

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of
Daniel Leary :

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 9/1/82 - 11/30/82.

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 15th day of April, 1987, he/she served the within notice of Decision by certified mail upon Daniel Leary the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

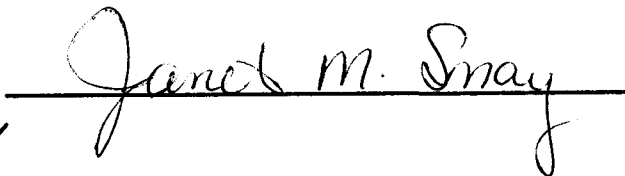
Daniel Leary
128 North Warren Street
Syracuse, NY 13202

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
15th day of April, 1987.


Authorized to administer oaths
pursuant to Tax Law section 174



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

April 15, 1987

Daniel Leary
128 North Warren Street
Syracuse, NY 13202

Dear Mr. Leary:

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

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of :
DANIEL LEARY : 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, 1982 :
through November 30, 1982.

Petitioner, Daniel Leary, 128 North Warren Street, Syracuse, New York 13202, 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, 1982 through November 30, 1982 (File No. 59748).

A hearing was held before Timothy J. Alston, Hearing Officer, at the offices of the State Tax Commission, 333 East Washington Street, Syracuse, New York on October 23, 1986 at 2:45 P.M. Petitioner appeared pro se. The Audit Division appeared by John P. Dugan, Esq. (James Della Porta, Esq., of counsel).

ISSUE

Whether a certain motor vehicle transfer to petitioner constituted a distribution of tangible personal property by a corporation to a stockholder as a liquidating dividend, thereby excluding said transfer from the definition of "retail sale" as set forth in section 1101(b)(4) of the Tax Law and thus from the imposition of sales tax.

FINDINGS OF FACT

1. On June 27, 1984 petitioner, Daniel Leary, filed an Application for Refund and/or Credit of Sales or Use Tax Paid on Casual Sale of Motor Vehicle, seeking a refund of \$315.00 in sales tax paid on the transfer of a 1979 Chevy Blazer. The transfer of title to the vehicle occurred on October 14, 1982 with

petitioner as transferee and Associated Architects of Syracuse, P.C., as transferor.

2. On February 21, 1985, the Audit Division denied petitioner's refund application in full.

3. Prior to its transfer, the vehicle in question was owned by Associated Architects of Syracuse, P.C. (the "corporation"), a New York professional corporation engaged in the practice of architecture. Petitioner was vice-president of the corporation and owned 45 percent of the outstanding corporate stock.

4. In April 1982, petitioner and the corporation's other major stockholder, who also owned 45 percent of the outstanding corporate stock, agreed to terminate their corporate architectural practice. On June 17, 1982 petitioner ended his involvement as an active employee and officer and began his own architectural practice at a different location. At this time petitioner took possession of the Chevy Blazer.

5. At a special joint meeting of the shareholders and directors of the corporation on December 27, 1982, the corporation formally redeemed petitioner's stock, and in redemption thereof agreed to the transfer of ownership of the Chevy Blazer.

6. On December 28, 1982 the officers and directors of the corporation executed a certificate of dissolution of the corporation.

7. On October 2, 1984 the corporation filed said certificate of dissolution with the office of the Secretary of State.

8. The corporation entered into no further contacts after June 17, 1982. Work in progress remained in the name of the corporation and accounts receivable were distributed when collected.

CONCLUSIONS OF LAW

A. That, while section 1105(a) of the Tax Law imposes a tax upon "[t]he receipts from every retail sale of tangible personal property", section 1101(b)(4)(iii)(B) excludes from the definition of retail sale "[t]he distribution of property by a corporation to its stockholders as a liquidating dividend."

B. That a liquidating dividend occurs when a corporation liquidates by redeeming its stock for cash or property (see generally, Bittker and Eustice, Federal Income Taxation of Corporations and Shareholders, ¶ 11.01, 11.02 [1979]). Inasmuch as petitioner's stock was redeemed for corporate property, we must determine whether such distribution was in liquidation of the corporation. In this regard, it is noted that:

"In determining whether a corporation has been completely liquidated the inquiry is not whether the corporation was formally dissolved under state law, but whether the corporation intended to and actually did wind up its affairs, gather its resources, settle its liabilities, cease engaging in business activity, and distribute its remaining assets to its shareholders. The absence of a formal written plan to liquidate is not conclusive of the issue if there exists in fact an intention to liquidate and those in control of the corporation entertain such intention." (47A C.J.S., Internal Revenue, § 361.)

C. That the transfer of the Chevy Blazer to petitioner constituted a liquidating dividend within the meaning of section 1101(b)(4)(iii)(B) of the Tax Law. The corporation's intent to liquidate and its winding up of business activity is clear in view of Findings of Fact "4", "5", "6" and "8". Contrary to the Audit Division's assertion, the corporation's failure to formally dissolve until some 21 months subsequent to the distribution at issue is not dispositive of whether the transfer was, in fact, a distribution in liquidation.

D. That 20 NYCRR 526.6(d)(9) sets forth the following, inter alia, with respect to section 1101(b)(4)(iii)(B):

"(iii) The liquidating dividend must be declared in accordance with the law of the state of incorporation, to qualify for exclusion from the definition of retail sale."


E. That the New York Business Corporation Law makes no requirement for a corporation to declare a distribution in liquidation, or a "liquidating dividend", as such. The corporation herein declared the redemption of petitioner's stock in exchange for the Chevy Blazer; it wound up its business activities, and executed a certificate of dissolution. The requirements of 20 NYCRR 526.6(d)(9) were therefore satisfied.


F. That the petition of Daniel Leary is in all respects granted and the Audit Division is hereby directed to refund the sum of \$315.00, together with such interest as may be due and owing thereon.


DATED: Albany, New York

STATE TAX COMMISSION

APR 15 1987


PRESIDENT


COMMISSIONER


COMMISSIONER