

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition  
of

Donna Luneburg

:

:

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 July 23, 1984.

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 20th day of July, 1987, he/she served the within notice of Decision by certified mail upon Donna Luneburg the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Donna Luneburg  
757 Foxhurst Road  
Baldwin, NY 11510

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  
20th day of July, 1987.

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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for the Period July 23, 1984.

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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 20th day of July, 1987, he served the within notice of Decision by certified mail upon Richard Luneburg, the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Richard Luneburg  
757 Foxhurst Road  
Baldwin, NY 11510

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  
20th day of July, 1987.

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

July 20, 1987

Donna Luneburg  
757 Foxhurst Road  
Baldwin, NY 11510

Dear Ms. Luneburg:

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) 453-4301

Very truly yours,

STATE TAX COMMISSION

cc: Taxing Bureau's Representative

Petitioner's Representative:  
Richard Luneburg  
757 Foxhurst Road  
Baldwin, NY 11510

STATE OF NEW YORK

STATE TAX COMMISSION

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In the Matter of the Petition

of

DONNA LUNEBURG

DECISION

for Revision of a Determination or for Refund  
of Sales and Use Taxes under Articles 28 and 29 :  
the Tax Law for the Period July 23, 1984.

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Petitioner, Donna Luneburg, 757 Foxhurst Road, Baldwin, New York 11510,  
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 July 23, 1984  
(File No. 58247).

A hearing was held before Frank A. Landers, Hearing Officer, at the  
offices of the State Tax Commission, Two World Trade Center, New York, New  
York, on February 25, 1987 at 3:30 P.M. Petitioner appeared by Richard Luneburg.  
The Audit Division appeared by John P. Dugan, Esq. (Angelo A. Scopellito, Esq.,  
of counsel).

#### ISSUE

Whether the Audit Division is required to take action against the bulk  
sale seller prior to seeking to obtain sales taxes due from the bulk sale  
purchaser.

#### FINDINGS OF FACT

1. On July 23, 1984, petitioner, Donna Luneburg, purchased a stationery  
store located at 53-54 Merrick Road, Massapequa, New York from Jack Rosen for  
\$10,000.00. Pursuant to the sales agreement, the assets transferred included  
"the stock in trade, fixtures, equipment, accounts receivable, contract rights,  
lease, goodwill, licenses, rights under any contract for telephone service or

other rental, maintenance or use of equipment, machinery and fixtures at the said premises, more particularly described in the Schedule herein." Mr. Rosen had operated the store for only a short period of time subsequent to purchasing it from Parkview Stationery Corp. ("Parkview") which was owned by Andrew E. Collins.

2. While it operated the business, Parkview failed to file sales or use tax returns for the quarterly periods ended August 31, 1983, November 30, 1983, February 29, 1984 and May 31, 1984. The Audit Division, accordingly, estimated Parkview's sales tax liability to be \$500.00 per quarter. On October 25, 1984, the Audit Division issued a Notice of Determination and Demand for Payment of Sales and Use Taxes Due to Jack Rosen assessing a tax due of \$2,165.00 for the period June 15, 1984, presumably the date Mr. Rosen purchased the business from Parkview. The Audit Division assessed a bulk sales tax of \$165.00 based on an estimated value of furniture and fixtures transferred of \$2,000.00. The notice contained the following explanation:

"The following taxes are determined to be due from Parkview Stationery Corp. and represents your liability, as purchaser, in accordance with Section 1141(c) of the Sales Tax Law."

The notice indicated that the purchaser's liability was limited to the selling price. Also, no penalty or interest was assessed against Mr. Rosen.

3. On October 29, 1984, the Audit Division issued to petitioner, Donna Luneburg, a Notice of Determination and Demand for Payment of Sales and Use Taxes Due assessing a tax due of \$2,165.00, plus penalty of \$129.90 and interest of \$27.93, for a total amount due of \$2,322.83 for the period July 23, 1984.

The notice provided the following explanation:

"The following taxes are determined to be due from Jack Rosen and represents your liability, as purchaser, in accordance with Section 1141(c) of the Sales Tax Law."

4. On July 25, 1984, petitioner mailed a Notification of Sale, Transfer or Assignment in Bulk, Form ST-274, to the Audit Division notifying it of her purchase of the business as required by section 1141(c) of the Tax Law. In addition to the terms and conditions of the sale, the notification also indicated that the sales price of fixtures, furniture and equipment was \$2,000.00. On August 1, 1984, the Audit Division issued a Notice of Claim to Purchaser and a Notice to Escrow Agent advising said individuals of a possible claim for New York State and local sales and use taxes due in accordance with the provisions of Article 28 and 29 of the Tax Law.

5. On August 28, 1984, the Audit Division sent a Notice to the Seller requesting, inter alia, that Parkview or Jack Rosen submit returns for the periods indicated in Finding of Fact "2", above. Subsequently, Parkview filed sales tax returns for the required periods with payments as follows:

<u>Quarter Ended</u>	<u>Tax Due</u>	<u>Tax Paid</u>
August 31, 1983	\$ 577.25	\$577.25
November 30, 1983	694.65	47.07
February 29, 1984	328.45	-0-
May 31, 1984	298.90	200.00
	<u>\$1,899.25</u>	<u>\$824.32</u>

Total Tax Due \$1,074.93

In addition to the above payments, the bulk sales tax of \$165.00 applicable to petitioner's assessment was paid on August 22, 1984.

6. Petitioner admitted that she is liable for the tax but maintained that Parkview is primarily liable and the Audit Division should attempt to collect the taxes from it or Jack Rosen before seeking to collect them from her.

#### CONCLUSIONS OF LAW

A. That the transaction between petitioner and Jack Rosen constituted a bulk sale within the meaning and intent of section 1141(c) of the Tax Law.

B. That the State may not be estopped "from collecting tax lawfully imposed and remaining unpaid in the absence of statutory authority" (McMahan v. State Tax Commission, 45 AD2d 625, 627). There is no statutory duty or responsibility imposed on the State to first obtain tax due from the seller in a bulk sale transaction (Matter of Edward M. Burns d/b/a Studio B, State Tax Commission, December 14, 1982).


C. That the taxes due are reduced to \$1,074.93 pursuant to Finding of Fact "5".


D. That the petition of Donna Luneburg is granted to the extent indicated in Conclusion of Law "C", above; the Audit Division is directed to modify the Notice of Determination and Demand for Payment of Sales and Use Taxes Due issued October 29, 1984; and, that except as so granted, the petition is denied.

DATED: Albany, New York

STATE TAX COMMISSION

JUL 20 1987

  
PRESIDENT

  
COMMISSIONER

  
COMMISSIONER