

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition
of
Triebitz Originals, Inc.

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 9/1/79-5/31/82.

State of New York :

ss.:

County of Albany :

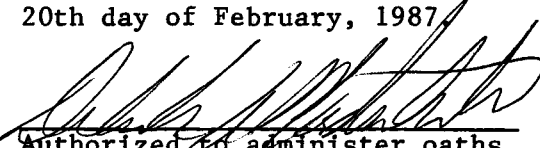
David Parchuck/Janet M. Snay, being duly sworn, deposes and says that he/she is an employee of the State Tax Commission, that he/she is over 18 years of age, and that on the 20th day of February, 1987, he/she served the within notice of Decision by certified mail upon Triebitz Originals, Inc. the petitioner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

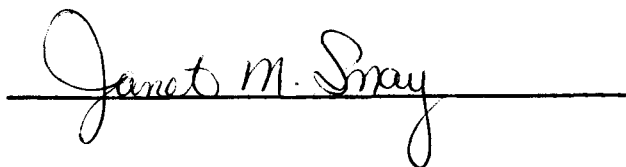
Triebitz Originals, Inc.
2122 86th Street
Brooklyn, NY 11214

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 February, 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
Triebitz Originals, Inc. :

AFFIDAVIT OF MAILING

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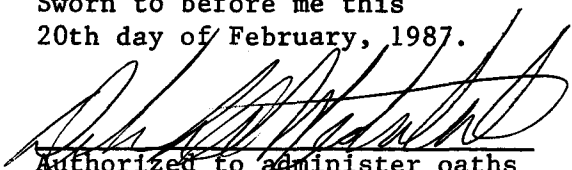
David Parchuck/Janet M. Snay, being duly sworn, deposes and says that he/she is an employee of the State Tax Commission, that he/she is over 18 years of age, and that on the 20th day of February, 1987, he served the within notice of Decision by certified mail upon Marc Baboff, the representative of the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

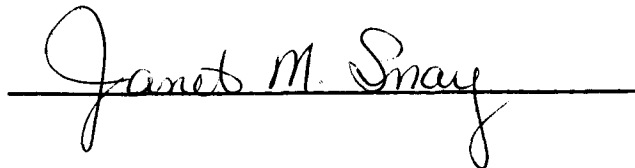
Marc Baboff
Kudler and Berner
20 Miller Place
Syosset, NY 11791

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 February, 1987.


Authorized to administer oaths
pursuant to Tax Law section 174



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

February 20, 1987

Triebitz Originals, Inc.
2122 86th Street
Brooklyn, NY 11214

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:
Marc Baboff
Kudler and Berner
20 Miller Place
Syosset, NY 11791

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition

of

TRIEBITZ ORIGINALS, INC.

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, 1979 :
through May 31, 1982. :

Petitioner, Triebitz Originals, Inc., 2122 86th Street, Brooklyn, New York 11214, 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, 1979 through May 31, 1982 (File No. 42167).

A hearing was held before Joseph W. Pinto, Jr., Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on September 11, 1986 at 10:45 A.M., with all documentation submitted by November 26, 1986. Petitioner appeared by Kudler & Berner (Marc Baboff, C.P.A.). The Audit Division appeared by John P. Dugan, Esq. (Angelo A. Scopellito, Esq., of counsel).

ISSUE

Whether petitioner is liable for additional sales tax due to its inability to substantiate nontaxable sales for the audit period.

FINDINGS OF FACT

1. On November 20, 1982, the Audit Division issued to petitioner, Triebitz Originals, Inc. ("Triebitz"), a Notice of Determination and Demand for Payment of Sales and Use Taxes Due for the period September 1, 1979 through May 31, 1982 ("the audit period"). Said notice assessed taxes due in the sum of

\$18,418.04, penalty of \$3,952.13 and interest of \$3,705.44, for a total amount due of \$26,075.61.

2. Petitioner operates a retail and wholesale business dealing primarily in women's shoes in Brooklyn, New York.

3. The assessment was the result of an audit by the Audit Division of the business operations of petitioner for the audit period. Pursuant to the auditor's request on and before August 9, 1982, petitioner produced some books and records, to wit, sales tax returns, Federal income tax returns for the year ended June 1980, depreciation schedules, a cash receipts journal and a check disbursements journal. However, petitioner did not produce complete sales invoices, resale certificates, complete bank statements or a Federal income tax return for the fiscal year ended June 1981.

