

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of :
James Durante : AFFIDAVIT OF MAILING
as Officer of Jimmy Durante's Superstock :
Performance, Inc. :

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 6/1/79-8/31/82.

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 11th day of March, 1987, he/she served the within notice of Decision by certified mail upon James Durante, as Officer of Jimmy Durante's Superstock Performance, Inc. the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

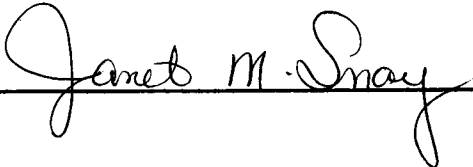
James Durante
as Officer of Jimmy Durante's Superstock Performance, Inc.
56-12 202nd St.
Bayside, NY 11383

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
11th day of March, 1987.


Authorized to administer oaths
pursuant to Tax Law section 174



STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of :
James Durante : AFFIDAVIT OF MAILING
as Officer of Jimmy Durante's Superstock :
Performance, Inc. :

for Redetermination of a Deficiency or Revision :
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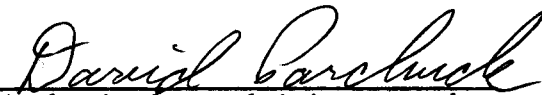
David Parchuck/Janet M. Snay, being duly sworn, deposes and says that he/she is an employee of the State Tax Commission, that he/she is over 18 years of age, and that on the 11th day of March, 1987, he served the within notice of Decision by certified mail upon Stephen Hochberg, the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

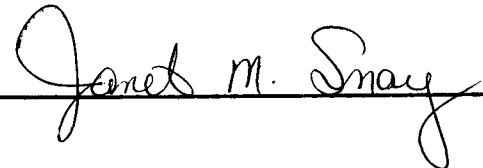
Stephen Hochberg
30 Beekman Place
New York, NY 10022

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
11th day of March, 1987.


Authorized to administer oaths
pursuant to Tax Law section 174



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

March 11, 1987

James Durante
as Officer of Jimmy Durante's Superstock Performance, Inc.
56-12 202nd St.
Bayside, NY 11383

Dear Mr. Durante:

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:
Stephen Hochberg
30 Beekman Place
New York, NY 10022

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition	:	
of	:	
JAMES DURANTE, AS OFFICER OF	:	DECISION
JIMMY DURANTE'S SUPERSTOCK PERFORMANCE, 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 June 1, 1979	:	
through August 31, 1982.	:	

Petitioner, James Durante, 56-12 202nd Street, Bayside, New York 11383, 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, 1979 through August 31, 1982 (File No. 44451).

A hearing was held before Robert F. Mulligan, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York on September 12, 1986 at 9:00 A.M., with additional evidence to be submitted by October 14, 1986. Petitioner appeared by Stephen Hochberg, Esq. The Audit Division appeared by John P. Dugan, Esq. (Lawrence A. Newman, Esq., of counsel).

ISSUES

- I. Whether the assessment of tax should be reduced due to a bad debt owed by a customer.
- II. Whether penalty should be cancelled and interest reduced to the minimum.

FINDINGS OF FACT

1. Petitioner, James Durante, was president and sole shareholder of Superstock Performance, Inc. and its successor, Jimmy Durante's Superstock Performance, Inc. ("the corporations").

2. The corporations operated an automobile service station at 86-22 Corona Avenue, Elmhurst, New York.

3. A sales tax field audit of the corporations covered the period June 1979 through November 1980 with respect to Superstock Performance, Inc. and the period December 1980 through August 1982 with respect to Jimmy Durante's Superstock Performance, Inc. The station was not in operation during the month of November 1980.

4. The amount of gross sales per books was in close agreement with gross sales per the Federal income tax returns. The amount of purchases per books also agreed with purchases per said returns. Gasoline purchases, as recorded by the corporations, were in substantial agreement with third party verification received from the supplier.

5. The auditor determined that the corporations incorrectly computed sales tax. The method used in computing sales tax was to apply the appropriate tax rate to recorded sales of tires, batteries, accessories and repairs and to add to the result 3.5 cents per gallon of gasoline sold. The total was then divided by the tax rate to arrive at taxable sales, which amount was also reported as gross sales.

6. The auditor used gross sales as per the corporations' books and determined that the following taxes were due: (a) Superstock Performance, Inc., additional tax \$8,851.77; (b) Jimmy Durante's Superstock Performance, Inc., additional tax \$11,123.19.

7. The Audit Division issued the following notices of determination and demands for payment of sales and use taxes due: (a) on March 14, 1983 to James Durante, President of Superstock Performance, Inc., tax due \$8,851.87, penalty \$2,212.95, interest \$2,880.57, for a total of \$13,945.39; (b) on April 20, 1983

to James Durante, Officer of Jimmy Durante's Superstock Performance, Inc., tax due \$11,123.00, penalty \$2,126.89, interest \$1,960.75, for a total of \$15,210.64. Petitioner timely protested both assessments.

8. The sales and use tax returns for the periods at issue were prepared by the corporations' former accountant. The accountant visited petitioner's home once each month to review the corporations' records and to obtain the information used in preparing the returns.

9. The corporations' books and records were complete and were clearly adequate for the accountant to have properly calculated tax.

10. Petitioner has an eighth grade education and was a truck driver for twelve years prior to entering the service station business. Petitioner's wife assisted him in maintaining the corporations' records.

11. Petitioner was the only full time employee of the corporations, as the station was essentially a one man operation. The corporations also employed part-time workers on an irregular basis.

12. The corporations did not accept credit cards during the years at issue, but sold gasoline on a credit basis to a nonmedallion taxi cab company. The taxi cab company failed, owing Jimmy Durante's Superstock Performance, Inc. \$20,775.00. Petitioner consulted an attorney in an attempt to collect the obligation, but the attorney concluded that the debtor had virtually no assets and that any judgment would be uncollectible. No part of the obligation was ever received by said corporation or petitioner.

13. Petitioner concedes that he is liable for taxes due, except for taxes determined to be due with respect to bad debts. He has asked, however, that penalties be cancelled and interest be reduced to the minimum.

CONCLUSIONS OF LAW

A. That petitioner has substantiated that the sum of \$20,775.00 constituted an uncollectible bad debt. Accordingly, petitioner is entitled to credit for tax attributable to said amount of sales. (Tax Law § 1132[e]; 20 NYCRR 534.7.)


B. That petitioner has established that the failure to pay the proper amount of tax was due to reasonable cause and not due to willful neglect. Accordingly, the penalty is to be cancelled and interest is to be reduced to the minimum rate. (Tax Law § 1145[a][1]; 20 NYCRR 536.5.) Petitioner kept detailed records on behalf of the corporations and retained an accountant to prepare the tax returns. The accountant's error would not ordinarily have been discernable by a person of petitioner's education and experience.

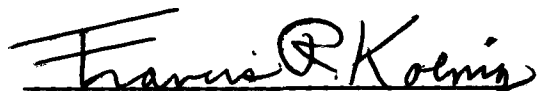
C. That the petition of James Durante is granted to the extent provided in Conclusions of Law "A" and "B"; and except as so granted, the petition is denied and the notices of determination and demands for payment of sales and use taxes due are otherwise sustained.

DATED: Albany, New York

STATE TAX COMMISSION

MAR 11 1987


PRESIDENT


COMMISSIONER


COMMISSIONER