

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of :
Dr. Florian Yandel, Jr. : AFFIDAVIT OF MAILING
d/b/a Ramapo General Hospital :
:
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 8/1/65 - 4/30/76. :

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 3rd day of July, 1986, he/she served the within notice of Decision by certified mail upon Dr. Florian Yandel, Jr., d/b/a Ramapo General Hospital the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Dr. Florian Yandel, Jr.
d/b/a Ramapo General Hospital
521 Rt. 304
Bardonia, NY

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
3rd day of July, 1986.

David Parchuck

Janet M. Snay

Authorized to administer oaths
pursuant to Tax Law section 174

STATE OF NEW YORK

STATE TAX COMMISSION

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of :
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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 3rd day of July, 1986, he served the within notice of Decision by certified mail upon Samuel D. Pressman, the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Samuel D. Pressman
369 Lexington Ave.
New York, NY 10017

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
3rd day of July, 1986.

David Parchuck

Janet M. Snay
Authorized to administer oaths
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STATE OF NEW YORK
STATE TAX COMMISSION
ALBANY, NEW YORK 12227

July 3, 1986

Dr. Florian Yandel, Jr.
d/b/a Ramapo General Hospital
521 Rt. 304
Bardonia, NY

Dear Dr. Yandel:

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:
Samuel D. Pressman
369 Lexington Ave.
New York, NY 10017

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition	:	
of	:	
FLORIAN YANDEL, JR.	:	DECISION
D/B/A RAMAPO GENERAL HOSPITAL	:	
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 August 1, 1965	:	
through April 30, 1976.	:	

Petitioner, Florian Yandel, Jr. d/b/a Ramapo General Hospital, 521 Route 304, Bardonia, 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 August 1, 1965 through April 30, 1976 (File No. 24455).

A hearing was held before Doris E. Steinhardt, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York on December 5, 1985 at 1:30 P.M., with all briefs to be submitted by April 2, 1986. Petitioner appeared by Samuel D. Pressman, Esq. The Audit Division appeared by John P. Dugan, Esq. (Angelo Scopellito, Esq., and Michael Gitter, Esq., of counsel).

ISSUES

- I. Whether the Audit Division properly determined petitioner's tax liability on the basis of available books and records.
- II. Whether an order vacating a tax warrant filed as a judgment against petitioner cancelled the underlying assessments.
- III. Whether the Department of Taxation and Finance is guilty of laches.

FINDINGS OF FACT

1. On August 21, 1978, following a field audit, the Audit Division issued against petitioner, Florian Yandel, Jr., M.D., d/b/a Ramapo General Hospital, four notices of determination and demands for payment of sales and use taxes due, assessing taxes as summarized below:

<u>PERIOD</u>	<u>TAX DUE</u>	<u>PENALTY</u> ¹	<u>INTEREST</u>	<u>TOTAL AMOUNT DUE</u>
8/1/65-11/30/68	\$34,281.70	-0-	\$50,905.98	\$85,187.68
12/1/68-5/31/72	\$93,842.93	-0-	\$87,973.87	\$181,816.80
6/1/72-11/30/75	\$168,174.61	-0-	\$115,873.42	\$284,048.03
12/1/75-4/30/76	\$17,638.94	-0-	\$9,259.90	\$26,898.84

2. From March 12, 1965 through April 30, 1976, petitioner operated Ramapo General Hospital (the "Hospital") as an unincorporated business. During part of that time, he was also the 100 percent shareholder of S.R.S. Holding Corp., which owned the hospital land, building, and equipment and leased the same to petitioner. On December 20, 1973, S.R.S. Holding Corp. liquidated its assets to petitioner, and on the same date, he sold the facilities and associated equipment to Congregation Zemach David for \$3,000,000.00. Petitioner continued to operate the Hospital as a sole proprietorship, renting the facilities from Congregation Zemach David. On April 30, 1976, petitioner relinquished all operating rights to the Hospital.

3. In the course of a routine audit of a stationery supplier, the Audit Division was presented with an exempt organization certificate executed by the Hospital. The Hospital's comptroller later contacted the Audit Division and stated that the Hospital was an exempt organization, and all its purchases were

1 Each notice stated, "PENALTY INCLUDED." Penalty and statutory interest were calculated together, rather than being stated separately.