4. Subsequent to the auditor's initial visit to petitioner's place of business, the Audit Division was notified on October 7, 1982 that petitioner's place of business was burglarized and that one of the casualties was the sales invoices for the entire audit period. A police report verifying said burglary was not produced.

5. Based upon the limited information which was acquired from petitioner, the auditor conducted a gross sales reconciliation, examining the gross sales from the sales tax returns filed during the audit period, the sales as reflected in receipts and the purchases as reflected in disbursements. There was a very small discrepancy between gross receipts reflected in the books and records produced by petitioner and the gross sales listed on the sales tax returns for the audit period. The Audit Division also reconciled taxable sales per receipts with those stated on the sales tax returns, finding virtually no discrepancy.

6. With the exception of one customer, Concoctions, Ltd., the Audit Division disallowed all other nontaxable sales stated in petitioner's sales tax returns because no substantiation for said nontaxable sales was produced. The total reported nontaxable sales of petitioner amounted to \$330,604.00 for the entire audit period. The Audit Division reduced that amount by sales to Concoctions, Ltd. totalling \$22,481.00, and also made a reduction for general income, consisting of insurance, rent and loans in the sum of \$80,602.00 to arrive at a final figure for nontaxable sales of \$227,521.00. This figure, without further substantiation, was assumed to be additional taxable sales and the Audit Division applied the proper sales tax rate to the additional taxable income in each quarter of the audit period to arrive at additional tax due of \$18,418.04

7. The Audit Division found no fixed asset acquisitions during the audit period and no further additional tax due.

8. Subsequent to hearing, petitioner submitted numerous cancelled checks, copies of bank deposits, a handwritten list of stores with which petitioner did business during the audit period and several pages of handwritten notes attempting to correlate the deposits listed on the bank records with sales for resale. However, the petitioner was unable to produce resale certificates substantiating its claimed nontaxable sales during the audit period.

CONCLUSIONS OF LAW

A. That Tax Law § 1105(a) provides that the receipts from every retail sale of tangible personal property shall be subject to a sales tax, except as otherwise provided in Article 28 of the Tax Law.

B. That Tax Law § 1101(b) provides, in pertinent part, that:

"(b) When used in this article for purposes of the tax imposed by subdivisions (a), (b), (c) and (d) of section eleven hundred five and by section eleven hundred ten, the following terms shall mean:

(4) Retail Sale. (i) A sale of tangible personal property to any person for any purpose, other than (A) for resale as such or as a physical component part of tangible personal property,...."

C. That the Regulation promulgated pursuant to Tax Law § 1101(b)(4) at 20 NYCRR § 526.6(c)(1) provides that:

"Where a person, in the course of his business operations, purchases tangible personal property or services which he intends to sell, either in the form in which purchased, or as a component part of other property or services, the property or services which he has purchased will be considered as purchased for resale and therefore, not subject to tax until he has transferred the property to his customer."

D. That the Regulations further state that a resale certificate is one used to claim exemption from tax on purchases of tangible personal property or services which will be resold or transferred to a customer when said personal property or services is for resale. It is required that each vendor accepting a resale certificate must, for verification purposes, maintain a method of associating a sale made for resale with the resale certificate on file. (20 NYCRR § 532.4[d][4].)

E. That petitioner failed to produce sales invoices and corresponding resale certificates for the nontaxable sales claimed on each sales tax

return filed during the audit period, with the exception of one customer, for which petitioner was given credit.

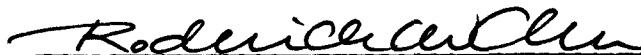
F. That, since petitioner did not pay its tax as determined by the Audit Division within the time required by Tax Law § 1136(b), and no reasonable cause appears herein, it is liable for penalty pursuant to Tax Law § 1145(a).

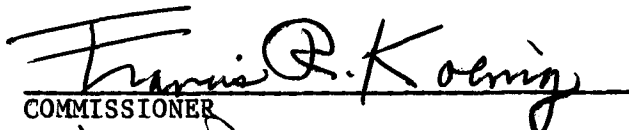
F. That the petition of Triebitz Originals, Inc. is denied and the Notice of Determination and Demand for Payment of Sales and Use Taxes Due issued on November 20, 1982 is sustained, together with penalties assessed and such additional interest as may be lawfully owing.


DATED: Albany, New York

STATE TAX COMMISSION

FEB 20 1987


PRESIDENT


COMMISSIONER


COMMISSIONER