

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of :
Carl R. & Eleanor Nellis : AFFIDAVIT OF MAILING
for Redetermination of a Deficiency or for :
Refund of Personal Income and Unincorporated :
Business Taxes under Articles 22 and 23 of the :
Tax Law for the Years 1980 and 1981. :
:

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 November, 1986, he/she served the within notice of Decision by certified mail upon Carl R. & Eleanor Nellis the petitioners in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

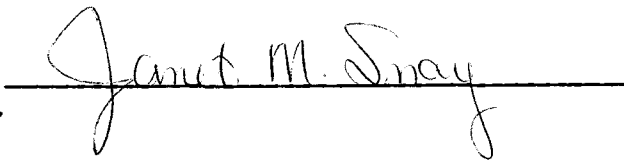
Carl R. & Eleanor Nellis
6897 N. Bergen Rd.
Byron, NY 14422

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 November, 1986.


Authorized to administer oaths
pursuant to Tax Law section 174



STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of

Carl R. Nellis : 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 3/1/78-5/31/78.
_____ :

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 November, 1986, he/she served the within notice of Decision by certified mail upon Carl R. Nellis the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Carl R. Nellis
6897 N. Bergen Rd.
Byron, NY 14422

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.

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20th day of November, 1986.

David Parchuck
Authorized to administer oaths
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Janet M. Snay

STATE OF NEW YORK

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Refund of Personal Income and Unincorporated :
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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 November, 1986, he served the within notice of Decision by certified mail upon William J. Neild, the representative of the petitioners in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

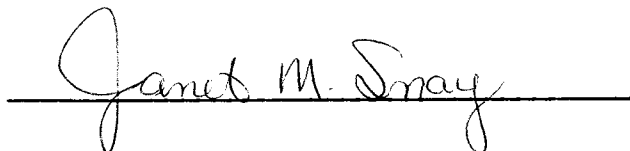
William J. Neild
Stern, Lane & Neild, P.C.
144 Exchange Blvd.
Rochester, NY 14614

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 November, 1986.


Authorized to administer oaths
pursuant to Tax Law section 174



STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition
of

Carl R. Nellis

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:

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 3/1/78-5/31/78.

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State of New York :

ss.:

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William J. Neild
Stern, Lane & Neild, P.C.
144 Exchange Blvd.
Rochester, NY 14614

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 November, 1986.

David Parchuck

Authorized to administer oaths
pursuant to Tax Law section 174

Janet M. Snay

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

November 20, 1986

Carl R. & Eleanor Nellis
6897 N. Bergen Rd.
Byron, NY 14422

Dear Mr. & Mrs. Nellis:

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) 690 & 722 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:
William J. Neild
Stern, Lane & Neild, P.C.
144 Exchange Blvd.
Rochester, NY 14614

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

November 20, 1986

Carl R. Nellis
6897 N. Bergen Rd.
Byron, NY 14422

Dear Mr. Nellis:

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:
William J. Neild
Stern, Lane & Neild, P.C.
144 Exchange Blvd.
Rochester, NY 14614

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition
of
CARL R. NELLIS AND ELEANOR NELLIS
for Redetermination of a Deficiency or for
Refund of Personal Income and Unincorporated
Business Taxes under Articles 22 and 23 of the
Tax Law for the Years 1980 and 1981.

DECISION

In the Matter of the Petition
of
CARL R. NELLIS
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 March 1, 1978
through May 31, 1978.

Petitioners, Carl R. Nellis and Eleanor Nellis, 6897 North Bergen Road, Byron, New York 14422, filed a petition for redetermination of a deficiency or for refund of personal income and unincorporated business taxes under Articles 22 and 23 of the Tax Law for the years 1980 and 1981 (File No. 57526).

Petitioner, Carl R. Nellis, 6897 North Bergen Road, Byron, New York 14422, 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 March 1, 1978 through May 31, 1978 (File No. 57559).

A consolidated hearing was held before Timothy J. Alston, Hearing Officer, at the offices of the State Tax Commission, 259 Monroe Avenue, Rochester, New York, on June 2, 1986 at 1:15 P.M., with additional evidence to be submitted by July 2, 1986. Petitioners appeared by Stern, Lane and Neild, P.C. (William J.

Neild, of counsel). The Audit Division appeared by John P. Dugan, Esq. (James Della Porta, Esq., of counsel).

ISSUES

I. Whether the source and application of funds analysis used by the Audit Division to reconstruct petitioners' income properly determined that petitioners understated their income for the years 1980 and 1981.

II. Whether the Audit Division properly determined sales tax due upon the purchase of a motor vehicle in 1978.

FINDINGS OF FACT

1. Petitioners, Carl R. Nellis and Eleanor Nellis, timely filed New York State income tax resident returns for the years 1980 and 1981. In 1981, petitioners filed separately on one return. Mr. Nellis reported a taxable income from business of \$5,644.00, and Mrs. Nellis reported a taxable income from wages of \$10,684.00. In 1981, petitioners filed a joint return reporting taxable income from business and wages of \$10,579.00. Mr. Nellis, an independent trucking contractor, did not file an unincorporated business tax return in 1980.

2. On September 27, 1984, as the result of a field audit of petitioners' books and records, the Audit Division issued against petitioners two notices of deficiency. The first asserted a tax due of \$4,321.73, including unincorporated business tax of \$2,053.94, plus penalty and interest for the years 1980 and 1981. The second asserted a tax due of \$1,319.37, plus penalty and interest for the same years.