made using exemption certificates. A search of the files of the Department of Taxation and Finance revealed that petitioner was not registered as a vendor with the Sales Tax Bureau, did not have exempt organization status and had never filed a sales tax return. In May 1977, the Audit Division commenced a sales tax field audit of petitioner. After numerous requests, both oral and written, were made for petitioner's books and records, the following were provided: financial statements for the calendar years 1965 through 1976, a lease and closing statement agreement between Dr. Yandel and Congregation Zemach David, federal tax returns of S.R.S. Holding Corp. for the years 1968, 1969, 1971 and 1973 and petitioner's federal income tax returns for the years 1972 through 1975. In addition, the New York State Health Department provided the Audit Division with Uniform Financial Reports filed by the Hospital for the years 1968 through 1975, excluding 1971. These were deemed inadequate to determine taxable sales. Petitioner's representative informed the Audit Division that the United States Attorney's Office was investigating the Hospital and that all other records were in that office's possession. Over a period of approximately five months, the Audit Division continuously but without success sought permission to review those records in the hands of federal government officials. Because adequate books and records could not be obtained, the Audit Division utilized the records that were available to estimate taxable sales and purchases of the Hospital during the audit period as summarized below:

Taxable sales to in-patients	\$ 321,318.37
Expense purchases	7,771,228.29
Rental of tangible personal property	1,109,483.70
Fixed asset acquisitions	17,627.00
Total	<u>\$9,219,657.36</u>

4. Total income for the year 1965, the only year for which complete figures were available, was calculated on a quarterly basis from which the

auditor determined the percentage of income earned in each quarter. These percentages were used to allocate sales and purchases in each year to appropriate sales tax quarters. The applicable sales tax rate was then applied to taxable sales and purchases to determine total tax due for the period under consideration of \$313,938.18.

5. On August 29, 1978, petitioner, by his attorney, sent a letter to the White Plains District Office protesting the notices issued against petitioner. Subsequently a Tax Appeals Bureau conference was held in early 1979 at which time petitioner asked that resolution of the dispute be postponed until such time as the records in the possession of the United States Attorney's Office would become available for inspection by the Audit Division. This request was granted.

6. On January 14, 1980, a tax warrant for sales taxes in the amount of \$622,848.78 was docketed as a judgment against petitioner in the office of the Clerk of the County of Rockland. Petitioner immediately petitioned for an order vacating the warrant and judgment. On November 17, 1981, Supreme Court Justice Theodore A. Kelly issued an order vacating the warrant "without prejudice and reserving the right of the State Tax Commission for refileing of the warrant for the same period if necessary when the taxpayer judgment debtor's administrative and judicial remedies under the Tax Law have been exhausted...". Petitioner has construed the Court's order as a cancellation of the underlying assessment.

7. On March 3, 1981, petitioner delivered to the White Plains District Office approximately sixty boxes containing books and records previously in the possession of the United States Attorney's Office. The records included computer-generated ledgers, bank statements, payroll records, cash books, accounts payable and miscellaneous other documents. The Audit Division used

these records to revise the existing assessments. Because the auditors were unable to reconcile sales invoices to the ledgers, the ledgers were deemed inadequate to determine taxable sales. The bulk of the Hospital's patient income records were not available. The auditors reviewed records of emergency room treatments and billings to Blue Cross and Medicare and found no evidence that tax was collected on taxable items charged to patients such as telephone service, standard stock medical and surgical supplies, absorbent materials, tampons, etc. Therefore, no adjustments were made in the category of taxable sales to in-patients. Purchase invoices for the year 1975 established that sales tax had not been paid on expense purchases, confirming the Hospital comptroller's statement that all purchases were made utilizing exemption certificates. The invoices were then analyzed to determine the percentage of taxable items to total purchases. The percentage obtained was applied to expense purchases for each quarter under consideration resulting in a reduction in taxable expense purchases to \$4,048,167.47. No adjustments were made for rental expenses or fixed asset acquisitions. The revised total of sales and purchases subject to sales tax amounted to \$5,496,596.54 with a tax due on that amount of \$186,170.40.

8. It is petitioner's position that the sixty boxes of books and records provided to the Audit Division in 1981 were the complete records of the Hospital for all the years in issue and were adequate for the purpose of accurately determining his tax liability. Petitioner believes that the order vacating the warrant filed as a judgment against him was based on a finding that the audit conducted in 1978 was in violation of "New York State regulations." Since the Audit Division did not completely inventory the sixty boxes of records submitted by petitioner in 1981, he alleges that a legally sufficient audit of the

Hospital's books and records was never conducted, and no tax liability may be assessed.

9. Petitioner contends that the elapsing of almost eight years from commencement of the audit to a hearing before the State Tax Commission may be attributed to the dilatory tactics of the Audit Division which he believes is guilty of laches.

CONCLUSIONS OF LAW

A. That the order vacating the tax warrant did not cancel the notices of determination and demands for sales and use taxes due under consideration in this proceeding. Consequently, the primary issue to be determined is whether the audit underlying the original assessments was proper and in accordance with the Tax Law.

