

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of
S & H Service Center, Ltd. :

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 9/1/83 - 11/30/83.

State of New York :

ss.:

County of Albany :

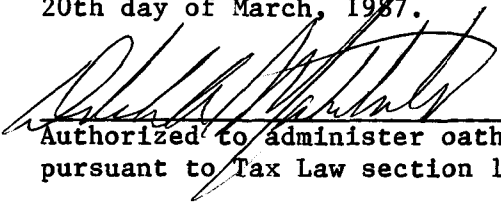
David Parchuck/Janet M. Snay, being duly sworn, deposes and says that he/she is an employee of the State Tax Commission, that he/she is over 18 years of age, and that on the 20th day of March, 1987, he/she served the within notice of decision by certified mail upon S & H Service Center, Ltd. the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

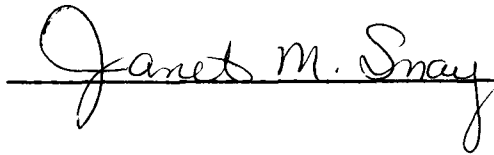
S & H Service Center, Ltd.
196-41 Northern Boulevard
Flushing, New York 11360

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 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

S & H Service Center, Ltd. :

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for Redetermination of a Deficiency or Revision :
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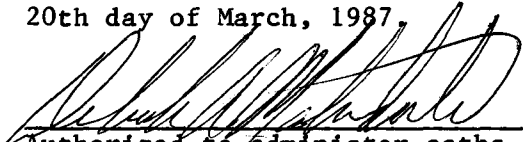
David Parchuck/Janet M. Snay, being duly sworn, deposes and says that he/she is an employee of the State Tax Commission, that he/she is over 18 years of age, and that on the 20th day of March, 1987, he served the within notice of decision by certified mail upon Peter R. Newman, the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

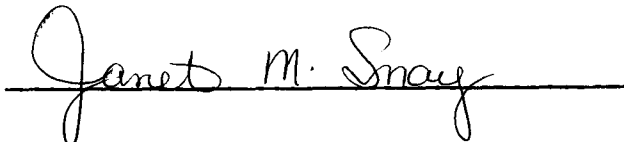
Peter R. Newman
350 Veterans Memorial Highway
Commack, NY 11725

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 March, 1987.


Authorized to administer oaths
pursuant to Tax Law section 174



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

March 20, 1987

S & H Service Center, Ltd.
196-41 Northern Boulevard
Flushing, New York 11360

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:
Peter R. Newman
350 Veterans Memorial Highway
Commack, NY 11725

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition

of

S & H SERVICE CENTER, LTD.

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, 1983
through November 30, 1983. :

Petitioner, S & H Service Center, Ltd., 196-41 Northern Boulevard, Flushing, New York 11360, 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, 1983 through November 30, 1983 (File No. 51515).

A hearing was held before Jean Corigliano, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on October 28, 1986 at 9:45 A.M., with all briefs to be submitted by February 9, 1987. Petitioner appeared by Peter R. Newman, Esq. The Audit Division appeared by John P. Dugan, Esq. (Patricia L. Brumbaugh, Esq., of counsel).

ISSUE

Whether petitioner has shown that it is not liable for sales and use taxes due as asserted by the Audit Division.

FINDINGS OF FACT

1. On January 16, 1984, the Audit Division issued to petitioner, S & H Service Center, Ltd., a Notice of Determination and Demand for Payment of Sales and Use Taxes Due for the period September 1, 1983 through November 30, 1983, asserting sales and use taxes due in the amount of \$35,000.00. The notice contained the following explanation:

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

The notice also stated that petitioner's liability as purchaser was limited to the purchase price of the business or \$35,000.00.

2. Following a field audit, the Audit Division determined that the books and records of Gallagher's Triangle Shell ("Gallagher's") were inadequate for the purpose of verifying its sales tax liability. Consequently, Gallagher's tax liability was estimated on the basis of information provided by Gallagher's accountant and third party verification of Gallagher's gasoline purchases. The total amount of sales and use tax determined to be due from Gallagher's was \$37,428.05.

3. Petitioner presented no evidence bearing upon either (1) the bulk sale transaction which the Audit Division asserted as the basis of its assessment, or (2) the audit methodology utilized by the Audit Division or the results obtained.

4. After all evidence was received, petitioner made a motion to dismiss on two grounds: (1) that the Audit Division failed to prove that a bulk sale transfer had occurred; and (2) that the Audit Division failed to prove that a notice of determination had been sent to Gallagher's.

CONCLUSIONS OF LAW

A. That the burden of proof to overcome tax assessments rests upon the petitioner (see, e.g., Clarence R. Oliver Post Memorial, Inc. v. State Tax Commission, 101 AD2d 921). Petitioner has not even alleged facts which, if proven, would relieve it of the liability asserted against it. Consequently, there is no basis for modification or cancellation of the assessment.

B. That the petition of S & H Service Center, Ltd. is denied, and the Notice of Determination and Demand for Payment of Sales and Use Taxes Due issued on January 16, 1984 is sustained.

DATED: Albany, New York

STATE TAX COMMISSION

MAR 20 1987

Rodriguez
PRESIDENT

Francis R. Koenig
COMMISSIONER

Mark J. ...
COMMISSIONER