3. A Statement of Personal Income Tax Audit Changes issued on July 18, 1984 explained that the Audit Division used a source and application of funds method to reconstruct petitioners' business income. The auditor calculated

petitioners' income from all sources and subtracted from this amount total applications of income to arrive at understated income in the amounts of \$27,041.72 in 1980 and \$24,449.12 in 1981.

4. Carl Nellis worked, almost exclusively, hauling produce for Sodoma Farms ("Sodoma"). From an audit of Sodoma's disbursement journal, the auditor determined that Sodoma made loans to Mr. Nellis totalling \$3,210.00 in 1981. Petitioners made loan payments to Sodoma of \$11,283.00 in 1980 and \$9,674.18 in 1981.

5. Prior to hearing, petitioners submitted documents to the Audit Division showing that in 1981 Sodoma had advanced monies to Mr. Nellis to pay for fuel and later deducted the amounts owed by Mr. Nellis from payments it made to him for his services. Mr. Nellis's fuel expenditures had been included in the applications factor without the correct offsetting amounts being included in the sources factor. At hearing, the Audit Division conceded that the applications factor should be reduced by \$2,044.91 to reflect these transactions.

6. The Audit Division further conceded that two checks totalling \$521.59 had been included in both the loan payments and personal living expenses categories and that an adjustment in the application of funds factor should be made accordingly.

7. On their 1980 Federal tax return, petitioners claimed a depreciation allowance for capital improvements acquired in the same year, consisting of three trailers and a copier with a combined cost basis of \$23,200.00. In 1981, petitioners claimed a Federal investment tax credit on a 1965 Mack truck with an unadjusted basis of \$13,000.00. The auditor included these amounts in the applications factor for the applicable year.

8. Petitioners contended that the 1980 Federal tax return was erroneous in that the three trailers shown on it were actually acquired in 1978 and 1979 with loans from Sodoma. Therefore, they argued, the amounts for capital improvements should be eliminated from the applications factor or, alternatively, included in the sources factor.

9. Mr. Nellis identified the three trailers in question as an International trailer and a Utility purchased in 1978 and a Great Dane purchased in 1979. Sodoma's records show that Sodoma made a series of loans to petitioners totalling \$32,981.62. Included were loans in the amounts of \$12,950.00, \$3,250.00 and \$1,662.00 for a truck, a Great Dane and a trailer, respectively. The records do not reveal the date upon which any particular loan was made. Petitioner offered no other evidence to substantiate his claim that the three trailers were purchased prior to 1980.

10. On September 27, 1984, the Audit Division issued against petitioner, Carl R. Nellis, a Notice of Determination and Demand for Payment of Sales and Use Taxes Due for the period March 1, 1978 through May 31, 1978 in the amount of \$3,955.00 plus interest. The assessment was predicated upon Mr. Nellis's failure to pay sales tax upon his purchase of a truck, during the period under consideration.

11. Mr. Nellis conceded that he purchased and took possession of the truck in question in New York State. However, he argued that no sales tax was due because a form, purportedly furnished to him by the New York State Department of Motor Vehicles, indicated that no tax was due if the truck's first load for delivery originated out of state.

12. After purchasing the truck in New York, Mr. Nellis drove it to New Jersey where he loaded the truck for the first time and then returned with it to New York State.

CONCLUSIONS OF LAW

A. That where a deficiency is asserted under Articles 22 and 23 of the Tax Law, the burden of proof is placed upon the petitioner to show that he is not liable for the tax imposed, except in three specifically enumerated instances which do not apply here (Tax Law §689[e]; § 722). Petitioners have failed to show that capital improvements totalling \$23,200.00 were not acquired in 1980. While the record shows that petitioners did receive loans from Sodoma to purchase a truck and two trailers, it was not possible to determine when the loans were made or whether they were used to acquire the three trailers shown on the 1980 Federal tax return. In this regard, it is especially damaging that petitioners did not produce a bill of sale, invoice, title or any other document which would have supported Mr. Nellis's testimony that the trailers were acquired in years other than 1980.

B. That petitioners have shown that the applications factor was overstated in the amount of \$2,566.50 (see Findings of Fact "5" and "6"). The Audit Division is directed to recompute petitioners' liability accordingly.

C. That liability for the sales tax arises at the point of delivery or the point at which liability transfers from the vendor to the purchaser (20 NYCRR 525.2[a][2], [3]). Section 1117 of the Tax Law provides for exemption from sales tax, despite the taking of physical possession by the purchaser within this state, under certain specifically enumerated circumstances, none of which exist here. There is no provision in the Tax Law which provides an exemption such as that claimed by petitioner Carl Nellis. It is unfortunate if

he was misled by or misunderstood instructions emanating from the Department of Motor Vehicles. However, in the absence of statutory authority, the State cannot be prevented from collecting taxes imposed and remaining unpaid (Matter of McMahon v. State Tax Commn., 45 AD2d 624, lv denied 36 NY2d 646).

D. That the petitions of Carl R. Nellis and Eleanor Nellis are granted to the extent indicated in Conclusion of Law "B"; that the notices of deficiency issued on September 27, 1984 shall be modified accordingly; that the Notice of Determination and Demand for Payment of Sales and Use Taxes Due issued on September 27, 1984 is sustained; and that, in all other respects, the petitions are denied.

DATED: Albany, New York

STATE TAX COMMISSION

NOV 20 1986

Rodrigue W. Chen
PRESIDENT

Francis R. Koenig
COMMISSIONER

Mark J. Miller
COMMISSIONER