B. That petitioner was a vendor of tangible personal property and as such was a person required to collect tax under section 1131 (subd. [1]) of the Tax Law. Every person required to collect tax pursuant to Articles 28 and 29 of the Tax Law is required: to register with the New York State Tax Commission (Tax Law §1134); to keep records of every sale and of all amounts paid, charged or due thereon and of the tax payable thereon in such form as the Tax Commission may require (Tax Law §1135); to timely file returns showing receipts from sales, the aggregate value of tangible personal property and services sold by him and subject to tax and the tax payable thereon (Tax Law §1136[a]); and to pay to the Tax Commission the taxes imposed by Articles 28 and 29 of the Tax Law (Tax Law §1137[a]).

C. That if a return required by law is not filed, the amount of tax due shall be determined from such information as may be available, but "[i]f necessary the tax may be estimated on the basis of external indices" (Tax Law

§1138[a]). In violation of the Tax Law, petitioner failed to register as a vendor, failed to file tax returns and failed to pay the taxes imposed by Articles 28 and 29 of the Tax Law, for a period of eleven years. Through the admission of the Hospital's comptroller, the Audit Division learned that throughout the Hospital's existence it had used invalid exemption certificates to avoid paying tax on its purchases. Furthermore, petitioner did not make available to the Audit Division the books and records he was required to keep by section 1135 of the Tax Law. Under the circumstances, the Audit Division justifiably utilized the records which were available to it to calculate petitioner's tax liability, and the burden rests on petitioner to demonstrate that the method of audit or amount of tax assessed was erroneous (Matter of Surface Line Operators Fraternal Organization, Inc. v. Tully, 84 A.D.2d 858).

It is fatuous to contend, as petitioner does, that the Audit Division was prohibited from determining his tax liability by his claim that the Hospital's books and records were in the possession of the United States Attorney's Office. At the time the assessments were issued, the Audit Division did not know, and could not know, the nature of those records and when, or if, they would ever become available for audit. Under the circumstances, the Division properly went forward with the information it had.

D. That at hearing, petitioner introduced no evidence to show error in the audit procedures or results. However, on the basis of additional information submitted subsequent to a tax conference, the Audit Division conceded that petitioner's liability should be reduced to \$186,170.40. Petitioner objects to the introduction of any evidence concerning the revised assessment on the ground that the Audit Division failed to produce at hearing the two auditors who actually reviewed the records and prepared the workpapers upon which the

revision was based. Nonetheless, the Audit Division's adjustments shall be accepted and the tax due shall be reduced accordingly.

E. That to address petitioner's contention that the Audit Division was required to conduct a complete audit of the books and records contained in the sixty boxes of materials supplied in 1981, it is noted that the materials were inadequate for the purpose of verifying taxable sales. Furthermore, once the assessment was issued, the petitioner had the burden of proving it improper. The Audit Division was not required to sift through mounds of records to determine whether or not they would be of assistance to the petitioner in carrying his burden (cf. Matter of Lionel Leasing Industries Co., Inc. v. State Tax Commission, 105 A.D.2d 581, 583). Nonetheless, in order to resolve the dispute in issue, the Audit Division did review the records presented to it and made adjustments to the assessment based on the additional information.

F. That petitioner's contention that the Department of Taxation and Finance unconscionably delayed in pursuing its claim against petitioner is without support in the record. Moreover, "[a]n estoppel may not be invoked to prevent the State from collecting taxes lawfully imposed and remaining unpaid in the absence of statutory authority" (Matter of McMahan v. State Tax Comm., 45 A.D.2d 624, mot. for lv. to app. den. 36 N.Y.2d 646).

G. That the petition of Florian Yandel, Jr., d/b/a Ramapo General Hospital is granted to the extent indicated in Conclusion of Law "D"; that the notices of determination and demands for payment of sales and use taxes due issued on

August 21, 1978 shall be modified accordingly; and that in all other respects,
the petition is denied.


DATED: Albany, New York

STATE TAX COMMISSION

JUL 03 1986


PRESIDENT


COMMISSIONER


COMMISSIONER

TA-26 (7/85)
 STATE OF NEW YORK
 State Tax Commission
 TAX APPEALS BUREAU
 W. A. Harriman Campus
 ALBANY, N.Y. 12227



709238	DATE	BY	REMARKS

Post a line over top of envelope to the right

CERTIFIED

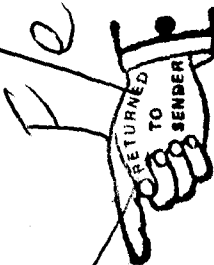
P 319 372 898

MAIL

Dr. Florian Yandel, Jr.
 d/b/a Namapo General Hospital
 521 Rt. 304
 Bardonia, NY



REASON CHECKED
 Unclaimed _____
 Attempted—Refused _____
 Insufficient Address _____
 No such street _____
 No such office in state _____
 Do not remain in this envelope.



