. Petitioner offered no evidence with respect to its acquisition of business assets that were used to compute the net worth shown on the application for a liquor license.

CONCLUSIONS OF LAW

A. That section 1141(c) of the Tax Law provides that a purchaser, transferee or assignee of business assets, otherwise than in the ordinary course of business, who fails to comply with the provisions of this subdivision, shall be personally liable for the payment to the state of any taxes determined due from the seller, transferor or assignor.

B. That Ralph Roye was an officer and stockholder in both Roye Powell and West Indian. In addition, he was the lessor of the business premises. Roye Powell ceased operations in March, 1979 and petitioner leased the same premises effective April, 1979 and operated the same type of business. The application for a liquor license showed that petitioner had a net worth of \$50,000.00. From the foregoing factors and the failure by petitioner to establish that it purchased or otherwise acquired new furniture, fixtures, equipment or inventory, it is reasonable to conclude that Roye Powell transferred its business assets to petitioner. Accordingly, since petitioner was a transferee and failed to notify the Audit Division of such transfer, it is personally liable for the taxes determined to be due from Roye Powell pursuant to section 1141(c) of the Tax Law. However, since Roye Powell was no longer in business after March 1, 1979, the taxes assessed for the periods ended May 31, 1979 and August 31, 1979 amounting to \$8,000.00 are cancelled.

C. That since Roye Powell refused to provide books and records to conduct an audit, the Audit Division properly estimated taxable sales on the basis of external indices in accordance with the provisions of section 1138(a) of the Tax Law.

D. That the petition of West Indian Panamanian Ind., Inc. is granted to the extent indicated in Conclusion of Law "B"; that the Audit Division is hereby directed to modify the Notice of Determination and Demand for Payment of Sales and Use Taxes Due issued December 27, 1982; and that, except as so granted, the petition is in all other respects denied.

DATED: Albany, New York

STATE TAX COMMISSION

MAY 28 1986

Redrich W. Allen
PRESIDENT

Francis R. Koening
COMMISSIONER

Mark J. [Signature]
COMMISSIONER