**UNDELIVERABLE AS ADDRESSED
 FORWARDING ORDER EXPIRED**



ST
TA-36 (9/76)

State of New York - Department of Taxation and Finance
Tax Appeals Bureau

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 7/16/86
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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. 7/3/86
Name Dr. Florian Yandel, Jr.	
Address d/b/a Ramapo General Hospital 521 Rt. 304 Barclonia, N.Y.	

Results of search by Files

<input type="checkbox"/> New address:	no found RP 85-84-83 lb 7/18/86
<input type="checkbox"/> Same as above, no better address	
<input type="checkbox"/> Other:	unobtainable as addressed

Searched by	Section	Date of Search

PERMANENT RECORD

FOR INSERTION IN TAXPAYER'S FOLDER

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

July 3, 1986

Dr. Florian Yandel, Jr.
d/b/a Ramapo General Hospital
521 Rt. 304
Bardonia, NY

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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:
Samuel D. Pressman
369 Lexington Ave.
New York, NY 10017

STATE OF NEW YORK

STATE TAX COMMISSION

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CONCLUSIONS OF LAW

A. That the order vacating the tax warrant did not cancel the notices of determination and demands for sales and use taxes due under consideration in this proceeding. Consequently, the primary issue to be determined is whether the audit underlying the original assessments was proper and in accordance with the Tax Law.

B. That petitioner was a vendor of tangible personal property and as such was a person required to collect tax under section 1131 (subd. [1]) of the Tax Law. Every person required to collect tax pursuant to Articles 28 and 29 of the Tax Law is required: to register with the New York State Tax Commission (Tax Law §1134); to keep records of every sale and of all amounts paid, charged or due thereon and of the tax payable thereon in such form as the Tax Commission may require (Tax Law §1135); to timely file returns showing receipts from sales, the aggregate value of tangible personal property and services sold by him and subject to tax and the tax payable thereon (Tax Law §1136[a]); and to pay to the Tax Commission the taxes imposed by Articles 28 and 29 of the Tax Law (Tax Law §1137[a]).

C. That if a return required by law is not filed, the amount of tax due shall be determined from such information as may be available, but "[i]f necessary the tax may be estimated on the basis of external indices" (Tax Law

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D. That at hearing, petitioner introduced no evidence to show error in the audit procedures or results. However, on the basis of additional information submitted subsequent to a tax conference, the Audit Division conceded that petitioner's liability should be reduced to \$186,170.40. Petitioner objects to the introduction of any evidence concerning the revised assessment on the ground that the Audit Division failed to produce at hearing the two auditors who actually reviewed the records and prepared the workpapers upon which the

revision was based. Nonetheless, the Audit Division's adjustments shall be accepted and the tax due shall be reduced accordingly.

E. That to address petitioner's contention that the Audit Division was required to conduct a complete audit of the books and records contained in the sixty boxes of materials supplied in 1981, it is noted that the materials were inadequate for the purpose of verifying taxable sales. Furthermore, once the assessment was issued, the petitioner had the burden of proving it improper. The Audit Division was not required to sift through mounds of records to determine whether or not they would be of assistance to the petitioner in carrying his burden (cf. Matter of Lionel Leasing Industries Co., Inc. v. State Tax Commission, 105 A.D.2d 581, 583). Nonetheless, in order to resolve the dispute in issue, the Audit Division did review the records presented to it and made adjustments to the assessment based on the additional information.

F. That petitioner's contention that the Department of Taxation and Finance unconscionably delayed in pursuing its claim against petitioner is without support in the record. Moreover, "[a]n estoppel may not be invoked to prevent the State from collecting taxes lawfully imposed and remaining unpaid in the absence of statutory authority" (Matter of McMahan v. State Tax Comm., 45 A.D.2d 624, mot. for lv. to app. den. 36 N.Y.2d 646).

G. That the petition of Florian Yandel, Jr., d/b/a Ramapo General Hospital is granted to the extent indicated in Conclusion of Law "D"; that the notices of determination and demands for payment of sales and use taxes due issued on


August 21, 1978 shall be modified accordingly; and that in all other respects,
the petition is denied.


DATED: Albany, New York

STATE TAX COMMISSION

JUL 03 1986


PRESIDENT


COMMISSIONER


COMMISSIONER